

THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE

RIGHT-TO-INFORMATION ARENAS: EXPLORING THE
RIGHT TO INFORMATION IN CHILE, NEW ZEALAND
AND URUGUAY

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DECLARATION

I certify that the thesis I have presented for examination for the MPhil/Ph.D. degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it). This thesis is licensed under creative commons licence attribution-noncommercial-sharealike 4.0 International (CC BY-NC-SA 4.0)¹ I warrant that this authorisation does not, to the best of my belief, infringe the rights of any third party. I can confirm that my thesis was copy edited for conventions of language, spelling and grammar by Richard Glyde and the company Editage. Stefan Bauchowitz provided support with the use of LaTeX

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ABSTRACT

The Right to Information (RTI) – a right every individual has to access public information held by governments – is now established in more than 100 countries. RTI laws set up a new logic in government: availability of public information is the principle and secrecy the exception. RTI laws create new public information arenas where several actors request, release and use public information for several purposes. In this work, I seek to explore why RTI arenas based on similar principles, work differently leading to different outputs. My explanation is based on a historical- institutionalist perspective arguing that origins of these laws and previous institutional structures matter. I argue that three factors help to shape these arenas: the level of participation in the policy-making process, the professionalisation of state bureaucracy and RTI enforcement institutions. The combination of these factors gives us three different kinds of arenas: functional, mixed and contested. I develop a conceptual framework, operating at a middle-range theory level, to analyse the role RTI laws, requesters, the state, and the existence of RTI enforcement institutions play in each configuration. I show how these arenas evolve and work, running a structured and focused comparison of three case studies: Uruguay, Chile and New Zealand. This work shows how these arenas ended up differing in outputs such as availability of public information and efficiency in processing RTI requests, as well as the existence of effective accountability mechanisms to resolve disputes about public information.

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F.S.M.

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ACRONYMS

APIU	Access to Public Information Unit
ATI	Access to Information
ASIEG	Agency for Society of Information and Electronic Government
CAINFO	Centro de Archivos y Acceso a la Informacion
COG	Campaign for Open Government
CPLT	Consejo para la Transparencia (Council for Transparency)
COI	Committee on Official Information
DATA	Datos Abiertos, Transparencia y Acceso a la Informacion
DIPRES	Direccion de Presupuestos
DGAIP	Grupo de Acceso a la Informacion Publica
EU	European Union
FOI	Freedom of Information
FOIA	Freedom of Information Act
ICT	Information and Communication Technologies
IACJ	Interamerican Court of Justice
LSE	London School of Economics and Political Science
LGOIMA	Local Government Official Information Act
NGO	Non Governmental Organisation
NPM	New Public Management
NZIS	New Zealand Immigration System
NZ	New Zealand

MP Member of Parliament

OGP Open Government Partnership

OIA Official Information Act

OECD Organisation for Economic Cooperation and Development

RTI Right to Information

SOE State Owned Enterprise

UNDP United Nations Development Programme

Keep Ithaka always in your mind. Arriving there is what you are destined for. But do not hurry the journey at all. Better if it lasts for years, so you are old by the time you reach the island, wealthy with all you have gained on the way, not expecting Ithaka to make you rich.

Ithaka gave you the marvellous journey. Without her you would not have set out. She has nothing left to give you now.

Ithaka, Cavalli Poems translated by Edmund Keeley/Philip Sherrard

There is in the South more than one worn gate, With its cement urns and planted cactus, Which is already forbidden to my entry, Inaccessible, as in a lithograph. There is a door you have closed forever And some mirror is expecting you in vain; To you the crossroads seem wide open, Yet watching you, four-faced, is a Janus.

Limits, Jorge Luis Borges

Este libro es sin tapas porque es abierto y libre: se puede escribir antes y despues de él.

Felisberto Hernandez : El libro sin tapas^a

^aI am indebted to Jorge Gemmetto for this quote

INTRODUCTION

In Uruguay, a small democratic country in Latin America, a journalist filed an access-to-information request to get data about primary and high school repetition rates. At the time, public education in Uruguay was at the centre of a fierce debate involving several conflicts with trade unions. The request received a mixed reply: the primary school authority replied with a good degree of detail about the schools, which allowed the journalist to make a partial comparison between them. The high school national authority did not respond. The journalist asked for the information again and was again refused. The justification was that the information could be used to promote discriminatory practices among students and educational centres. In short, if someone got to know who the worst performers were, various forms of discrimination would result. Furthermore, the high school authorities expressly criticised the primary education authorities on their decision to share the information. The journalist decided to sue the government using the special provisions of the right-to-information (RTI) law. After a lengthy legal battle, the information was partially released. Repetition rates were alarming, something that was known by a small niche of experts, but relatively unknown by the public. A vigorous debate ensued, which ended in the removal of the president of the high school national education authority. In this case, public information was not initially available, it was difficult to get such information and only after a lengthy and difficult process was it possible to access it.

In the same region, but on the other side of the Andes, data on secondary education is available in Chile, providing full descriptions of schools, numbers of students, average grades, average grades in national performance tests and other data. Information is available on line. This was the situation even before the enactment of a RTI law in that country. However, finding information about how the system worked in terms of granting access to university was more elusive. A group of civil society leaders struggled for years to get information about a controversial test that determines who gets

entrance to university. The test also evaluated high school performance and was important to establish the benefits students can access. The test was evaluated by an external contractor and the results of such evaluations were never made public. In addition, the test allegedly created several inequalities in terms of access to higher education, and there were no appropriate controls. A court denied access to the evaluation on technical grounds (Zavala Guzman c/Rector de la Universidad de Chile, 2007). With the enactment of an access-to-information law, the Council for Transparency, an autonomous organisation in charge of enforcing the law, finally recommended the release of a significant amount of information (including a copy of the evaluation report), but the debate still persists in Chile (Salazar y Peña, 2013). In this case, public information was initially available. Yet, when more details were requested, problems emerged. An effective appeals system managed to intervene, ordering the partial release of the information requested.

Across the Pacific Ocean, New Zealand is considered one of the most transparent countries in the world, having a history of RTI dating back to 1982. Information about the education system had traditionally been open until, in 2008, the government of the day decided to create a national standard reporting on school mechanisms. The scheme was heavily debated, with the government, unions and parents hurling accusations at each other about fairness and the implications of transparency in the system. The main argument was that the release of information would create losers and winners and unfairly portray student and school performance. Journalists requested access to student performance categorised by individual schools, and even went to each school requesting the data. After several controversies, New Zealand's Office of the Ombudsman ordered the release of the data. The government released the data through a website that showed the results, albeit with very cautious warnings about how those results should be interpreted. In this case, systems were in place to deal with an access-to-information request. The release was resisted but followed standard procedures, the final result being that information was made available and was contextualised for public use.

These cases all dealt with the same issue: citizens requesting public information in the education sector. All the cases show the existence of a similar RTI law, establishing similar principles, but different reactions from governments when dealing with it. They represent the central puzzle this study aims to understand: *Why do right-to-information regimes that operate under similar principles work differently and lead to different outputs?* In this chapter, I provide an introduction to the transparency field, focusing on RTI. First, I provide a discussion of transparency and access to information, showing its historical roots and evolution as a multidisciplinary field. Then, I focus on how the comparison

of public information institutions evolved in the literature, identifying issues that I seek to address in this work. Finally, I provide an overview of the structure of this work. The chapter shows that there is a need to develop comparative research frameworks that give room for context and history in explaining why right-to-information regimes work differently, leading to different outputs.

1.1 RIGHT TO INFORMATION: HISTORY AND CONTEXT OF A MULTI-DISCIPLINARY FIELD

Transparency is now in demand around the globe. It is virtually impossible to argue against the principle of transparency; it would be like arguing against motherhood and apple pie (Piotrowski, 2008). As noted by Hood (2006), transparency is now the secular equivalent of '*holier-than-thou*' (Hood, 2006 p. 6) in debates about governance. Politicians from all parts of the political spectrum are in favour of transparency. For instance, the conservative UK Prime Minister David Cameron recently proposed a 'transparency revolution' in the UK (Worthy, 2013). In the United States, President Barack Obama, a democrat, in his first days of government issued an Open Government Directive aimed at enhancing access to public information. In Brazil, the left-of-centre government headed by Dilma Rousseff approved an access-to-information law in 2011, the first of its kind in Brazil, allowing Brazilians access to public records and enhancing government accountability. The recently created international alliance The Open Government Partnership² includes countries such as Indonesia and Tanzania, who expressed a strong commitment to advancing significant governance reforms, such as establishing freedom-of-information laws and better accountability mechanisms.

Transparency studies have flourished in economics (Stiglitz, 2002, Akerlof, 1970, Vishwanath and Kaufmann, 2001), international relations (Donaldson and Kingbury, 2013, Stasavage, 2006), technology studies (Camp, 2006), cultural studies (Teurlings & Stauff, 2014), fiscal transparency (Head, 2003, Khagram et al. 2013) and anthropology (John, 2009), among other disciplines. The recently set up Transparency Conferences³ aim to organise and systematise a wide range of disciplines that deal with how transparency, institutions and actors work together in several fields. In this work, I focus on a subset of this field, dealing with access-to-information regimes from a public policy perspective.

Right to information (RTI) – the regulation that establishes the presumptive right of citizens to

²The OGP is an international partnership that brings governments and civil society together to work on transparency, collaboration and participation.

³There have been three global transparency conferences, in New York (2012), Utrecht (2013) and Paris (2014).

access government information (Birkinshaw, 2006) – can be considered a sub-set of transparency studies. The original idea can be traced back to Anders Chydenius⁴ who in 1766 promoted the adoption of the first access-to-information regulation, in what was then the Kingdom of Sweden. A true representative of the Swedish Enlightenment, Anders Chydenius advocated for several economic and social reforms, including transparency in the public sector. The *offentlighetsprincipen* or ‘principle of publicity’ was established in Swedish law after lengthy discussions⁵ and eventually it was left to the Ombudsman (another Swedish invention) to enforce it, when the institution was created in 1812. This regulation endured in Sweden⁶ until today, establishing the principle of openness of public records.

While freedom of the press and freedom of communication would find its way to several liberal constitutions, in America and others parts of the world, access to public information, the idea that the information the state produces should be open to public scrutiny, did not find its way so easily. Brandeis, an American judge, who coined the popular phrase ‘*sunlight is the best disinfectant, electric light the best policeman*’ (Brandeis, 1914),⁷ was an adamant defender of access to information, in particular policy realms, such as financial regulation, banking and city governance (Berger, 2009), but he never argued for it as a universal principle. The ground-breaking report by Harold Cross (1954) ‘*The People’s right to know*’ summarised the complexities of access to public information in the United States, arguing for the need to establish a specific right to inspection of public documents held by the government. In 1966, after an intense campaign led by California Representative, John Moss, Lyndon B. Johnson signed (reluctantly) the Freedom of Information Act (FOIA)⁸ that would become landmark legislation, and would subsequently be hailed as an example for other democracies to adopt (Schudson, 2013).

In the international arena, the adoption of several United Nations treaties on human rights also led to an acknowledgement of freedom of expression and, indirectly, to access to information. In

⁴Chydenius was member of the clergy, operating initially from Alaveteli, a small town in Finland

⁵According to Manninen (2006), while Chydenius had in mind publishing the records of the Parliament (Diet in Swedish terms), he was more focused on freedom of the press and abolition of censorship, but others such as the Historian of the Realm Anders Schonberg provided in-depth lists of documents that should be public.

⁶And generally in the Nordic countries after the Kingdom of Sweden lost Finland to Russia and Norway got its independence.

⁷The phrase can be traced back to Bryce (1848 p. 367) who notes ‘Public opinion is a sort of atmosphere, fresh, keen and full of sunlight like that of the American cities, and this sunlight kills many of those noxious gems which are hatched where politicians congregate... Selfishness, injustice, cruelty, tricks and jobs of all sorts, shun the light, to expose them is to defeat them’. I am indebted to Al Roberts for a tweet where he mentions this point.

⁸According to Kennedy (1996), Johnson signed this law reluctantly, after intense pressure and lobbying from Moss and several civic groups.

2006, the Inter-American Court of Justice '*established access to information as an autonomous right*' (IACJ, 2006 Claude Reyes vs. Chile). The European Court of Human Rights and other international bodies have followed this trend.

Ackerman and Sandoval (2005) and Banisar (2006) report an explosion of freedom-of-information laws across the world. In the last accounting, the number of RTI laws had reached 100 by 2014 (McIntosh, 2014). RTI is now a right established in a significant number of countries around the world.

Such a proliferation of laws is matched by significant literature on the matter. From an empirical public administration, policy and legal perspective, case studies about how access-to-information legislation emerges and works have flourished in several countries and regions.⁹ In a legalistic and normative vein, there are studies about global standards (Mendel, 2008, 2012), and how they should be enforced globally. There are also studies showing the complexity of enforcing RTI standards globally considering the particular contexts in the developing world (Darch and Underwood, 2010).

Other studies have focused on the role the state machinery plays in RTI. Roberts (2006) notes how bureaucracies are able to adjust to new access-to-information regulations to minimise their effect.¹⁰ While transparency was at the core of New Public Management (NPM) reforms (see for instance Scott, 2001, Hughes, 2014) structural reforms in terms of contracting out services led to significant changes in how right-to-information legislation works, leading private contractors to handle large amounts of public information which did not necessarily fall under the scope of an access-to-information law (Roberts, 2004, Piotrowski, 2006, Roberts, 2000, Taggart, 1992). Also related to NPM reforms and transparency, there are concerns about how transparency may affect impartial (or 'free and frank') advice from the civil service (Mulgan, 2012).

As the public sector incorporates new technologies, collecting, storing and eventually disseminating public information are now also crucial to understand how information flows in an era of what Meijer (2007) calls a '*computer-mediated transparency*'. Release of public information on line can significantly alter work routines in public administration, leading to discomfort and complex trade-offs for public

⁹Such as the UK (Hazell et al. 2010, Worthy, 2010, Birkinshaw, 2006), Latin America (Michener, 2010, Lanza, Fumega y Scrollini, 2011), Australia (Snell, 2000, Hazell, 1989), New Zealand (Eagleson et al 1989). (White, 2007), (Price, 2006), (Hazell, 1989), China (Xiao, 2010), United States (Katz, 1969, 1976, Gianella, 1970, Sofaer, 1972, Furby, 1977, Kreimer, 2010), Canada (Hazell, 1989, Roberts, 2002), Germany (Holsen and Pasquier, 2011, Larsen and Wallby, 2012), Sweden (Andersson Hazell 1973), Chile (Schonsteiner, 2012), India (Jenkins and Goetz, 1999, Jenkins, 2007, Sharma, 2012) Ireland, (Felle and Adshear, 2009), The Netherlands (Meijer, 2012), Switzerland (Villeneuve and Pasquier, 2006, Holsen and Pasquier, 2011) and Mexico (Lopez Ayllon y Arellano, 2007, Lopez Ayllon, 2010)

¹⁰Gregory (1984) also makes this observation about when the New Zealand Official Information Act was introduced.

servants (Halachimi and Greiling, 2013). Some are dubious about how much technology-enhanced transparency can deliver in terms of public administration and social outcomes, particularly where data provision cannot be automated (Bannister and Connolly, 2013). Furthermore, the internet has led to new ways of interacting with citizens, automating access-to-information requests, publishing more information on decision processes and, generally speaking, changing citizen–government relationships (Margetts, 2011). Archives and information management usually remain under-studied subjects in this field. Snell and Sebina (2007) look in detail at the difficulties that lack of record management policies can create for FOI laws, leading to the ‘empty cabinet syndrome’ (Flinn and Jones, 2009) or absence of public information once requested.

Not all academic and practitioners’ voices are fond of access to information and openness. Some argue that transparency and openness create dysfunctional governments, preventing policymakers from deliberating to make balanced decisions. In the American context, Fukuyama (2014) argues in favour of discrediting the notion of transparency as an unrivalled value in a democracy. In a less elaborate yet frank fashion, former PM Tony Blair notes that the freedom of information act was ‘*one of the domestic legislative measures I most regret*’ (Blair 2010). As noted by Roberts (2014), new trends and pressures also operate against RTI such as privatisation of public services and the expansion of the security apparatus as a result of the ‘war on terror’. In short, while access to information might sound in principle like an idea inherent to democracy, it is not by any means guaranteed its full expression. The basic but powerful idea that government information should be open is still controversial.

1.2 COMPARATIVE ACCESS TO INFORMATION: THE STATE OF THE FIELD

In the above review, I noted access to information has a long and diverse history, but only recently is it emerging as a research field in several disciplines. I also note different studies emerging in this field from a public policy / public administration perspective. However, for all the studies available, only a few provide a set of concepts and frameworks to understand *why right-to-information regimes operating under similar principles work in different ways obtaining different outputs*. There are case studies that try to understand why and how RTI spreads globally. These studies deal with particular regions, trying to understand why these regimes emerged in the first place. Studies such as those of Darch and Underwood (2010) in the developing world or Michener (2010) in Latin America provide in-depth and valuable discussions about specific processes of setting up access-to-information regimes in several developing countries, as well as descriptions of how some of them work, but do not provide

a systematic way to compare them, nor do they explain the reasons why they work differently.

In terms of the reasons behind countries adopting these laws, Grigorescu (2003) emphasises the role of international organisations. He argues that international organisations provide more information to societies than the governments themselves, forcing governments to adopt access-to-information regulation to become more credible. Bennett (1997) provides a discussion about the extensive use of policy transfer as a conceptual device in the field of privacy, access to information and accountability. Bennett argues that in the OECD context, the adoption of these policies is the result of an interaction in policy communities between early adopters and other countries. In the case of access-to-information regulation, Bennett argues that legitimisation and not learning was the main motivation for the diffusion of these laws. These studies provide explanation about how RTI laws emerged, but not at the links between the origins and the way RTI regimes work.

Along these lines, Berliner (2012) argues that models at a regional level play a significant role when countries decide to adopt access-to-information laws through several emulation processes. This is noticeable in terms of institutional design, as most laws would share common principles. Berliner notes that there is no systematic evidence that international organisations play a significant role in spreading these laws. While a methodologically sound study, Berliner understates the role actors and international institutions play in this field. Due to the methodological approach, Berliner's study cannot go deep into the cases looking for specific patterns and links with history and context.

Stubbs (2012) poses a different explanation from a transnational historical materialist point of view. He notes that the general shift to transparency is a radical change in the way citizens relate to the state. He explains that the expansion of these laws to 'Hobbesian' states is a 'passive revolution' in these states, usually in deep inter-relationship with transnational movements, supporting the adoption of access-to-information laws. According to Stubbs, the change and evolution of capitalism across the world would have also changed the way citizens relate to the state, even in countries with no 'Lockean' tradition, associated with this right. Stubbs' study provides an ideas-related account of how these regimes spread but does not go into detail about the way they work or whether ideas affect this.

Thus, the aforementioned set of studies helps in understanding why a country would potentially adopt a RTI law. Some of them may go into the specifics of particular countries but they do not provide an explanation of why these regimes work differently and how this is connected to the way RTI policy was set up.

Other studies focus more on the role politics play in adopting RTI. Along these lines, in a later

paper, Berliner (2014) argues that political competition in the domestic political system is significant when approving an FOI law. In this view, if incumbents are about to leave, an access-to-information law might work as a guarantee to gain access to information in the future. Berliner's contribution might explain why, in some cases, RTI reforms would emerge, but does not account for equifinality: the possibility that other factors might also contribute to the same end. Furthermore, this work does not link the politics of RTI with implementation. Along these lines, Michener (2014) argues that the timing of the reform is important and presidents might delay the implementation of such a law. Michener argues that two factors shape the way RTI laws are set up and how robust they end up being. Based on a set of examples from Latin America, Michener notes that strong executives with full control of the cabinet of a single party and parliamentary control are less likely to support RTI reforms. On the other hand, multiparty cabinets open the possibility for RTI reforms as politicians might be more inclined to open up diffuse control to the citizenry. Michener's contribution links structural conditions in the executive with legal robustness of these measures, but does not explore the connection between structural conditions, legal robustness and how these regimes work.

Other set of studies provide a more comparative and historical approach to RTI, connecting adoption with larger institutions. McClean (2010), developing a study of RTI in developed democracies, argues that institutions affect the way these laws are adopted. McClean argues that power relationships among certain groups such as citizens, public servants, politicians and interest groups (and particularly who is an insider and an outsider in a given policy process) affect the making of these laws. McClean argues that competitive two-party systems are more prone to politicise access-to-information rights. Furthermore, he argues that relationships between the parliament and executive affect how politicised or not access-to-information rights become. McClean notes as well that different configurations in terms of political party alliances affect how RTI regimes emerge. He also notes that in countries where firms are organised in a non-competitive manner, through associations representing them, freedom-of-information policies tend to be delayed as insiders already have the information they need to operate. Finally, McLean notes that relationships between bureaucrats and politicians also affect how RTI works. Where organisations operate at an arms-length of political power, senior political figures may lean more towards setting up a RTI regime. McClean's study provides a set of relevant variables, and shows the different paths consolidated democracies followed to approve these laws. By taking a comparative and historical approach, McClean manages to capture the complexity and diversity of these paths. Yet McClean does not explore how these regimes end up working, or how

history connects to the subsequent development of these regimes. In addition, while identifying several important variables, his work is unable to run structured and focused comparisons. Along these lines, Sharma (2012), in a case study about India, argues that historical factors and contextual political variables are also essential to explain different processes in the adoption of public information institutions and the outcomes of transparency regimes, putting emphasis on context. He offers important insights in the specific case of India, offering a different narrative about the emergence and initial working of the law. Furthermore, he stresses the role of international organisations in this process. Sharma contributes with an important specific case study, but does not provide a systematisation that could help in a comparison with other countries

In terms of a conceptualisation of how access-to-information institutions work, there are also a few studies. For instance, Heald (2006) discusses what he calls ‘transparency habitats’, building on Hood’s (1994) policy habitats idea. A habitat is where transparency policies unfold and work, yet the idea of a habitat is not specifically defined in Heald’s framework and reflects macro factors that could affect transparency policies, rather than a specific description of a transparency ‘habitat’. In a more detailed way, Meijer (2013) provides a heuristic model of how transparency works from a constructivist perspective. Meijer defines transparency as the availability of information about an actor that allows other actors to monitor the performance of the original actor. Assuming complexities in terms of strategy, cognition and institutions, his framework provides an analysis in three dimensions: strategic (based on power games between stakeholders), cognitive (the frame stakeholders use in the process) and institutional (institutions affecting transparency). Meijer’s framework assumes that the interaction between stakeholders establishes complex dynamics in terms of how transparency works, and how multi-actor interactions result in transparency, as well as how transparency influences multi-actor interactions. The multidimensional analysis provides a rich description of the complexity of transparency policies in the specific case studies he provides (European Union and Dutch schools), yet it might be unable to travel to other policy fields or areas. Moreover, while three lenses are useful to understand the complexity of the field, the framework does not provide an explanation of how the institutional playing field, where the lenses are deployed, actually works.

In the Canadian context, Roberts assesses the compliance of the Canadian government identifying key factors concerning coverage, scope and challenges for enforcement institutions (Roberts 1998). In this paper, Roberts identifies three types of ways in which governments behave around RTI: malicious non-compliance, adversarialism and administrative non-compliance. Malicious non-compliance

assumes bad faith on the side of governments. Adversarialism assumes a will to test the limits of RTI, and non-compliance assumes issues around resources and practices in the administration. Adding to this typology Snell (2001), working on a comparative study between Canada, Australia and New Zealand includes administrative compliance and administrative activism. Administrative compliance assumes the administration process requests according to the law, while administrative activism assumes that the administration takes special care in processing RTI requests. This typology is particularly useful when considering a government behaviour, but not necessarily user's behaviour. Snell (2001) adds the user dimension to this discussion by considering a particular group of users.

Also in the Canadian context Roberts (2002) argues that laws alone are far from being the only component of an access-to-information system. Roberts performs an analysis of a Canadian government agency showing that contentious access-to-information requests, usually filed by political parties and journalists, have longer processing times than the average. Administrative discretion is as a key component in terms of how fast requests are processed. The 'internal law' of administration is one of the most important issues to address in a system, although the paper does not explore other components of the system. In a subsequent article, Roberts (2004) examines in detail the Canadian case adding that adversarialism and scope are the two challenges Canadian RTI law faces. The paper provides more information about requesters and conflicts around the law, as well as analyses the role of enforcement institutions. Roberts (2006) notes that a decent record-keeping system and a professional civil service, as well as sufficient resources, are likely to have an effect on how the law is implemented. Further, Roberts notes that in some countries (notably where RTI has been recently established) it is worth asking whether civil society organisations have the capacity to use the law effectively. Finally, Roberts (2012) explores the idea of a RTI system noting that RTI laws should be considered the backbone of a RTI system. Roberts argues that the right to information depends on more than the law itself. In particular Roberts notes that:

We can state, more positively, the elements that are necessary for a RTI law to realize its potential. There must be a community of potential users who understand how to make requests; administrative capacity within government departments so that requests are handled properly; and similarly capacity within enforcement agencies so that complaints are addressed properly. In the long run, there must also be a well-organized constituency of non-governmental stakeholders who are capable of articulating complaints about weaknesses in the law, monitoring against governmental backsliding, and importing innovations in law and practice from other jurisdictions.

Roberts' work establishes the need to consider other elements beyond RTI laws, and focuses on the extensive experience Canada has acquired in the last 40 years. In particular, Roberts' work focuses on one particular variable which is public administration. Thus, there is room to consider in detail some of these elements, as well as to explore relationships among them. Further there is room to explore these elements in other cases to compare the relevance of different state bureaucracy models.

Along these lines, Pasquier and Villeneuve (2007) provide a framework for understanding documentary transparency. The framework focuses on which types of barriers accessing information faces. There are contexts in which there is no access-to-information law, under the justification that it is not necessary to have transparency. There are contexts in which, having access-to-information law, it is possible to identify illegal behaviours such as averted transparency (where organisations disobey the law), obstructed transparency (where organisations resist releasing public information), strained transparency (where organisations would comply but have no capability) and maximised transparency. The study does provide a set of possible behaviours by public organisations that can be useful for a comparative endeavour, but does not fully take into account the requester (demand) side of the relationship. Furthermore, the framework deals basically with documentary information, which is a subset of public information.

Worthy and Michener (2013) have drawn up a typology of types of requests and requesters, noting that RTI can be understood as an information-gathering device. According to their analysis, the political dimension is important to consider as well as the orientation the requester has when making a request. As a result, they create a matrix where two dimensions are important: political importance and publicness of the request. They also identify different kind of requesters based on their intentions. The framework presents good insights and analysis dimensions based on four cases, but does not provide an analysis beyond the 'demand side', thus not providing a more comprehensive view of what they term transparency systems and their eco-systems.

