

ANTI-CORRUPTION HELPDESK

PROVIDING ON-DEMAND RESEARCH TO HELP FIGHT CORRUPTION

PROACTIVE DISCLOSURE OF INFORMATION AND STATE OWNED ENTERPRISES

QUERY

Could you please provide information on how other countries regulate proactive transparency in state owned enterprises?

PURPOSE

The government will amend the access to information law and the chapter wants to ensure that state owned enterprises are included.

CONTENT

1. Access to information and proactive disclosure
2. Are state owned enterprises (SOEs) covered by access to information laws?
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Author(s):

Maíra Martini, Transparency International,
tihelpdesk@transparency.org

Reviewer(s):

Marie Chêne, Transparency International
Robin Hodess, PhD., Transparency International

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SUMMARY

State owned enterprises (SOEs) may have a significant impact on a country's economic and social development, and access to information regarding their activities is instrumental to ensuring citizens know how public money is managed.

SOEs are increasingly included among the entities required to proactively and passively provide access to information to citizens. This is the case in laws that have recently been enacted or amended in Brazil, Estonia and Spain. However, the type and level of information required to be published will vary from country to country and there is no agreed good practice. Proactive disclosure often includes information on organisational structure, salaries and job descriptions, budgets and expenditures, and public procurement processes, including the publication of contracts, among others.

In order to ensure that all relevant information is made available to the public, attention should also be paid to the exceptions put forward to the law as well as to potential contradictory provisions in dedicated laws.

1. ACCESS TO INFORMATION AND PROACTIVE DISCLOSURE

Overview

Laws on access to information primarily aim at regulating the mechanism through which citizens can request information from public institutions. These laws define the scope (who can access what) as well as the exceptions and refusals to access information (Chêne 2012). Increasingly, however, provisions on proactive disclosure have been included in these laws. That is, access to information laws specifically establish a legal obligation on public authorities not only to respond to requests, but to anticipate potential requests and make information available in an active manner (Darbishire 2011).

International organisations and civil society groups have been calling for governments to proactively publish information about their structure, personnel, and contracts awarded, among others. Similarly, international and regional treaties have also covered the issue. The United Nations Convention against Corruption (UNCAC) promotes the proactive disclosure of certain classes of information as a means to curb corruption. The Council of Europe Convention on Access to Official Documents encourages signatory-countries to enact national rules on proactive publication of information in order to promote transparency and boost informed participation by the public in issues of general interest (Article 10).

Minimum standards for proactive disclosure

There is no consensus on the information that should be proactively disclosed by government and/ or SOEs. The approaches adopted in different countries vary quite significantly. They can include only the active disclosure of frequently made requests, or information on salaries, and contracts awarded, among others. The level of detail released will also vary from country to country.

Based on recent discussions and experience with access to information laws, Darbishire (2011) highlights the main classes of information for proactive disclosure that are often included in the

law. They are:

- **institutional information:** internal regulations, functions and powers
- **organisational information:** information on personnel, name and contact details of public officials
- **operational information:** strategy plans, policies, activities, reports and evaluations
- **decisions and acts:** decisions and formal acts, including the documents and data used to take decisions, particularly if they affect the public
- **public services information:** information about the services offered to the public, fees and deadlines
- **budget information:** projected budget, actual income and expenditure (including salary information)
- **open meeting information:** information on meetings, including which are open meetings and how citizens can attend
- **decision-making and public participation:** information on procedures as well as mechanisms for consultation and citizen participation
- **subsidies information:** beneficiaries of subsidies, the objectives, amounts, and implementation
- **public procurement information:** detailed information on public procurement processes, criteria, and outcomes of tender applications, copies of contracts and reports on implementation
- **lists, registers, and databases:** information on all the lists, registers and databases held by the public authority
- **publications:** information on all publications issued
- **information about the right to information:** information on the right to access

information, deadlines to receive the information and contact details of the responsible person within the public body in question

In addition, the disclosed information should be made available through different channels (internet, radio, public libraries, and official gazette) to ensure that it reaches different sectors of society. It should also be timely, comprehensible, easy to find, presented in a user-friendly format and preferably free or provided at a very low cost (Darbishire 2011).

2. ARE STATE OWNED ENTERPRISES COVERED BY ACCESS TO INFORMATION LAWS AND PROACTIVE DISCLOSURE?

Access to information and state owned enterprises

State-owned enterprises are legal entities that are wholly or partially owned by the state. In many countries, they play a key role in utilities or infrastructure industries, such as transport and energy, and they may represent an important share of the country's GDP (OECD 2005, Wickberg 2013).

