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Review

Transparency of Transparency: The pro-active disclosure of the rules governing Access to Information as a gauge of organisational cultural transformation. The case of the Swiss transparency regime



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ABSTRACT

Transparency has become a fundamental aspect of organisational life in the public sector. In this context, the spread of Access to Information legislations has been central. This trend has been studied from a number of angles, from the theoretical implications to the inputs and outputs of transparency. This contribution looks at an underdeveloped aspect that is the proactive Transparency of Transparency; the open and unobstructed communication of the processes aimed at generating this transparency. This study looks at the Transparency of Transparency of Swiss Federal websites relating to the rules and regulations framing the 2006 Access to Information Law. This study was first completed in 2008 and replicated in 2011. The study shows that the objective of the law, mainly to create a cultural transformation from secrecy to transparency as an organisational norm, has not been realised. It also questions and positions the Transparency of Transparency as one of the key elements in the managerial cycle of transparency.

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“Government should be transparent. Transparency promotes accountability and provides information for citizens about what their Government is doing. (...) Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public.”

[President Barack Obama, January 21, 2009]

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1. Introduction

The transparency of the activities of governments and public service organisations has become a democratic imperative. This imperative rests upon a ‘non-negotiable’ ‘right to know’ (Fung, Graham, & Weil, 2003; Pope, 2003), whose connection to the fundamental freedom “... to seek, receive and impart information” (The Universal Declaration of Human Rights, 1948) is increasingly recognized (Hins & Voorhoof, 2007). For Hood, transparency has gained a ‘quasi-religious’ significance (2006a: 3).

The concept of transparency as it applies to the institutions of the public sector can be summarised as the “conduct of public affairs in the open or otherwise subject to public scrutiny” (Birkinshaw, 2006: 189).¹ This concept has been activated through a larger number of tools, whether legal (laws), administrative (regulations) or managerial (processes and practices). Over the last 20 years, one of the key instruments of transparency has been Access to Information (ATI) laws. These laws give individuals the opportunity to request, without the need to justify or to substantiate the request, information, or a document containing the desired information. Citizens thus have a legally guaranteed right of Access to Information held by the authorities. This right is qualified by a specific and limited number of exceptions and exemptions to the general rule of disclosure. One of the main consequences of ATI is to force the authorities to disclose what they would rather keep secret. This represents, for organisations and citizens, a significant cultural transformation away from the traditional and historical notion of administrative privilege (Roberts, 2005a, 2005b, 2005c).

Evaluations of the success of ATI laws have been based on the processes (Gilad, 2009; Herz, 2009; Holsen & Worthy, 2010; Maggetti, 2009; Neuman & Calland, 2007; Roberts, 1999a; Van Roosbroek & Van de Walle, 2008), outputs (Herz, 2009; Holsen & Pasquier, 2010; Schwanitz, 2007) and impacts (Peisakhin & Pinto, 2008; Piotrowski, 2009; Rely & Sabharwal, 2009; Transparency, 2008) of such laws. One larger aspect of ATI that has not been evaluated as thoroughly is the transparency of the transparency: the openness of the transparency process itself. This ‘Transparency of Transparency’ (ToT) can be defined as:

“...the pro-active, open and unobstructed communication of the concepts and tools set in place to promote or to achieve transparency, underscoring the inherent rights and obligation of administrations and citizens alike.”

Transparency laws and transparency tools are not necessarily transparent. The objective of ATI laws to create transparency as an outcome does not, *sui generis*, engender the creation of transparency in the policy inputs and managerial processes making this objective possible. Mechanisms of transparency have been shown not to be fully transparent (Roberts, 2005c) notably by the establishment of parallel procedures to manage sensitive requests or by issuing decision of non-communication that cannot be appealed nor corroborated by a third party.