Kreimer (2008), writing in the American context and from a constitutional theory perspective, defines how the Freedom of Information Act (FOIA) works in an *ecology of transparency*. Kreimer's main argument is that the American Constitution provided guidance about neither transparency nor secrecy, as the Constitution relied mainly on the executive to carry out tasks and the division of powers to keep a balanced system. In the aftermath of 9/11, much criticism of the FOIA emerged from judges and government officials, reflecting a tension between advocates for institutional checks and balances and advocates of social control or 'do it yourself' oversight. Kreimer provides an in-depth description

of issues affecting FOIA such as suppression of files and the role of the integrity of public servants in the administration of FOIA, as well as the several strategies public administrations can use not to release files. Furthermore, Kreimer provides a description of users of the law, particularly the media, NGOs and lawyers, and the challenges they face in a very contentious and litigation-oriented regime. Kreimer's description focuses on how, through the use of revelation and inside sources, users of the law can get access to documents that otherwise would be 'lost' in bureaucracy. Kreimer also argues that key infrastructures supporting FOIA are a strong civil society, willing lawyers and a free press. Finally, Kreimer notes that FOIA requests trigger 'cascades of transparency' where official information release activates watchdog units inside government.

Kreimer's framework provides a very insightful discussion about the American case, but does not provide a systemic view of the phenomenon that could help a comparative endeavour to understand how RTI policies work in different settings. Some of the behaviours Kreimer describes are similar to other countries, and have been documented, but it is not yet possible to organise and compare them. Along these lines, a recent World Bank study (Dokeniya, 2012) also broadly reflects on the idea of 'enabling environments' for transparency policies, in particular, access-to-information policies. Focusing on a set of six countries, the practitioner-oriented study provides an overview of what makes an access-to-information law effective. The study identifies formal accountability institutions (namely regulators) as key to creating awareness and support for an FOIA law. The study also identified as key factors the underlying political economy relationships and governance environment for the implementation of an access-to-information law. However, the study does not provide an in-depth analytical framework, to understand fully the relationships between key actors in a transparency system.

Other studies focus more on proactive or reactive publication of public information: this is the 'push vs. pull' model of transparency and access-to-information laws. In the pull models, citizens try to get information from the state by using access-to-information laws (e.g. filing an access-to-information request). Increasingly, there has been a shift to push models where the state increasingly publishes information so citizens can use it for several purposes (Xiao, 2010, Schartum, 2004, Darbshire, 2010). Push models are often associated with technological change while pull models are often associated with 'antagonistic' and individually oriented request-for-information practices. In the context of recent open government data policies, the push model is favoured by politicians to '*make FOI redundant*' (Maude, 2012).

The push model focuses on proactive transparency (i.e. publishing information). From a quantitative perspective, Islam (2006) provides a study that links availability of public information to better economic and political decisions. Drawing a parallel with markets, Islam notes that more information implies that citizens will be able to make better judgments about government policies, while the government will be more wary of citizen's demands. Furthermore, she notes that data availability could increase coordination among government departments, promoting efficiency in the public sector. From a practitioner perspective, Darbshire (2009) notes the increasing importance of proactive transparency as a central element of RTI. She argues that, increasingly, regimes should publish public information in an available, findable, relevant, comprehensible, free or low-cost, and up-to-date way. Darbshire finds that the drivers behind the increasing importance of proactive transparency are more accountability, the expansion of public services and demands for more participation. All of this requires more proactive transparency.

It should be noted that, even in push models, the release of government information is governed by right-to-information laws, which establish specific categories about which information to release and how to release it. Thus, it is unlikely that FOI *per se* will be made redundant.¹¹ Looking at pull vs. push models is a convenient strategy to analyse how an aspect of RTI works, but conceptually does not allow a full comparison explaining why RTI works like this.

In terms of RTI enforcement institutions (i.e. institutions which ensure that public information is available), previous research has identified them as key to explaining how access-to-information regimes work (Neuman, 2009, Holsen and Pasquier, 2012, White, 2007). The role of enforcement institutions in resolving the release of public information as well as handling the withholding of information in a fair and non-partisan manner (Holsen and Pasquier, 2012) is essential in access-to-information regimes. Neuman (2009) distinguishes three models: the Judiciary model, the Information Commission or Tribunal with the power to issue binding orders, and the Information Commissioner or Ombudsman with recommendation powers. The Judiciary model trusts that the judges will deal with ultimately enforcing the release of public information. Courts have wide-ranging powers to investigate and order

¹¹Linked to this, but different, is the concept of targeted transparency, which is defined as a '*more focused approach to public information in which government compels companies or public service agencies to disclose information in standardized formats in order to reduce specific risks or improve services. Such policies are more light-handed than conventional regulation because they rely on the power of information rather than on enforcement of rules and standards or financial inducements to alter choices*' (Weill, 2013). According to Weill, it differs from the general right to know and open government efforts which are broader. Yet, to some degree, there is a similarity with 'push models' as all targeted transparency policies involve certain actions from government. The government is the only player who has the power and legitimacy to order the release of information for a defined public purpose (Fung et al. 2007).

the release of public information. Another part of their main function is to uphold the rule of law and, as a result, ordering the release of public information is part of their natural duties. However, courts are potentially inefficient due to the length of time that the process could take, as well as the access barrier requesters might face.

Another model, the Information Commissioner with binding powers, is a recent development in the international context (Holsen and Pasquier, 2015)¹² entrusting a particular institution with the role of ordering the release of public information. Practitioners consider this the best model, as it is an independent institution, with specialist knowledge and usually with low entry barriers for requesters. As noted by Holsen and Pasquier (2012), this model can be classified as two types: the Commissioner model (e.g. Slovenia, UK) and the Tribunal model (more than one member, e.g. Chile, Mexico). Finally, the Ombudsman is an institution dealing with administrative injustice that emerged in the Nordic countries (Rowat, 1970). It is usually a Parliamentary officer appointed by the Parliament for a fixed period of time.¹³ The aforementioned research has argued consistently in favour of specialist institutions to deal with the enforcement of public information regulation, but there is little understanding of how different regimes compare to each other and the advantages and disadvantages they may present from an empirical perspective. Furthermore, while the three models are indeed the most used, little is said about the role of administrative units dealing with RTI coordination such as the French or Uruguayan cases. A synthesis of this issue is provided in Table 1.1.

To sum up, the availability of frameworks to compare RTI institutions work is limited. Part of the literature explores why and how RTI regimes spread across the world, but does not address the way such regimes work. Other parts of the literature address important comparative elements to understand RTI regimes, but they do so in partial ways, focusing on requesters or the government. For instance, while the literature singles out public administration tradition as an important factor to consider, it is not clear from a comparative perspective how exactly this element affects RTI regimes. Most of the literature is single case studies or is not designed to generate and use concepts that allow comparability between the several models of access-to-information institutions available. Moreover, the literature available has limited understanding of how enforcement institutions work in ensuring the release of public information. Furthermore, the connection between adoption and eventual

¹²Information Commissioners with binding powers have been available at state level in Canada (Quebec, 1982) and Ontario (1987). In this way they are not a new development. Nevertheless in Latin America and elsewhere have gained notoriety as advocates keep pushing for these new institutions which had no previous precedent in these regions. This was the case for instance in Mexico, Guatemala and Chile

¹³Holsen and Pasquier (2012) propose four types of institution including administrative tribunals

implementation of access-to-information regimes is often not covered at a comparative level. Either the literature explores the emergence of these institutions or how they work at a certain point in time, but not the process of how adoption is linked to the evolution of these institutions. None of these studies, to the best of my knowledge, connect the adoption process of these laws with the way they ended up working in different ways, leading to different outputs. My work seeks to address this.

The expansion of access to information as a general principle and the normative imperative to enact legislation changes the logic of how governments operate, making comparative endeavours relevant. Advocates promoting these reforms have in mind a particular scenario that never fully materialises once reform is enacted. Eager international organisations willing to support the expansion of RTI across the world often indicate that, once the law was approved, change did not follow. Partly this is about expectations of how these institutions work in other jurisdictions being regarded as good examples. This research aims to address this academic–practitioner gap, looking in detail at the difference in terms of how RTI works. As a result, this research will generate a framework that will help to compare more systematically how these institutions work and explain why they produce different outputs. It will add value by exploring the connection between the ways these institutions originated, previous institutions in place, and how these factors influence the way RTI regimes work.

1.3 OVERVIEW OF THIS WORK

The rest of this work is structured as follows. In the next chapter (Chapter 2), I specify the research question. I specifically develop a comparative framework: RTI Arenas. The framework provides a set of elements and concepts to allow a structured and focused comparison of the case studies. In particular, the framework identifies the state as a nodal (central) actor in a given society and RTI laws as a foundation that establishes a shift in government and citizen expected behaviours around public information. The framework aims to capture several of these behaviours and provides a typology of requesters and enforcement institutions. Through the development of this framework, I provide examples from the cases and from the available literature to strengthen its descriptive power. The framework is a heuristic device to guide the structured comparison in this work. In Chapter 3, I explain my methodological approach and theoretical lenses. I show the scope and limits of this work and of its methodology. I explain the criteria to select the cases presented in this research. In Chapters 4, 5 and 6, I discuss the New Zealand, Chile and Uruguay case studies following the framework advanced in Chapter 2. In Chapter 7, I compare the cases selected, explaining the differences among

RTI regimes, according to the framework provided in Chapter 2. Finally, I provide a set of conclusions showing the contribution of this work to the larger literature, exploring its limits, providing advice for practitioners and outlining a future research agenda from this study.

Table 1.1: Models of Enforcement Institutions

Type of RTI Enforcement Institution/ Characteristics	The Judiciary	Ombudsman's Office	Specialist Institution	Administrative Tribunal
Institutional form	A single judge or a tribunal usually dealing with administrative matters (e.g. USA)	A single office dealing with several matters linked to public administration (e.g. Sweden, New Zealand)	<ul style="list-style-type: none"> An independent commissioner with a special mandate to investigate access-to-information issues (e.g. Slovenia) An independent tribunal with a special mandate to deal with access-to-information issues (e.g. Chile) An administrative unit with a special mandate to deal with access to information (e.g. France, Uruguay) Independent organisation equal to a branch of government specialised on RTI (e.g. Mexico) 	An independent Administrative Tribunal dealing with several administrative matters (e.g. Costa Rica)
Enforcement Powers	Binding resolution	Non-binding resolution	Mixed: Binding subject to review but this characteristic depends on jurisdiction	Binding
Level of independence	Independent branch of government	High: Parliamentary Officer	Mixed: Usually depending on the executive but can also be a Parliamentary Officer or even an independent tribunal	High: Independent institution usually equal to an independent branch of government

Source: Author's classification based on Neuman (2009) and Holsen and Pasquier (2012) and own evidence.

RIGHT-TO-INFORMATION ARENAS

‘The map is not the territory’ (Korzybisy, 1958)

2.1 DEFINING RTI ARENAS

The key question in this research is: *Why do RTI regimes operating under similar principles work differently leading to different outputs?*

The question requires a set of clarifications that leads to the introduction of key concepts in this chapter. In this study, I consider access to public information as a central institution in a given country, establishing the rules that govern particular type exchange of public information between the state and all other actors¹⁴. Such an institution is designed to ensure transparency but this is not always guaranteed.¹⁵ In this research, I consider RTI regimes are a *system of institutions, actors and practices*

¹⁴As I discuss in the next pages, when describing the elements of this framework, there are other laws that govern other types of exchanges of information with the state such as privacy laws, copyright laws etc

¹⁵ There are objective definitions of transparency emphasising the role of a flow of public information that should be reliable and timely. For instance, Vishwanath and Kaufmann (1999) and Kaufmann (2002) define transparency as the ‘*increased flow of timely and reliable economic, social and political information*, which is accessible to all relevant stakeholders’, while Lindset and Naurin (2010) note that transparency is ‘*the release of information by institutions that is relevant to evaluating those institutions*’. In these definitions, information has to be available in a certain manner to allow the evaluation of a given institution. Candeub (2013) notes in the American context that the most important government statutory regime in terms of transparency is the RTI law (FOIA) as it mandates the release of public information but argues that transparency or access does not exist if accessing and securing information is costly in time and effort for requesters. A different approach is when the definition considers in more detail the audience of public information. In this view transparency focuses more on the ability of stakeholders or citizens to understand and use information. Transparency would be ‘*the ability to look clearly through the windows of an institution*.’ (Den Boer, 1998: 105 cited Meijer, 2006) or transparency implies that *information is visible and inferable* (Michener and Birch, 2011). Inferable here being used in the sense that is possible to draw conclusions from the information released. Subjective definitions usually also tend to understand transparency as a relationship. For instance, the Utrecht definition stresses the availability of *information about an actor allowing external actors to monitor*

dealing with the exchange of official information between the state and society. This definition is linked with the idea of regimes that is used in other areas of public policy such as regulation, institutional analysis, governance and economics (Hood, Rothstein, & Baldwin, 2001). I will use the term *RTI arenas* instead of *regimes*, because it captures the conflict that usually emerges in these systems. As noted by Fox (2007), the limits within which the relationships between state and society operate are in constant flux and part of cumulative processes where actors keep pushing the boundaries, for more or less information

There are four central assumptions behind RTI arenas that are grounded in the available literature in this field. These assumptions are: 1) the need for a RTI law, 2) the state as a nodal actor, 3) that there is an inherent tension between stakeholders and the state, and 4) that RTI arenas do not cover all the information exchanges, only official information.

First, a RTI arenas framework assumes that there is an institution in a given setting ensuring the release of public information. It is not possible to understand an RTI arena without a central institution that establishes that information should be public. As noted by Candeub (2013), RTI laws are not the only regulation mandating the release of public information. Other laws in several domains (such as finance, health, consumer relations and so on) also mandate the release of public information, but the crucial issue about a RTI law is that it establishes a general principle: the expectation that all public information should be public. In some cases, RTI laws superseded laws that established secrecy as a principle, such as the Official Secrets Act in the United Kingdom. Now the principle operates the other way around: public servants could be sanctioned for hiding information. Other institutions and regulations play a role in a RTI arena, such as official secrets laws, privacy laws, copyright laws and whistle-blower protection, but they have to accommodate this new principle. This assumption excludes the potential use of this comparison in polities where such an institution is not present.

Second, a RTI arenas framework assumes that public information is held by the state, which is a nodal actor in any given society. Nodality is defined as the capacity of a given state to operate as a node in information networks, assuming the state plays a central role in society (Hood, 1983, Hood, 2007, Hood and Margetts, 2008). How information is collected, processed and stored and, later on, released are important features in a RTI arena. If countries do not have a state apparatus in place, as

the actions and decisions of that actor (Meijer, 2013; Grimmelikhuijsen & Meijer, 2012). In the context of public services, Stirton and Lodge (2001) note that transparency combines two elements: *answerability to citizens* i.e. being informed about the state of the world) and the possibility of citizens incorporating feedback, elements that come from control and democratic theory.

could be the case for fragile states, the framework developed would not be applicable.

Third, a RTI arenas framework assumes a certain degree of conflict between society and the state in terms of release of public information. As a result, RTI arenas sit in the interface between society and state relationships, and are a relatively fluid rather than a fixed arrangement. In this way, RTI arenas are a bit like shifting sands. As noted in a different context by Fox (2008), RTI arenas are where different forces struggle, and there are several alliances that can be formed that change the power balance about who controls public information. In other words, the essential rule of these environments is not set in stone. Conflicts provide feedback loops in a RTI arena that have the potential to change the way RTI laws works in terms of scope of the institution, access mechanisms, time, and who can request information, among other significant issues. Berliner (2014) notes that changes in transparency are usually costly once access-to-information laws are enacted, particularly since several stakeholders (citizens, business, opposition political parties, and international organisations) would be able to mobilise resources to stop negative changes. However, backlashes are possible in a RTI arena, regardless of how costly they can be, as the examples of Hungary and Uruguay recently showed (Cainfo, 2013, Transparency Hungary, 2013).¹⁶ Furthermore, it should be noted that stakeholders in RTI arenas have complex incentives to retain and release information. The state does not always want to hold information and requesters might not be always willing to dig as much as they could.

Fourth, a RTI arenas deal with only a fraction of the exchanges of information in any given society. People exchange information constantly with the state, and it is not always through RTI requests or proactive transparency. For instance, people may give personal details to the state that are covered by other regulations such as Privacy Acts. What makes RTI arenas relevant is that they deal with the particular fraction that is supposed to be official information. By official information, I mean information that is held by the State. Official information is allegedly more reliable than other kinds of information (such as private records) as it provides certainty and is the underlying base in terms of exercising legal powers and rights.

While not an assumption per se, it should be noted that RTI arenas increasingly take place in a computer-mediated environment. Digitalisation leads to more requests and proactive publication of information being made online and the use of e-mail is now extensive. Thus, RTI arenas are becoming an environment where information is relatively easy to store and distribute, in a cheap and efficient way. This means transparency in modern times (Meijer, 2009) is what is provided on

¹⁶Both countries experienced a significant reform in their access-to-information laws.

computer screens.

2.2 PRINCIPLES OF RTI LAWS

In my research question I indicate that RTI laws operating under similar principles work differently, leading to different outputs. The global explosion of RTI laws mentioned in Chapter 1 led to the introduction of a set of similar RTI norms across the world. As noted by others, RTI has a set of principles that makes them very similar across the world (Bennett, 1997, Stubbs, 2012, Mendel, 2009) ¹⁷. When I use the term principles I refer to a set of norms that are often present in RTI laws. These principles can be summarised as follows:

- a Establishment of a presumptive right to information held by public authorities.
- b Duty to publish public information (or Proactive Transparency): The state has a duty to provide certain information without any request. Usually this includes organisation information, budget information and decision-making information.
- c A request mechanism: This usually establishes different kinds of processes to access information from the requester's perspective and different degrees of limitations on making a request, including being a national of the country, format, etc.
- d Limited exceptions: Exceptions allowing the non-release of information are usually few and should be interpreted in a restrictive way. Examples of common exceptions are national security, trade secrets and financial stability.
- e Duty to assist: The state should assist requesters when using the law, providing guidance to get the information requested.
- f Accessibility: Information should ideally be free, and fees should only be charged to recover costs for accessing information.
- g A conflict resolution mechanism: There should be a mechanism in which conflicts about the release of information are resolved. Usually, this is done through a specialist institution or the

¹⁷I return to the definition of principles and its comparability in chapter 3 where I provide a justification for the use of these principles in this research

judiciary.¹⁸¹⁹

RTI law is the foundation of a RTI arena, as it structures the basic ways stakeholders will relate to each other, as well as what can be (formally) done and what cannot be done with official information. RTI laws are- in other words- the constitution of the arena. As Berliner (2013) notes, the key role of these laws is to institutionalise transparency in rules and procedures.

2.3 ON DIFFERENT TYPES OF RTI ARENAS AND DIFFERENT OUTPUTS

In this research, I asked why RTI regimes based on similar principles lead to different outputs. I argue that RTI regimes can be grouped in three different categories that exhibit different outputs. These categories are: functional RTI arena, mixed RTI arena and contested RTI arena ²⁰ I argue that three different factors (or variables) contribute to shape these RTI regimes, leading to different outputs: participation in the policymaking process, the state bureaucracy and enforcement institutions. I now turn to explaining these factors and how I will use them in the course of this research.

2.3.1 *Participation in the policymaking process*

I argue that the participation in the policymaking process by different stakeholders in a given country affects the design and implementation of the RTI law. High levels of participation would lead to more robust policy design and the evolution of a policy community that supports RTI implementation.

By participation I mean the active involvement of local stakeholders in the policymaking process. My argument is that high levels of participation by local stakeholders when a RTI law is set up (this is to say, in the formative moment) leads to a more functional RTI arena. The fact that all stakeholders are able to contribute to the process leads to a better design and implementation of the RTI. The group of stakeholders that participates in setting up a RTI usually remains in place after the approval, acting as a policy community, fostering the development of the arena. This is a stark contrast with processes where only a few actors participate, leading to a small policy community in place. Thus, participation in the early stages of the policy- making process is essential to understand the way RTI regimes (or arenas) end up operating as functional, mixed or contested. A particular aspect to

¹⁸A similar list has been established by Grigorescu (2003) in his study on what drives a country to adopt transparency regulation.

¹⁹Arguably, there could be more principles (Mendel 2009) but, in the context of this research, these are the ones most relevant to understanding a RTI arena.

²⁰I provide a definition of this classification in this chapter.

explore about participation, is the influence international actors such as international foundations and multilateral organisations play in the policymaking process. My argument is that international organisations play a role mostly in the policy stream, supporting several stakeholders during the policymaking process, as well as supporting the work of advocates through implementation. Evidence gathered in this research shows that international organisations play an influential but limited role in RTI policymaking processes, usually supporting efforts of local stakeholders but not as central stakeholders in the policymaking process.²¹

To explore the policymaking process, I use Kingdon's (1984) well-known heuristic model.²² In this model, the emergence of a policy can be understood as the confluence of three streams: policy, politics and problems. When these streams meet, a 'window of opportunity' opens for a new policy to emerge. The problem stream is usually a list of several issues demanding attention from policymakers and in need of a solution. For instance, in the context of this research, a corruption scandal could be considered a problem that policymakers might be inclined to address through the enactment of access-to-information legislation.

When a problem emerges, decision-makers need to have a set of options ready to solve the problem. These options are developed in the policy stream where ideas are constantly being traded. Finally, the political stream is where certain decisions or changes might lead to policymakers adopting a decision. For instance, a change of government might be a good opportunity to address the issue of access-to-information law. The streams are usually independent from each other and policy entrepreneurs are the actors involved in bridging them. Policy entrepreneurs have ideas, connections and enough

²¹In the literature, these processes are considered policy transfer (Dolowitz and March, 1996) or 'lesson drawing' (Rose 1991) among other terms often used to describe external influence and adoption of new policies in policymaking. As noted by James and Lodge (2003), these concepts are influential and often used in a broad way, which can in fact be confused with rational policymaking (in the case of lesson drawing) or other ways of policymaking. I avoid getting into an extensive discussion of this in this work. Concurring with Page (2000), I think that *'who, what, how, where and why policies were transferred do not generally require a previous intellectual investment in a set of complex concepts or a voluminous theoretical literature, but can be explained and grasped using common-sense terms and categories'* (Page, 2000 p. 12).

²²There are several models to explain the policymaking process. Lindblom (1968) proposes an incrementalist approach to public policy decision-making, Baumgartner and Jones (1993) propose the theory of 'punctuated equilibrium' and Sabatier (1988) the advocacy coalitions framework. As noted by Meijer (2005), these frameworks can mostly be seen as complementary rather than competing when explaining policy stability and change, but they also offer room for competing hypotheses about how the policy process works. My decision to use Kingdon has more to do with the descriptive power of the framework rather than with a dogmatic view of how the policy process unfolds. One of the main objectives of this work is to connect the origins and evolution of what I termed RTI arenas. Thus, I decided to use Kingdon's framework as it was able to capture specific developments in each of the streams which later influenced these arenas. While the debate around the policymaking process is indeed extremely important, this work does not seek to address it. I do address that in these particular policies it is important to consider participation among a community of actors, regardless of how the policy process evolved.

persistence to advance an agenda. For instance, some public servants and some NGO leaders might act as policy entrepreneurs.

Policy entrepreneurs are the ‘policy middle man’ (Heclo, 1974), those advancing the reforms in several settings. As a window opens, it is important to recognise the opportunity as it might easily fade away; it is the job of policy entrepreneurs to pursue these opportunities. Looking at the configuration of these streams, it is also possible to understand who were the actors, individuals and interest groups that took part in setting up these regimes. In this work, I characterise these actors, exploring their motives, resources and influence. In some of these cases, entrepreneurs are organised interest groups with specific political skills that can translate into policy proposals and influence (Eckstein, 1963), while in other cases a handful of people were able to advance the reform.²³

In countries such as New Zealand where there was a high level of participation by several actors, there is evidence of a more robust institutional design and implementation.²⁴ Level of participation is related to the establishment of a subsequent policy community that remains in place when the law is established. By policy community, I mean a relatively loose group of individuals and organisations that remains in place, sharing an interest in this policy area and who, over time, succeed in shaping the policy (Wilks and Wright, 1987).²⁵

2.3.2 *Professionalisation of the state bureaucracy*

I argue that professionalisation of the existing state bureaucracy affects the implementation and outputs of a RTI regime. High levels of professionalism will lead to a more consistent implementation of a RTI regime.

The state, in particular those agencies collecting, releasing or mandating the release of information,

²³The fact that not only interest groups but individuals are also active in these arenas creates complexities in terms of developing an analytical device that could capture both developments in a comparative fashion. Thus, while this work deals with interest groups, it does not go deeply into a theory of how these groups influence decision-making in all the cases selected, as it would exceed the boundaries of this work

²⁴This contrasts strikingly with more externally-driven processes which ended up little or no participation, such as the recent approval of an FOI in Tunisia, where the World Bank played a significant role through a loan to the interim government (World Bank, 2013).

²⁵The literature has extensively debated policy communities and networks (Atkinson and Coleman, 1992, Dowding, 1995, Blanco et al. 2011). At the core of the debate is the problem of defining the very idea of what community and networks are and if these are useful conceptual devices when exploring policymaking processes. For instance, Rhodes (1986) sets a very restrictive concept of community, characterised by stability, restrictive membership, vertical interdependence and insulation from networks and institutions. Other definitions include Heclo (1974) issue network (more at a microlevel) and Sabatier’s (1988) in the advocacy coalitions framework. More recent debates on this matter includes the concept of governance networks (Blanco et al. 2011). The definition I borrowed here seeks not to engage in this highly theoretical debate but to use the concept in a way that helps to explore the connection between the context, origins and outputs of these arenas. By using the idea of a community, I seek to use it as a device to explain how a group of individuals remained influential (or not) after a RTI law was passed.

play a central role.²⁶ State bureaucracy is singled out by the relevant literature (Roberts, 2006, White, 2010, Hazell et al. 2010, Piotrowski, 2008, McClean, 2010) as one of the most important factors to explain how RTI institutions work.

Noting the state bureaucracy is an important factor the main issue is to specify how it becomes relevant. State capacity to manage information records and answer requests is often signalled as one of the issues in RTI (Roberts, 2006, Snell and Sebina, 2007, Trapnell and Lemieux, 2014, White 2007). If there are no resources allocated to deal with RTI and archives policies, then it is likely that retrieving and finding information will be difficult, causing problems concerning implementation. Further, some organisations inside the state will have more state capacity to manage information records than others as all the cases in this research show. Delays, problems applying rules, lack of proper procedures among other issues, can be attributed to different levels of state capacity.

Another issue about bureaucracies is the relationship between public servants and politicians, also known as public service bargains (Hood and Lodge, 2006). This relationship often goes at the core of politics in a given country and delineates responsibilities of public servants and politicians when dealing with multiple issues arising from administrative practice. Most of these relationships are not formal. In some countries public servants act as 'trustees', this is to say *'public servants are expected to act as independent judges of the public good (i.e. the interests of their beneficiaries) to some significant extent, and not merely to take their orders from some political master. The notion of a trustee relationship implies that public servants possess a domain of autonomy...'* (Hood and Lodge 2006 p.26). In other jurisdictions public servants act as agents of political principals, following orders from political masters in exchange for certain rewards (Hood and Lodge, 2006 p. 45). To put this in other words public servants can be more or less autonomous from a political master.²⁷ To understand this relationship is important as in the RTI field, public servants and politicians play a vital role when ordering the release of public information. As noted by Roberts (2006), White (2007) among others, public servants might well choose to not write down material, potentially obstruct the working of the RTI Act or

²⁶Max Weber noted, in an era where transparency was not in vogue, that *'The concept of the official secret is the specific invention of bureaucracy, and nothing is so fanatically defended by the bureaucracy as this attitude... in facing a parliament, the bureaucracy, out of sure power instinct, fights every attempt of the parliament to gain knowledge by means of its own experts or interest groups'* (Weber, 1978p. 242)

²⁷Another way to distinguish is to approach this issue is drawing a distinction, between instrumental vs. autonomous bureaucracies to use Knill (1999) terminology. Instrumental bureaucracies often have strong executives and low levels of entrenchment of the public service and relatively low levels of political influence hence orders by the Executive are easier to implement. Autonomous bureaucracies often have weak executives and high levels of entrenchment and high levels of political influence. This work is unable to cover all the aspects related the different arrangements public servants have in different type of bureaucracies.

they could even uphold the law in spite of their political master wishes. This largely depends on what kind of relationships public servants and political masters have. ²⁸ Along these lines, Dahlstrom et al (2015) notes that professional bureaucracies are the ones where public servants and political masters interests are separate; they are responsive to different chains of accountability (Dahlstrom et al. 2015 p. 659). Clear indicators of such a bureaucracy are meritocratic recruitment, non-politicisation of public service posts and internal promotions. The common theme in this discussion, refers to the level of influence politicians have (or not) over a bureaucracy.