Given the economic and social impact they may have, it is crucial that SOEs abide by the highest transparency and accountability standards, and that citizens have the necessary tools to access relevant information regarding how public money is spent.

International standards on access to information regulations have explicitly recommended that countries include SOEs among the institutions required to respond to access to information requests and/ or proactively disclose information.

For instance, the standards put forward by the non-governmental organisation Article 19 recommend that freedom of information laws should be guided by the principle of maximum disclosure and should cover "public bodies", such as bodies from the three branches of government, public enterprises, as well as private bodies that carry out public functions (Article 19 2012).

The Council of Europe Convention on Access to Official Documents requires signatory countries to include public authorities at the national, regional and

local level in their respective access to information laws. The convention also recommends countries to broaden the scope of their laws to include natural or legal persons performing public functions or operating with public funds.

At the domestic level, the scope of access to information legislation adopted varies across countries, with some countries opting to include only federal entities, and others also covering other public bodies such as the judiciary, SOEs and even political parties. The general trend, however, seems to be towards increasing the scope of the entities covered as well as increasing the amount of information to be disclosed proactively by these entities (Right2Info 2013).

Proactive disclosure and SOEs

In principle, the requirement for proactive transparency covers all those public authorities included in the access to information laws. This means that if the law covers SOEs, they also have to proactively disclose information. But countries may decide which public bodies to include and what kind of information public entities should actively disclose as they find appropriate.

The Helpdesk did not find an example of an access to information law that establishes specific proactive disclosure rules to SOEs, but only general rules which apply to all public bodies, as discussed in the first section.

However, in many countries, rules on transparency of SOEs, including on requirements to disclose important information to the public, may be set in dedicated legislation.¹ It is also important to verify whether confidentiality clauses in dedicated laws (or even the exceptions listed in the access to information law) could hamper the proactive disclosure of relevant information set in the access to information law.

¹ For more information, please see a previous Helpdesk Answer on transparency of SOEs: Wickberg, S., 2013.

3. EXAMPLES OF PROACTIVE DISCLOSURE FOR SOEs

As mentioned, countries have adopted different rules with regards to the scope of access to information laws, as well as to the proactive or passive access to information.

Laws in several countries contain requirements for proactive disclosure, including laws in India, Mexico, Hungary, the United Kingdom and Norway, among others, but they do not cover SOEs. Several countries have also enacted laws that cover SOEs, but they are not required to proactively disclose any information. This is the case in Serbia, for example.

Nevertheless, the Helpdesk found a few examples where SOEs are obliged by law to proactively disclose information, such as Brazil, Estonia and Spain. In addition, the model access to information law put forward by the Organisation of American States (OAS) also establishes active transparency for SOEs.

Brazil

In Brazil, the Law on Access to Information enacted in 2011 covers public bodies that form the direct administration as well as autonomous government agencies, public foundations, state-owned companies, government-controlled companies and other entities directly or indirectly controlled by the federal government (Article 1).

Articles 6 and 7 of the law deal specifically with proactive transparency. Public bodies must promote the disclosure of relevant information on their respective websites regardless of external requests. The law explicitly states that this requirement also applies to SOEs.

According to the law, information in the following classes should be disclosed:

- organisational structure, competences, applicable legislation, most relevant positions of authority and the respective incumbents in office, unit addresses and telephones, working hours
- programmes, projects, actions, works and activities under implementation, indicating

the respective unit in charge, the most relevant goals and achievements and, whenever possible, result and impact indicators

- transfer of funds or transfer of financial resources
- detailed budgetary and financial statements
- on-going and finished tenders, with the respective invitations for bids, appendices and results, along with the awarded contracts and the issued spending authorisations
- compensation and salary received by incumbents holding public office, post, grade, function or job, including allowances, reimbursements, director's fees and other financial benefits, as well as retirement pensions and survivor's pensions for those who are still working, listed individually, pursuant to directives issued by the Ministry of Planning, Budget and Management
- answers provided to society's most frequently asked questions
- information on how to request information, including an access to information request form

The Brazilian Law on Access to Information is available [here](#) (in Portuguese).

Decree n.7.724/2012 which regulates the Law on Access to Information can be accessed [here](#) (in English).

Estonia

In Estonia, the Law on Access to Information enacted in 2000 and last amended in 2012, establishes that state and local government agencies, legal persons in private law or natural persons performing public duties as well as undertakings that have a dominant position in the market or special or exclusive rights or which are natural monopolies and legal entities receiving public funds are covered by the law.

