



# Ideology beyond partisanship: The behavior of judges on freedom of information cases in Chile

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## ABSTRACT

Based on an original database on votes in non-unanimous decisions ( $n = 502$ ) in an independent administrative tribunal resolving Freedom of Information (FOI) cases between 2009 and 2017 in Chile, this research tests whether partisanship and ideology explain judges' decisions on administrative information disclosure. We specify a logistic model with pairs cluster bootstrapped t-statistics to account for votes nested in judges and calculate correcting standard errors. The study indicates that when appointing FOI judges close to their parties, politicians cannot count with responsive same party judges to rule in their favor when resolving FOI disputes. Nonetheless, ideology is a strong predictor of judges' decisions when resolving FOI disputes related to privacy and commercial secrets. In doing so, the study enhances our understanding of the behavior of administrative judges working in agencies in charge of controlling the government and sheds light on the role of ideology on adjudication in FOI disputes -an area of law barely explored empirically.

## 1. Introduction

The control of bureaucracies through transparency measures is a worldwide doctrine of better governance, and its main expression is the diffusion of Freedom of Information Acts (FOIAs) (Islam, 2006). FOIAs state a universal right and procedure to access to information held by the Administration, qualified by legal exceptions subject to impartial adjudication (Mendel, 2008). As with other transparency measures, FOIAs' goals are to enhance public accountability and combat corruption by increasing citizens' participation in governance as control agents (Cucciniello, Porumbescu, & Grimmlikhuijsen, 2016). Judges in charge of adjudication on FOI disputes between citizens and the Administration play a central role in the achievement of these goals. Interpreting the legal exceptions to freedom of information, judges adjudicate on whether information disclosure would damage other public values, such as national security, individuals' privacy or companies' commercial secrets. In doing so, they define the limits of secrecy and, consequently, the scope of FOI as a control mechanism.

Although it seems axiomatic that judges should be impartial and guided exclusively by the law, empirical studies have shown that judges' personal preferences play a key role in explaining their decision-making. Most notably, attitudinal studies on judges' behavior have repetitively shown that the judges' ideology is highly correlated with their decisions on the bench, either on civil liberties issues or highly

technical areas of law, i.e., liberal judges are more likely to issue what is considered liberal votes (Miller & Curry, 2009; Pinello, 1999; Segal & Spaeth, 2002). However, few studies have measured the impact of judges' ideology on decision-making distinctly from the judges' level of affiliation with a political party, i.e., their partisanship (Kopko, 2008; McKenzie, 2012; Segal & D'Elia-Kueper, 2017). These two factors are relevant when studying judges' behavior on disputes between citizens and the government as partisan and ideological motivations could conflict, i.e., ideologically liberal decisions might damage the liberal party in government. More importantly, as highlighted by Segal and D'Elia-Kueper (2017), while people expect judges to be influenced by their ideology and values, they disapprove when adjudication is based exclusively on partisan motivations. Indeed, whilst the former might be understood as part of lawful judicial discretion in legal interpretation, the latter appears as unlawful arbitrariness.

Studying the politics of judicial behavior is particularly relevant in FOI cases. Firstly, FOI cases involve controversies over important public values comprised in the legal exceptions to information disclosure, among them, national security and privacy. Thus it can be expected that a judge's ideology influences its decisions on transparency. Secondly, the political economy of transparency indicates that FOI disputes are not innocuous to judges affiliated to political parties. The reason is that administrative information disclosure has the potential to distribute costs and benefits between the coalitions in government and opposition

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by triggering accountability mechanisms, allocating blame or changing the political agenda (Berliner, 2014; Hood, 2007). Therefore, judges' partisan affiliation might be a relevant explicative factor of their decisions on FOI cases. More specifically, if judges vote in a way that is consistent with their partisan position, it can be expected that when a judge is affiliated with the coalition government, then the less likely it will be that he or she favors information disclosure. This is a central issue in the implementation of FOIAs since the achievement of transparency goals depends on how actors and institutions manage the tension between politicians' interest in controlling FOI outcomes and the expected impartiality of FOI judges.

The Chilean FOIA provides an excellent case study to address this issue for two reasons. Firstly, adjudication on FOIA disputes has been delegated to an independent public agency that operates as an administrative tribunal, following a trend in the institutional design of contemporary FOIAs in 65 countries (Blanke & Perlingeiro, 2018). In this institutional model, agency board members are granted with independence levels similar to judges in the judiciary in order to ensure impartial adjudication. Therefore, Chile provides a case study of an institutional model of FOIA largely diffused in the world. Secondly, as authorities of a public agency, FOI judges operate both as bureaucratic agents and judges whose impartiality is considered an axiom. However, a study on the biography of Chilean FOI judges indicates that they present significant levels of partisan affiliation, e.g. some of them have worked as political authorities or as high-level assistants of political authorities. Since the appointment of authorities based on partisan rather than meritocratic grounds has been highlighted as a common strategy to ensure political responsiveness from formally independent agencies (Bach, Hammerschmid, & Löffler, 2018; Kopecký et al., 2016), Chile provides an excellent case study to assess the impact of partisan affiliation on FOI judges' decision-making.

