Puerto Rico

Analysis of the Access to Information and Open Data Laws

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Introduction[1] [2]

Puerto Rico adopted two laws giving individuals a right to access information held by public authorities (the right to information or RTI) in 2019, in the form of the Law on Transparency and Expedited Procedures for Access to Public Information (Transparency Law)[3] and the Law on Open Data (Open Data Law)[4] (together, Laws). This follows the recognition of this much earlier, in 1982, as a fundamental right by the Supreme Court of Puerto Rico.[5] In addition, federal agencies are covered by the United States' Freedom of Information Act.[6]

This is a very welcome development but the rules on transparency in these two Laws fall far short of established international standards in this area. As a result, they fail to establish an effective right to access public information for the citizens of Puerto Rico.

The Laws have a number of both strengths and weaknesses. They create a clear right of access, are broad in terms of scope, and put in place adequate procedures for the making and processing of requests for information. However, the regime of exceptions is vastly overbroad, there is no provision for an independent oversight body (such as an information commission) and there are few promotional measures to support effective implementation.

This Analysis of the Laws has been prepared by the Centre for Law and Democracy (CLD) at the request of the Transparency Network of Puerto Rico. The aim is to obtain an independent review and analysis of the Laws, given that they have not been assessed on the RTI Rating, developed by CLD and Access Info Europe.[7] The

[2] This analysis was prepared by CLD pursuant to a request form the Transparency Network of Puerto Rico (Red de Transparencia). The Transparency Network of Puerto Rico is a coalition of organisations and individuals with specialised knowledge and commitment to the right to access information from, and transparency and accountability in public administration in Puerto Rico. We are grateful for the support of Centro de Periodismo Investigativo, Espacios Abiertos and Sembrando Sentido for their ongoing technical support and collaboration in this project.

[3] Act No. 141-2019.

[4] Act. No. 122-2019

[5] *Soto v. Secretario de Justicia*, 112 D.P.R. 477 (1982).

[6] 5 USC § 552.

[7] As a territory of the United States, Puerto Rico in not included the Country section of the RTI Rating. The RTI Rating, which was first launched in September 2011, is based on a comprehensive analysis of international standards adopted both by global human rights mechanisms, such as the UN Human Rights

Analysis is based on international standards regarding the right to information, as reflected in RTI Rating, and also takes into account better legislative practices from democracies around the world.[8]

An assessment of the Laws based on the RTI Rating has been prepared[9] and should be read in conjunction with this Analysis; the relevant sections of this assessment are pasted into the text of this Analysis at the appropriate places. The overall score of the Laws, based on the RTI Rating, is as follows:

Section	Max Points	Score	Percentage
1. Right of Access	6	5	83
2. Scope	30	26	87
3. Requesting Procedures	30	19	63
4. Exceptions and Refusals	30	7	23
5. Appeals	30	9	30
6. Sanctions and Protections	8	2	25
7. Promotional Measures	16	5	31
Total score	**150**	**73**	**49**

This score would place the Puerto Rican legal framework for the right to information in 87th place out of the 128 countries whose national laws are assessed on the RTI Rating, in the bottom one-third of all countries. This is clearly a weak position which highlights that the Laws could be substantially improved.

The government of Puerto Rico should take seriously its obligation to implement the international and constitutional right to information and amend the Laws so as to do this. We note that within the Inter-American human rights system a Model Inter-American Law on Access to Public Information has been developed.[10] This Model

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Committee and Special Rapporteur on Freedom of Opinion and Expression, and by regional mechanisms, such as regional human rights courts. The Rating is continuously updated and now covers 128 national laws from around the world. It is the leading tool for assessing the strength of the legal framework for the right to information and is regularly relied upon by leading international authorities. Information about the RTI Rating is available at: http://www.RTI-Rating.org.

[8] See, for example, Toby Mendel, *Freedom of Information: A Comparative Legal Survey, 2nd Edition* (2008, Paris, UNESCO), available in English, Spanish and several other languages at: http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/freedom-of-information-a-comparative-legal-survey-2nd-edition/.

[9] Note that this was an informal rating that did not go through the rigorous process that applies before a rating can be uploaded to the RTI Rating website.

[10] See Organization of American States, General Assembly AG/RES. 2607 (XL-)/10), 8 June 2010. Available at: https://www.oas.org/dil/AG-RES_2607-2010_eng.pdf.

Law is extremely robust, garnering 142 points out of a possible 150 on the RTI Rating.[11] As such, it provides an excellent point of reference for the government and other stakeholders in Puerto Rico for improving the current Laws.