Borrowing from these discussions, and for the purposes of this research in the RTI field, I define as a professional bureaucracy as the one staffed by civil servants operating in an institutional arrangement that secures their independence from their political masters and with enough resources to carry out their tasks. A bureaucracy with low levels of professionalism is staffed by civil servants that are less independent from their political masters and with insufficient resources to carry out their duties.

2.3.3 *The existence of RTI enforcement institutions*

I argue that different kinds of RTI enforcement institutions might lead to different outputs in a RTI regime. The more autonomous and able such institutions are, the more information is released in a given regime.

RTI enforcement institutions make decisions about potential conflicts in terms of public information. In this research I focus on RTI enforcement institutions that are (or should be) accessible to users when facing a conflict over access to RTI. As noted in the first chapter, there are different kinds of RTI enforcement institutions including special administrative units, ombudsman offices and specialised tribunals. Some of RTI enforcement institutions work more effectively than others and some of them are limited by institutional constraints. Different kinds of RTI enforcement institutions might lead to different outputs in a RTI regime.

2.3.4 *Three different configurations: Functional, mixed and contested arenas*

The factors presented in the previous section give room for at least eight possible combinations. Some of these combinations are hypothetical in the sense that they could exist logically but not empirically. Table 2.1 shows the possible logical combinations and as shown in Table 2.2, from these combinations at least three types of regime can emerge.

²⁸Note that certain types of agency-type bargains with a strong component of delegation in Hood and Lodge (2006) terms could still provide a certain room of significant autonomy for public servants

Table 2.1: Combination of factors

Combination	Participation in the pol- icymaking process	Professionalisation of state bureaucracies	Autonomy and ability of enforcement institution	Example	Type
A	High	High	High	New Zealand/Sweden/Norway	Functional RTI regime
B	High	High	Low	Unlikely	
C	High	Low	High	Unlikely	
D	High	Low	Low	Unlikely	-
E	Low	High	High	Germany	mixed RTI regime
F	Low	High	Low	Unlikely or no RTI regulation	-
G	Low	Low	High	Chile, Mexico	mixed RTI regime
H	Low	Low	Low	Uruguay	Contested RTI regime

Table 2.2: Types of RTI Arenas

Element/Type of Arena	Functional RTI arena (Combination A)	Mixed RTI arena (Combinations E, G)	Contested RTI arena (Combination H)
Policymaking Process	High level of participation	Low level of participation	Low Level of participation
State tradition	High Level of professionalisation in the state bureaucracy	High/Low level of professionalisation in the state bureaucracy	Low level of professionalisation in the state bureaucracy
Enforcement Institutions	High levels of autonomy and ability in enforcement institutions	High levels of autonomy and ability in enforcement institutions	Low levels of autonomy and ability in enforcement institutions

I argue that these arenas exhibit different outputs. Defining outputs in the RTI field is often complex. For instance, in the UK context, Hazell et al. (2010) explored the differences between outputs and outcomes of RTI laws. To do so, these researchers identified the main objectives of the RTI law in the UK. These objectives are : openness and transparency in government, accountability of government, improving the quality of decision making, improving public understanding in government, increasing public trust in government, and increasing participation in government ²⁹. According to this line of research, outputs are closely related to immediate results while outcomes are related to long term results. In this way, transparency and accountability in government are closer to the definition of ‘outputs’ while trust in government would be closer to the definition of ‘outcomes’.

In a similar vein, I define outputs as verifiable (observable) results linked to the combination of factors in each arena. The outputs I identify here are specifically suited for this framework. Further, this framework does not reflect the linkage of RTI outputs with outcomes such as trust or participation in government. This is to say, the outputs identified in this research are modest and strictly linked to the operation of a RTI law.

These outputs are : the proactive availability of public information, efficiency in answering RTI requests, accessibility, and effectiveness to resolve disputes. Table 2.3 provides a definition of each output.

A functional RTI arena, shows high availability of public information, efficiency in dealing with RTI request and an accessible and effective way of solving disputes. Authorities publish the information in

²⁹The authors note the difficulties of isolating these objectives, and they ran an extensive analysis of supporting documents, such as the Hansard Records, declaration from MPs, etc. to support their conclusions. (Hazell et al. 2010 p.18)

Table 2.3: Outputs

Availability of public information on a proactive basis	It refers to information published by the state proactively as mandated by the RTI law
Efficiency in dealing with RTI requests	It refers to the process bureaucracy undertakes to reply to a request
Accessibility and effectiveness to resolve disputes	It refers to the possibility of requesters easily accessing an appeal system to resolve conflicts and to get an effective solution in a reasonable time

a timely and regular manner and information is easy to find and properly structured. The bureaucracy abides by the rules and processes requests in due time. When there is a conflict between requesters and the government, there is an effective mean to resolve this conflict. The system to resolve disputes is accessible and efficient. By labelling this arena as 'functional' I mean it works as it is supposed to work according to the RTI law. It does not imply a normative judgement on whether the arena is better than other arena. In functional arenas there are conflicts as well and many stakeholders would argue are far from 'ideal' arenas.

A mixed arena, shows a good degree of availability of public information, authorities abide by the rules and process requests mostly on time, and there is a system to resolve disputes. Authorities often publish information, but some might not do it on time and it could be difficult to find. The bureaucracy abides by the rules and processes the requests but there may be inconsistencies and political influence in the implementation. When there is a conflict between requesters and the government, there is an effective and efficient way to resolve this conflict, though it might not necessarily work at its best or have adequate resources. The mechanism to resolve the conflict is accessible but might be costly in some cases. By labelling this arena as 'mixed' it shows that it does not work fully according to the RTI law in place. There may be discrepancies and issues, which are observable according to the outputs. This does not make a 'mixed' arena worst than others per se, but it means that it does not deliver on its own standards.

A contested arena, shows a poor degree of availability of public information, low efficiency in dealing with RTI requests and absence of effective ways of solving disputes. Authorities do not often publish information, and if they do, it might not be relevant or timely. Bureaucracy does not necessarily abide by the rules and there are inconsistencies arising from political influence in

RTI implementation. Where there is a conflict between requesters and the government, there is no effective way to resolve the conflict. Mechanisms are not accessible and often costly. By labelling this arena as contested it shows that it does not work according to the RTI law in place. There are severe discrepancies in terms of what the law says and what actually happens in practice. This is not a normative judgement per- se, but it implies the arena is dysfunctional.

Table 2.4 provides a comparative view of different outputs of RTI arenas.

Table 2.4: Different outputs of RTI arenas

Functional RTI arena	<ul style="list-style-type: none"> • Public Information readily available, published regularly by the state • Bureaucracy receives and processes RTI requests on time • Requesters can access an independent institution and resolve conflicts within a reasonable timeframe
Mixed RTI arena	<ul style="list-style-type: none"> • Public Information readily available, published regularly by the state with certain inconsistencies • Bureaucracy receives and processes information inconsistently • Requesters have a certain degree of access to an institution and resolve conflicts within a reasonable timeframe
Contested RTI arena	<ul style="list-style-type: none"> • Public Information is seldom available and is not published regularly by the state • Bureaucracy does not receive and process RTI requests on time or does it showing resistance • Requesters have difficulties in accessing an independent institution and resolve conflicts within a non reasonable timeframe or may not resolve the conflict at all

2.4 ELEMENTS IN RTI ARENAS

The framework in RTI arenas contains five key elements: 1) a RTI law which is the foundation for information exchange or ‘constitution of the arena’, 2) the state and a set of particular core agencies inside the state, 3) a group of stakeholders that use this regulation and information, 4) an information enforcement institution that is in charge of deciding upon the release of official information in case

of conflicts.

2.4.1 *Right-to-information laws*

RTI laws set the way official information is released and requested in a given RTI arena. RTI has a set of principles, which makes it very similar across the world (Bennett, 1997, Stubbs, 2012). Notably, most of these regulations also establish a set of very similar exceptions around issues such as national security, internal workings of government and commercial protection, among other issues (Mendel, 2009, Stubbs, 2012, Bennett, 1997).³⁰

RTI laws set a new logic in motion in each RTI arena but also engage with previous informal institutions (Helmke and Levitsky, 2012). In this way, RTI foundation also has an informal side that is shaped by the interaction between the law, the state and stakeholders. Informality is not necessarily dysfunctional. For instance, some requests may be very simple for public servants and would not need much processing time. In this way, instead of following the procedure, the public servant might just point the requester in the right direction. However, informal institutions can also lead to ineffective results. For instance, when civil servants decide not to write down information, for several reasons, it becomes an issue in a RTI arena, as information cannot be trusted and is not recorded.

RTI is intertwined with other regulations relating to privacy, public records and copyright. Privacy is a major limit in terms of how information is published. Privacy, understood as the basic right of the individual to protect personal information about him/herself, is usually embedded in privacy and personal data protection regulations. Because the state collects information about persons, privacy regulation operates as a restraint in terms of sharing that information when RTI regulations operate.³¹ In addition, some institutions in charge of ensuring access to information have the jurisdiction to deal with access-to-information issues and privacy issues, such as in Chile or Mexico, or such a jurisdiction can be separate as in the cases of Germany, Uruguay or New Zealand. These institutional features show the degree of interdependence of these rights and institutions.

Copyright regulation on public information is an important issue, as it could limit the flow of public information. If the release of information is subject to state (crown) copyright, then it means it

³⁰Despite this, depending on the jurisdiction's legal tradition, some have put a public interest clause that assesses the benefits of releasing official information even where such information was initially covered under one of the exceptions

³¹However, this relationship with privacy heavily mediated by culture. Some countries, such as Norway, have no issues with releasing personal data about taxes. For an account of this situation <http://info-a.wikidot.com/norways-publishes-all-tax-returns-on-line> accessed 30 May 2012. Norway eventually reassessed the release of this data which allowed citizens to check exactly how much their neighbour is contributing to public finances. Countries such as the United Kingdom, New Zealand and Uruguay would find such an approach troubling

cannot be republished or redistributed. Copyright legislation and tradition does vary across countries and is usually a manifestation of how much value is placed on intellectual property, and is also often part of the games to prevent the release of public information. Finally, archive regulations indicating how to preserve and classify public information is crucial for a RTI arena to work. Storage and integrity of public information, in the digital age, becomes an essential part of the system to ensure trust. Public records are usually underplayed as an important factor in RTI arenas.

2.4.2 *The state*

As mentioned the state plays a nodal role in an arena. By nodal I mean a property of being at the centre of social and informational networks (Hood and Margetts, 2005) ³² The state collects information about most of the activities of citizens, businesses and the state itself in a given arena. By 'state', I mean not only the executive branch but all public institutions, including the three branches of government. In daily operations, the state produces large amounts of official information through several activities, including transactions, production of documents, etc. Official information is essential to exercise rights, as well as to exercise authority or even to question authority. Thus, the importance of information produced by a nodal actor in a given setting which also has the monopoly of production of official information is significant.

The nodal role of the state does not imply that the state is actually a monolith: it is a fragmented organisation. Formally, the state has divisions such as branches of government; administratively, the state has divisions such as departments or ministries. Informally, the state also has several other divisions usually not reflected in its organisational chart. As a result, large organisations such as the state face internal asymmetry-of-information issues. Sometimes the left hand might not know what the right hand is doing, which is what Hogwood and Peters (1985) termed as 'information pathologies'. Sometimes there are good reasons for compartmentalising information, in order to protect privacy, for example,³³ but it could also lead to severe inefficiencies, maladministration and, in worst-case scenarios, corruption. Transparency helps to reduce such asymmetry, albeit imperfectly. As a result, while the state is indeed a big node of public information, it should also be seen, depending on its structure, as a set of nodes that do not necessarily link to each other or share information with

³²Hood and Margetts and Hood (1983) use the term nodality as one of the tools government has to affect societal change. I use the term in the sense that the state plays a central role in a given society.

³³Although states are increasingly implementing laws to share personal information among several departments, in order to stop asking people for their details for every transaction.

each other.

I identify core agencies that are able to collect as much information as they need, usually interacting with key political stakeholders in a RTI arena ³⁴. Core agencies can be defined as particular nodes in the state with the power to retrieve information from others through the use of hierarchy, networks or persuasion. For instance, in the context of the United States of America, the Office of Management and Budget, the Treasury and the Office of Personnel play a prominent role in handling and collecting public information from several sources. These offices are very active in debates around public information.³⁵

Core agencies usually have a legal mandate to collect certain kinds of information, or are powerful enough to request it from other agencies.

The state also includes the parliament, the judiciary and other independent public bodies. Usually, these public bodies are covered by an access-to-information law, but this is not a universal principle. For instance, New Zealand's judiciary and parliament are not included in the access-to-information law, while in Chile they are partially covered. In Uruguay, the law includes every single public sector body. Whether the judiciary and the parliament should or should not be included in access to information regimes is usually a heated debate between activists, who have long been pushing for including parliament, as well as the courts, in access-to-information regimes. From a more systemic perspective, every public body should be to some degree under democratic control, which includes providing information about its activities. The recent review from the New Zealand Parliament argues in this way (NZ Commission, 2012).

Thus, the state can be visualised in this framework as a large reservoir of public information that is constantly being collected, used, produced and released, where certain agencies play a more relevant role, depending on the RTI arena. Agencies such as the presidency, the treasury, management and budget offices and archives are usually the more relevant central agencies, where a large amount of public information is placed.

³⁴Core Agencies are also known as central agencies. The New Zealand Treasury (2013) provides a good description of their role as a "Corporate Centre" to lead a State sector that New Zealanders can trust, and that delivers better public services, including outstanding results and value for money. This requires the Corporate Centre to take an active role across the sector, and provide system-level coordination, a clear focus and strong leadership... This central agency role reflects the unique position that the three agencies share. They each have, through their individual roles, a State sector system-wide perspective, engagements and connections with every other agency and significant State sector performance levers available (such as the Government's strategy, Budget and chief executive performance. For an evolution of central agencies in New Zealand see Norman (2008). These agencies can be found in Uruguay and Chile as well, as they cover key functions of the State

³⁵For instance, these offices are now involved in discussing technical standards to release financial data from government <http://www.federalnewsradio.com/?nid=513&sid=3550835&pid=0&page=1> accessed 10 February 2013

The civil service plays a key role. Although the framework proposed is unable to go into internal organisation behaviours,³⁶ it is able to identify key players in the field: information receptors, decision-makers and specialists. *Receptors* are the ones in charge of first dealing with a RTI request. These are usually known as FOI officers or FOI liaison officers and, in most RTI arenas, there is usually a civil servant tasked with this job. Occasionally, there is a division between civil servants working on 'reactive' transparency (i.e. answering requests) while other teams work on 'proactive' transparency (i.e. publication of information). Information receptors acknowledge, assess and eventually answer requests.³⁷ Receptors are also in charge of following the information requested across the organisation. Depending on the level of politicisation of the administration, some information receptors might also evaluate the request in political terms. When requests activate political alarms, it is highly likely that coordination between core agencies happens, involving key decision-makers. Sometimes organisations will set up special administrative systems to deal with access-to-information requests. Such systems usually alert organisations about the timeline and importance of the requests.

Specialists are in charge of evaluating the release of public information. Specialists consist of several kinds of professional in the bureaucracy. This category ranges from topic experts, to lawyers, to communications officers. Lawyers play a significant role in this process, assessing whether they can release the information. Communication officers also play a significant role in terms of how and when to release public information. If information involves very sensitive topics, political strategists might also step in to coordinate the 'defence' or release of information. Ministerial advisers also play a crucial role when party politics gets in the way, following requests as well as keeping relevant government politicians informed. These actors usually provide the strategy behind complex answers, delays and other less subtle games that requesters, politicians and public servants might play.

Decision-makers are the ones with formal authority to release public information. They are usually placed in the highest authority echelons in each organisation. Decision-makers are depending on the case, politicians, political appointees or public servants. In New Zealand, chief executive officers (i.e. public servants) are the ones in charge. To order the release or non-release of official information, decision-makers need to provide an explanation and their decision will eventually be reviewed by an enforcement institution. As a general rule, the more professional an organisation is, the more chances there are to get better teams dealing with requests. However, this does not in itself imply

³⁶For an ethnographic description of how FOI policies work in an office, see (John, 2009)

³⁷This research does not deal with the micro-level (inside the organisation) issues of FOI such as John (2009) does in her ethnographic study of the FOI Commissioner in Scotland, though they should be taken into account in in-depth studies.

more transparency, but probably a decent performance of the functions according to the law.

2.4.3 *Demanding information in a RTI arena*

Activities in a RTI arena are carried out by a relatively small group of individuals and organisations with a peculiar interest on getting information out of the state. They usually include journalists and non-governmental organisations and businesses. The way the law is used is seldom described, amidst accusations that access-to-information regulation is for ‘nutty NGOs’ or ‘corporate sharks’.³⁸ In this section, I describe the most common users from the demand side. During the course of this research, several interviewees in different settings are mostly referred to as *‘the usual suspects’*. (ISNZ₁, ISCUY₂, ISCUY₃)

While every individual potentially has the right to demand official information from the state, this is seldom the case in a RTI arena. Individuals usually do not work alone, and usually groups, firms, civic associations or particular professions have an interest in access to public information. As noted by Roberts (2002) in the Canadian context, the success or failure of access-to-information requests also depends on the identity of the requesters, for better or worse. Who demands information influences the answer.

Journalists were traditionally early users of these laws. Behind most of the RTI regulation across the world, journalists are some of the most prominent backers of this regulation. Journalist associations or groups push for this kind of regulation in the name of freedom of expression. Journalists also have more specific incentives to use this kind of regulation as tools to improve their work, particularly when doing research for investigative reporting, which usually demands more detailed information as well as confirmation of facts. However, journalists might also be disinclined to use access-to-information regulations. First, journalists usually have a public profile, which may or may not help them when receiving public information. The fact that the person who has to release information actually knows the identity of the requester plays both ways for journalists. This is one of the reasons why some access-to-information regulations, such as in Mexico, protect the anonymity of the requesters.³⁹ However, even with such protection, it is relatively easy to find out or at least guess who is behind a request in specific policy domains or small polities.

Second, journalists still rely heavily on traditional ways of doing journalism, which involve the uses of traditional sources of information, access through informal means, and leaks. This was noted

³⁸See for instance ‘Brussels hits out at nutty NGOs and corporate sharks’ (Rettman, 2012)

³⁹It has been noted that in Mexico even Mickey Mouse could fill a request for access to public information.

as early as when the FOIA was implemented in the US (Gianella, 1971) and continues to be a trend today. Journalists do have an incentive to get the 'exclusive', and access-to-information requests can actually alert other journalists that they are pursuing a story on a certain matter. Furthermore, newsrooms are under time pressure, and thus cannot usually afford to just file a request and wait. Traditional journalism methods can be combined with access-to-information requests. Information obtained informally about official information can actually then be requested through RTI. This is usually done to prevent exposing the source or using information that could be classified as secret.

As noted by Coronel (2012) '*journalists are not always torchbearers for freedom-of-information laws. Accustomed to having privileged access to information because of their press passes, they are not always enthusiastic supporters of laws that would democratize access*'. Similar concerns have been voiced in the Swiss context during the approval of the transparency law (Pasquier and Villeneuve, 2007).⁴⁰

Civil society is a regular user of RTI in every environment in terms of access to information. As a matter of fact, in the three case studies selected for this research, civil society played a significant role in advocating for these laws and using them. A particular type of organisation is one of the most relevant in this field. This type of organisation⁴¹ was formed to push for these laws, usually in the form of coalitions which ended up later in official and formal organisations with a specific mandate to promote access to public information. These organisations not only demand information but also provide advice to other requesters, as well as continuing to push to expand the right to information. These organisations also provide monitoring services in terms of how proactive transparency is working and keeping the state accountable in terms of fulfilling its duties. In terms of resources, they have the capacity to monitor, influence and potentially resist changes in RTI arenas.

Increasingly, other more 'traditional' civil society organisations are also using the law in their respective policy domains. In particular, environmental organisations and human rights advocates are among the most significant users in the cases selected. Even public sector unions use access-to-information laws to obtain information from the government on issues related to pay and conditions

⁴⁰While a general argument can be made about the existence of a robust press as a sign of a healthy and vibrant RTI arena (Stiglitz, 2002), this claim should be qualified. First, indicators about freedom of the press are largely reputational, usually ignoring some issues about self-censorship and certainly not taking into account how easy or not it is to get public information in a given jurisdiction. Second, these sets of indicators largely ignore how media structure plays a role in terms of demanding public information. Media-concentrated environments might have no incentives to request public information, particularly when they rely heavily on government policies and publicity to survive. Furthermore, even if the media has the will, large media outlets would have a relatively large network which would allow them get information from their sources. In this way, investigative journalists and small media are sometimes crucially important in terms of the use of access to information from a journalistic perspective, even though resources for these kinds of initiatives are usually scarce.

⁴¹An example of what Eckstein (1963) defines as a pressure group or what is more generally termed as an 'interest group'

of work.

In the selected cases, a new breed of organisations combine web technologies to foster access to information.⁴² These organisations set up online RTI request websites which allow users to send a RTI request to government offices and get a reply on line. This is a new development in several ways and this study cannot fully cover it. It should be noted that the platforms are built on free/open-source software and that they are built without any previous consent from the government in a RTI arena. Platforms target e-mails from public organisations and set up a portal where citizens can ask public sector organisations to show the expected reply date and whether or not the government replies. These platforms also allow users to comment on each other's requests in order to help each other when getting or not getting a government reply. These platforms are the result of the interaction between information right activists and technology activists. Portals are more or less successful depending on the RTI arena in which they evolve, as these case studies can show.

In this research, I found only a few grassroots organisations that would engage in requesting public information through this tool. At a global level, the notable exception is the well-documented case of India (Pudepphatt, 2009).⁴³ Grassroots organisations would usually benefit from mediators that help them to access information relevant to their ends. In several cases, those mediators are either difficult to find or too expensive. Indicators about the strength of civil society are not reliable proxies to represent this diverse group of users. A general argument would be that the strength and autonomy of civil society in a given arena provides for 'healthy' RTI arenas, but other variables are also important, such as policy areas, the structure of civil society and the level of awareness about access to information.

Academics are also users of these laws in all RTI arenas. It is not unusual in interviews with civil servants to hear that answering some requests is 'like doing someone's thesis' (ICNZ2). Academics, from all sorts of fields, usually fill requests when they are unable to obtain the data through easier means, as sometimes the FOI is used as a last resort. Academics are usually of good value when providing scrutiny and triangulation of several public data.

With the rise of 'digital government',⁴⁴ websites become increasingly important in government activities, as well as technology allowing their existence. As a result, in the context of the release of public information in reusable formats, mostly under the banner of Open Government Data policies,

⁴²The first organisation to set up a portal was the British NGO My Society. Currently, at least 16 portals operate world-wide.

⁴³Note that there is no agreement among scholars on this topic. For a different view, see Sharma (2012) and Roberts (2010). Both authors note the role elites played in India in different parts of the process.

⁴⁴See Margetts and Dunleavy, (2011), and, for a cautionary note, Lodge and Gills, (2011)

software developers are also interested in using government data, becoming a new constituency intertwined with civil society or private entrepreneurs. Developers are usually interested in large datasets that could be used for new applications, and usually argue for better technical (data) standards in the release of public information. Some of these datasets can be obtained through access-to-information requests⁴⁵ while others are covered under open government data policies. It should be noted that Open Government Data and Access to Information communities, while advocating for similar issues, are not that closely connected (Fumega, 2012).

Companies are increasingly using public information to get better information about where to invest, or to challenge government decisions in new RTI arenas such as Chile and Uruguay. It is not unusual among public servants to complain about how large companies are taking advantage of official information and, to some degree, how these requests can intimidate them (Wong et al. 2010). Determined companies have the resources and legal teams to push through requests. Some companies use public information in order to foster their business models or set up new ventures. New examples are websites that allow users to monitor public procurement, providing analysis about the process.

Lawyers are also part of this arena, though usually as a tool rather than as requesters themselves. However, lawyers provide significant expertise and doctrinaire development around the boundaries and limits of RTI regulation, hence they are particularly influential in shaping the way access-to-information laws work. Lawyers are generally involved in the litigation phase in every RTI arena as solicitors (advisers) or as barristers. Lawyers are active in working with NGOs and other requesters and they often have important professional incentives to participate in access-to-information cases. Exceptionally, lawyers may use access-to-information regulations to get evidence, when assessing if there is merit in a case. This is what in common law terms is considered 'pre-discovery'.

A way of classifying requesters is according to their level of expertise and level of use of the law as Table 2.5 shows:

⁴⁵The UK has modified its access-to-information law to include the right to demand datasets. In other jurisdictions, this is still uncertain.

Table 2.5: Typology of RTI users

Expertise	Usage	
	High	Low
High	Expert and Willing user: NGOs with specialisation in the matter are likely to have more expertise and are intensive users of the law. MPs, political parties and politicians are increasingly among this group once they learn the ropes. They are usually an elite group. They constitute an 'elite task force'	Expert and infrequent user: This group seldom use the law but when they do, it is very effective. Lawyers are particularly adept at using the law when needed, as are firms. This group was considered by an interviewee as 'snipers'
Low	Low expertise and High usage: Some journalists file 'fishing expeditions' which are likely to be rejected by authorities. A public servant noted that this group is 'firing salvos'.	Low expertise and Low usage: The 'average citizen' does not usually file access-to-information requests and when they do, they lack the support to carry through the request. They are considered 'innocent requesters'.

There are two elements that affect how access-to-information requests work in any given environment: political considerations and complexity.

Political considerations refers to how decision-makers evaluate the risk and opportunities for themselves, the organisation or the state as a whole. As the aphorism goes, '*where you stand depends on where you sit*', which means that each organisation and decision-maker will have a particular view of its risk, which could be real or a mere possibility of risk. This dimension is also emphasised by Michener and Worthy (2013). Decision-makers also have a view of possible benefits from the release of public information. In any case, the higher the perception of political risk or reward, the greater the chances that core agencies and politics play a role favouring (or not) the release. If risk is high, these kinds of requests could potentially be left to the enforcement institution to decide, taking significant time.

Complexity involves how difficult it is for the organisation to answer the request. Complex requests might have several questions (usually practitioners call these kinds of requests 'fishing expeditions'). In addition, information can be difficult to retrieve due to information management practices, lack of resources or the need to involve several units or agencies to reply. Complexity of the request does depend on the agencies' size and institutional capabilities. Table 2.6 shows a typology combining these dimensions.