The influence of politicians (Calvert, McCubbins, & Weingast, 1989; Moe, 1985) and interest groups (Carpenter & Moss, 2014; Stigler, 1971) on administrative agencies has been largely researched, but little attention has been given to those bureaucratic agents that exercise quasi-judisdictional powers, and less to those operating inside of independent agencies in charge of controlling the Administration. Although there is comparative evidence on the tensions between governments and the agencies in charge of FOI enforcement, little attention has been given to the behavior of FOI judges and whether partisan or ideological motivations explain their decisions. Previous empirical studies on FOI have mainly focused on its impact on bureaucrats' behavior in local (Cherry & McMenemy, 2013; Spáč, Voda, & Zagrapan, 2018; Worthy, 2013) and central governments (Camaj, 2016; Hazell & Glover, 2011), but the politics of judicial behavior on FOI cases remain largely unexplored. Moreover, while studies on the behavior of administrative judges resolving controversies between private entities indicate that their ideology has a significant role on adjudication (Seabrook, Wilk, & Lamb, 2013; Taratoot, 2013, 2014, 2017; Taratoot & Howard, 2011), few studies have explored whether partisan rather than ideological motivations explain judges behavior on legal controversies where political parties have a strong interest, as in FOI cases (Segal & D'Elia-Kueper, 2017).

Motivated by this gap in the literature and based on an original database on the votes on non-unanimous decisions ( $n = 502$ ) in an independent administrative tribunal (*Consejo para la Transparencia*) resolving FOIA cases between 2009 and 2017 in Chile, this research investigates the politics of judicial behavior in FOI decision-making. In particular, the study aims to answer whether partisan affiliation explains judges' decisions on administrative secrecy and to what extent this effect operates separately from ideological influences in adjudicating on legal exceptions to information disclosure. Based on a study of FOI judges' biographies, a binary variable was built to identify the partisan position of each judge, considering, among other things, having held public office. We operationalized ideology considering whether a judge self-identifies (or is identified by the media) as a

rightwing or leftwing party member or close to a right/leftwing party. The judges' ideology is fixed on time, while our measure of partisanship varies three times according to changes in the government coalition during the 2009–2017 period. As such, the conditions of the data provide two independent measures for ideology and partisanship. As a result, while most studies on judicial behavior do not differentiate ideology and partisanship, mainly because they operationalize the former based on the partisan affiliation of those in charge of the judges' appointment (Segal & D'Elia-Kueper, 2017), the Chilean FOIA provides a case study to test the separate impact of these variables. Additionally, the judges' previous work experience in the public sector, tribunal composition, time on the bench, and the legal claims in dispute in each case (inter alia, privacy, companies' commercial rights, and national security) were used as control variables. To test our hypotheses, we specify a logistic model with pairs cluster bootstrapped t-statistics (Esarey & Menger, 2018) to account for votes nested in judges and obtain correct standard errors. This model allows us to study a collection of over 500 emitted votes, from a small number of judges (8), with a robust inference method.

Results indicate that there is no significant correlation between partisanship and judges' behavior on information disclosure. Hence, when appointing FOI judges close to their parties, politicians cannot count on responsive same party judges to rule in their favor when resolving FOI disputes. However, the ideological position of the judges is a strong predictor of their decision when resolving FOI disputes related to individuals' privacy and companies' commercial rights. Regarding the former, the probability that a leftwing judge will vote to favor the disclosure of the information is 0.75, while this is 0.20 when a rightwing judge reviews a similar case. By analyzing the political and institutional determinants of judges' decision-making when controlling government secrecy, this research shed light on the tension between the politicians' interest in controlling administrative tribunals in charge of monitoring the Administration –studying an extensively diffused institutional model of administrative organization. In doing so, the study also contributes to the literature exploring the role of judicial ideology in an area of law barely explored empirically.

The next Section 2 presents the political and institutional structure of FOI in Chile. Section 3 exposes the literature on the impact of ideology and partisanship on judicial decision-making, presenting the hypotheses to be tested. Section 4 explains the methodology, describing the operationalization of partisanship and the statistical model applied for testing the hypotheses. Results and discussion are displayed in Section 5. Conclusions are presented at the end.

## 2. The political and institutional structure of freedom of information

Just as many FOIAs, the Chilean law does not set exact normative boundaries to justify secrecy, but somewhat generic or ambiguous categories in which boundaries are determined on a case-by-case basis (Blanke & Perlingeiro, 2018; Mendel, 2008). Most notably, information access can be denied lawfully if its disclosure will damage: individuals and companies' rights, particularly their privacy and commercial secrets; national security; or the accomplishment of administrative functions, such as law enforcement, policy deliberation, government attorney-client privilege, or administrative efficiency, the latter by attending too generic or too costly information requests. Given the ambiguous nature of these legal justifications for secrecy, judges play a central role in shaping the boundaries of transparency and the scope of FOI as a mechanism to enhance the control of the Administration (Blanke & Perlingeiro, 2018).

Many FOIAs in the world delegate adjudication on FOI requests to an independent administrative agency, where bureaucrats exercise quasi-judisdictional powers to resolve FOI dispute. Indeed, according to the Global Right to Information Rating, a comparative indicator of FOIAs' de jure strength, 65 countries have delegated FOI adjudication

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