1. Right of Access and Scope

The constitution and Laws include clear statements of the right of access, thus providing strong guarantees for this right. The Transparency Law also includes strong statements about the benefits of the right in the Statement of Motives, which refers to values such as a culture of openness, combating corruption, fostering participation and promoting accountability. Article 12 of the Transparency Law, the Interpretation Clause, calls on those tasked with interpreting the law to do so in the way that is "most beneficial for the person requesting public information", which is positive. It falls short, however, of calling for interpretation to be done in the manner that best gives effect to the benefits listed in the Statement of Motives.

Article 3(7) of the Transparency Law provides that "every person has the right to obtain public information". It is not clear from this formulation whether foreigners and/or legal entities are included. Better practice RTI laws apply to everyone and also specifically to legal entities. A wider scope, at least in terms of people, is also mandated by the fact that the right is, under international law and the Puerto Rican Constitution, recognised as a human right.

In terms of the scope of information covered, the Transparency Law provides, in Article 3(1), that information and documentation "produced by" the government is presumed to be open, which is rather limited in scope. However, Article 3(4) goes on to provide that all information and documentation that "originate in, are held or received by" any government office are presumed to be public, which is much broader. However, even Article 3(4) appears to be limited in scope to government offices, rather than all of the entities to which the law applies, as defined in Article 2.

The scope of the Transparency Law in terms of coverage of public authorities is defined in Article 2, which appears to cover a wide range of executive, legislative and judicial actors, government agencies, public corporations and sub-national entities. It also covers third party custodians of public information. However, it does not appear to cover private bodies that are funded by government or which undertake public functions, contrary to better practice.

Recommendations:

[11] See https://www.rti-rating.org/international-institutions/.

- Article 12 should be amended to add in a requirement that the provisions of the Transparency Law should be interpreted so as best to give effect to the benefits recognised in the Statement of Motives.
- The Transparency Law should make it clear that everyone, including foreigners and legal entities, has the right to make requests for information.
- Article 3(1) of the Transparency Law should be removed, leaving in place Article 3(4), which should be amended to make it clear that it covers information held by any entity to which the openness rules apply.
- The law should cover all bodies which receive substantial public funding or which undertake a public function.

Right of Access

Indicator		Max	Points	Article
1	The legal framework (including jurisprudence) recognises a fundamental right of access to information.	2	2	Article II§4, Const.
2	The legal framework creates a specific presumption in favour of access to all information held by public authorities, subject only to limited exceptions.	2	2	3
3	The legal framework contains a specific statement of principles calling for a broad interpretation of the RTI law. The legal framework emphasises the benefits of the right to information.	2	1	Motives, 12
	TOTAL	**6**	**5**	

Scope

Indicator		Max	Points	Article
4	Everyone (including non-citizens and legal entities) has the right to file requests for information.	2	1	3
5	The right of access applies to all material held by or on behalf of public authorities which is recorded in any format, regardless of who produced it.	4	3	3
6	Requesters have a right to access both information and records/documents (i.e. a right both to ask for information and to apply for specific documents).	2	2	3
7	The right of access applies to the executive branch with no bodies or classes of information excluded. This includes executive (cabinet) and administration including all ministries, departments, local government, public schools, public health care bodies, the police, the armed forces,	8	8	2

	security services, and bodies owned or controlled by the above.			
8	The right of access applies to the legislature, including both administrative and other information, with no bodies excluded.	4	4	2
9	The right of access applies to the judicial branch, including both administrative and other information, with no bodies excluded.	4	4	2
10	The right of access applies to State-owned enterprises (commercial entities that are owned or controlled by the State).	2	2	2
11	The right of access applies to other public authorities, including constitutional, statutory and oversight bodies (such as an election commission or information commission/er).	2	2	2
12	The right of access applies to a) private bodies that perform a public function and b) private bodies that receive significant public funding.	2	0	2
	TOTAL	**30**	**26**	

2. Duty to Publish

The Transparency Law has only rather limited rules on proactive publication, contained in Article 4, which calls on the government to routinely publish information about its functions, actions and the results of its actions, as well as documents that are "routinely produced" by a public authority. These are positive statements but are too general to be effective in terms of proactive publication.

However, Article 5 of the Open Data Law includes a long list of specific categories of information that every "Government Agency" shall make available through the Internet Portal. It may be noted that the Open Data Law generally applies to a broad range of bodies, including both the government and private bodies that undertake public functions or receive public funding (see Article 2), but that this proactive publication obligation only refers to government agencies.

The specific items on the Article 5 list of categories of information are quite detailed as regards financial matters, tender contracts and administrative/organisational matters relating to public authorities. Consideration should, however, be given to including additional proactive publication obligations regarding the services and benefits provided by public authorities.

Recommendations:

- The proactive publication obligations set out in Article 5 of the Open Data

Law should extend to all of the entities covered by the Law, rather than just applying to "government agencies".
- The list of types of information subject to proactive publication in Article 5 of the Open Data Law should be expanded to include more information about services and benefits provided by public authorities.

Note: The RTI Rating did not assess the duty to publish and so no excerpt from it is provided here.