Table 2.6: Typology of RTI requests

Political Considerations	Complexity	
	High	Low
High	Difficult to process and assess involving several decision-makers and parts of the organisation	Information available, resistance due to possible risk of political damage. Existence of previous leak very likely. If there is chance of a reward, then is seen as an opportunity
Low	Usually a fishing expedition on a topic, or information difficult to retrieve. There is no incentive to 'win' something out of the release	Usually information that is covered under proactive transparency duties

Who requests information also affects reply rates. For instance, in the Indian context, Sharma notes *'a phone call to the right person, or appeal made to the right official, written in English and demonstrating a thorough knowledge of the law and administrative procedures, signed by 'well-known' persons, does have an impact on the way the state machinery responds'* (Sharma 2012, p. 242). This is a subjective element in terms of how requests are processed and is context-dependent, present in all arenas.

2.4.4 RTI Enforcement institutions

As expected, RTI arenas face conflict when official information is not released. Such conflicts are managed by RTI enforcement institutions in charge of resolving conflicts. Following Mcallister (2010) I identify autonomy and capacity as two key dimensions to explore about enforcement institutions. These dimensions capture key normative and operational aspects of how RTI enforcement institutions work in RTI arenas aiding the comparability effort.⁴⁶

Autonomy: Autonomy means that the RTI enforcement institution is able to formulate and pursue goals that are not primary reflective of the interests of the regulated entities (McAllister, 2010). In the field of RTI enforcement institutions, I identify a set of dimensions to understand how autonomous institutions are. These dimensions are : screening and appointment, stability, effectiveness, resources

⁴⁶Unlike Mcallister (2010) I do not go into a full discussion of enforcement styles, which includes other variables such as the degree of formalism and degree of coercion. The combination of these variables leads Mcallister to provide a typology of enforcement styles which does not necessarily apply to the cases presented in this research. I adapt definitions from Mcallister (2010) for this particular part of the work

and perception. Screening and appointment are important dimensions to this regard ⁴⁷. Screening is about making sure that the individuals running these offices are fit to do so.⁴⁸ There are several vetting processes available in different governance settings, which allows for a discussion of how open and transparent processes are. For instance, before the nomination of an Ombudsman in New Zealand, a round of consultation with major political parties in parliament is held. In the United States, vetting processes for certain types of federal judges are usually carried out by the Senate in an open forum. Appointment – the process by which the authority is put in place – is important to provide legitimacy to the function. If the appointment is made by a direct superior with no vetting process, then it is highly likely autonomy will be limited. If the appointment is made by a representative body, it is highly likely the institution will have more independence.

Stability of appointed officials is also a dimension to consider. Exit and re-appointment strategies should also be clear. A sign of problems with independence is when a government uses strategies to not re-appoint existing authorities, or to delay the appointment of new ones. Another dimension to consider is oversight over the RTI enforcement institution. If the oversight mechanism is not legitimate or clearly established, then the autonomy of the RTI institution can be affected. Another dimension of autonomy have to do with resources. If budgetary independence arrangements are well established it is likely that the regulator will be more autonomous. Finally if the institution is not perceived as autonomous then, autonomy also can be compromised as other actors may not perceive the value of the institution. The following table provides a comparative overview of these dimensions with possible indicators.

⁴⁷Debates about how authorities should be appointed are often common under a stream of literature known as ‘institutional design’ (Gooding, 1998, Pettit, 1998)

⁴⁸In the words of the American constitutionalist James Madison, ‘*The aim of every political constitution is or ought to be first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust*’ (Madison, 1788).

Table 2.7: Autonomy

Dimension	Indicator
Screening and appointment process	Is the process regulated? How open is the process to all stakeholders involved? Which institution is in charge of appointing the enforcement institution? Is the institution appointing the enforcement institution independent (e.g., a Parliament)?
Stability	Time elapsed in replacement of authorities / discontinuity of the institution.
Oversight	Which institutions can potentially overrule the enforcement institution's decisions and how? Is this institution independent and legitimate?
Resources	Is the budget allocated taking into account the enforcement institution's estimates?
Perception	What is the perception of key stakeholders about the screening, appointment and performance of functions by the enforcement institution?

Enforcement Capacity refers to the agency's ability to implement its policies (McAllister, 2010). Even if institutions are autonomous agencies need to be able to implement their policies. In the context of RTI some of them might not have the legal mandate to perform three important tasks: a) review powers to order an organisation to hand over the information for analysis, b) enforce the decision, and c) eventually sanction an organisation for not complying. These legal mandates ensure the enforcement institution has enough institutional standing to order the release of information. If information is not handed over (or if there is not a mandate to do so), then the enforcement institution is unable to perform its task. As noted by Holsen and Pasquier (2012), this is seldom mentioned in debates about oversight institutions, where most debates focus on enforcement of the

decision and not on this crucial power.

Even if there is a mandate, resources might not be in place. Resources go beyond an allocated budget⁴⁹ and implies adequate and trained staff, an institutional capacity to perform complex tasks and access to international networks to foster innovation. Resources are important because, in their absence, decisions might not materialise or might be slow to materialise, which damages the reputation of the enforcement institution.

Table 2.8 shows potential indicators for this dimension:

Table 2.8: Enforcement Capacity

Dimension	Indicator
Extent of the legal mandate in terms of review processes?	No access, partial access and full access to documents.
Extent of the legal mandate in terms of enforcement practices?	Binding, partially binding or non-binding.
Extent of the legal mandate in terms of imposing sanctions	No sanctions, symbolic sanctions and full sanctions.
Resources (staff, budget, capacities) to carry out the assigned tasks	Number of staff over volume of work Budget over volume of work.
Service delivery	Processing times.
Decisions or sanctions effectively applied?	Decisions issued/Decisions effectively applied.

Enforcement institutions might also play an educative and training role depending on the RTI arena, but the core function is to make the decision about whether information should be made public or not.

Combining these two information categories, there are four possible categories as shown in Table 2.9

Depending on the RTI arena, other accountability institutions can step in. For instance, the judiciary (when it is not the only enforcement institution available) can settle definitive issues around access to information in several RTI arenas.

If horizontal accountability institutions operate in a coordinated fashion, there are more chances to

⁴⁹For the sake of clarity: An institution might have negotiated a budget independently and received enough money but might be lacking expertise in key areas, or an institution might have no independence to bargain the budget and nonetheless have enough money to direct to an area where it has an order to allocate such budget.

Table 2.9: Typology of enforcement institutions

Autonomy	Enforcement Capacity	
	High	Low
High	Autonomous and able: Able to deliver complex resolutions in a RTI arena in an efficient and effective way. Fiercely independent and with resources to carry out their task. Colloquial term: <i>'Knights Templar'</i>	Principled but futile: regarded at its best as a complaints forum and at its worst as an irrelevant institution. Colloquial term: <i>'State NGO'</i>
Low	Not fully independent but with resources: While able to implement some decisions, low levels of independence make it remain in the shadows. Colloquial term: <i>'Shadow Institution'</i>	Neither independent nor resourced. Can assist in terms of implementation issues. Colloquial term <i>'Window Dressing'</i>

reinforce each other's roles. This reinforcing logic is usually favoured by policy communities working collaboratively across the issues and challenges that access to official information presents, as has been the case in New Zealand. However, when horizontal accountability institutions do not act in an aligned way, they start to undermine each other. This can result in 'turfing', overlapping competencies and, in worst-case scenarios, complete uncertainty about the criteria to resolve access-to-information issues in a given RTI arena.

2.5 FEEDBACK LOOPS: CHANGE AND CONTINUITY IN A RTI ARENA

Feedback loops are particular points of time in the life on a RTI arena when several actors decide to seek change in the rules that govern the exchange of public information. These changes usually emerge from problem in interpretation of the rules or enforcement issues.⁵⁰ To put it another way, 'new policies create new politics' (Schattsneider, 1935 p. 38).

As noted in this chapter, this framework assumes that there is always a degree of conflict in RTI arenas. Conflicts appear through activities in the arena (i.e. RTI requests, denials, political struggles

⁵⁰This often materialises in questions about what should be public or not, or who should decide about public information issues in a given arena

about public information, etc.). Use of RTI triggers a set of behaviours which involves several actors characterised in this framework, creating and accumulating pressure in a RTI arena. When an opportunity emerges actors will try to reform the constitutive element of the arena (i.e. the RTI law) in order to cater to their particular interest. Feedback loops can reinforce the path a RTI arena followed, or can also debilitate this path. An attempt to reform a certain aspect of a RTI law is an example of a feedback loop. These matters usually refer to the scope, exceptions and exemptions and the autonomy or capacity of the enforcement institution in place. In other words, feedback loops are about what information is available, how it should be classified and, eventually, who should release it and how.

The concept of feedback loops is linked to the historical institutionalism underpinning of this work. In historical institutionalism literature, the concept of path dependence plays a role in explaining change and continuity of policies ⁵¹Path dependence is defined in this research as a process that exhibits feedback loops and thus, generate branching patterns of historical development (Pierson 2004). ⁵².

While I argue in this research that each feedback loop takes the RTI arena a step further into a particular institutional dynamic, reinforcing a previous path, I do not deny the possibility of change. For instance, a feedback loop could end up in a major reform, giving more powers to a RTI enforcement institution, which in turn could help to develop a more functional RTI arena. Thus, if a certain configuration of actors provides an alternative in the right conditions, feedback loops could deliver gradual change in a RTI arena. ⁵³

Feedback loops are present in all arenas. My argument is that each arena has a particular kind of feedback loops. In functional RTI arenas, the participation process led to the establishment of a strong policy community, as well as a professional bureaucracy able to implement the law and good enforcement mechanism in place. As a result feedback loops are mild, often leading to discussions 'at

⁵¹As noted by Kay (2003) historical institutionalism has been mostly used to explain 'macro' social issues rather than specific policies. In this research I am using historical institutionalism lenses to explain the evolution of RTI policy in the context of a middle-range theory.

⁵²The concept of path dependence is often used in social sciences and presents problems of 'concept stretching' (Sartori, 1970, Pierson, 2004). The definition provided here comes from Pierson (2004) with a slight modification in the wording as the word 'positive' may confuse the reader

⁵³Mahoney and Thelen (2010) research on different dynamics to explore institutional change in the context of historical institutionalism. They argue that beyond 'punctuated equilibrium' theories of change, one could consider more subtle patterns when the meaning of the rules and enforcement issues arise in a given policy. A good example they provide is the evolution of the House of Lords in Britain. The concept of feedback loops is designed to capture changes over time. It is then similar to what Mahoney and Thelen (2010) refers as 'layering'. I avoid going into a extensive debate of patterns of change as it is not the objective of this research.

the margins'. These feedback loops are unlikely to affect the basic structure of the arena. In mixed RTI arenas the combination of factors led to a situation where discussions are broader. While there might be a strong policy community in place, the problems of implementation and issues around enforcement institutions will put pressure for more significant changes. Discussions will be broader and new developments (not necessarily positive ones) can emerge. In contested arenas, the situation is more fragile. Discussions are often about the very foundations of the arena and can create and 'up for grabs' scenario where significant aspects of the arenas could be changed. Table 2.10 provides a summary:

Table 2.10: Feedback loops

Case	Feedback loops
New Zealand (Functional RTI)	Feedback loops at the margins and occasional positive developments
Chile (Mixed RTI arena)	Feedback loops with some important developments
Uruguay (Contested arena)	Feedback loops can be serious. 'Up for grabs' scenario

To sum up: in this chapter I aimed to explain the framework I will use in this study to describe how RTI arenas work. I described the key elements in a RTI arena: a RTI law, the state, requesters and users of information and RTI enforcement institutions. In the next chapters, I will use this framework to explain how RTI arenas work in the case studies selected: Chile, Uruguay and New Zealand.

METHODOLOGY

3.1 A COMPARATIVE APPROACH

To understand *why RTI arenas that operate under similar principles work differently, leading to different outputs*, it is necessary to compare these regimes. Comparative methods have a long tradition in social sciences (Sartori, 1970, Liphjart, 1975, Ragin, 1987, Peters, 1997). At the core, the comparative methods approach seeks to obtain conclusions, looking at similarities and differences across different cases. This approach was famously advanced by Mills' (1843) method of agreement and method of difference. By comparing a set of relevant cases, I expect this research to contribute to a better understanding of RTI arenas in terms of commonalities and differences.

When taking a comparative approach there are basically two ways to proceed. As Ragin (1987) notes, the most traditional divide is between variable-oriented researchers and case-oriented researchers. In variable-oriented studies, generality takes precedence over complexity. In this way, *'investigators are usually interested in testing propositions derived from general theories than they are in unravelling the historical conditions that produce different historical outcomes'* (Ragin, 1987 p. 55). Variable-oriented researchers tend to see the social world in this way and, as a result, the emphasis is on finding correlations among variables to explain certain social phenomena.

In contrast, in this work I am more interested in a small number of cases, from a qualitative perspective. This is to say:

Historically oriented interpretive work attempts to account for specific historical outcomes or sets of comparable outcomes or processes chosen for study because of their significance for current institutional arrangements or for social life in general... Such work seeks to make sense out of different cases by piecing evidence together in a manner sensitive to chronology and by offering limited historical generalizations that

are both objectively possible and cognizant of enabling conditions and limiting means—of context. (Ragin, 1985 p. 3)

In this way, when answering the research question posed, I will be more concerned with concept formation and causal connections than testing different theories. Taking this approach, this research contributes new concepts to understand RTI arenas and, in particular, the connection between their origins and their outputs. Thus, this work is an attempt to provide *'building blocks'* (George and Bennett, 2005) to develop further comparisons. Small 'N' studies allow exploration of the different and specific paths that a case followed towards a certain outcome, opening 'the black box'.

This research is concerned with the intersection of a set of conditions in time and space that produces a certain outcome. (Ragin 1987, p. 27). As noted by Ragin, (1987, p. 25), *'this is not the same as arguing that change results from many variables as in the statement "both X_1 and X_2 affect Y " because this latter type of argument asserts that change in either causal variable produces a change in Y , the dependent variable'*. In this way, this research follows the logic of the case study which is fundamentally configurational. This means *'Different parts of the whole are understood in relation to one another and in terms of the total picture that they form'* (Ragin, 2000 p. 68). In this way, I explore how convergent causes fit together or combine to lead towards a certain output.

In this kind of approach, evidence and theory are in constant dialogue, but in the context of a theoretical framework. I provide here a *focused and structured comparison* (George and Bennett, 2005 p. 69). By *structured* I mean I compare all the cases selected using the same framework, which includes the same dimensions of analysis. This framework is presented in Chapter 2. By *focused* I mean this study only deals with the question posed in this section and an appropriate theoretical framework built on previous literature.

It should also be noted that this work joins a tradition of other studies of theories of the middle range (Merton, 1949) with limited explanatory power. Middle-range theories usually start with a particular puzzle emerging from evidence and related to a particular field, aiming to generalise what is defined in the scope of the theory, providing clear definition of concepts avoiding universal claims but getting generalisable findings (Ziblat, 2006). In this way, this work operates at a meso level of analysis focusing on the definition of problems, the setting of agendas, and the decision-making and implementation processes (Parsons, 1995). In short, I do not seek here to provide a 'grand theory' of RTI regimes.

Finally, a more general point is that *the theoretical lenses I use to address this question come from*

an historical institutionalism perspective. I understand that choices made at an early stage help to determine the path that an institution follows, thus setting the course of its development. In this way, there is a *path dependency* argument in this work: that certain decisions, when establishing institutions, actually set in motion a set of re-enforcing processes (Pierson, 2000). These theoretical lenses are useful because they allow me to look in detail at the process of adoption of these reforms, the previous institutions and the links which show how RTI arenas are implemented. Literature in this field often deals with policy transfer processes across countries, distinguishing between emulation, coercion and policy learning (Bennett, 1997, Berliner, 2014, Grigorescu, 2003). However, the link in terms of the adoption process and the unfolding of the institution is usually not explored in a comparative fashion. As noted by McClean (2011), literature in this field tends to be normative (as in prescriptive) or policy oriented. Comparative historical work is able to depart from explanations that are either too normative-based or too policy-oriented to shed light on reasons for differences among these regimes. In short, while activists and policymakers might be tempted to say that a certain regime is a ‘failure’ or a ‘success’, historical analysis can contribute to understanding the reasons behind such perceptions.

3.2 RESEARCH DESIGN

To explore why RTI arenas based on similar principles work differently, leading to different outputs, I identify three factors. These factors emerge from the available literature and in dialogue with the evidence from this work. These factors are: 1) participation in the policymaking process, 2) the professionalism of state bureaucracy and 3) RTI enforcement institutions. In Chapter 2, I have referred in detail to these factors and the key arguments I make about them. From a research design perspective, these three factors and the arguments I make about them operate as the hypotheses behind this work. I also argue that there are three types of regimes (or arenas) that result from the combination of these factors. In this way, I select a set of cases already established and work ‘*backwards*’ to explain how they arrived at the current configuration and outputs. Thus, I show the different paths countries followed to set up similar regimes that ended up producing different outputs.

Table 3.1 provides a summary of how these cases are configured:

Table 3.1: Case selection

Case/Factor	Policymaking process	State bureaucracy	Enforcement institutions
New Zealand	High level of participation by several stakeholders	Professional civil service	Ombudsman model (independent and able to enforce)
Chile	Low participation: civil society, key politicians and techno-pols	Politicised civil service with a certain level of professionalism	Information Tribunal (partially independent and able to enforce RTI)
Uruguay	Low participation: civil society	Politicised civil service	Administrative Unit and the Judiciary(not independent and with low enforcement capacities/-independent but costly enforcement)

New Zealand can be considered a functional RTI regime. By functional I mean that institutions operate as expected, according to the regulation of the arena. Functional is not equivalent to a virtue nor necessary a sign that this arena is a ‘transparency heaven’. When I mean functional, I mean it works as it is supposed to work according to its own standards. In New Zealand Information is often available, the state is reliable and conflict resolution is swift and established. In New Zealand, as will be shown in Chapter 3, there was a high level of participation by local civil servants and civil society members which helped to pass this legislation in 1982. Furthermore, New Zealand had a Whitehall public administration model, which, since 1912, established meritocratic recruitment into the public service. It also established the principle of political neutrality, establishing public servants to serve the government of the day, and not a particular political party. New Zealand bureaucracy was a strong Weberian type until major reforms in the 80s under the New Public Management doctrine (Boston et al. 1996). These reforms had a significant impact on how RTI operated in New Zealand, but for the purposes of the current study, I will focus on the period from 1982–1988 when those reforms had not yet been implemented. Regarding enforcement institutions, New Zealand had an Ombudsman pre-established which took over the role of administering conflict around this regulation, becoming an independent and able institution. In explaining New Zealand, this research is able to explore which particular set of events and factors allowed the emergence of such a regime. This is useful, as New Zealand is often hailed by several international organisations as an example for others in this

field. By explaining who was involved and the specific sequence of events and factors, the research provides context and a pertinent explanation of why the RTI regime worked differently, leading to a particular outcome.

Chile is an example of a mixed RTI regime or arena. By mixed, I mean that institutions often operate as expected, according to the regulation of the arena. Nevertheless, occasionally there is non-compliance issues with aspects of the RTI law, and dysfunctional situations can appear as a result of conflict in the arena. This does not imply a value judgement on the arena, but it implies that does not work as expected according to its own standards.

While the logic of RTI is established in these regimes, there are still issues about how requests and publication are handled, and the resolution of conflict takes time. In Chile, RTI was established after a set of corruption scandals and the sentencing of the Chilean government by the Inter-American Court of Justice. These events led to the approval of a RTI law. Participation in this process involved a few politicians and members of civil society. Chile is advanced in terms of managerial reforms oriented towards the implementation of NPM, particularly in terms of output budget-oriented results, and partially in terms of senior public management reform (Grindle, 2012, Ramos y Scrollini, 2012). Chile set up a special enforcement institution with a high degree of autonomy that is independent and able to carry out its functions.

Choosing Chile provides an opportunity for this research to understand the emergence and development of a regime that is evolving and how international and local factors interplay to set up a RTI regime. This specific configuration allows this research to understand more about the role of a professional yet politicised bureaucracy in dealing with RTI requests, as well as providing a unique analysis of the relationship between enforcement agencies and such a bureaucracy. By choosing Chile, I am also able to contrast how a politicised yet professional bureaucracy works compared to a non-politicised bureaucracy, as is the case in New Zealand. This contrast allows for better understanding of how this element functions in all configurations. Furthermore, it allows comparison between the role of a new and specialist enforcement institution and an already established one.

Uruguay is a contested RTI arena. By labelling an RTI arena as contested, I mean that institutions often do work as expected in this setting. This label is not a value judgement on the arena, but an indication that exhibits dysfunctional characteristics for its own standards. Conflicts are frequent and resolved in a costly way. Bureaucracy might not even deal with all requests and the publication of information is irregular. Uruguay has been a reluctant reformer in terms of the public service

(Panizza y Phillip, 2005, Panizza, 2004), less professional than the Chilean bureaucracy (Garcia y Garcia, 2010), and set up this regulation amidst pressure from civil society and international donors. It also set up an administrative unit with low levels of independence to control the implementation and resolve conflicts.

A politicised Uruguayan bureaucracy offers a unique perspective on how RTI requests and release of public information can be mediated by political interests. Uruguay also allows an understanding of how weak RTI enforcement institutions work. As a result, Uruguay allows this research to show the challenges faced by RTI regimes. When a specific combination of factors is sufficient to create a regime but it faces challenges, it also helps to contrast this case with more 'advanced' cases to look for similarities and differences.

There are two additional benefits of comparing these countries. First, Uruguay, Chile and New Zealand offer variants of enforcement institutions (presented in Section 3). As a result, the selection adds value as it explores three different institutional forms with different levels of independence and capacity. In this way, this research can add to an emergent literature on the matter. Second, Chile, Uruguay and New Zealand are small countries which are perceived to have high levels of integrity according to several international reputation indexes (Transparency International, 2013, WB, 2011) as well as solid democratic regimes (EIU, 2012). They also share a very high or high level of human development, according to the UNDP Human Development Index (2012). Furthermore, these three countries present a centralised structure of government; this means they are unitary states which allow a comparison at similar levels, avoiding the complexities of comparing federal and unitary states. In short, these are small, democratic and comparable units. This is not *per se* theoretically relevant, but it eases the comparison.

A first important caveat about this comparison is the timing of the reforms. New Zealand adopted its regulation in 1982, Chile in 2008 and Uruguay also in 2008. As a result, New Zealand has now had more than thirty years of experience in terms of access to information, while Chile and Uruguay have only had five years. Therefore, a full comparison between the three cases would be flawed as New Zealand has obviously accumulated more experience in this field. Thus, for comparability reasons, this study will focus on *the first five years of each regulation*.

Related to the former point, is the issue of principles. Principles established in laws in the RTI field evolved over time and there is yet no agreement whether there should be global principles about these laws. Advocates and CSO organisations (see for instance Mendel, 2009) have pushed for establishing

basic principles at a general level (such as the United Nations) but this has not yet materialised ⁵⁴. The Organisation of American States endorsed a RTI Model law which establishes a set of principles for the Americas in terms of RTI (OAS, 2015). In the context of this research, when I use the word principles, I mean a certain group of norms are often incorporated in RTI laws. These principles are present in the three cases selected in this research. In each chapter I show in detail the embodiment of these principles in each law. A cautionary note is that while a principle may be present in a RTI law, there could be a matter of scope. For instance, some institutions can be excluded from the scope of the RTI law for several reasons (e.g. national security) and some forms of information can be excluded from the scope of the law (e.g. information from private contractors). I list these principles in Table 3.2 providing a comparative overview of each RTI law used in this research.

⁵⁴For a list of all the principles and declarations available check Campaign for Right to Information in Nepal <http://www.ccrinepal.org/resources/principles> [accessed 8 March 2015]

Table 3.2: Principles of RTI laws compared

Principle	New Zealand	Uruguay	Chile
Establishment of a presumptive right to information held by public authorities	Broad definition of public information and public authorities Section 2 Official Information Act	Broad definition of public information and limited definition of public authorities Articles. 4 and 10 Law 20285	Broad definition of public information and public authorities Article.1 Law 18381
Duty to publish public information (or Proactive Transparency): The state has a duty to provide certain information without any request. Usually this includes organisation information, budget information and decision-making information.	Principle of availability established in Section 4 Official Information Act	Duty to publish established in Article 7 Law 20285	Duty to publish established in Article 5 Law 18381
A request mechanism: This usually establishes different kinds of processes to access information from the requester's perspective and different degrees of limitations on making a request, including being a national of the country, format, etc.	Minimum requirements to make a request Section 12 Official Information Act	Minimum requirements to make a request Article 12 Law 20285	Minimum requirements to make a request Article 13 Law 18381
Limited exceptions: Exceptions allowing the non-release of information are usually few and should be interpreted in a restrictive way. Examples of common exceptions are national security, trade secrets and financial stability	Exceptions and Exemptions clearly established in Section 6 and 7 Official Information Act	Exceptions established in Article 21 Law 20285	Exceptions established in Articles 8 and 9 Law 18381 .
Duty to assist: The state should assist requesters when using the law, providing guidance to get the information requested	Duty to assist established in Section 13	Duty to Assist established in article Law 20285	Duty to assist established in article 17 Law 18381 .
Accessibility: Information should ideally be free, and fees should only be charged to recover costs for accessing information	Free in principle Part 2 Section 14	Free in principle Article 11 Law 20285	Free in principle Article 17 Law 18381.
A conflict resolution mechanism: There should be a way in which conflicts about the release of information are resolved.	Enforcement authority established in Section 35 Official Information Act	Enforcement authority established Article 31 Law 20285	Enforcement authority established Article 19 Law 18381

A second important caveat about this comparison exercise, is that the three experiences do have a different historical context in which RTI emerges. In New Zealand RTI emerges in a democratic context, but against what some would perceive as an extremely regulated economic regime (Reardon and Gray, 2007) and a government that faced serious conflicts on issues on such as the environment. The Official Information Act (OIA) was part of a reaction against this state of affairs, as New Zealanders sought to expand their rights.

Uruguay and Chile present a different context. The legacy of authoritarianism in Chile and Uruguay links the development of RTI to other human rights issues, which were not present in the New Zealand case. Both military dictatorships operating during a 'Cold War' environment committed gross violations to human rights. Both military dictatorships ended after a negotiation between civilians and military juntas. Former dictators kept a certain level of formal or informal influence around some key decisions related to certain institutional issues, including the military. In this way, RTI was conceived amidst a struggle to recover democratic institutions and civic liberties. Campaigns for freedom of information would be linked to issues such as access to documents produced during the military dictatorship about human rights violations and freedom of expression.

In Uruguay RTI discussions started 15 years after democracy was regained. As noted in this research, Uruguay has been traditionally acknowledged as one of the most democratic nations in the region setting up advanced social rights and civic liberties early on the 20th Century. Democracy was lost from 1973-1985 in the context of the Cold War. Thus, Uruguayans returned to their path of enhancing civic liberties and dealing with a traumatic past. Chile was also acknowledged as a democratic regime if slightly more conservative in terms of social rights. Democracy was lost and regained in 1990, opening up a new chance for Chileans to expand their rights. Thus, the authoritarian past in both countries is relevant to explain the emergence of these laws and their context, but does not affect the case selection. When these laws were discussed and passed all these cases were considered democratic countries (EIU, 2012)

Finally, it is necessary to acknowledge the effect of technology in these arenas. In 1981 NZ officials did not have to deal with e-mail and the internet as their Uruguayan and Chilean counterparts did in 2008.