One of the currently favoured approaches to achieve greater transparency is the pro-active disclosure of information and documents; the publication, mostly in electronic form, of various elements before they are even requested. As mentioned in previous contributions, this approach, while not mandatory can prove both more efficient and less costly (Pasquier & Villeneuve, 2007). The ToT addresses the situation within the very process of generating this transparency by analysing the proactive disclosure not of documents (downstream) but of the process itself (upstream).

Beyond the exploration of the concept and application of the ToT, this study serves a number of objectives in the wider scholarship on

transparency. The first is to ascertain the presence and subsequently the effectiveness of the ‘cultural transformation’ that ATI is supposed to bring about. Have public organisations integrated the transparency agenda in their structures and procedures? Being transparent and proactive about one’s transparency obligations is an indicator of the organisation’s willingness to support ATI and a by-product of having undergone, at least mentally, this cultural transformation. Such a consideration takes its importance in the face of the organisational, political and technical hurdles that this transformation faces (Pasquier & Villeneuve, 2007). The second is to provide a further analytical tool to evaluate ATI. This might be particularly useful in contexts where ATI is not used extensively by citizens (for example, in Germany and Switzerland).

This study looks at the ToT in the deployment of the Swiss Federal ATI law, the “Loi sur la Transparence” (LTRANS). How transparent are Swiss federal departments and offices with regard to their obligations under the LTRANS? Is the new law hidden, is it denatured, or is it presented prominently for anyone to find? The Internet presence of all the Swiss federal government’s entities will be used as a testing ground. This study was made in 2008, two years after the enactment of the law in and, for comparison, again in 2011.

After this short introduction, the second section of this contribution looks at the current approaches used to evaluate ATI laws with an emphasis on the ToT approach. The third and fourth sections present the context and methodology selected for this study. The fifth section presents the results, while the sixth discusses their ramifications.

2. Attempts at ‘measuring’ transparency: processes, outputs, outcomes and impacts

The development of ATI laws is based on three general postulates: that it 1) improves ‘Governance’ (Kondo, 2002; Mendel, 2008; Naurin, 2006; Piotrowski, 2007); 2) leads to greater ‘Trust’ (Grimmelikhuisen, 2012; Hazell, Worthy, & Bourke, 2009; Roberts, 2005a); and 3) increases levels of ‘Participation’ (Aarhus Convention, 1998; Hazell, 1989). These form the premises of most, if not all, ATI legislations. With such objectives being defined, the proper evaluation of the ‘success’ of any ATI legislations is necessarily multi-dimensional. The systemic and transversal nature of these objectives, as well as the ‘adjunctive’ value of the benefit of ATI legislation to overall governmental transparency, makes any global and definitive evaluation difficult. For this reason, no single approach claims prominence in this evaluation process.

Attempts at evaluating and measuring ATI laws are numerous. These evaluations have been made from different vantage points, each coming with its own technical lenses and analytical objectives:

- 1) official evaluations by governments, respectively by the supervisory authority of the law (Ministries, Commissioners, Ombudsman, etc.);
- 2) academic evaluations taking as a starting points various disciplines, such as political science, economics, law or sociology; and
- 3) non-governmental organisations generally taking a more normative approach in favour of transparency.

These various analyses have focused on different segments of the transparency equation: a) the ‘process’ of transparency – how are ATI legislations activated within organisations; b) the ‘outputs’ of ATI – the actual products generated by the legislation – number of requests, refusals and legal challenges; c) the ‘outcomes’ – the measure of the increase of the level of transparency of public organisations; and d) the ‘impacts’ – the measure of the benefit of ATI legislations in the attainment of the initial objectives of better governance, greater trust and higher level of participation.

The ‘process’ of transparency has been measured in the appropriation of budgets (British Information Commissioner’s Office, 2007), its mechanisms (Roberts, 2005c), the development and structuring of its boundaries (Blanton, 2003; Roberts, 2006), its costs (Office of the

¹ For related definitions see Graham & Weil (2002); Heritier (2003); Hood & Heald (2006a); and A.J. Meijer (2012).

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