3. Requesting Procedures

The system for making and processing requests is, overall, an area where the Transparency Law does reasonably well but could also do a lot better. It scores 19 out of the possible 30 points in this category of the RTI Rating, or 63%. While this is above the overall average score of the legal framework on the RTI Rating, procedures is an area where it is generally easy to do well and so more effort should be directed towards improving these rules.

The rules for making requests are generally quite positive, with no particular interest needed to be shown in requested information, with requests able to be made in both written and electronic form and only limited information being listed as being required on a request (see Article 6). The latter could be improved by making it explicit that the information listed is the only information that may be demanded from requesters.

Article 5(3) provides, very generally, that information officers shall "facilitate access" and provide the "necessary assistance" to requesters, while Article 5(4) provides that information officers shall be the central contact within public authorities for "assisting individuals requesting information". While these are positive obligations, they fall short of a clear obligation to provide assistance in particular where this is needed to clarify requests, which is a common challenge for requesters, or to help those who are illiterate or disabled to make requests in the first place.

Article 6(1) imposes an obligation on information officers to notify requesters that their requests have been received. This is positive but better practice requires such notice to be provided within a set period of time, normally of five working days or less.

The Transparency Law fails to set out any rules for cases where a public authority does not hold the information requested. Better practice in this case is to require the

authority, where it is aware of another authority that holds the information, to transfer the request to that other authority and to inform the requester about this.

Article 5(3) calls for information officers to facilitate access in the "format requested" and Article 7(4) sets out four different forms of access. Article 8(2) also calls for information to be provided in the format requested, as long as this does not, among other things, entail a cost "greater than delivery on paper or in the format usually utilized by the" public authority, in which case it may provide access in "the format available or at a lesser cost". While it is legitimate for public authorities to try to operate efficiently, the rules already provide for requesters to cover the costs of copies and reproduction (see below). As such, cost should not be able to be used as a reason not to provide information in the format preferred by a requester (i.e. since he or she is already shouldering that cost).

The timelines for responding to requests are also problematical. To start with, there is no requirement that requests be processed as soon as possible. This is important to ensure that public authorities do not wait until the end of the stipulated maximum time to respond to requests. For central agencies, the maximum time limit is ten working days, which reflects best practice. However, this is extended to 15 working days when requests are made "directly at the level of a regional office" (Article 7(1)). Best practice would be to retain the ten working day limit for regional offices as well. Article 7(2) allows the time limit to be extended by another ten working days provided that the information officer informs the requester of the extension and the reasons for it within the original period. This is an appropriately short period for extensions, although better practice is to stipulate in the law the reasons or conditions which would justify an extension (such as that the request requires a search through a lot of documents or consultation with third parties).

The rules on fees are found in Articles 7(4)(c) and 8(1) of the Transparency Law. The former provides for information in the form of copies to be sent by federal first class mail, as long as the requester is willing to pay the "postage and other related costs". It is not clear here what "related costs" might refer to. Article 8(1) provides that the issuance of copies or other forms of reproduction (such as recordings) may be subject to reasonable fees, further defined as including the direct costs of reproduction and mailing, but also "fees expressly authorised by law". For the executive branch, uniform guidelines shall be established regarding fees, while the legislative and judicial branches shall determine "internally how they will create uniform guidelines" on this. There are also fee waivers for indigent requesters.

The fee rules are generally positive but the references to "other related costs" and "fees expressly authorised by law" create some doubt as to whether fees will actually be limited to the costs of reproduction and sending the information.

Recommendations:

- Article 6(2) should make it clear that the information it lists is the only information that a requester may be required to provide to lodge a request for information.
- Articles 5(3) and (4) should be amended to make it clear that information officers must provide (reasonable) assistance whenever requesters require it, including to clarify their requests or where they are having problems lodging a request due to illiteracy or disability.
- A set period of time within which information officers must provide an acknowledgement of a request should be added to Article 6(1).
- The law should require public authorities to transfer requests to other authorities where they do not hold the information themselves but are aware of other authorities which do hold it.
- Article 8(2) should be amended to remove cost as a grounds for not providing information in the format preferred by the requester, taking into account the fact that the requester is already bound to cover the cost of reproducing the information.
- The law should provide for requests to be responded to as soon as possible, with the ten working day limit being a maximum period. Consideration should be given to applying the ten-day limit to all requests, including those made at regional offices. Finally, consideration should be given to adding in conditions for when extensions to the original time limit may be claimed.
- The references to "other related costs" and "fees expressly authorised by law" in Articles 7(4)(c) and 8(1) of the Transparency Law should be removed so as to make it clear that fees will be limited to the costs of reproducing and sending the information.