The law also establishes in chapter 4 that the above mentioned public bodies should publish on a regular

basis a series of information as described in paragraph 28(1). Those applicable to SOEs include:

- names and electronic mail addresses of members of the supervisory boards and management boards of legal persons in public law
- management reports and income and expense statements of legal persons in public law
- information concerning the state of the environment, environmental damage and dangerous environmental impact
- precepts or decisions relating to state supervision or supervisory control as of the entry into force thereof
- draft concepts, development plans, programmes and other projects of general importance before such drafts are submitted to the competent bodies for approval, and the corresponding approved or adopted documents
- research or analyses ordered by the state or local government agencies
- information concerning the use of assets and budgetary funds which the state or a local government has transferred to legal persons in private law founded by the state or local government or with the participation thereof
- programmes of public events
- information concerning the price formation of companies that have a dominant position in the market or special or exclusive rights or are natural monopolies
- data contained in databases, access to which is not restricted

The information should be up-to-date and published on the public agency's website in an electronically processable format and in its original format. Additionally, the information can also be publicised through radio and television programmes, printed press or official publications.

The Estonian Law on Access to Information is available [here](#).

Spain

The Spanish Law on Access to Information enacted in December 2013 has broad coverage, including all public institutions, state-owned enterprises, as well as the King's House, political parties, trade unions and private entities that receive more than 100,000 per year in public money.

The law gives emphasis to the proactive disclosure of information by all public institutions, the King's House as well as SOEs with regard to their organisational structure, budget and expenditures, all contracts and grants, including information on amendments to contracts, allowances of senior managers, among others (Article 6, 7, 8).

In order to ensure adherence to the law and facilitate access to information, the law creates a Transparency Portal. The idea is to have a single platform where the information proactively disclosed by public entities can be accessed in a user-friendly manner (Article 10).

The law, however, imposes several limits regarding the type of information that can be requested by citizens. For instance, citizens cannot request information regarding on-going activities of a public body; only "archived" information can be accessed. Such limits have been heavily criticised by civil society organisations.

The Spanish Law on Access to Information can be accessed [here](#).

Model Inter-American Law on Access to Public Information

The model law adopted by the Organisation of American States in 2010 aims at setting the minimum standards for access to information laws.

The model law applies to all public authorities, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory authorities, non-state bodies, which are

owned or controlled by government, and private organisations, which operate with substantial public funds or benefits (directly or indirectly) or which perform public functions and services insofar as it applies to those funds or to the public services or functions they undertake.

All these bodies are obliged to answer to access to information requests in a timely manner, as well as proactively disclose information considered of wider relevance.

The model law established that the Information Commission is supposed to approve a publication scheme to set the classes of information to be proactively disclosed by different public authorities. Once approved, the respective public authority is obliged to proactively make available on a regular, timely and free manner the relevant information.

The law also provides a list of key classes of information that could be included in the publication scheme as subject to proactive disclosure. The list includes a description of the entity's organisational structure, the qualification and salaries of senior officials, salary scales, the entity's budget and expenditures, procurement procedures, including information on the contracts granted, among others.

The Inter-American Model Law on Access to Public Information is available [here](#).

Darbishire, H. 2011. *Proactive Transparency: The Future of the Right to Information?* Washington DC: The World Bank. <http://siteresources.worldbank.org/EXTGOVACC/Resource/s/DarbishireProactiveTransparency.pdf>

OECD. 2005. *Guidelines on Corporate Reporting of State-owned Enterprises*. www.oecd.org/daf/corporateaffairs/oecdguidelinesoncorporategovernanceofstate-ownedenterprises.htm

Right2Info. 2013. "Private Bodies and Public Corporations". www.right2info.org/scope-of-bodies-covered-by-access-to-information/private-bodies-and-public-corporations

Wickberg, S. 2013. *Transparency of State Owned Enterprises*. Anti-Corruption Helpdesk Answer, Berlin: Transparency International. www.transparency.org/whatwedo/answer/transparency_of_state_owned_enterprises

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4. REFERENCES

Article 19. 2012. *International Standards: Right to Information*. www.article19.org/resources.php/resource/3024/en/international-standards:-right-to-information

Chêne, M. 2012. *Good Practice in Access to Information Laws*. Anti-Corruption Helpdesk Answer, Berlin: Transparency International.

Council of Europe. 2009a. *Council of Europe Convention on Access to Public Documents*. <http://conventions.coe.int/Treaty/EN/Treaties/Html/205.htm>

Council of Europe. 2009b. *Explanatory Report on the Convention on Access to Public Documents*. <http://conventions.coe.int/Treaty/EN/Reports/Html/205.htm>