This study deals with complex processes with interdependent variables, which implies that this research makes a considerable effort to describe as accurately as possible how exactly these factors configure a RTI arena. This means addressing who were the key stakeholders, the sequence of events,

the context and the process of adoption, exploring the linkages to its eventual implementation. As a result, this case study employs process tracing as a methodological device to achieve its goals. Such a methodological device allows us to *link initial conditions to certain outputs* (Venesson, 2008).

As in other case studies and qualitative and comparative research, there are limits. This research is unable to account for all the possible cases that can emerge. This is to say, the findings are only applicable to the cases selected, as the objective is to show how they are structured and deliver different outputs. This approach works well when the numbers are small (as in this case) but it may not be applicable to other cases. (Ragin, 1989). Yet, due to the current state of the field, it is still a valid strategy to explain why RTI regimes operating under similar principles end up working differently. Further theory development and study could enable a refinement of the categories and theory presented here. Another common critique of qualitative and comparative studies is the argument of ‘selecting on the dependent variable’. In this way, critics often point out that qualitative researchers select cases because of the variation (or lack of variation), not exploring the entire range of options to test different independent variables and their effects. In this case, I argue that the selection is purposeful as it aids in comparing existing outputs and shows the different variables at play that led to them. The value of this work is in identifying those variables and explaining the way they link to the outputs in each arena according to the literature and evidence available. Thus, it fits the research strategy I advance in this work.

3.3 DATA GATHERING

Data was gathered through three different techniques: elite interviewing, analysis of relevant historical documents including legal records and media records.

In terms of elite (or qualified) interviewing, it has long been considered one valid method to collect information, particularly when developing conceptual work. Combined with process tracing, elite interviewing allows for establishing facts that were not documented, contrasting facts and reconstruction of events. It fits with process tracing as a methodological device (Tansey, 2005). While the term ‘elite’ may have certain class implications, in this context it does not necessarily mean a member of the country’s leading political and economic elite, but someone with unique knowledge of the subject at a political, policy or implementation level. In some arenas, these people were, in effect, members of the political elite. The sampling and selection of interviewees was guided according to the desk research performed for each case. In the particular case of New Zealand, I was not able to gather

many elite interviews, because legislation was approved in 1982 and some key stakeholders were either not in a condition to answer or were deceased. Interviews were semi-structured and allowed input from the interviewees, as it was essential to develop the framework. Interviews were granted under conditions of anonymity. This was done to protect the interviewees from potential harm to their reputation or position for taking part in this research. Most of them were willing to go on the record, but I decided to follow conventions in this field and did not name them. Most of them were identified according to their position. Interviews lasted for 45 minutes to one hour. I performed 65 interviews⁵⁵ in three countries according to Table 3.3:

Table 3.3: Interviewees

	New Zealand	Chile	Uruguay
Politicians/ Authorities	2	6	14
Public servants	2	8	9
Experts/Academics/ Journalists	4	8	12
Total	8	22	35

Uruguay demanded more interviews due to the absence of studies and written material, unlike Chile and New Zealand where there is fairly good documentation. I took part as participant or organiser in four seminars in these countries, which allowed me to understand better the context in which practitioners work. Finally, in partnership with a software engineer and colleague, Gabriela Rodriguez, we set up the prototype for an online access-to-information request website based on free software Alaveteli for the Uruguayan case study. The collaboration emerged at a conference we both attended in the context of this research, organised by the British NGO My Society at the University of Oxford on the 2nd and 3rd of April, 2012. The prototype was prepared at the premises of the London School of Economics and Political Science, Government Department over the next four days after the conference. The software provides an interface where users can request data from several government departments covered by an access-to-information law. New Zealand and Chile already had similar portals, hence the collaboration was useful to explore the Uruguayan setting where no data was available about the government response. The prototype was fully developed by DATA – a Uruguayan NGO which I chair – and was turned into the current website www.quesabes.uy. It was

⁵⁵I carried out a total of 100 interviews but only 65 were fit to use in this work. Of those a selected set are quoted in this text as shown in the Appendix I

formally launched as an access-to-information portal in partnership with local access-to-information activists in this country in October 2012.⁵⁶ The software also helped to expose a set of reactions from the administration aiding comparability with the other two cases.

The design and implementation of the software in Uruguay requires a set of clarifications about my involvement as a researcher. My research design does not contemplate an action- research methodological component as a central element. Nevertheless, this particular development can be understood under this research approach. Action research assumes the researcher works alongside members of a given community to develop a solution or knowledge about a certain issue. In this way, the researchers work with counterparts to generate evidence and potentially develop new approaches to tackle practical issues (Herr & Anderson, 2005). Central to this approach are matters of ethics and professional judgement. My involvement as part of this research project was in terms of setting up the prototype as described above. This meant to analyse the Uruguayan legal framework to ensure that the prototype complied with Uruguayan RTI law as well as with Uruguayan data protection law. When the organisation I chair- DATA Uruguay- decided to continue with this project, it was also decided that all the basic statistical data available from the project would be open to all interested parties, including government organisations, researchers ,international organisations and civil society organisations. This is the data that used in this research. In this way no other type of data that would have required a different research and ethical framework (e.g. personal data of requesters, data from public servants, specific patterns of web behaviour, etc) was used in this research. When the organisation decided to push forward with the project, I also raised concerns about potential misuse of this tool (e.g. 'vexatious' requests'). I monitored the website to prevent these requests. To date, the website did not register any vexatious request. Thus, the portal does not constitute an 'experiment' in which the researcher seeks to apply a set treatments to users to achieve a certain goal or probe a certain point. It does constitute a limited intervention in which- as described- I made a set of choices in terms of engaging as a researcher in the design and in monitoring potential problematic behaviours. The Uruguayan case also requires an extra caveat about the researcher himself. I am Uruguayan and I've been fairly active in the right to information and public policy community in Uruguay before conducting this research. As a result, interviewees might have reacted to who I am, and what they perceived as my views in the past. This is always a risk in qualitative studies and I did my best effort to check different sources and triangulate interviewees testimonies with other data available.

⁵⁶A full history of this development and credits for different parts of developing the software can be found at: <http://www.datauy.org/wp-content/uploads/2013/09/Creditos-Quesabes.uy.pdf>

FUNCTIONAL RTI ARENAS: THE LIMITS OF SUNSHINE IN NEW ZEALAND (AOTEAROA)⁵⁷

‘The Official Information Act...a nine day wonder’. Robert Muldoon, New Zealand, Prime Minister 1982

‘In short, the Queen’s papers have become the people’s’ (Lange vs. Atkinson 1998)

‘Making the decision to withhold information used to be easy – the only question was: will it embarrass the Minister?’ Peter Brooks (1984)

4.1 INTRODUCTION

New Zealand is consistently recognised as a good regime in terms of access to public information (Access Info-CDI 2012). There are reasons for such a well-earned reputation that can be traced back to the combination of three factors: levels of participation in the policymaking process, the professionalism of state bureaucracy and the autonomy and capacity of RTI enforcement institutions.

⁵⁷ Aotearoa in Maori means the ‘Island of the long white cloud’.

In this chapter, I set out to describe how the access-to-information regime emerged in New Zealand. Second, I will analyse how the New Zealand RTI arena evolved during the first five years. The reason for doing so is for comparability purposes among the three case studies presented in this work. Third, I will describe the core government agencies, the roles of requesters and public servants. I will also provide a brief description of the evolution of the New Zealand RTI arena up to the present, identifying key feedback loops. Fourth, I will introduce a set of puzzles presented by the New Zealand case and explain them according to the arguments advanced in this work.

4.2 THE QUEST FOR ACCESS TO INFORMATION: THE EMERGENCE OF THE NEW ZEALAND RTI ARENA

4.2.1 *A world of secrecy*

New Zealand was an early adopter of right-to-information legislation when in 1982 it passed the Official Information Act (OIA). The OIA was greeted with scepticism by the prime minister of the day, Robert Muldoon, as a ‘nine day wonder’. Nonetheless, the law has since been in place for thirty years, providing a sound anchor for the New Zealand RTI arena. In this section, I seek to explain the key elements in the design phase of the OIA that allowed this policy to survive the test of time, turning the OIA into a constitutional convention.

There is compelling evidence that, before the introduction of the OIA, there was an atmosphere of tension about the use of public and private information by state authorities, as well as high levels of secrecy. The underpinning legal tool justifying this was the Official Secrets Act (1911)⁵⁸ which established that public information was the property of the New Zealand Government, and imposed draconian sanctions on public servants for ‘wrongful communications with anyone outside the state’ (Elwood, 1997). As noted by Gregory (1984), official secrecy fitted the tradition of a Weberian bureaucracy such as the one New Zealand had in place at the time.⁵⁹

Before OIA, New Zealand was a place where public servants had to sign a declaration of secrecy to protect public information. As mentioned in discussion records by one public servant:

It has been said, not altogether facetiously, that a public servant who discloses the number of cups of tea

⁵⁸The Act was based on the British Statute of 1911. When NZ gained full independence from the UK, the Act was incorporated in the New Zealand legal system, dated 1951.

⁵⁹New Zealand was one of the first countries in the world to legislate and implement centralised meritocratic recruitment for public servants, providing them with tenure which would ensure consistency across New Zealand’s relatively large public sector at the time.

consumed in his office is guilty of an offence under of the Official Secrets Act. (GS. Orr, 1984)

The Official Secrets Act led to serious issues in terms of efficiency and accountability in the public sector. For instance, in 1962 the New Zealand Government engaged in a large campaign to get rid of polio, vaccinating its entire population. However, some of the material might have been contaminated, which allegedly resulted in serious consequences twenty years later for those involved. In 1974, speculation about this event had a significant impact on New Zealand's public. An MP took up the case and a report followed. The report shed significant light on the process, ending public controversy, but only when full information was available (Collins, 1984). There is anecdotal evidence by journalists and public servants about 'secret meetings' to get very basic information about policies, and even limits in terms of which social events a civil servants could go to due to the secrecy regulations. For instance, after a major outbreak of possible wine contamination, the answer to the question about which brands were involved was:

Sorry, we can't tell you because it could constitute prejudice, and we could deny someone a fair trial if we try to prosecute them. (Southworth, 1980)⁶⁰

While the dense web of regulation around official secrets provided a framework for secrecy, the government of the day also had the political will to enforce it. Robert Muldoon, New Zealand National Party Prime Minister at the time, was very well known as a charismatic leader who often had major disagreements with the public service (Gustafson, 2000).⁶¹ Muldoon promoted a series of policies whose objectives were to give the state a larger role in the economy: the 'Think Big' programme. Muldoon aggressively pushed forward these policies and made sure to release as little information as possible about the policymaking process. There is significant evidence of government refusals to requests from activists groups trying to obtain public information about Muldoon's government policies, with responses which ranged from lack of time to replies of 'not being prepared' to release internal reports (Salmon 1984). Information obtained by environmentalist groups via leaks was also a thorny issue. For instance, a circular from the government of the day in 1976 made this point:

I am quite confident that no committee member would make these documents available to pressure

⁶⁰Most of this anecdotal information is available on transcripts from a conference in 1980 when campaigners were pushing for the OIA. Another example was a standard question about new helicopters bought by the NZ Royal Air Force. The journalist asked 'How fast can an Iroquois helicopter go?' The reply never came and the journalist just went to a text book where the speed of the Iroquois helicopter was available. There are also reports about lack of information for trade union bargains, and key information delivered in boxes falling off trucks for the right people to pick up.

⁶¹In New Zealand, the constitutional convention of free and frank advice establishes that ministers should receive all the available information to make decisions, with the best advice from the public servants in an impartial and comprehensive way regardless of whether or not the advice accords with ministers' views. (Cabinet Manual, 2001).

groups, and that I regard the matter as one of simple theft. A theft is a criminal offence. I shall have no hesitation in recommending the application of the law should the identity of the thief be ascertained. (Director of Forestry 1976, quoted in Salmon, 1984)

Secrecy was established but, in 1962, New Zealand also became the first Westminster democracy to set up an Ombudsman. The New Zealand Ombudsman was the first set up outside Scandinavia and established itself as a reliable and legitimate figure where the ‘layman’ could seek remedy against unfairness caused by the public administration. The office of Ombudsman was conceived as an administrative arbiter and it was initially involved in matters of social policy and services (Lundvik, 1980). Although initially resisted by the civil service, by 1969 there was evidence of compliance with the Ombudsman resolution and respect for its impartiality (Weeks, 1969). As a result, New Zealand had one institution in place to counter the ‘unbridled power’ (Palmer, 1979) of the executive, where a ‘first-past-the-post’ (FPP) electoral system in place provided considerable room for the Prime Minister to manoeuvre. The Ombudsman was an important piece of New Zealand’s institutional landscape when the OIA arrived and a significant check-and-balance institution to protect individuals. There was a breeding ground developing for the discussion of RTI. Yet, as in other scenarios, events trigger reforms.

4.2.2 *A ‘fair go’ in New Zealand: RTI and the events that unchained change*⁶²

According to historical evidence, two events were important to advance the OIA: the environmental campaign against the ‘Think Big’ government programme and a set of activities by the NZ intelligence service over a prominent civil servant. In a Cold War context, a respected public servant, William Sutch, was arrested under the Official Secret Act under the charge of spying (Section 3) which included obtaining information that ‘may be of use directly or indirectly to an enemy’. According to Gustafson (2000):

The Attorney-General, Dr Martyn Finlay, reluctantly agreed to Sutch being prosecuted and a trial by jury was conducted in the Wellington Supreme Court 17–21 February 1975. Sutch was found not guilty and following his acquittal there was considerable public criticism of the SIS, which led to Rowling deciding to review the Official Secrets Act and also on 8 August 1975 to set up an inquiry into the SIS conducted by the Chief Ombudsman Sir Guy Powles. Powles submitted his report to Muldoon on 6 May 1976. It contained ten findings and 28 recommendations and led to the drafting later in the year of a Security

⁶²A ‘fair go’, in Australia and New Zealand, is a colloquial term meaning a reasonable opportunity to do something.

Intelligence Amendment Bill and in 1978 the establishment of a committee chaired by Sir Alan Danks to consider freedom of information.

Sutch was acquitted but his health suffered and he died soon after.⁶³

Another set of events was related to environmental issues. The Think Big programme was an aggressive state-led industrial programme which promoted a series of environmentally controversial projects such as dams, methanol plants, petrol plants, and electrification and aluminium smelters. There is compelling evidence that environmental information about aluminium smelters and other projects was systematically denied by the government (VUW, 1980). New Zealand cabinet notes from 1978 dealing with fairly basic evidence were deemed confidential (NZ Cabinet, 1978, 1980). The Commission for Environment, whose role at the time was to monitor some of the high-profile projects, noted problems with secrecy of several processes, which resulted in unclear guidance even in the government's own activities:

I have expressed to you and the previous Ministers my reservations about cabinet minutes as a record of the main decisions taken by government. It does not record the Hon. Venn Young's argument in favour of including social impacts in the broadest sense, or the support he obtained from his colleagues. (NZ Cabinet, 1978)

In other words, excessive secrecy was not only undemocratic, but also inefficient for the government itself (Palmer, 1987). Even the Auckland District Law Society recommended a non-partisan revision of the handling of public information legislation. Atkins (1999) notes that a small but well-organised environmentalist group was essential in adding pressure to approve the Official Information Act. Other stakeholders included one member of the opposition who also put forward an access-to-information bill with no success (Taggart, 1985).

In short, there were two events that can be identified as triggers for the OIA reform: resistance to the Official Secrets Act and pressure from public opinion on environmental issues. The events unfolded in an existing climate of tension about government secrecy.⁶⁴

⁶³Controversy about Sutch's espionage activities remain, although new information available seems to confirm he was not a spy. (New Zealand Herald, 2008).

⁶⁴Former State Service Commissioner Peter Boag argues that in 1964 there was already regulation about progressively releasing information although it seems not to have had much impact on the discussion (Boag, 1984).

4.2.3 *The policy mix: civil society and unexpected policy entrepreneurs*

Key policy entrepreneurs were initially the Ombudsman and a small group of environmentalist campaigners who helped to trigger the reform.

In 1978, the government set up a Committee on Official Information (also known as the Danks Committee)⁶⁵ whose main aim was *'to contribute to the larger aim of freedom of information by considering the extent to which official information can be made readily available and in particular to examine the purpose and application of the Official Secrets Act, 1951'*.

Almost immediately, a Coalition for Open Government assembled by civil society and championed by former ombudsman Sir Guy Powles entered onto the scene.⁶⁶ Most of the ideas in the policy stream were discussed through submissions to the Danks Committee.

The Committee published two reports in 1980 and 1981 which reflects how the policy stream fluctuated in those days. There are three key elements to consider in this 'primeval soup' as relevant to the subsequent development of the New Zealand RTI arena: a 'close knit' policy community, a full awareness of other experiences around the world at the time, and, paradoxically, the extensive participation of the public service in the process.

New Zealand is a close-knit community of policymakers due to the size and resources the government possesses.⁶⁷ As a result, New Zealand policymakers work very closely with each other and are used to working with familiar concepts and procedures, thus helping streamline the policy process. At the time this law was adopted, the New Zealand bureaucracy had not been affected by the radical New Public Management reform, which would foster more diversity in administrative forms in the public sector (Boston et al. 1996). Therefore, there was a shared knowledge about procedures, principles and goals for the public service. Thus, debates about administrative procedures, principles and related issues were framed by a shared understanding in the public sector.

Policymakers in New Zealand had full access to most of the available international experience, which gave them a unique vantage point when designing the system. In a civil society newsletter

⁶⁵Sir Alan Danks, an academic from Canterbury University, was the president of the committee and he and Judge Kenneth Keith from Victoria University of Wellington were the only non-public servant members. The rest of the Committee was formed by public servants from the State Services Commission, the Prime Minister's Department and the Departments of Justice, Foreign Affairs and Defence. (Taggart, 1985)

⁶⁶The campaign was organised with very few resources by a small group of highly motivated citizens in New Zealand. Being championed by Sir Guy Powles meant the campaign had a 'heavyweight' on their side, but a very limited budget. (COG, 1980, VUW, 1980, No Right Turn, 2007)

⁶⁷At the time of the OIA reform, the NZ public service did not suffer from the fragmentation that the New Public Management reforms would be responsible for years later (Gregory, 2003).

(COG, 1980), there are full descriptions of reform processes in Australia, the U.S.A., Canada, the Nordic countries, France, the Netherlands and Austria (Powles and Longworth, 1980). The Danks committee also provided an extensive review of international experience in relevant cases:⁶⁸

We have followed closely the debate in Britain, Canada, and Australia, since their experience of information problems arises in settings similar to our own. We have also studied the systems adopted in the United States and Sweden. Our aim has been, however, to find solutions relevant to New Zealand needs and circumstances. In seeking the way which might serve best to promote the aim of freer information flows in this country, we have relied heavily on local sources. (p. 6)

The Committee then engaged in a thorough analysis of New Zealand official secrets and related regulations, which resulted in a major principle shift: openness was the default mode for public information, not secrecy. In the words of the Danks Committee:

We therefore consider that the system based on the Official Secrets Act should be replaced by a new set of arrangements. The Government should, in our view, reaffirm its responsibility to keep the public informed of its activities and to make official information available unless there is good reason to withhold it. Grounds for withholding information from the public should be set out clearly, along with the basic principle. (COG, 1980 p. 4)

Besides the international experience on legal and policy analysis, there was also a more local political reading about the meaning of the Act. In the words of the Danks Committee:

Access to official information is part of a wider general issue. It involves the whole interrelationship of government and the community, and the mutual advantage in communication and co-operation. The increasing complexity of official interventions undoubtedly contributes to community attitudes, and to the generalised concerns about ability to influence government action, that has, in turn, spurred debate on open government. (COG, 1980, p. 19)

The New Zealand civil service took a leading role in the debates about the Act. As noted by Gregory (1984):

There are probably some who will argue that having the Act drafted by a committee composed mainly of top public servants was akin to the idea that the Society for the Promotion of Community Standards⁶⁹ should draft indecency laws.

⁶⁸At the same time, Australia discussed a bill about access to official information at a federal level. The bill ended up being less systematic and more problematic in terms of implementation than the New Zealand one (Snell, 2000).

⁶⁹The Society is still a fairly conservative organisation supporting certain limits to freedom of expression and the promotion of certain moral values often associated with Christianity.

Although there were several voices criticising the heavy participation of public servants in the Committee⁷⁰ (Taggart, 1985), this worked to the advantage of policy design. Most of the public servants involved in this particular group knew the ropes an access-to-information policy would pull inside the machinery of government. One of the members of this committee, Kenneth Keith, described this group as mostly a '*very progressive and forward-thinking group of civil servants*' (Keith, 2012). While they were representatives of the civil service, they also had in mind broader challenges for the machinery of government as a whole. Thus, the OIA was seen in a different light, as a tool to enhance participation and collaboration with the public. They were also a group of traditional and highly respected civil servants who probably reflected the view of their colleagues and found it increasingly difficult to live under the Official Secrets Act. This group was largely responsible for the design and analysis that would lead to the current state of affairs in the New Zealand RTI arena.

The Committee received 130 submissions from people and organisations. Eighty of them were interviewed, which reflected a wide concern for the topic. Among them, government departments had the opportunity to submit papers which, of course, made the Danks Committee's task more complex (Keith, 1984). There were also opponents of this law across the civil service and the political spectrum. Notably, some large agencies were fiercely opposed to releasing information, and most of the public service considered this law a threat to the provision of free and frank advice to the government. As noted by the Ombudsman at the time:

No one who has been involved in the development of the new legislation can fail to have been impressed and not a little dismayed by the guarded and in some instances entirely negative reaction of many public officials to the notion that official information of any kind should be made more accessible to the public. The same attitudes were common when the Ombudsman Act passed. (Laking, 1983)

In this way, RTI was not an agreed concept among civil servants, but one that was very much discussed. At some point during the policymaking process, a group of high-ranking civil servants became convinced of the need for such a law, and went ahead with the plan even in opposition to some of their colleagues' instincts. This pivotal shift made possible not only the advancement of the bill but crucially facilitated early implementation and promoted a certain degree of ownership in the civil service, as this study will show.

The Committee made a set of recommendations that decisively shaped the initial OIA and the way the current New Zealand RTI arena works:

⁷⁰In the words of one of the members, a 'secret committee of bureaucrats meeting in secret', (Keith, 1984)

- An evolutionary outlook towards the implementation of the policy: information would be available progressively. This would ensure a gradual and initially consistent implementation of the policy.
- A clear and broad definition about what constitutes public information. This would ensure that practically no information is out of reach in this arena.
- A balanced approach to privacy and official information that would ensure appropriate consideration for privacy and eventually would be outdated by the Privacy Act.
- A set of generally liberal guiding principles to release, classify and retain public information. This would ensure an easy request regime, with relatively little difficulty for requesters.
- A large list of authorities who would be subject to the law, including state-owned enterprises (SOEs). This would ensure exceptions were difficult to justify later.
- The decision to set up an implementation body (the information authority) and an independent control body (the Ombudsman) to resolve potential conflicts between the administration and citizens. The existence of ownership in the civil service and a neutral information enforcement institution would be essential to sustain the system.
- The decision to not involve the Courts in conflict resolution about official information requests. This would ensure a non-legalistic approach to access to information.
- The decision to keep public servants in charge of making the decision of releasing public information or not, which would keep them as stewards of the system and provide them with partial ownership of the decisions.
- The decision to keep the ministers 'in control' through leaving the final call to release information to the executive if challenged by the Ombudsman. This would placate politicians' initial fears about the access-to-information regime, as well as being aligned with New Zealand's constitutional framework at the time.

The Committee proposed that the Ombudsman should be in charge of handling complaints about the Official Information Act, but it also noted that such an approach would lead to certain inconsistencies in terms of the release of public information, due to the fact that decisions made by

the Ombudsman were on a case-by-case basis.⁷¹ The Committee sought to take advantage of the fact that the Ombudsman was already an established institution, dealing with the public service, and that its 'raison d'être' was aligned with that of the OIA. Both institutions were designed to deal with the same issue:

New Zealand is a small country. The Government has a pervasive involvement in our everyday national life. This involvement is not only felt, but is also sought, by New Zealanders, who have tended to view successive governments as their agents, and have expected them to act as such. The Government is a principal agency in deploying the resources required to undertake many large-scale projects, and there is considerable pressure for it to sustain its role as a major developer, particularly as an alternative to overseas ownership and control... Our social support systems also rely heavily on central government. History and circumstances give New Zealanders special reason for wanting to know what their government is doing and why. (COG, 1981 p. 19)

The Ombudsman, designed as an independent parliamentary officer, was then the natural arbiter for any dispute. It was a legitimate actor, created due to the same motivations and respected by public servants and the public. Crucially, in the New Zealand system the Ombudsman has the power to investigate all documents from public bodies, acting as an intermediary between the administration and the citizen. In this way, the new Official Information Act's handling of complaint procedures was built into an already established routine between the Ombudsman and the administration (Shelton, 1982). In the words of the Danks Committee:

The Ombudsman already can and does handle cases in the information field in accordance with their well established procedures with the mana⁷² the office has acquired over two decades. (COG, 1981 p. 16)

As Shelton (1982) notes, the Ombudsman would disseminate public information through special reports, reports to the Parliament and individual complaints. In the words of the then Ombudsman himself, George Laking:

I can only see my function in this area as having been materially enlarged. (Laking, 1983)

⁷¹The Committee also advised the setting up of an independent body whose main function would be key to increase public information progressively, issuing advice on what should be deemed public, what should be withheld, and issuing advice on grey areas. The Committee went to great lengths to justify its existence, and in modern terms this would be a unit in charge of ensuring proactive transparency. Furthermore, the Committee argued that such a body would ensure a certain degree of consistency across the public sector (COG, 1981 p. 16). This body was not finally set up in the way the Danks Committee envisaged it (White, 2007 p. 28), and, as a result, all decisions about when and how to release public information in the New Zealand system continue to be on a case-by-case basis.

⁷²Mana is a Maori term referring to power or prestige in a community

4.2.4 *An absent political will*

Eventually, the law was passed on December 17th 1982 after a brief discussion of less than 12 days. The politics of the day made it very difficult for Muldoon or the opposition to ignore the recommendations of the Danks Committee. In the New Zealand governance system, recommendations from a Committee are typically accepted by the government of the day. Yet politicians managed to modify some aspects of the original proposal, most notably the recommendation about the existence of an information authority, establishing a ‘sunset clause’ for such an authority, which was tasked with the mission of promoting and standardising OIA requests procedures across the public sector.

Muldoon did not seem to be particularly concerned about this piece of legislation. To some degree, the law was just seen as a declaration of principles, a salvo more than ground-breaking regulation. The law passed with little significant discussion, although there is evidence that some MPs were keenly interested (Keith, 1984). Robert Muldoon called the OIA ‘*a nine day wonder*’ but it proved to be one of the most enduring pieces of legislation in the New Zealand constitutional system. The Hon. J. K. McLay mentioned that ‘*the bill represents one of the most significant constitutional innovations to be made since the establishment of the office of the Ombudsmen in the early 1960s*’ (Belgrave, 1997).