Indicator		Max	Points	Article
13	Requesters are not required to provide reasons for their requests.	2	2	6
14	Requesters are only required to provide the details necessary for identifying and delivering the information (i.e. some form of address for delivery).	2	2	6
15	There are clear and relatively simple procedures for making requests. Requests may be submitted by any means of communication, with no requirement to use official forms or to state that the information is being requested under the access to information law.	2	2	6
16	Public officials are required provide assistance to help requesters formulate their requests, or to contact and assist requesters where requests that have been made are vague,	2	1	5

	unduly broad or otherwise need clarification.			
17	Public officials are required to provide assistance to requesters who require it because of special needs, for example because they are illiterate or disabled.	2	0	
18	Requesters are provided with a receipt or acknowledgement upon lodging a request within a reasonable timeframe, which should not exceed 5 working days	2	1	6
19	Clear and appropriate procedures are in place for situations where the authority to which a request is directed does not have the requested information. This includes an obligation to inform the requester that the information is not held and to refer the requester to another institution or to transfer the request where the public authority knows where the information is held.	2	0	
20	Public authorities are required to comply with requesters' preferences regarding how they access information, subject only to clear and limited overrides (e.g. to protect a record).	2	1	5
21	Public authorities are required to respond to requests as soon as possible.	2	0	
22	There are clear and reasonable maximum timelines (20 working days or less) for responding to requests, regardless of the manner of satisfying the request (including through publication).	2	1	7
23	There are clear limits on timeline extensions (20 working days or less), including a requirement that requesters be notified and provided with the reasons for the extension.	2	2	7
24	It is free to file requests.	2	2	8
25	There are clear rules relating to access fees, which are set centrally, rather than being determined by individual public authorities. These include a requirement that fees be limited to the cost of reproducing and sending the information (so that inspection of documents and electronic copies are free) and a certain initial number of pages (at least 20) are provided for free.	2	1	7
26	There are fee waivers for impecunious requesters	2	2	8
27	There are no limitations on or charges for reuse of information received from public bodies, except where a third party (which is not a public authority) holds a legally protected copyright over the information.	2	2	Open Data Law
	TOTAL	**30**	**19**	

4. Exceptions and Refusals

The regime of exceptions is one of the weakest features of the Laws, garnering just seven points out of a possible 30 or 23%. This is highly problematical because this regime defines the dividing line between openness and secrecy and is, as a result, an extremely important part of the overall framework for transparency. Getting the

right balance here is important since legitimately confidential information should be protected but an overbroad regime of exceptions can undermine the whole thrust of an RTI law.

International standards maintain this balance by imposing three conditions on or a three-part test for exceptions. First, they must only protect legitimate confidentiality interests. These are very similar in most laws since the types of interests that need protecting do not vary from country to country. Second, information should be confidential only if its disclosure would pose a risk of harm to a protected interest and not just because information "relates" to a particular interest (the harm test). Third, even where disclosure of the information would pose a risk of harm, it should still be disclosed where the benefits of this – for example in terms of combating corruption or facilitating participation – would outweigh that harm (the public interest override).

The regime of exceptions is divided between the Transparency Law and the Open Data Law, with the latter containing the primary rules on exceptions. A first issue here is the relationship between the openness rules and laws which provide for secrecy. Better practice is to protect all secrecy interests in the RTI regime, even if in a rather general way, subject to a harm test and a public interest override, and then provide that if secrecy provisions in other laws go beyond this, the RTI rules shall override them. Under such an approach, other laws may elaborate on secrecy interests recognised in the RTI rules, but not extend them (including by failing to include a harm test or public interest override).

The Transparency Law does provide, in Article 12, that in case of conflict between its provisions and any other law, the rules which are most favourable to the requester shall prevail. This is an odd formulation, which is not found in many other laws. While it appears to be positive in nature, in fact it leaves the question of which rules shall prevail largely up to the discretion, at least in the first place, of officials (since it will be up to them to decide which rules are most favourable). In any case, since the main rules on secrecy are in the Open Data Law, we must look to that instrument for guidance on this issue. That Law recognises exceptions in other laws, in Article 4(3)(a), which indicates that exceptions found in other laws are legitimate, essentially following court decisions which have indicated the same thing. As such, the RTI rules do not follow better practice inasmuch as they do allow for restrictions in other laws.

In terms of the first part of the international test for exceptions, four of the exceptions in the Laws are not considered legitimate under international standards, as follows:

- Article 4(1) of the Transparency Law provides that personnel files or similar information shall not be public. It is legitimate to protect private information

but personnel files are not limited to private information and hence this is not a legitimate exception inasmuch as it covers a range of non-sensitive information.

- Article 4(3)(c) of the Open Data Law provides that information the disclosure of which may injure the fundamental rights of third parties is not public. While this may appear to be legitimate, in fact it is significantly overbroad, as reflected in the fact that most RTI laws do not include such an exception. Instead, other laws protect only specific rights, such as privacy. It may be noted that what is at issue here is information held by public authorities, not the wider concept of freedom of expression. Thus, for example, there is no need to include protection for reputation as an exception here because we assume that public authorities will not hold defamatory material on a third party (and, if they did, it might be quite important to expose that fact). An exception of this sort also grants far too much discretion to officials to determine what is and is not a secret, since the scope of fundamental rights could be interpreted in different ways by officials.
- Article 4(4)(ii) of the Open Data Law provides that "rules or practices of internal personnel of a Government Agency" shall be confidential. This is simply not legitimate. The rules by which public authorities operate should almost always be open. While specific applications of these rules may involve private information, this can be protected by a much narrower exception in favour of private information.
- Article 4(4)(iii) of the Open Data Law provides that "internal communications between agencies" are secret. Once again, this is not legitimate. Better practice RTI laws do protect the free and frank exchange of information among officials, which is an important and legitimate government interest. But that is far narrower in scope than all internal communications, many of which are simply not be sensitive.

In terms of the second part of the test, a number of exceptions do not incorporate a proper, or any, harm test, as follows:

- Article 4(3)(d) of the Open Data Law provides for an exception in case the identity of a confidential source is at issue, without limiting this to cases where the source might be exposed or some other specified harm might result.
- Article 4(4)(i) of the Open Data Law renders secret all information that is classified on national security grounds. Classification is merely a procedural or administrative step which is different from an objective requirement that disclosure of the information harm national security.
- Article 4(4)(iv) of the Open Data Law categorises as exempt information relating to one or more of the privileges recognised in the Constitution of the United States or Puerto Rico, to the laws and rules of evidence, including official information on deliberative procedures for public policy, or

information recognised as secret by the jurisprudence. These are all categories of information as opposed to references to a specific interest which is then protected against harm, as is required by international law.

- Article 4(4)(v) of the Open Data Law classifies as exempt Information associated with ongoing civil or criminal trials in which a public authority or an official, due to his/her employment, is a party. There is clearly no warrant for providing such special protection to public authorities and/or officials, although a general exception to protect the fair administration of justice against harm is found in many RTI laws.
- Article 4(4)(viii) of the Open Data Law renders secret a "summary of the public ministry, which is privileged, or the work product in an investigative file or that contains information and/or documentation related to an ongoing investigation". Here again, the exception is significantly overbroad because it is not conditioned on a risk of harm to the administration of justice.
- Article 4(4)(xii) of the Open Data Law exempts information related to the security of an information network or to the design, operation, or defence of such a network. Again, there is no reference to the idea of harm so that it covers all such information, even if its disclosure would not undermine any legitimate interest.

Finally, the Laws fail to refer to the third part of the international test for exceptions, namely the public interest override.

The Laws also fail to include three other features that are found in better practice regimes of exceptions:

- There is no overall time limit on exceptions to protect public interests, such as national security or public order. Better practice is to limit these to periods of 20 or 30 years, or even less in the modern world given the fact that the sensitivity of information declines over time, normally quite rapidly. A special procedure could be provided for to extend these presumptive time limits on secrecy where, exceptionally, information really did remain sensitive after that time.
- There is no procedure for consulting with third parties where a request is made for information provided by them on a confidential basis. Better practice in such cases is to consult with the third party to obtain either his or her consent to release the information or his or her reasons as to why the information should be considered exempt. In the latter case, these reasons should be taken into account by the public authority but they should not be treated as a veto over disclosure.
- In many cases, only part of a document or record is exempt while the rest of it is not sensitive. In this case, that part should be removed – severed – from the document and the rest of the document should be disclosed. There is no rule on severability in the Laws.

Article 7(3) of the Transparency Law provides that where a public authority refuses to disclose information, it must provide the requester with written notice of the legal basis for the refusal. This is positive but the notice should also be required to include information about the right of the requester to challenge or appeal against the decision to refuse to disclose (see the next section, on Appeals).

Recommendations:

- The openness rules in the Laws should override secrecy provisions in other laws to the extent of any conflict.
- The exceptions to the right of access should be carefully limited to narrow and specific interests which can justify secrecy and the problematical exceptions listed above should be removed or narrowed in scope.
- All of the exceptions should be made subject to a harm test.
- Similarly, all of the exceptions should be subject to a public interest override.
- The law should provide for a presumptive overall time limit on the applicability of exceptions to protect public interests, along with a special procedure to extend this in those exceptional cases where the information remained sensitive beyond this time.
- The right of third parties to be consulted in relation to requests for information provided by them on a confidential basis, so as either to consent to the release of the information or to put forward objections to its disclosure, should be provided for. Where a third party objects to disclosure, this should be taken into account but it should not be treated as a veto over the release of the information.
- The law should provide for a rule on severability whereby, if only part of the information in a document or record is exempt, that should be removed from the document and the rest of the information should be disclosed.
- The requirement to provide notice in case of refusals to disclose information should include an obligation to inform the requester about his or her right to appeal against the refusal.