4.3 THE NEW ZEALAND RTI ARENA: 1982–1987

New Zealand moved to implement the act swiftly after its approval in 1982 and, in July 1983, it came into force. When the OIA effectively started to work, New Zealand was in transition from a conservative government led by Muldoon to a new Labour (left-wing) one⁷³. In this first stage, major changes in the state sector were still being discussed and, as a result, the New Zealand RTI arena operated under the same administrative structure that had existed under the previous government. This would change with the well-known New Public Management reform of the 1980s.

In this section, I provide an analysis of the original RTI arena up to 1987. First, I provide an analysis of New Zealand RTI law. Second, I describe the state and the role of the public service. Third, I provide a summary of feedback loops in the NZ RTI arena. This section shows how the interplay between core agencies, the government of the day, the Ombudsman and the courts was crucial and shaped some of the key characteristics of both the current and the early New Zealand RTI arena.

⁷³Robert Muldoon called a snap election and lost it, creating a subsequent constitutional crisis by not following instructions from the elected government during the transition (or caretaker) period.

4.3.1 *New Zealand RTI law*

Table 4.1 summarises the main characteristics of New Zealand OIA law.

Table 4.1: NZ Official Information Act	
Presumptive right to information held by public authorities.	Information about procedures, decisions and support documents should be public. Information is understood in a broad sense (i.e. not just documents or materials produced by the state; can include oral histories, section 2).
Proactive publication	The principle of availability establishes the principle that the information shall be made available unless there is good reason for withholding it. There is no set of common categories and formats for publishing information (Section 4) .
Request mechanism	No special procedure. Requester has to be a NZ national or a resident of New Zealand. There is a time limit of twenty working days that can be extended (Section 12) .
Exceptions and Limits	There are conclusive and special reasons to limit the information release (Section 6 and Section 7). Among these reasons are: security; defence; international relationships; prejudice to the maintenance of the law (including the prevention, investigation, and detection of offences); personal safety; stability, control, and adjustment of prices of goods and services, rents, and other costs, and rates of wages, salaries, and other incomes; international public debt; special provisions around commercial interests of state-owned enterprises, special provisions concerning privacy; third-party interests; protection of the free and frank advice convention; protection of communications; and information about negotiations (including commercial and industrial negotiations).
Duty to assist	Part 2 Section 13 establishes a duty to assist requesters.
Fees	Part 2 Section 14 In principle, there is no charge for getting documents. If charges are applicable, they should be proportional.
Conflict resolution System	The law establishes the Ombudsman as the conflict resolution institution.

New Zealand RTI law is a very detailed law in terms of procedures and exceptions. This was the result of the involvement of the civil service and the availability of legal advice on the matter. As noted, the process of designing this law was viewed by many participants with suspicion due to the significant involvement of the civil service. However, such involvement did not influence the law in a negative way.

4.3.2 *The state*

As noted in Chapter 2, the state is the largest information holder in any given society. In comparative terms, New Zealand has always had a large state sector. According to Polascheck (1949) and later Schick (1996), the New Zealand state always had a small number of large departments (Schick, 1996, p. 28). The period until 1984 can be seen as governance by hierarchies (Gill, 2012) where the state played a larger role in the economy, providing services through trading departments and local governments. It was a highly centralised system, where central government was a major player and employer. A Royal Commission in 1962 established several inefficiencies of the system; the fact that there was a meritocratic system in place helped to standardise certain practices across the state, including storing and archiving information. In short, New Zealand bureaucracy was a sound and traditional Weberian system. In total, 174 organisations were subject to the Official Information Act (Information Authority, 1987).

In this context, the core agencies are the ones that collect information from other agencies, which mean they are able to convey information about the arena and the state itself. In New Zealand, these nodes identified are: the Information Authority, the State Services Commission, the Treasury and Archives New Zealand

The Information Authority was created to define and review categories of official information with a view to enlarging the categories of official information to which access is given as a matter of right (OIA, 1982, Section 38, expired). However, it was not the authority as originally envisaged by the Danks Committee but a transitional implementation agency (White, 2007 p. 33). As a result, the Information Authority was in charge of making public information progressively available to the public, a term known in modern freedom-of-information language as proactive disclosure. The Information Authority played a key role in leading policy implementation, providing evaluation of the policy and also providing key statistics about the evolution of the Official Information Act. The Unit also dealt with the review guidelines for personal records (Boag, 1984).⁷⁴

The Authority operated as a centre where public servants could get advice, as well as providing in-depth analysis of issues that recent OIA legislation affected, such as privacy and archives (Information Authority, 1985, 1986, 1987). The Authority performed a key role streamlining previous secrecy provisions (more than 220) and recommending the repeal of several acts, helping the system to be

⁷⁴The Unit also had an advisory board convened by the State Services Commission which involved the Permanent Heads of the Ministries of Defence, Justice, Social Welfare and Trade and Industry, the Post Office, the Prime Minister's Office, and the Treasury (Boag, 1983).

more consistent. This coordination role was particularly difficult. The Authority itself noted:

The general force of the exercises which have been undertaken is to consolidate and widen the coverage of the OIA as the centrepiece in the handling of official information formulating conditions and clarifying processes in pursuit of the general ideal of open government. Public agencies could not be rushed into compliance with suggested changes and painstaking consultations have sought to establish agreement and promote confidence. (Information Authority, 1985).

The authority was disbanded in 1987 as an independent institution, although some of the personnel and functions were transferred to the Ministry of Justice (Snell, 2000). The disbandment had major effects in New Zealand as no central records of FOI requests were kept (Clemens, 2001, Hazell, 1989). For instance, in 2001 a local researcher found that core agencies were responding to requests but there was an absence of guidance and information policies; this was directly linked to the disappearance of the Authority. In the words of the Ombudsman's Office,

Its role in monitoring the success of the legislation in practice has been vital and will be sorely missed in future. If there is one lesson from the Authority's existence, it is that the process of open government cannot succeed on an on-going basis without some form of continuing official oversight at a policy level. It is not appropriate for the Ombudsmen to have that role; we would accordingly express the hope that the Authority's monitoring functions will be assumed by some other body. (1988 p. 29)

The lack of an authority also shaped the New Zealand system in the way OIA requests are dealt with at an administrative level, using the broad categories foreseen in the law, but on a case-by-case basis. The disbandment also resulted in lack of training for public servants, possibly resulting in inconsistency of procedures across New Zealand public administration.⁷⁵

The State Services Commission performed the key task of briefing public servants about the extent of the act and how to proceed when releasing information. Wiles (1984) noted that the Services Commission dealt with thorny issues for the New Zealand public service, such as the constitutional convention of free and frank advice, the time frames to process OIA requests and the issue of record keeping. Since the State Services Commission was the most relevant civil service institution at the time, the issue of the convention of free and frank advice became dominant. In the context of the New Zealand government, free and frank advice is built in a tradition of a politically neutral civil service, which means that advice must be honest, impartial and comprehensive to maintain the confidence

⁷⁵As White (2007) points out, this could also have been the consequence of the change in the role of the State Services Commission who went through the New Public Management reforms. As a result, the SSC was in charge of hiring chief executives and evaluating them, but had no obligation to train public servants in several areas.

of present and future ministers. (Cabinet Manual, 2001). During the early implementation of the act, permanent heads of department reported issues with releasing policy written by public servants (Galvin, 1983, Clark, 1983) that would dominate debates around the OIA among public servants.

Although there is evidence that archivists played a role in pushing for the OIA (Lambeth, 1983), Archives New Zealand was not an initial big player in this RTI arena (White, 2007). In addition, by several public servants' accounts, archives in the public sector were a potential weakness for full implementation of the law:

I suspect that we all have an uneasy consciences in respect of our record systems. They have never been the pride and joy of our respective administrations. If these systems are inadequate for our present needs, their inadequacy to meet the anticipated pressures of the era of open government will become dramatically apparent. (Deputy Chairman SSC, 1983)

Some departmental libraries initially took on the role of receiving requests, while other sections, traditionally linked to library services such as record management, took a more active role. Librarians were acutely aware of two of the most significant challenges to the OIA: the Copyright Act, and the Government Printing Office, who had serious delays in publishing material. Librarians also promoted the idea of a disclosure log, which would record all the disclosures and could be published once a year, but the idea never gained currency (Lambeth, 1983).

The Treasury was initially hesitant to release public information, most notably around commercial interests and economic forecasts, which at the time were deemed secret. The Treasury saw an opportunity in the law to start publishing material that was actually useful for economic decision-makers. As a result, the Treasury started to proactively release more information. The OIA law proved a useful tool (at least rhetorically) when the Treasury put forward the set of NPM reforms (The Treasury, 1987), where transparency played a key role. As noted by Mulgan (2004):

Some departments have taken advantage of this new freedom by publishing their own recommendations. This is most notably the case of the Treasury. It has been long-standing practice immediately after an election for departments to present incoming ministers with briefing papers, setting out the functions of the department and the main policy issues... The Treasury, after the elections in 1984, 1987 and 1990, took this process a stage further by publishing their briefing papers in the form of book-length policy manifestos in a clear attempt to influence the government. (Mulgan, 2004 p. 67)

Most commentators on the Act acknowledged that if the Act were to work well, it depended on the administrative discretion of public servants (Boag, 1983), and it was not meant to be 'a charter for

whistle blowers’. In other words, information should reach the public through official channels.

One of the most pressing anxieties for public servants in the early OIA days was the possibility of a stampede of requests. This did not materialise. Table 4.2 shows data from the Information Authority from 1983 to 1987:

Table 4.2: OIA Requests in the NZ RTI arena

Year/Requests	1983–84	1984–85	1985–86	1986–1987
OIA requests	1152	730	721	707
OIA denied requests	714	373	281	219
OIA partially released	386	302	383	336
OIA conditionally released	52	55	57	152 ⁷⁶

Source: [Author’s analysis based on NZ Information Authority 1982–1987.]

Table 4.3: Denial Rate in the New Zealand RTI Arena

Year	Denial Rate
1983–1984	62%
1984–1985	39%
1985–1986	51%
1986–1987	30%
Average 1983–1987	45.5%

Source: [Author’s calculation based NZ Information Authority 1982–1987.]

On average, in the period 1983–1987 the denial rate was 45.5%. The numbers show a decrease in demand as well as a decrease in denial rates by 1987 and are consistent with the qualitative evidence and reports from the Information Authority that suggest initial tensions around the law and, later, a partial adjustment on the part of the public sector. In any case, almost half of the requests were denied. Furthermore, almost all the requests approved were partially released, which suggests that not all the information requested was released.

⁷⁶Source: Information Authority (1987). Numbers exclude personal information requests under the same Act.

Table 4.4: Refusal Rates per Department in NZ RTI arena

Organisation	Requests	Refusals	Refusal Rates
Defence	136	11	8%
Commerce Commission	124	2	2%
Customs	71	7	10%
Inland Revenue	12	10	83%
Labour	26	19	73%
Social Welfare	19	2	10%
Transport	33	14	42%
Total	466	89	20%

Source: [Author's calculation based on NZ Information Authority 1987.]

Table 4.4 provides a description of the number of requests departments were receiving in 1986–1987 and the replies they provided.⁷⁷

The numbers support evidence that, after an initial upsurge of OIA requests, departments started to manage the process and provide more information to the public, if partially modified. Evidence suggests that the main departments were below the average in terms of request denials.⁷⁸ The Unit's statistics show that up to 30% of the decisions to withhold information were challenged in the Ombudsman's office. It also showed that calls for release of information dropped from 64 in 1985 to 15 in 1986 to 12 in 1987. In its final report, the Authority noted that public servants' original fears had not materialised and that there was evidence of a shift towards a more open regime.

There is evidence that New Zealand public servants struggled initially to adjust to the Act. A strategy was devised to channel requests appropriately involving senior civil servants, particularly when denial of requests was involved (Boag, 1983). There were initial worries about the time-consuming process to reply to access requests, lack of guidance on how to proceed with replies, and anxiety about the release of policy advice to ministers. In addition, the Ombudsman reported a tendency to think that something should not be released and then find an excuse in the Act (Laking, 1984).

The sole responsibility to release public information was in the charge of the public service, through

⁷⁷There are limitations and errors in the data provided by the Information Authority (1987) in the final numbers (p. 12), hence there can be discrepancies in the same report, particularly regarding the refusal rates.

⁷⁸However, due to the notation procedures, these numbers should be considered with caution.

the Department's Permanent Secretary. This is to say that public servants, not politicians, were entrusted with the responsibility of making information available. However, this posed a set of challenges for the public service, as information released could also damage the confidence of the minister, which in turn could affect the convention of free and frank advice and impartiality of the civil service. For instance, if policy briefs emerged showing discrepancies between a minister's actions and advice from public servants, then an embarrassing situation could arise. The Information Authority reported in 1986 that initial fears were settling and that such a situation did not happen. However, public servants were forced to make decisions that could upset their political masters, who might see them as disloyal. As a result, some public servants deemed it appropriate to consult with their ministers whether to release information, a practice that, while it made sense, was not completely agreed upon, as the minister could have '*two bites of the cherry*'.⁷⁹ Thus, there could be consultations with the ministers in order to check whether to release the information, although the responsibility remained with the public servant. Section 14 of the act also allowed for the request to be transferred directly to a minister's office.

Another common situation was to transfer a request to other departments. Information is or could be available but, if it was the responsibility of another department, consultation could be a lengthy process which would consume time, and usually led to the interaction of several offices looking for the information involved. In fact, the Ombudsman has criticised agencies approaching the transfer process based on who had requested information. Two agencies would consult the minister on every report coming from the media or a political opposition party (White, 2007 p. 59)

An unusual response from the civil service would be to charge for the information, if retrieving it seemed too expensive or costly. While this could be part of a delaying strategy, charging for information would also be a response to '*fishing expeditions*', large requests with no clear indication of what information was sought. Delaying strategies such as requiring clarification, transfer of the requests to third parties that could be affected, or requesting formalities from the requesters were used in the system, most of them using the set of exceptions provided in the Act.

The ultimate change of attitude is not writing down anything that could be released. As mentioned by Keith (1984), during the consultation period and in the aftermath of the approval, several public

⁷⁹The expression refers to the fact that ministers would have the opportunity to express their opinion twice: when consulted and then potentially vetoing the release of information. Thus, public servants who had ordered the release of public information would find themselves in a very awkward position after a ministerial veto. This concern became less relevant when the veto mechanism changed and the Cabinet had to issue an order in council (White, 2007 p. 40).

servants would suggest that some things might not be written down. This is consistent with research that shows a trend towards advice being tendered to ministers in a more informal way (Poot 1997, Shanks, 2002).⁸⁰ As noted by Voyce (1996):

Ministers do not want to be haunted by a paper trail which could demonstrate that they have made decisions contrary to the advice proffered by officials.

4.3.3 Demanding information

Table 4.5 shows a partial understanding of who the requesters were in the early days. Note that these requesters were the ones that managed to reach the Ombudsman, which supposes a degree of commitment to get the information:

Table 4.5: Requests per user in the NZ RTI Arena

User/year		1983/1984	1984/1985	1985/1986	1986/1987	1987/1988
Media		34	21	29	18	N/A
MPs		11	9	3	1	59
Special Interest Groups		33	24	27	25	22
Individuals		241	195	166	177	N/A
Private Sector		49	50	33	30	N/A
Not classified ⁸¹		67	N/A	N/A	67	N/A

Source: [Author's analysis based on Ombudsman's Office 1982–1987.]

As noted in Chapter 2, there are four types of requesters: expert and willing users (*'elite task forces'*), expert and infrequent users (*'snipers'*), users with low expertise and frequent use (*'firing salvos'*) and users with low expertise and infrequent users (*'innocent requesters'*). As in other RTI arenas, journalists, researchers, MPs and civil society are among the heavy users of this regulation.

⁸⁰This trend was predicted by the Danks Committee: 'The requirements of openness could be evaded, for example, by preparing and giving advice orally, or by maintaining parallel private filing systems, the record of how decisions are arrived at would be incomplete and inaccessible...' (p. 7).

⁸¹This category is not specified in the Ombudsman's report. Only the previous categories are specified. The researcher assumes that a set of requests was not classified.

Journalists were in 1982 among the first users of the OIA, although journalists perceived the law as not fully effective. As noted also, in other RTI arenas, information is a perishable commodity and as such, the more it is delayed the less interesting it is for journalists. In the New Zealand case, the OIA came as a dramatic change for journalists, as what once was secret was now very much public. In the words of a prominent journalist of the time, '*Our top news stories, the pieces of official paper found on the rubbish, the governmental briefcase left in a taxi, are all going down in flames, because it's now all part of the service under the OIA*' (Priestly, 1984). The quote shows how journalist feared that OIA might reduce their privileged access to sources or leaks that they managed to get from the public service.

By its own account, the New Zealand media at the time was diverse but lacking in a significant investigative journalist tradition that could take advantage of the new OIA. Journalists stressed that '*they were not the enemy*', as usually they would work for the public interest, while other users of the OIA, such as corporations and specially trained lawyers, would use it for profitmaking purposes. Some journalists were initially dismissive of the act, describing it as '*a political huckster trick, the same rotten deal as the Official Secrets Act, in a bigger, brighter and more publicly acceptable package*' (Berryman n.d., quoted by Atkins, 1997). An early study organised by journalists in 1982 showed a variety of responses from public organisations in New Zealand to OIA queries. Some queries were replied to in eight days, which in comparative terms was a good standard at the time and still is today, but journalists were initially not satisfied.⁸² Requests ranged from figures for public salaries to appointment procedures. Priestley (1984) reports an episode where government officials (not identified as such) tried to find out the identity and details of the requesters by visiting the house of one requester.⁸³ Journalists kept using the law and, crucially, once information was obtained through OIA, this was properly acknowledged in the papers, a practice that continues until today. The different range of interests and capacities in this group in New Zealand shows that, to some degree, journalists were frequent users of the law, but not always very effective ones.

Civil society organisations gathered in the Coalition for Open Government remained influential users of the Act after the law passed. Environmentalist groups were one of the most active. The use of the law was not merely to gather public information, but, as stated by one member of the Native

⁸² According to Priestley (1984), the State Services Commission drew a time limit of seven days to reply to users but this timeframe seemed unrealistic at the time. This seems to be confirmed by Boag, 1983.

⁸³ The incident was related to an OIA request about an appointment to the Poultry Board, and apparently government officials were sent to find out who was requesting the information and why.

Forest Action Council:

'Our need of official information derives from our desire to participate in the striking of balances in policy formation. We are not interested in simply being informed of what decisions the government is making for us; rather, we are seeking to adjust the balance in those decisions by putting forward an alternative strategy' (Salmon, 1984) p. 92.

Salmon (1984) reports an improvement in the liberalisation of forest and other environmental information after the OIA came into force. As more information became available, members of civil society were also able to fine-tune questions and professionalise the way they requested information. Despite the aforementioned improvement, there is evidence that departments denied the existence of information when it actually existed and had previously been leaked to other requesters who were not aligned with the environmentalists' interests. Furthermore, the timing of responses was also unsatisfactory, as it did not allow enough room for analysis and participation in several cases. In these cases, the Forest Service would use the legal exception that the information sought 'will be shortly published'. Moreover, information that used to be published before the Act was then not made available, using the new Act exemption as an excuse.

4.3.4 *Snipers and innocent requesters*

Politicians were slow in terms of adopting the use of OIA but there is evidence of requests in the first year of the Act looking for information that could be used to embarrass the government (Knapp 1984). As noted by the MP Gary Knapp in 1984:

The Official Information Act has as much bite as a gummy sheep. So long as innumerable prohibitions against disclosure of information are retained in other pieces of legislation, I would go as far to assert, moreover, that this Act is of more relevance to ordinary citizens than to members of Parliament (Knapp, 1984).

Records in 1986 show that only one MP used the Act and complained to the Ombudsman (Ombudsman, 1987). According to the Ombudsman's report (1989), during the period 1988–89, opposition MPs' requests surged from 22 the previous year to 59. The Ombudsman noted that *'though the Opposition was slow to take advantage of the Act it now appears to be using it increasingly as a major means of obtaining hard information on which to base its critical role as her Majesty's loyal Opposition'* (Ombudsman's Office, 1989, p. 28). Parliamentarians were not among the people that were supposed to use the law, as the lack of discussion in the Danks Committee shows (White, 2007

p. 32). The law eventually ended up being used by MPs and even altered some conventions in New Zealand government settings. For instance, there is evidence of the development of a constitutional convention where the leader of the opposition would be consulted on the release of documents from previous administrations (Schoff, 1993).

Individuals used the OIA law with different degrees of success. There is insufficient data to describe full use by individuals, but lawyers figured among them. Lawyers slowly took up the OIA and used it for several purposes, most notably to access evidence in the pre-discovery stage. As a result, they acted more like ‘snipers’ as they had extensive knowledge of the law, and usually had an idea of the documents that they were looking for. Companies also became users of the law, but with a very narrow focus. They also became extensive users of the law due to the restrictive climate that operated in New Zealand’s business environment. Companies were often looking at public procurement processes or regulations that used to be secret.

4.3.5 *RTI Enforcement institution in the New Zealand RTI arena*

The Ombudsman plays a central and unique role in the New Zealand RTI arena. The key role of the Ombudsman is to protect the citizens from maladministration. The Ombudsman Act 1975 grants the Ombudsman powers to investigate and recommend changes where an unfair administrative procedure is found.⁸⁴ As noted in Chapter 2, enforcement institutions can be classified according to two criteria: autonomy and enforcement capacity.

Autonomy

Table 4.6 summarises the information about the autonomy dimension.

The Ombudsman is a parliamentary officer appointed by parliament for a period of five years and can be re-appointed for a second period. The Ombudsman is appointed by a Select Committee of the parliament where all parties should agree on the person to appoint. There is an extensive screening process where parties engage in several consultations chaired by the Speaker of the House. The consensual aspect of this process guarantees the Ombudsman independence and legitimacy. However, the process is not open to public scrutiny and civil society members do not have a say in terms of who they select as Ombudsman. Traditionally, the Ombudsman’s Office has at least two Ombudsmen,

⁸⁴I Ombudsman Act 1975.

Table 4.6: Autonomy

Dimension	Indicator
Screening and appointment process	Process regulated involving all parties in New Zealand The Parliament appoints the Officer
Stability	Appointment is regularly performed
Oversight	An Ombudsman decision could be vetoed by the Executive
Resources	The budget is allocated in consultation with the Ombudsman
Perception	No official survey available.

one of whom takes the leading role as Chief Ombudsman. Furthermore, this Committee also is in charge of setting the budget the Ombudsman's Office should have in consultation with that office.

Once elected, the Ombudsman has to report to Parliament every year, but is independent in terms of the function he/she performs. The Ombudsman is also independent of the Courts and his/her decisions are not subject to judicial review. Independence from other institutions was won through several challenges during the Ombudsman's history. In terms of the OIA, the government tried to diminish the Ombudsman's independence by challenging the Office's decision in court. The Danks Committee had not foreseen the involvement of the courts in access to information issues. This logic made sense in the context of the New Zealand governance system: the executive is accountable to the people, not to the courts. Unlike other settings, such as the United States of America, the courts in New Zealand cannot strike down legislation and are seldom involved in mediating constitutional disputes. In the case *Wyatt Co Ltd v Queensland Lakes District Council* [1991] 2 NZLR 180, Judge Jeffries observed that:

The allegations of errors, unreasonableness and failure to take into account relevant matters are attacks on the several judgments the Chief Ombudsman had to make in the functions ordained for him by the Act. That Act requires him to exercise his judgment using experience and accumulated knowledge which are his by virtue of the office he holds. Parliament delegated to the... Ombudsman tasks, which at times are complex and even agonising, with no expectation that the Courts would sit on his shoulder about those judgments which are essentially balancing exercises involving competing interests. The Courts will only intervene when the... Ombudsman is plainly and demonstrably wrong, and not because he preferred one

side against another. (Wyatt Co Ltd v Queenstown Lakes District Council.1991)⁸⁵

In this way, as predicted by the Danks Committee, the courts deferred to the Ombudsman, and to date no Ombudsman's decision has been challenged in court. The early decision of the Danks Committee plus the reassurance that the courts would not intervene gave the arena predictability and clearly established the conflict resolution system. The decisions operated as a reinforcement of the role of the Ombudsman's Office and its independence.

In the context of the OIA (1982), the Ombudsman could only be overruled by the ministerial veto. This could be exercised by the minister and had to be recorded in writing and sent to Parliament, as well as being properly justified (Williams, 1984). Thus, ministerial veto was to some degree limited but its existence made the ministers officially the ultimate information gatekeeper. In the first six months of the act, the Ombudsman received 188 requests for investigation under review and four of his recommendations were vetoed by ministers. Most of these requests were resolved informally by the Ombudsman (Watson, 1984).

The veto was then used by ministers in the early days of the OIA. In the period from 1982 to 1987, the Ombudsman issued 92 recommendations and the ministers exercised vetoes 14 times (Law Commission, 1997). According to Hazell (1989), eight vetoes occurred under Muldoon. Vetoed information also included the combined electoral roll (sought by a debt recovery company), an evaluation report on computers in schools (sought by the Post-Primary Teachers' Association), a proposal to set up an investment bank, the price of wall plugs purchased by the Post Office, and a geothermal report (sought by a mining company).

Vetoes were not initially linked to the political importance of the request. A good example comes from education policy documents on fairly simple cases that were not released by the relevant minister challenging the Ombudsman's authority (Kelly, 1984). Another example was the opposition by the Ministry of Labour to releasing estimates of unregistered unemployed. The exception of breaching 'constitutional conventions' was usually used for not releasing such information, with statements such as '*opinions of departmental officials on unregistered unemployment could well be at variance with those of the Government*' (Ministry of Labour, 1984). Some legal scholars suggested that this kind of veto could be challenged in court, but this did not materialise (Baragwanath, 1984).

⁸⁵ According to Chen (2010) this decision was later sustained in several court decisions and has been further considered in Rangitikei District Ratepayers Association Inc v Rangitikei District Council HC Wanganui CP12/00 28 September 2000, and was referred to in Sanford Ltd v Minister of Fisheries HC Wellington CP257/94, 31 October 1994 and Television New Zealand v Ombudsman [1992] 1 NZLR 106 (HC).

A decision to veto an ombudsman's recommendation was not taken lightly but, in the words of former Prime Minister Muldoon, politicians were willing to use them:

While on this occasion I am prepared to agree with the decision of the Ombudsman being carried out, it nevertheless, as the reserve bank directors pointed out, breaches the principle of confidentiality of it, and whereas as leader of the government, which introduced and passed the OIA, I would be reluctant to override the decision of the Ombudsman, I consider as a general rule that departmental advice is more important than the curiosity of the journalists and on a future occasion my decision is likely to be different. (Muldoon, 1986)

Enforcement capacity

Table 5.7 shows the enforcement capacity of the New Zealand Ombudsman's Office.

Table 4.7: Enforcement Capacity

Dimension	Indicator
Extent of the legal mandate in terms of review processes	full access to documents.
Extent of the legal mandate in terms of enforcement practices	Non-binding initially but enforceable.
Extent of the legal mandate in terms of imposing sanctions?	No sanctions
Resources (staff, budget, capacities) to carry out the assigned tasks	Lack of adequate staff (Ombudsman Reports 1982–1987)
Service delivery	Existence of minor backlogs.
Decisions or sanctions effectively applied?	14 vetoes out of 92 recommendations.