Indicator		Max	Points	Article
28	The standards in the RTI Law trump restrictions on information disclosure (secrecy provisions) in other legislation to the extent of any conflict.	4	0	12
29	The exceptions to the right of access are consistent with international standards. Permissible exceptions are: national security; international relations; public health and safety; the prevention, investigation and prosecution of legal wrongs;	10	6	4, Open Data: 4(3)(c), 4(4)(ii),

	privacy; legitimate commercial and other economic interests; management of the economy; fair administration of justice and legal advice privilege; conservation of the environment; and legitimate policy making and other operations of public authorities. It is also permissible to refer requesters to information which is already publicly available, for example online or in published form.			(iii)
30	A harm test applies to all exceptions, so that it is only where disclosure poses a risk of actual harm to a protected interest that it may be refused.	4	0	Open Data: 4(3)(d), 4(4)(i), (iv), (v), (viii), (xii)
31	There is a mandatory public interest override so that information must be disclosed where this is in the overall public interest, even if this may harm a protected interest. There are 'hard' overrides (which apply absolutely), for example for information about human rights, corruption or crimes against humanity.	4	0	
32	Information must be released as soon as an exception ceases to apply (for example, for after a contract tender process decision has been taken). The law contains a clause stating that exceptions to protect public interests do not apply to information which is over 20 years old.	2	0	
33	Clear and appropriate procedures are in place for consulting with third parties who provided information which is the subject of a request on a confidential basis. Public authorities shall take into account any objections by third parties when considering requests for information, but third parties do not have veto power over the release of information.	2	0	
34	There is a severability clause so that where only part of a record is covered by an exception the remainder must be disclosed.	2	0	
35	When refusing to provide access to information, public authorities must a) state the exact legal grounds and reason(s) for the refusal and b) inform the applicant of the relevant appeals procedures.	2	1	7
	TOTAL	**30**	**7**	

5. Appeals

This is another category where the Laws do poorly on the RTI Rating, scoring just 9 out of the possible 30 points or 30%. The main reason for this is the Laws' failure to establish an independent administrative body with the power to entertain appeals against refusals to disclose information and other failures to respect the rules relating to the processing of requests. Extensive experience in countries around the world has clearly demonstrated the crucial importance of this sort of appeal to the success of RTI regimes. In essence, while appeals to the courts are important, they

are simply too expensive and time consuming to be a realistic remedy for the vast majority of requesters. As a result, for these requesters, an appeal to an independent administrative body is the only effective recourse they may have.

Independent administrative oversight bodies in most countries also play a key role in supporting effective implementation of RTI laws in other ways, such as by providing training and other forms of support to information officers and public authorities, by raising public awareness about the law and generally by monitoring whether the law is being applied properly.

For this reason, most modern RTI laws provide for some system of administrative oversight. The most effective approach, which is also the most common, is to create a dedicated body for this purpose, such as an information commission, and these bodies are found throughout the Caribbean and Latin America as well as in many other countries around the world. Other options are to allocate these functions to a general ombudsman or human rights commission, although experience shows that in these cases the information function tends to attract a lot less attention, given the competition from other issues. The United States' Freedom of Information Act, being one of the earlier such laws, does not provide for any administrative oversight body but this has been recognised as a weakness and there is no reason for Puerto Rico to follow this approach.

Administrative oversight bodies need to have certain characteristics if they are to be able to discharge their RTI functions effectively. Most importantly, they need to be as independent as possible from the government, the decisions of which they are tasked with reviewing. Independence can be promoted in various ways, such as through the rules on appointing members, prohibitions on individuals with strong political links from being appointed, requirements of appropriate expertise, protection of the tenure of individuals, once appointed, and protection for the independence of the budget process. These bodies also need to have appropriate powers both to investigate and decide appeals, and to impose remedial measures where they find that the law has not been complied with by a public authority.

The Transparency Law does provide for an appeal to the courts (see Articles 7(2) and 9) and an attempt has been made to render this relatively user friendly. For example, the courts are called upon to make available a simple form for lodging a legal complaint, which is free of charge and does not require a lawyer. Strict time limits for dealing with such appeals are also provided for. While this is all very helpful, it does not provide an adequate substitute for an administrative level of appeal, as described above.

One shortcoming of the court appeals provided for in the Transparency Law is that it only covers refusals to disclose information or to respond within the established

time limits (see Article 9(1)). Better practice is to provide broadly for an appeal against any failure to apply the rules relating to requests, including such issues as failing to provide information in the format sought or charging excessive fees. Related to this, the remedies available to courts on appeal are limited to requiring a public authority to produce the information (see Article 9(7)), whereas better practice is to provide for a range of remedies, which may also include compensating requesters in appropriate cases and even requiring public authorities to undertake structural measures where they are systematically failing to meet their obligations under the law, such as to appoint and/or train an information officer or to manage their records better.