The Ombudsman had inquiry powers which, according to the Ombudsman Act, allowed this institution to access files and get information from other public offices. This was (and is) one of the cornerstones where the Ombudsman's power lies in the New Zealand RTI arena. The Ombudsman can issue non-binding recommendations that the government should follow. The Ombudsman cannot impose sanctions on the civil service; nevertheless, an Ombudsman's recommendation or a report to Parliament can be considered a sanction. Reports are not taken lightly by the Civil Service. Formally, twenty-one days after a recommendation is issued, it becomes public duty and is then enforceable by the Solicitor-General. The Ombudsman welcomed this new role, noting it was different but related

to its functions:

I am not, under the Official Information Act, deciding whether a departmental decision or action is unjust, unreasonable, discriminatory or wrong. I am called upon to decide, much as a court would do, whether the department or organisation has, first, interpreted correctly the provisions of the Act and, secondly, provided an adequate justification of its decision to withhold information. (Laking, 1984)

Inquiry powers were also part of a dispute with the government. In the *Ombudsman v the Police* (1988), the Judiciary stated that:

The provisions of the Ombudsman Act apply (S. 29 of the Official Information Act), and under SS. 18 and 19 they are given wide powers of inquiry and are not confined to the material put before them by those immediately involved. In the nature of things he who alleges that good reason exists for withholding information would be expected to bring forward material to support that proposition. But the review is to be conducted and the decision and recommendations made without any presumptions other than those specified in the Act.

At the time of the OIA approval, the Ombudsman was an effective institution, as around 2000 complaints would come to the Ombudsman for several reasons and most would be processed on time. Furthermore, the fact that the Government rarely challenged its (non-binding) advice was also a matter of great importance in terms of the Ombudsman's effectiveness (Laking, 1983). When the OIA was approved, the Ombudsman's Office coped with new activity which affected its capability. Table 4.8 provides a picture of the workload the Ombudsman faced in those early time:

Table 4.8: Ombudsman's Office Workload

Number of Requests received/ Years	1983/1984	1984/1985	1985/1986	1986/1987	1987/1988
	435	354	343*	318	482†

* This figure is an approximation taken from the Ombudsman's report produced in 1997. Initial reports ran from March to March, but eventually the series was discontinued and ran from June to June. The 1996 Ombudsman's report shows a graphic which does not specify the exact number for the period but would be a reasonable estimate.

† Data coming from Ombudsman's Report (1989). Increase due to Local Government Official Information Act.

Source: [Ombudsman's Office 1982–1987]

The Ombudsman statistics provide a clear picture of the issues in the New Zealand RTI arena in terms of resolving OIA requests:

As noted, the Ombudsman's Office dealt with more work and carried an annual backlog of

Table 4.9: Types of claim presented to the Ombudsman's Office

Review cause/year	1983/1984	1984/1985	1985/1986	1986/1987
Refusals	369	290	261	211
Corrections	11	6	3	N/A
Deletions	11	6	1	4
Charges	3	5	8	12
Transfers	1	0	5	5

Source: [Ombudsman's Office 1982–1987]

unresolved cases. In several reports, the office noted that an increased budget was needed to carry out the new functions.

Table 4.10: Classification of Outcomes

Outcomes/Year	1983/84	1984/1985	1985/86	1986/1987
Discontinued (or- ganisation resolved issue)	31	165	177	181
Sustained	25	64 ⁸⁶	15 ⁸⁷	12*
Not sustained	16	71	81	66
Declined	19	86	8	6
Not pur- sued/Discontinued	15	13	31	72
Under Investigation	193	136	142	80

* 34 recommendations made.

Source: [Ombudsman's Office 1982–1987]

The process to challenge an authority not complying with the OIA was fairly simple: the complainant would go to the Ombudsman and then the Ombudsman would notify the agency involved. The Ombudsman would then conduct an inquiry, requesting all the relevant documents and recommend disclosure of those that seemed relevant to the claimant. Recommendations from the Ombudsman are not mandatory, but are rarely ignored due to the moral weight they carry. Recommendations are supposed to be implemented after 21 days, as the government has a duty to observe

and implement them.⁸⁸

Numbers provided by the Official Information Authority showed that calls for release from the Ombudsman diminished from 64 in 1985, to 15 in 1986 and to 12 in 1987. Some of the Ombudsman's work was behind the scenes, dealing with public agencies before issuing formal recommendations, a practice that remains until today (White, 2007 p. 42). The interplay between the ministers and the Ombudsman was then an essential feature of the final stage of releasing public information. This tension between an Ombudsman with no formal powers and the political powers is indeed one of the fluid limits of New Zealand's transparency environment. The successive testing of this limits led to a series of reforms limiting the power of the politicians and ensuring the Ombudsman's independence, which in turn ensured more transparency and more sophistication in New Zealand's RTI arena

The leadership of the Office is also important in terms of how the enforcement works. This is obviously an attribute difficult to measure. The approach by the first Ombudsman in charge, Sir George Laking, was, according to colleagues, essential to combine the requirements of the OIA and the function of the Ombudsman (White, 2007; Belgrave, 1997). As a result, a personal factor in terms of the leadership of the Office can be considered important in the evolution of New Zealand's RTI arena. Each Ombudsman brought a set of skills and priorities that would shape the office's development.

The above description of this enforcement institution shows that it is an able and independent institution which fits into the category of 'Knight Templar' presented in Chapter 2.

4.4 THE EVOLUTION OF THE NEW ZEALAND RTI ARENA

New Zealand has now had 32 years of experience with RTI and provides evidence to strengthen the core argument of this thesis: that the influence of early decisions affects how a RTI arena evolves. As noted in Chapter 2, arenas experience feedback loops which reinforce (or potentially change) the way they work. In this section, I point to a set of significant feedback loops the New Zealand arena experienced affecting scope, processes and the role of information enforcement institutions.⁸⁹ It should be noted that from a macro perspective, the arena was affected by three major factors: the New Public Management reforms, the Electoral Reforms and the rise of technology. Even with the impact of these major factors, the arena evolved to strengthen the enforcement institution, include

⁸⁸This duty was potentially enforceable by the courts, though I have found no actual evidence of this.

⁸⁹Note that it is impossible to provide a full assessment of the New Zealand experience. For a full review, White (2007) and the Special Commission reports (1997, 2013) provide an in-depth view of the experience.

more organisations in the scope, refine and further refine the processing of RTI requests, and publish more information.

4.4.1 *Feedback loops*

The 1987 Reform

In 1987, New Zealand passed a significant reform of the OIA and passed the Local Government Official Information and Meetings Act (LGOIMA). The feedback loop was triggered by the need to review the OIA as originally agreed and planned by the Danks Committee. This opened a major opportunity for reform in terms of scope and procedures. The logic for this change was that the experience with the OIA had proven valuable at a national level but that local governments were not included. This, in effect, enhanced the principle that all information should be public in New Zealand.

In terms of the scope of the Act, after lengthy debates it was extended to include the SOEs and their subsidiaries. According to SOEs, the OIA caused severe inefficiencies and put them at a disadvantage with other possible commercial competitors. The general argument from an SOE perspective was that several report mechanisms already in place to the shareholders' assembly and ministers was enough in terms of accountability. Although SOEs acknowledged the importance of being 'open', they maintained that this did not mean they should be subject to the OIA (Allen, 1997, Bauman, 1997). However, in 1987, up to 70 modifications were made to the different acts to provide a coherent framework (Donnelly, 1997). Among other tools to avoid the OIA, SOEs would try to include commercial confidentiality clauses in contracts with providers, a practice that to the Courts seemed unacceptable.⁹⁰ SOEs remained subject to the Act and to the public interest test. Some SOEs competing in the market were in a better position to not disclose information, while others with regulatory and social functions were under more pressure to release information. (Donnelly, 1997). The Committee specially set up in 1990 to study the situation found that the benefits of having SOEs subject to the OIA outweighed the possible cost of administration (White, 2007 p. 34). SOEs are a source of conflict in several arenas, and New Zealand is not the exception. The battle about the scope of OIA continues until today where the Ombudsman has mentioned a strong tendency on the part of new SOEs and public sector bodies to escape from Ombudsman control (Ombudsman, 2012)

⁹⁰In the case *Wyatt Company (Ltd) v Queensland Lakes District Council*, Justice Jeffries stated, 'There cannot be allowed to develop in this country a kind of commercial Alsace beyond the reach of the statute'.

In terms of procedure, in 1987 a new regulation ensured that twenty working days was the time limit for answering OIA requests.⁹¹ Previously, the law had not established a time frame in the hope that Government units would self-regulate. Conflicts about delays prompted its inclusion.

In terms of implementation, the disbandment of the Information Authority in 1987 proved to be an important blow to the system, with two specific results: the lack of specific and standardized training for civil servants, as well as the loss of central guidance in terms of answering access-to-information requests. This would lead to a fragmentation of approaches towards OIA, a tendency that would be reinforced by the NPM logic which encouraged freedom to manage in each department. Special Commission reports in 1997 and 2012 mentioned the need for central coordination in terms of supervision and advice about OIA for civil servants.

In terms of the powers to withhold information, in 1987 the ministerial veto was replaced by a collective veto by Order in Council. The change made vetoing an Ombudsman's decision more difficult, as it required every minister in a cabinet to agree. In the context of the current electoral system, cabinet ministers could be from different parties, making vetoes extremely unlikely.

The 1993 Privacy Reform

Another major change was the approval of the Privacy Act, and the Privacy Commissioner, in charge of dealing with requests for personal information that were initially covered under the OIA Act, and were later covered by the Privacy Act. The reform effectively separated the streams of work related to public information and private information and set up a special agency to deal with private information, relieving the Ombudsman of this duty and setting up boundaries in terms of how the public sector operates with public and private information.

The public duty issue

In 1994, the Ombudsman encountered the first non-compliance case when a school principal refused to release documents demanded by school parents. The Ombudsman had ordered the release of this information and the school principal decided not to follow the Ombudsman's order, effectively challenging the obligation to fulfil a public duty. New Zealand does not have a solution for this (very rare) kind of behaviour and, at the time, the Ombudsman invited the Solicitor-General to effectively

⁹¹The Law Commission (1997) recommended reducing the time limit to fifteen days, although eventually this was not implemented.

enforce its decision. The point is not minor: New Zealand's Ombudsman's power is based in terms of legitimacy and persuasion and if agencies do not follow its recommendations, this is a major issue. Since then, the issue has resurfaced in discussions and a recent review of the law (NZLC, 2012) suggested establishing this duty clearly in legislation.

The Official Information Amendment Act 2003

In 2003, a set of reforms addressed the issue of large requests (or fishing expeditions) and lack of resources for agencies. In cases where public servants are required to collect substantial quantities of information, they are allowed to charge for information or to extend the time to answer the request. It also established a consultation procedure with the requesters.

The reform also expanded the proactive information duties of the Ministry of Justice, ordering the publication of more information on line, partially addressing technological change and the rise of the internet. Furthermore, the reform also included airport companies where the government had more than 50% of control, effectively adding more SOEs to the scope of the Act.

Finally, the reform formalised a previous practice by the Ombudsman of accepting verbal complaints and asserted their validity, but specified that they should be documented.

The Public Records Act: 2005

Technology also played a significant and radical change in terms of the OIA environment in New Zealand, particularly with the arrival of e-mail. The tendency to use e-mail means more information which needs to be collated demanding more work and resources. (Ombudsman's Report, 2003). As one requester noted, in 1982 there were clerical workers making sure that everything was in order. By 2002, with the major changes in public management and technology, it was becoming increasingly difficult to access records (Hager, 2002). Managers in several areas also expressed concerns that, with the introduction of the Public Records Act, there would be trouble such as '*Files are in disarray, there is stuff in electronic records, stuff in papers and the two don't match up sometimes*' (White, 2007 p. 121).

In 2005, New Zealand passed a major act on public records which effectively determined which records are to be kept and which records can be disposed of. Record-keeping became an important activity and the situation in 2005 showed that there were reasonable systems in place but the challenge of electronic information was not yet being handled appropriately. As White points out, Archives New Zealand is providing guidance on the underpinning information structure of the government

or, to put it simply, *‘it is not possible to release information that cannot be found or has not been kept’* (White, 2007 p. 49).

4.5 AOTEAROA: SUNSHINE AT ITS BEST, YET A LONG WHITE CLOUD

In terms of outputs, New Zealand corresponds to what I defined as a functional arena. Table 4.11 shows a synthesis according to the definition presented in Chapter 2

Table 4.11: outputs of NZ RTI arena

Availability of public information on a proactive basis	Progressively available in all organisations by 1987
Efficiency in dealing with RTI requests	Bureaucracy adjusted and by 1987 requests were handled within an average of 20 working days
Accessibility and effectiveness to resolve disputes	System in place was accessible and effective. Ombudsman’s Office does not charge for services and cases were resolved within reasonable time-frames (Ombudsman’s Office, 1987)

Source: [Author’s analysis based on Information Authority, 1987, Ombudsman’s Office, 1987]

New Zealand passed a significant reform that has endured more than 30 years. It went from being ‘a nine-day wonder’ to becoming a significant part of the New Zealand government system that endured two major changes, the NPM reforms and electoral changes. There are three factors that explain what led New Zealand to adopt such a reform: the policymaking process, the level of professionalization of the New Zealand bureaucracy and the previous institutions in place.

In terms of policymaking process, New Zealand developed a robust process in which there was a great detail of analysis of other experiences but which was largely focused on its own problems. The process then was largely endogenous and driven by local interests from civil society and, up to a point, from a group of public servants. The public service took part extensively in this process (and was heavily criticised for doing so) and some of its key leaders participated actively in the Danks Committee.

However, in a country with a strong tradition of Weberian bureaucracy, a fair question to ask is: why would a group of public servants want a RTI arena? Furthermore, once the law was approved and passed, why would the civil service comply reasonably well with such regulation? A partial answer to the pivotal role the civil service played in this regulation is the desire for change by a small minority

of leaders. The New Zealand Civil Service was deeply affected by secrecy regulations, but also showed signs of resistance once discussions about the OIA started. In other words, it was one thing was to get rid of the 1911 Official Secrets Information Act but a very different one to set openness by default. This shift was only envisioned by a few individuals working in civil society as well as on the Danks Committee. The ideas behind this group of people as well as the early defenders and members of the Ombudsman's office were a sign of New Zealanders' liberal outlook on rights and guarantees for individuals. This led to (at least partial) ownership by the public service, some politicians and sections of the civil society.⁹²

The level of participation led to the establishment of a policy community that played a significant role when feedback loops emerged. Subsequently, the New Zealand regime improved, extending its scope as well as limiting the power of the executive. The policy community remained influential in terms of generating ideas and through several reviews, seminars and policy forums. In this way, a tight community of practice was set up. The disbandment of the Information Authority meant that New Zealand lost an important reference for this policy community. Without an authority in charge of collecting information and reporting on the OIA, the arena lost an important function that would lead to implementation issues in the following years.

The second important factor that explains how this arena operates is the professionalism of the New Zealand bureaucracy. New Zealand had at the time a politically neutral civil service. The civil service got hit by implementation issues such as time-consuming requests, the need to manage media and ministerial relations, as well as the possibility of being exposed to the public. On the other hand, it also gained some control over the Act. The decision to release public information is still under the control of the Chief Executive, and not in the hands of the politicians. This factor cannot be emphasized strongly enough: the civil service operated as a counterbalance to political interests when making decisions about disclosing or not disclosing public information. Even after the NPM reforms, which were supposed to drive a more politically responsive service, public servants remained committed to follow procedures as a distinctive mark of their trade. An example of this is the account of a public servant, dealing with an Ombudsman investigation, telling the Ombudsman's office that she was unable to comply because the relevant papers were in the minister's office. The Ombudsman's

⁹²New Zealand in 1981 was in a complex situation where other forces were also showing discontent with the high level of regulation. A small group of people were already on the march to reform New Zealand economy and governance, something they would achieve a few years later (Reardon and Lay, 2007). Was the OIA a prelude of more substantial changes to come? This is not necessarily the case. Many of these individuals were not directly linked to the issue, but it was a sign that something had to change in the way government worked in New Zealand.

office directed the public servant to fetch them as it was the only lawful solution. She crossed the street, went to the minister's office, fetched them, and eventually released the information. The public servant in question is today the National Auditor (Donnelly, 2012). A law designed to expose the potential failings of the machinery of government needs the same machinery to actually perform effectively. As the civil service in New Zealand still constitutes quite a distinct group with a certain degree of autonomy, their participation in the design and implementation of the law was one of the defining reasons why it works somewhat better than in other settings.

The OIA Act was designed to expose the work of the machinery of government, which in turn meant the end of anonymity for public servants. To some degree, the decision to change the status quo came from the public service, as several of its members advocated directly or indirectly for the OIA, and took a dominant role in the design and implementation of the law. The words of Mark Prebble, former State Service Commissioner and an influential public servant in New Zealand are eloquent about the role of OIA: *'My view, formed of close experience with the Act is that the OIA remains effective and relevant...it has been the most significant and valuable reform that has affected the public service during my career'* (Prebble, 2007).

The third factor that explains the endurance of this Act are previous institutions in place: the Ombudsman. The existence of an Ombudsman since 1962 was essential in leading towards an effective implementation of the law. The logic behind the creation of an Ombudsman was very similar to the logic behind the OIA, as both instruments are, after all, horizontal accountability tools; they were a reaction against too much power placed in the executive. The fact that the Ombudsman managed to secure legitimacy and was already an established part of the New Zealand landscape was essential to embed OIA practices.

This is to say that before the OIA, the Ombudsman was already playing a significant role in NZ governance, already earning the trust of the public through appropriate interventions, as well as respect in the public service due to the appropriate and proportionate dealing with public affairs. Thus, the existence of an embedded institution willing to take up the responsibility and also with the resources and power to stand up to the political system largely determined the success of the policy. The three distinctive notes of the office that made it effective according to one of the Ombudsmen was flexibility, credibility and independence (Laking, 1983).

The flexible approach of the Ombudsman, while creating uncertainty about what were the exact rules of the game, also created room to manoeuvre for requesters and public servants. The Ombudsman

Office is more flexible than the Courts. In this way, the Ombudsman secured a niche among other horizontal accountability institutions, carefully avoiding turf wars.

There is also a matter of agency. Successive leaders of the Ombudsman's Office became really important in terms of 'disarming' initial fears from the bureaucracy as well as balancing competing interests. To some degree, New Zealand institutions are not overly dependent on the persons in charge of them, but in this case, who is in charge does matter. It is through the combination of these factors that one can understand the paradox of a 'toothless enforcement institution' whose recommendations are followed by most of the actors in this arena. Notwithstanding a few exceptions, most of the Ombudsman's recommendations are followed.

While originally ministers could veto the release of information, the evolution led towards the need of an Executive Order in Council to block the release of information. This kind of order has never been used, and under the current electoral system where coalitions are essential to maintain power, it is highly unlikely that it will happen. Politicians of all parties also have an incentive to keep the system working as they have access to a source of valuable information with which a government can be kept in check. Thus, while the OIA remains a constant hurdle for the political system, it has a reinforcing logic behind it, as the political system is also in need of a fair arbiter that is able to sort out differences in an acceptable and legitimate way. In this way, the role of the Ombudsman in New Zealand has evolved from an administrative arbiter to a political arbiter in certain situations, as the more politicians use the OIA, the more the Ombudsman is exposed to political conflicts, thus feeding this evolution. Where politics are involved in a request, a different set of rules applies: an impartial enforcement institution that secures fair play, which in this case is the Ombudsman. This shows how far the Ombudsman has come since 1962 in the New Zealand governmental environment. Initially conceived as an administrative tribunal, the Ombudsman was supposed to deal with maladministration practices, which were largely about implementation of public policies affecting the average New Zealander. It was almost a more flexible administrative tribunal (Lundvik, 1980). By 2012 and largely due to the regulation imposed by the OIA, the Ombudsman is now an agency which deals with complex policy issues, which shows an expansion and increased complexity of its traditional role.

Power struggles are an integral part of the New Zealand arena. Because of the way the reform emerged and the institutions in place, the battle is always at the margins, in sophisticated ways rather than in more radical approaches. The OIA is now a full, integral part of the New Zealand governance system. This is the result of a well-informed policymaking process, which ensured the involvement

of key actors. It is also the result of previous strong institutions being able to deal with enforcing RTI (the Ombudsman) and being able to process requests (the New Zealand bureaucracy). New Zealand's OIA has survived the test of time and is part of the constitutional landscape, but its use keep generating controversies in this polity.

ACCESS TO PUBLIC INFORMATION IN CHILE: A MIXED ARENA

Have you heard about it? What? It is the new access-to-information law. They can access everything we have. (Long silence) ...Oh Boy... (Overheard conversation in Santiago airport between two public servants)

'El puente vale callampa'
 'The bridge isn't worth a crap'
 'In the future, the armed forces will be reluctant to collaborate with civilian authorities when facing natural catastrophes, due to being forced to display their war material or military equipment' (Chilean Minister of Defence, using a colloquial Spanish expression to avoid releasing information about the cost of a bridge. He resigned over the incident.)

In 2012, an Argentinian student decided to ask the Chilean government who the lawyers representing Chile were and how much they were charging in fees for a trial before the International Court of Justice. The trial was to decide a long-contested territorial limit between Chile and Peru and was of obvious national importance. Amidst accusations of espionage and strong vocal opinions about letting an Argentinian ask for information in Chile, the government swiftly denied access to documents under the excuse of national security and international relations. The student challenged

this decision before the Council for Transparency, who eventually decided to order the release of the names of the litigating lawyers and details of their fees. The Council's decision was challenged in the courts and, while the Higher Tribunal acknowledged the Council's decision as correct, the Supreme Court decided in favour of the government, noting that only the President of the Republic was able to consider and order the release of this information (Supreme Court of Justice, 2013).

The above case shows the different dynamics the Chilean RTI arena can offer. Obtaining public information is not necessarily straightforward and can trigger several complex processes. In this chapter, I explore how the Chilean RTI arena emerged and its main characteristics. First, I focus on why Chilean authorities adopted a RTI law, noting it was a reaction to internal pressures, where exogenous factors had a significant effect in terms of policy design. Then I describe the main elements of the Chilean RTI arena: the RTI law, the state, the enforcement institutions and the requesters. I conclude by arguing that, while Chile has strong regulation and relatively independent enforcement institutions, RTI institutions are not still fully grounded.

5.1 CONTEXT: DEMOCRACY IN TRANSITION

Chile regained democracy in 1990 when Augusto Pinochet's infamous dictatorship finally ended. Pinochet left a democracy under tutelage (Gonzalez, 2008). Politicians were wary and cautious when dealing with the military. Chilean activists found support in the international community to make inroads into Chile's democratic, yet authoritarian regime.⁹³

Chilean civic liberties struggles offered an ideal battlefield for lawyers. As one participant recalls: *'There was a division: conservative lawyers vs. progressive lawyers, all were organised and from different universities, but the matter was always debated among lawyers'* (IECHI).

The courts provided a significant source of stability for the newly arrived Chilean democracy but were also a source of conservatism in terms of new rights. In other words:

The Chilean courts have long been highly professionalized and institutionalized. Yet they did little to

⁹³For instance, in 1988 Chilean dictatorial authorities outlawed the exhibition of the film *'The Last Temptation of Christ'*. The film was controversial due to several passages that were not in line with the gospels, depicting a more human Christ. In 1996, the film was finally allowed to be shown but a group of conservative lawyers successfully introduced an injunction to stop this. As a reaction, a group of progressive lawyers took the case to the Inter-American Court of Justice (IACJ) where, after a lengthy process, the Chilean government was ordered to remove censorship obstacles to the exhibition of films (Olmedo Bustos y Otros c/Chile). The government had to abide by the classical liberal mandate: freedom of expression without censorship. The IACJ intervention was not a coincidence as in 1990, with democracy regained, Chile had become a signatory of the Inter-American Covenant of Human Rights. The international regime proved influential in fostering civic liberties.

restrain the dictatorship of Augusto Pinochet. Nor did they play much of a role in democratization, with the exception of a single decision of the Constitutional Tribunal that decreed that Pinochet had to hold the election he ultimately lost. The Chilean judges had internalized an ideology of 'apoliticism' along with a hierarchical, self-reproducing institutional structure that rendered judges unequipped and disinclined to take stands in defence of liberal democratic principles before, during, or after the authoritarian interlude. (Ginsburg, 2012)

In this scenario of judicial conservatism and division among legal elites, a set of events triggered a significant RTI reform.

5.1.1 *The 'window of opportunity' for RTI in Chile*

Events triggering RTI reform: corruption scandals and international pressure

In 1997, an American company presented to the Chilean Government an investment project to buy a significant amount of land in Tierra del Fuego, a southern province of Chile. Environmentalists resisted the investment project, noting the damage it would cause to native forests.⁹⁴ While initially successful in stopping the project, a new version was approved by the Foreign Investment Committee. Fundacion Terram, NGO Forja and the MP Longthorn submitted a request for access to all the information regarding the approval of the project. Some information was released, but the most relevant was kept back by the Administration. Furthermore, the state never justified the reasons for withholding information. Activists decided to push through the courts to get the documents. Procedures were unsuccessful, as activists expected them to be (IECHI). Finally it was decided to take the case to the Inter-American Commission on Human Rights, an international human rights organisation in the context of the Organisation of American States. As noted, Chile had now the option of accessing these institutions and several activists were willing to test this.

The Commission stage is mandatory and happens before a trial before the Inter-American Court of Justice. In this context, access-to-information activists saw an opportunity to advance their legal cause:

The cause was instrumental to our purposes. Of course we wanted to help the environmentalists group but we also saw a major chance to improve Chilean institutions... We had a clear expectation: to validate some of the arguments that were made by the Special Rapporteur for Freedom of Expression and to contribute to

⁹⁴The project was presented by Cetec Engineering Company Inc. and the project was called Rio Condor. Trillium was the company that finally got the exploitation rights after several contract concessions.

this right globally. (IECH1)

The case was presented in 1998 and admitted before the Inter-American Court of Justice in 2003. The case received support from regional and international organisations in the form of ‘*amici curiae*’ (written depositions) before the Commission and later before the Court.⁹⁵ According to the Court:

The Commission stated that this refusal occurred without the state ‘providing any valid justification under Chilean law’ and, supposedly, they ‘were not granted an effective judicial remedy to contest a violation of the right of access to information’; in addition, they ‘were not ensured the rights of access to information and to judicial protection, and there were no mechanisms guaranteeing the right of access to public information. (IACJ, 2006, p.6)

The Commission provided recommendations which the Chilean government did not fully comply with.⁹⁶ As noted by one of the witnesses in the trial before the Inter-American Court of Justice: *‘From 2001 to 2005, administrative practices were implemented that favoured the confidentiality and secrecy of administrative acts, documents and background material. These practices were based on the Secrecy or Confidentiality Regulations created by Supreme Decree No. 26 of the Ministry-General Secretariat of the Presidency. The Regulations transcended the framework of normative jurisdiction, increased the grounds for refusing information, and gave rise to the announcement of some one hundred decisions by the body of the Administration that transformed secrecy and confidentiality into ‘the general rule, impairing the principles of transparency and disclosure’. Another obstacle was the limited and insufficient judicial protection arising from the special amparo (protection) remedy established in the Administrative Probity Act which, far from strengthening the principle of disclosure and access to information, has resulted in departmental heads choosing to ‘wait for a judicial decision’, which also provides little protection to applicants’* (IACJ, 2006 p. 6). In the meantime, activists led by Fundación Pro Acceso, supported in particular by the Open Society Foundations, continued a strong campaign of strategic litigation in the local courts.