Finally, better practice is to place the burden of proof in such cases on the public authority, given that access is a human right and also that, in almost every case, the public authority will have better access to the information which is needed to decide the case. No such burden is established by the Transparency Law.

It can also be useful for the law to provide for an internal appeal to the same public authority which refused to disclose information in the first place. Such appeals can be a useful way of resolving disputes within the original public authority, without having recourse to an external body. Practice in some countries suggests that in certain cases the more senior officials who hear internal appeals tend to be more likely to release information.

Recommendations:

- The law should provide for the right of requesters to lodge an appeal with an administrative body whenever they believe that their requests have not been processed in accordance with the rules. The independence of this body from the government should be protected and it should have adequate powers to investigate complaints.
- The grounds for appeals, before both the administrative oversight body and the courts, should be broad, including any failure to apply the rules relating to the processing of requests.
- Both the administrative oversight body and the courts should have the power to order appropriate remedies in case they find that a public authority has breached the rules.
- The law should provide explicitly that in an appeal before either the administrative oversight body or the courts, the concerned public authority bears the burden of proving that it acted in accordance with the rules.
- The law should explicitly grant both the administrative oversight body and the courts the power to order public authorities to put in place such

structural measures as may be required to ensure that they are able to comply with their legal obligations in relation to the processing of requests.
- Consideration should be given to adding a system of internal appeals to the RTI rules, if this is deemed to be useful.

Indicator		Max	Points	Article
36	The law offers an internal appeal which is simple, free of charge and completed within clear timelines (20 working days or less).	2	0	
37	Requesters have the right to lodge an (external) appeal with an independent administrative oversight body (e.g. an information commission or ombudsman).	2	0	
38	The member(s) of the oversight body are appointed in a manner that is protected against political interference and have security of tenure so they are protected against arbitrary dismissal (procedurally/substantively) once appointed.	2	0	
39	The oversight body reports to and has its budget approved by the parliament, or other effective mechanisms are in place to protect its financial independence.	2	0	
40	There are prohibitions on individuals with strong political connections from being appointed to this body and requirements of professional expertise.	2	0	
41	The independent oversight body has the necessary mandate and power to perform its functions, including to review classified documents and inspect the premises of public bodies.	2	0	
42	The decisions of the independent oversight body are binding.	2	0	
43	In deciding an appeal, the independent oversight body has the power to order appropriate remedies for the requester, including the declassification of information.	2	1	9
44	Requesters have a right to lodge a judicial appeal in addition to an appeal to an (independent) oversight body.	2	2	7
45	Appeals (both internal and external) are free of charge and do not require legal assistance.	2	2	9
46	The grounds for the external appeal are broad (including not only refusals to provide information but also refusals to provide information in the form requested, administrative silence and other breach of timelines, charging excessive fees, etc.).	4	2	9
47	Clear procedures, including timelines, are in place for dealing with external appeals.	2	2	9
48	In the appeal process, the government bears the burden of demonstrating that it did not operate in breach of the rules.	2	0	
49	The external appellate body has the power to impose appropriate structural measures on the public authority (e.g. to conduct more training or to engage in better record management)	2	0	

TOTAL	**30**	**9**	

6. Sanctions and Protections

The Laws again perform poorly in this category, scoring just two out of a possible eight points, or 25%. They fail to provide for any sanctions for obstructing access to information or wilfully failing to apply the RTI rules. There are protections for individuals who report on failures to apply the rules (see Article 10). While positive, this is not the same as providing directly for sanctions for breach of the law, as many such laws do. While many RTI Laws provide for criminal sanctions for such breaches, experience suggests that it may be more effective to provide for a regime of administrative sanctions for all but the very most serious breaches.

The Laws also fail to provide for sanctions for public authorities which systematically fail to implement their provisions. This is an important supplementary form of sanction since, in many cases, the main problem lies not with individuals, such as information officers, but with the performance of the public authority as a whole.

In addition to sanctions, it is very important to provide for protections for individuals who release information in good faith pursuant to the RTI rules. Otherwise, information officers, in particular, will always be concerned about the risk of sanctions for releasing information, in case it is decided later on that they should not have done so. Similarly, it is important to provide protection for individuals who release information in good faith with a view to exposing wrongdoing or serious problems of maladministration (whistleblowers). This is an important information safety valve, encouraging the release of these types of information, which are of high public importance. Article IV of the Anti-Corruption Code provides for some such protection but it would be useful to expand upon this either in the rules on access to information or in a dedicated whistleblower law.

Recommendations:

- The law should provide for sanctions for individuals who wilfully obstruct access to information in breach of the law, as well as for sanctions for public authorities which are systematically failing to implement the law.
- The law should also provide for protection for individuals who release information in good faith pursuant to its provisions.
- Consideration should be given to providing at least basic protection in the RTI rules for individuals who release information about wrongdoing, or to adopting a dedicated whistleblower law.

Indicator		Max	Points	Article
50	Sanctions may be imposed on those who wilfully act to undermine the right to information, including through the unauthorised destruction of information.	2	0	10
51	There is a system for redressing the problem of public authorities which systematically fail to disclose information or underperform (either through imposing sanctions on them or requiring remedial actions of them).	2	0	
52	The independent oversight body and its staff are granted legal immunity for acts undertaken in good faith in the exercise or performance of any power, duty or function under the RTI Law. Others are granted similar immunity for the good faith release of information pursuant to the RTI Law.	2	0	
53	There are legal protections against imposing sanctions on those who, in good faith, release information which discloses wrongdoing (i.e. whistleblowers).	2	2	Anti-Corruption, IV
	TOTAL	**8**	**2**	

7. Promotional Measures

This is yet another category where the Laws do not do well, earning only 5 of the possible total of 16 points or 31%. In more positive terms, Article 5 of the Transparency Law calls for the appointment of at least three public servants per public authority to be designated as information officers. These individuals are allocated a range of tasks and need to be trained in the legal rules relating to RTI, including jurisprudence. Best practice goes even further and calls for at least some training to be given to all civil servants, although the initial focus should indeed be on information officers. Furthermore, here, as in some other areas, the law limits the obligation to government bodies. Instead, it should apply to all bodies which are covered by the access rules (see Article 2 of the Transparency Law).

One of the tasks of information officers is to file monthly reports on the number of requests and their status (Article 5(5)). While the ambition of this commitment is impressive, it is probably excessive and annual or semi-annual reports, such as are found in other countries, are probably enough. In addition to these reports at the level of each public authority, it is very important to provide for a central report on what is happening overall in terms of implementation of the RTI rules. In many countries this is prepared by the oversight body but it could also be prepared by a central government body.

A number of other promotional measures are simply missing from the Laws, as follows:

- No central body is given overall responsibility for promoting the right to information or proper implementation of the rules. In many cases, this role is allocated to the oversight body but it could also be done by a central government body.
- Similarly, no body is given the task of raising public awareness about the RTI law. This is crucial since, if the public are not aware of their right to information, they are unlikely to make requests for information, and the whole system will fail to deliver its objectives.
- If a public authority cannot locate information, it cannot provide that information to a requester. It is thus very important for the RTI law to put in place a good system for improving records management. This starts with adopting minimum standards for records management but that needs to be supplemented by providing training to officials and building the capacity of public authorities to apply these standards. Then, some system for monitoring performance in this area and for addressing cases where public authorities are failing to meet the standards needs to be put in place.
- Better practice laws place an obligation on public authorities to publish full lists of at least the more important records they hold. Such lists can be very useful for requesters as they represent a mapping of the information each public authority holds. This makes it much easier to identify the right public authority when lodging a request for information as well as to know whether the information you are seeking is available at all. At a minimum, public authorities should be required to publish a description of the classes of records they hold.

Recommendations:

- The rules on information officers should apply to all bodies covered by the access rules, not just government bodies.
- The law should provide for some training to be given to all officials, in addition to the in-depth training it already calls for in the case of information officers.
- In addition to the reporting by information officers, a central body should be tasked with preparing an overall report on what is happening in terms of implementation of the RTI rules, ideally on an annual basis.
- A central body should be tasked both with overall responsibility for ensuring appropriate implementation of the RTI rules and with raising public awareness about the law and the right of individuals to make requests for information.
- The law should create a proper records management system involving the

setting of records management standards, the provision of training on this and a system to monitor performance and to address cases where public authorities are not meeting minimum standards.

- Consideration should be given to requiring public authorities to publish lists of the main records they hold or at least of the categories of records they hold.

Indicator		Max	Points	Article
54	Public authorities are required to appoint dedicated officials (information officers) or units with a responsibility for ensuring that they comply with their information disclosure obligations.	2	2	5
55	A central body, such as an information commission(er) or government department, is given overall responsibility for promoting the right to information.	2	0	
56	Public awareness-raising efforts (e.g. producing a guide for the public or introducing RTI awareness into schools) are required to be undertaken by law.	2	0	
57	A system is in place whereby minimum standards regarding the management of records are set and applied.	2	0	
58	Public authorities are required to create and update lists or registers of the documents in their possession, and to make these public.	2	0	
59	Training programmes for officials are required to be put in place.	2	1	5
60	Public authorities are required to report annually on the actions they have taken to implement their disclosure obligations. This includes statistics on requests received and how they were dealt with.	2	2	5
61	A central body, such as an information commission(er) or government department, has an obligation to present a consolidated report to the legislature on implementation of the law.	2	0	
	TOTAL	**16**	**5**	