The above-mentioned practices were an insufficient response to civil society demands. It created the basis for a RTI arena, but showed severe resistance in the public service. In other words, it established the basis for a very basic RTI arena but with no clear framework. As President Lagos’ term advanced, a new political constitution was drafted and approved, dealing mostly with Pinochet’s legacy. The reform included a particular clause in the Constitution which established that all secret or confidential information should be declared so by law and by a special majority in the Legislative.⁹⁷

⁹⁵ According to the procedures of the Inter-American Court of Justice, a case first needs to go through the Commission of Human Rights, which later has to recommend the case to go before the Court.

⁹⁶ The government finally released all the information in the hearing before the Commission.

⁹⁷ The article was very similar to a recommendation of the Commission for Public Ethics established by Eduardo Frei in

In 2006, after lengthy international litigation, the Chilean state was ordered to release the information and, in more general terms, to guarantee access to information in Chile. In the particular case, the court ordered the release of information regarding the project or a full explanation of the reasons for denying it (p. 159). Crucially, the Court ordered that:

...Chile must adopt the necessary measures to guarantee the protection of the right of access to state-held information, and these should include a guarantee of the effectiveness of an appropriate administrative procedure for processing and deciding requests for information, which establishes time limits for taking a decision and providing information, and which is administered by duly-trained officials. (IACJ, 2006 p. 151)

The IACJ decision was the final stage in a long march towards an access-to-information regulation.

A second set of intertwined events also promoted the advancement of the RTI agenda. Since 2002, the left-of-centre government of President Lagos had faced a set of corruption scandals, mostly related to payments of extra salary to members of the executive. These payments were a hidden 'extra' for several members of the ruling left-of centre coalition led by President Lagos. Other scandals included privileged access to government information or funds.⁹⁸ The scandals compromised the integrity of the government and, according to Olvarria et al.(2011), there were even rumours of the President resigning. The government reached out to the opposition in order to secure an agreement and address public opinion concerns. As a result, opposition and government created a Commission for Transparency and Public Probity and introduced a wide range of changes related to good governance, such as civil service reform, transparency, reform of political finances, reforms of local and regional governments, etc. (Segpres, 2006).

This set of events was also influential in setting the stage for a RTI reform, and put into motion measures that included the creation of basic norms about transparency in the public sector. For an activist pushing transparency reforms, corruption scandals were highly beneficial: *'Some of the scandals were beyond the understanding of 'Doña Juanita' (the average Chilean) but some of them like Chile Deportes⁹⁹ caused indignation among citizens...the elites needed a way out and the Commission created this room'* (IECHI).

1994 (Rehren, 2006). As a matter of fact, the first reference to transparency and access to information was elaborated by this Commission but most of its recommendations were not adopted.

⁹⁸The cases were known as 'sobresueldos', 'coimas', MOP-GATE, MOP CIADE, 'Central Bank' and 'CORFO-Inverlink'. A second set of cases in 2006 were Chile Deportes, an emergency programme in Valparaíso and another case in the Region of Valparaíso (Olavarria, 2013).

⁹⁹Chile Deportes was conveniently timed at the beginning of Bachelet's term, exposing funds that were never used and deceased people as beneficiaries of programmes, among other irregularities.

The above combination of facts shows a close interrelation between two intertwined factors: corruption scandals and international pressure. While the original events that led to the demand were of an environmental nature, they were amplified by a set of corruption scandals that put Lagos' administration under public opinion extreme pressure. The scandals forced the Chilean elites to look for new measures to protect stability as well as to appease public opinion. The decision from the IACJ put more pressure on the political system, as it involved the prestige of Chile overseas.

Politicians in need of a solution

The political stream moved to reach consensus. However, the newly-elected government led by Michelle Bachelet, from the same political party as President Lagos, distanced itself, showing more commitment to approving an access-to-information law according to international standards. Schonsteiner et al. (2013) noted (based on interviews) that it was corruption scandals, not the IACJ decision, that prompted the government to pass the new legislation. In this context, two senators, Hernan Larrain (UDI – Right) and the Socialist Senator Jaime Gazmuri, introduced a bill establishing the right to access to information. For the bill *'timing was of the essence, parties needed to show a sign of commitment to a new way of doing politics'* (IACH1). The project noted that:

...despite legislative efforts [in the 1999 Probity Act and Act No. 19,880 of May 29, 2003], in practice, the principles of transparency and access to public information are severely limited, converting these laws into dead letters [...] owing to the fact that the Probity Act itself stipulates that one or more regulations shall establish the cases of secrecy or confidentiality of the documentation and background information held by the State Administration, and this constitutes a significant barrier to the right of access to public information established by law.

The alignment of the Chilean elites was crucial. *'The elites were aligned and the introduction of the law was a "magic window"'*, (IECH1) noted one of the members of civil society pushing for the reforms. The decision of Michelle Bachelet to create a Commission to study transparency regulation¹⁰⁰ resulted in the 'Agenda Probidad' and the decision to send a proposal to the Legislative. While Senators Larrain and Gazmuri presented a project which ensured bi-partisan support, Bachelet's decision was essential to deepening and defining the agenda.

¹⁰⁰The Commission was composed of 7 members: Enrique Barros, Carlos Carmona, Alejandro Ferreiro, Davor Harasic, Maria Recart, Salvador Valdes and Jose Zalaquet. All of them had significant experience, although Alejandro Ferreiro was the only one that could be called a techno-pol in his own right.

Crafting the law: Presidential power, fast policymaking and techno-pols as policy entrepreneurs

Discussions moved quickly through both chambers of parliament and, as a result, the process to approve the transparency law took only eight months. The initial project presented by Larrain and Gazmuri established a set of basic principles but did not establish an institutional framework for access to information in Chile. Many of the *'transparency loopholes Chile is facing today, is due to the fact that this was a very quick process'* (Olmedo, 2012).

In 2006, the newly-elected President Michelle Bachelet released a set of decrees to foster transparency in the administration as well as to create a Commission of Experts whose main aim was to address concerns about corruption, transparency and efficiency in the public sector. This Commission recommended the adoption of a RTI law, and finally included the creation of a Council for Transparency among its recommendations. Presidential will is a key variable to explain policymaking and the eventual success of public policies in Chile (Olavarria, 2013). With the bill in place, civil society organisations led by Fundación Pro Acceso¹⁰¹ started a strong lobbying campaign to modify the initial draft. *'While it was a good sign, the draft had significant limits on access to information. Our job was to push for more progressive reforms. I am not sure how far we went but if it had not been for us, crucial aspects in the design would not have been included'* (IECH1).

President Bachelet's proposal did not include an autonomous institution but an agency to implement transparency legislation. According to Olmedo (2012), this agency was modelled on the Council for the Higher Civil Service, a body established to ensure probity in the selection of higher civil service officials. The Government was unsure whether to create an independent institution but civil society evidence was compelling. As noted by Olmedo (2012), the Council for Transparency *'was not part of the initial government agenda. It was not conceived as an external control organism... we won this reform in the field'*. The IACJ decision helped the final push for a transparency regulation, and also put Chile in the international spotlight. Chile – due to the composition of its political system and public administration – is usually responsive to international pressure. The judgment provided civil society groups with more leverage in the discussion. *'We were able to influence policy, particularly pushing for an independent institution to act as a guardian of the new law which was initially resisted or not properly understood'* (IECH2).

However, this was difficult in the Chilean context because it would need a constitutional reform.

¹⁰¹ Olmedo was the Executive Director of Fundación Pro Acceso. Juan Pablo Olmedo would become the first President of the Council for Transparency and was also the leading lawyer in front of the IACJ.

The solution was to create a ‘sui generis’ institution within the executive, with legal autonomy and with jurisdiction over administrative acts. As a result, the Legislative, the Judiciary, the Electoral Court, the Constitutional Court and the Contraloría General de la República – all branches of governments independent of the executive – were partially excluded from the scope of the law. Some organisations, such as the Contraloría General de la República and the Central Bank, actively lobbied to be excluded from the law, arguing institutional autonomy and – in the case of the Contraloría General de la República – overlapping competences.

The process involved several policymakers in the bureaucracy and civil society usually referred to as techno-pols. As noted by Joignant (2011), the term ‘highlights their competence and power over the parties as well as their prominent role in the policymaking process, based on the resources of a technical and political nature that they demonstrate’.¹⁰² According to Joignant, the influence of this group declined during Bachelet’s term. I use the term in a broader sense still conveying the idea of politically powerful policymakers with a strong technical background. As mentioned by Olavarria (2013), one of the key players was the man in charge of the Presidential Commission on Transparency and Probity, Alejandro Ferreiro. Ferreiro was a member of the Christian Democratic Party which was a part of the ruling Concertación (coalition of left of centre parties). *Ferreiro had significant political experience and technical knowledge*.¹⁰³ However, Ferreiro was not the only techno-pol involved, as Olavarria’s account suggests.¹⁰⁴

On the other side, civil society had Juan Pablo Olmedo, a litigating lawyer trained overseas who was leading the charge in the international field. While other actors played an important role,¹⁰⁵ these two figures became central when policy formulation and bargaining became crucial. Their policy expertise gave them a relative advantage and also significantly affected the quality of the final policy. Support from international organisations such as Open Society and the Ford Foundation was crucial for civil society to push the agenda forward. *‘When looking back, without the support of these*

¹⁰²Joignant identifies 20 techno-pols and explain their competences and the way they achieved influence in Chilean policymaking.

¹⁰³Alejandro Ferreiro had studied overseas and held significant positions in previous Concertación governments, such as head of several regulatory agencies, adviser to the Presidency and Minister of Economics. Ferreiro would become the second President of the Council for Transparency.

¹⁰⁴Olavarria (2013) argues that *then, what the formulation process of this policy most appropriately expressed is the key role played by a techno-pol who, together with a group of experts, designed the policy with the strong support of the President*. This is an appropriate description of a part of the process, but through approval of the law, civil society managed to introduce significant changes, including the creation of the Council for Transparency.

¹⁰⁵Other actors included Transparency International Chile, the Open Society Groups represented by Helen Darbishire, Corporación Participa, Fundación Pro Bono and Fundación Pro Acceso (Biblioteca del Congreso, 2012)

foundations I am not sure how the process would have ended' (IECH1).

Olmedo and Ferreiro were the policy entrepreneurs able to speak a common language and eventually secure the passage of the law. Both would meet again as members of the Council for Transparency and also as Presidents of the Council. The process could be considered mostly run by the political and civil society elite. NGOs involved were supported by high-profile advocates (most of them lawyers). The policymaking process was then quick, highly influenced by techno-pols and the international agenda and a response to a particular political reality: the corruption scandals. The way this process unfolded would have consequences in terms of institutional design and implementation, as Section 3 will show.

5.2 CHILE'S RTI ARENA

As noted in Chapter 2, in a RTI arena there are at least five elements to consider: a right-to-information (RTI) regulation which is the foundation for information exchange, the nodal agent (the state), particular nodal agencies inside the state, a group of stakeholders that use this regulation and information, and an information enforcement institution, which is in charge of deciding upon the release of official information in case of controversy. In the next sub-sections, I characterise the main elements of Chile's arena.

5.2.1 *Chilean RTI law*

Chilean access-to-information law is the cornerstone of the RTI arena, establishing the basic rules of what information should be public and how it should be released.

Table 5.1 outlines the basic features of Chilean transparency law.

Chilean access-to-information law establishes clear game rules in terms of who is subject to the law, how to request information, when to publish information and what are the potential limits. The Chilean law also establishes a clear conflict resolution mechanism which shapes the Chilean RTI arena, and also excludes a group of public sector entities from the request mechanism procedures. The request mechanism procedure is relatively simple and informal and it can be done by electronic means. Chilean law is relatively well ranked among activists groups (Access Info and CDI, 2013) and generally complies with Inter-American Standards on the matter. The level of detail and sophistication of the law can be traced back to its technocratic origins, which explains its consistency.¹⁰⁶ While

¹⁰⁶Albeit with some flaws in terms of handling private information and institutional design, as it will be noted through

Table 5.1: Characteristics of Chilean RTI law

Presumptive right to information held by public authorities.	Information about procedures, decisions and support documents should be public. Information is understood in a broad sense (i.e. not just documented or produced by the state).
Proactive publication	The government has to publish on line: structure, functions, normative framework, tenured and contract personnel, contracts (identifying contractors), public funds transfers to third parties, how to make an access-to-information request, subsidies information, auditing information, budget information and entities in which the authority has participation.
Request mechanism	Chilean law mandates a simple request mechanism to be in place. There are no formal restrictions to non-citizens.
Exceptions and Limits	There is a clear list of exceptions: prevention of crime, previous deliberation, generic requests, human rights, national security and national interest including international relationships and commercial interest. Future exceptions should have a special quorum by law. Other limits include classification of information as reserved for ten years and potential involvement of third parties.
Duty to assist	The law establishes the duty to assist the requester.
Fees	In principle, there is no charge for getting documents. If charges are applicable they should be proportional.
Conflict resolution System	The Law establishes a conflict resolution mechanism, setting up a Council for Transparency as an enforcement institution and judicial review of Council decisions.

the Chilean law refers to privacy as a limit, it is important to note that Chile has not developed a strong privacy framework. In this way, the use of privacy as an excuse not to release information is limited.¹⁰⁷

Courts, the Contraloría General de la República and the Central Bank are not fully covered by access-to-information legislation. The reason for this can be traced back to institutional design in the Chilean state which set up these entities as independent, and the institutional dynamics in place in which these entities defend (vigorously) their independence. For instance, during the discussion of the law, the Contraloría General de la República issued a note stating that:

this chapter.

¹⁰⁷Except in one case where it has been argued that public servants have the right to privacy, most of the information about public servants is available on line.

‘... this organisation feels a duty to express its deep concern about the adverse effects the creation of a normative and institutional system crafted without the necessary guarantees could have for administrative transparency; it is important that measures introduced do not impede or limit the Contraloría General de la República’s control function or interfere with its institutional autonomy’. (Contraloría General de la República, 2007)

The well-known state-owned copper extraction company, CODELCO, also tried to resist (unsuccessfully) being included in the scope of the RTI law. As a result, the scope of this RTI arena comprises the executive, local governments, regional governments, universities and public companies.

5.2.2 *The Chilean state*

In the Chilean case, public administration has four characteristics that contribute to understanding how Chilean RTI arenas work: a tradition of secrecy in public affairs, a tradition of relative control and accountability in public resources, a strong state-sector reform agenda inspired by NPM principles, and a compliant yet politicized bureaucracy. Chile had a long tradition of secrecy in public affairs (Olavarria, 2013). A study run by the NGO Corporación Participa in 2005 showed that 70% of Chilean institutions surveyed would not reply to access-to-information requests (Participa, 2005). The legacy of secrecy in the state apparatus was an obvious consequence of Pinochet’s government, but also an indicator of the low levels of civic participation in Chile and the way public affairs were conducted by political parties.

Chile started significant state sector reforms in 1994. President Frei established a Commission on Ethics which, among several measures, promoted a reform of the public sector in terms of integrity. Crucially, Chile developed a management-for-results framework that incorporated several principles from New Public Management in public finances and management of the state sector. Dussange-Laguna (2013) notes the process started with President Frei’s reforms plans to update the state administrative apparatus and indicators and evolved in a gradualist way. 2000–2006 were the crucial years in setting up the framework and management principles. One interviewee noted that *‘it is difficult to implement a transparency law, but it would be more difficult without certain public management tools in place’* (ISCH2). NPM reform focused on measuring performance was useful in terms of setting metrics and retrieving information.

Chile had a politicized yet compliant bureaucracy in place. When Pinochet’s regime came to an end, parties had to introduce a new breed of public servants – in the spirit of transition – and managed to

keep a balance in place with the previous regime. After the corruption scandals in 2003 and the famous measures described above, a new attempt to professionalize the public bureaucracy was set in motion. The Council for the Higher Civil Service was an attempt to depoliticize public administration and to establish merit in higher echelons of the bureaucracy. While the process was relatively successful, institutional design and practice shows that an element of patronage in key services persist in Chilean bureaucracy (Ramos y Scrollini, 2013). Furthermore, Chile developed several e-government initiatives, most notably the Chile National Procurement system, whose objective was to centralize and provide transparency in public procurement, and was also an important precedent for transparency policies.

All in all, the Chilean state is considered one of the most competent in Latin America (Garcia y Garcia 2010). It is a highly centralised state. The development of the Planes de Mejora de Gestion (PMG Improve Management Plans) helped to guide public management actions.

There are two core agencies in the Chilean state able to convey and centralise information when required: The Ministry of Finance and the Secretariat of the Presidency. Both units carry significant weight in terms of policymaking but are crucial in terms of getting information from several government offices. The Ministry of Finance, through the Direction for Budgets (DIPRES), is able to get all the information about the execution of the public budget and direct action through the Programme of Management and Innovation (PMI). Furthermore, the Ministry of Finance has direct links with the Civil Service, as the regulator of the system depends on it indirectly.

The Secretariat of the Presidency (SEGPRES) has control over the strategic direction of public offices. Several units of SEGPRES dealt with transparency-related issues, from the original design of the RTI law to its current implementation. Core agencies, notably SEGPRES, play a role when coordinating replies to complex matters that could affect the Presidency or the government. As one public servant noted, *'This is part of the game... they [the opposition] always want very sensitive information, also the press. When such requests exist, there is always a level of political coordination in replying. The opposition never rests'* (IACH2).

Chilean record management was not up to speed when the law was implemented and is still a problem. As noted by Sousa (2010), when the law came into force, only a few offices were able to cope with requests and digitalization processes. Unlike other arenas, where archives play a substantial role in preserving documents, Chilean archives were affected by Pinochet's dictatorship and a significant part of the information was lost. Furthermore, digitalization practices in the Administration were still weak, although this was dependent on each state unit's capacity. As a result, digitalization practices

affect the structure and release of information. Archive and record management is still relatively poor, although the existence of the Council for Transparency helped to create indicators and pushed for better data collection at the executive level. Archives play an essential role in terms of retrieving public information. Chile has relatively outdated norms in terms of archives (Guillan, 2012) and it is one of the weakest areas in this RTI arena. Evidence from a survey carried out by the Council for Transparency shows a low level of training in handling archives, lack of awareness and hierarchical importance by staff working on archives, paper as the preferred support mechanism for information and a lack of indicators about activities (CPLT, 2013).

Implementation of the law in Chile was mostly a top-down process, which reflects the nature of the Chilean state. The Probity Commission started a central training process, distributing specific software to deal with legal obligations. The software was partially resisted by certain organisations which considered it *'useless'* (Sousa, 2010, p. 43), and the training programme was not fully completed before the due date. According to Sousa (2010), the involvement of multidisciplinary teams (not just lawyers) and leadership from the higher echelons of the civil service were considered positive factors, while ambiguities in the law, poor record-management practices and the timing of the implementation were considered elements that made the implementation difficult. Furthermore, there is a record of difficult coordination between the DIGPRES and the Council for Transparency, notably around the management of requests and the creation of a web portal that would allow the centralization of access-to-information requests.

The state also showed different degrees of compliance with the law. While the central government complied with the regulation in a relatively short time, other institutions such as universities, health services and local councils, had different performances. Local councils exhibited lower performance levels than central government, showing how centralization and state capacity influences the implementation of this policy (Iglesias, 2009, Council for Transparency, 2013, Marin y Mynarz, 2012). The initial strategy focused on adapting websites to active transparency requirements set by the norm, which was done in above 80% of cases, according to the Council for Transparency (2012).

Public servants are in charge of delivering information to citizens once information has been requested. As mentioned in the previous sections, Chilean implementation was mainly a top-down approach and several procedures were not in place when the transparency law started to operate. Public servants have three clear tasks when requests arrive: acknowledge receipt, find the information and eventually release it. The Council for Transparency has a set of contacts which allows each

Table 5.2: Active Transparency in Chilean Administration

Active trans- parency rating	2010	2010–2011	2011–2012	2012
Central Adminis- tration	88.3	93.8	95.2	97.7
Hospitals	N/A	77.7	84.6	93.1
Universities	N/A	20.5	76.5	77.9
Municipalities	N/A	N/A	N/A	30.3%

Source: [Author, based on Council for Transparency (2012).

organisation to be informed about the latest information in terms of best practices. These links are, however, weak (Olavarria et al. 2013 p. 75). Most of the requests are through online mechanisms or, if they are done by letter, public servants digitize the requests. Public servants working at the entry point sometimes find difficulties interpreting what citizens want:

Sometimes the writing is really unclear, very generic, sometimes we are not even able to understand it. (Castillo et al. 2011)

This statement seems to be consistent with the general perception of public servants, as 47% of them mentioned citizens do not know how to use the law (Olavarria et al, 2013).

Public servants also note that there has been an increase in their workload since the law was approved:

We had to prepare for the law, then document all the replies and set up a process for this. Once a request is made it, follows a very particular path inside the organisation. (ISCH3)

Public servants acknowledge that requests are not the easiest or most normal way of interacting with citizens:

If you are dealing with a request, it is a sign that at some point, something went wrong. Alternatively, it is people looking for information for studies or a thesis... in both cases, our workload increases. (ISCH4)

This statement is consistent with at least 28% of public servants perceiving that access-to-information regulation has increased their workload and they do not have the necessary staff to cater with requests. Around 11% think that they do not have the economic resources for it (Olavarria et al. 2013).

One of the most sensitive information areas is about public salaries. Initially, public servants did not fully apply the law, not including names or full salaries on line, arguing that it would violate their privacy. Nevertheless, it is now possible to check most of these facts on line. A public servant

remembers that:

Salaries were a big issue. Sometimes we were not even aware of how much money the guy next door was making. Now we know. As a result, in some cases we also see public servants using this law, either to justify increases of salary or to challenge how much they are paid. (ISCH7)

Generally, public servants acknowledge the importance of this law, and while it creates hurdles, they understand the democratic spirit that underpins it. Evidence from a survey of public servants shows that at least 59% think that the Chilean state is very transparent or transparent. This still leaves a significant proportion of civil servants unconvinced. The same survey notes that 85% of public servants acknowledge the existence of an access-to-information right and 95% consider that citizens should have the right to appeal if information is not granted. Nevertheless, only a third of the public service knows about the existence of the Council for Transparency. Public servants understand that the law fosters civic participation, helps to control state activities and also helps to disseminate important information to the citizenry (Olavarria et al. 2013). However, when faced with difficult accountability dilemmas, limits are blurry. Some public servants may choose not to write down certain things due to political sensitivity:

There are things I am no longer writing down any more. Quite frankly, you have to be careful what to document and how, due to the risk of political exposure. (ISCH 3)

This practice is linked with a recent case about the privacy of public servants' emails, where the Court of Justice finally ruled in favour of public servants and politicians (Courts of Justice 2014). As one public servant stated, '*We ... as public servants have a reasonable expectation of privacy*' (Soto, 2012). Arguments about privacy in the public sector are often used in the New Zealand and Uruguayan context where information about salaries and functions is significantly less available than in the Chilean case. Not writing things down is an extreme form of defence some public servants might be taking in light of what transparency regulations could do to their careers. Not writing things down means that some conversations never existed. It should be noted that public servants in a Chilean context often exhibit a degree of politicization, that goes down at least two levels below the minister. While advisers are now recruited through a more competitive process, recent evidence shows that new governments bring in their own staff (Ramos y Scrollini, 2013). As a result, there are political incentives to not write down certain information, because revealing it could be considered an act of political disloyalty.

5.2.3 *Demanding information in the Chilean RTI arena*

Journalists, lawyers, politicians and NGOs are the main users of this regulation. From a general perspective, all these users come from the high end of the social spectrum, which means they have resources, knowledge and interest in pursuing public information. As noted by the former President of the Council for Transparency, Alejandro Ferreiro, users:

... are male, above 40, middle-high income status, with graduate degrees, and this the reason I say that users of the RTI law are the social elites. (Ferreiro, 2013)

In 2010, the Council for Transparency ran a customer characterization study which showed that most customers came from the private sector, were trained in a profession (law being the most significant one) and half of them were concentrated in the capital (CPLT, 2010). In 2012, a study showed that 84% had completed university or postgraduate education, and 14% had completed technical education, showing the degree of specialization users have. This is consistent with studies from the Council for Transparency which shows that only 11% of the population know about access-to-information policy (CPLT, 2012). Furthermore, most of these users are in Santiago, the capital of Chile (CPLT, 2012).

Table 5.3 shows the number of requests since the inception of the law:

Table 5.3: Requests per year to Chilean administration

	2009	2010	2011	2012
Number of requests	23,912	35,409	39,960	51,952

Source: [Commission for Probity and Transparency 2010–2013.]

Table 5.4 shows the classification of these requests.

Table 5.4: Classification of requests to Chilean Administration

Type of Ministry/Number of requests	2009	2010	2011	2012
Political	4,874 (20%)	7,445 (21%)	9,139 (15%)	6,231 (13%)
Social	10,836 (45%)	16,557 (47%)	20,812 (52%)	24,295 (46 %)
Economic	8,202 (35 %)	11,407 (32%)	10,009 (33%)	21,426 (41%)
Total	23,912 (100 %)	35,409 (100 %)	39,960 (100%)	51,952 (100%)

Source: [Commission for Probity and Transparency 2012.]

However, such high numbers do not tell the full history. As one public servant mentioned,

Numbers are explained by our systems and we count as an access-to-information request every interaction [that] can potentially become an access-to-information request. (ISCH, 4)

Journalists: expert and frequent users of the law

Journalists are one of the most influential users in terms of access-to-information law, although use does not seem to be extensive among journalists. Surveys show that on average in the period 2008–2013, 10% of journalists used access-to-information legislation to request public information and an average of 18% considered that the law was effective for their work. In the same period, journalists seemed to agree that, in general terms, the access-to-information situation has worsened.

Table 5.5: Journalists' opinion about the RTI law

	2009	2010	2011	2012	2013
Journalists using the law	12%	10%	8%	10%	10%
Effectiveness	23%	11%	17%	22%	21.1%
Overall positive evaluation	35%	23%	8%	9%	11%

Source: [Source Adimark 2010–2014]

This shows that one of the most significant groups of users of access-to-information law usually prefers to gain access through different means. As noted by one journalist, *'we still prefer sources. Of*

course, access-to-information legislation has led to good stories, or to get documents that otherwise we would have to get through leaks, but overall, sources are the best way to go' (IECH4). Another interviewee notes, 'Traditional media still has its sources, thus do not need access-to-information legislation. They were not involved in the process and now seldom use the law' (IECH5).

Most of the use made of access-to-information law in Chile is in investigative reporting. For instance, CIPER Chile, an investigative reporting agency, has used access-to-information regulation extensively to get contracts and information from the public sector that, combined with other sources, produce in-depth investigative reporting histories. Reporting about ministerial pardons (Skoknic, 2010), educational reforms (Skoknic, 2012) and military spending (Ramos, 2012) are some examples of complex topics where access-to-information regulation played a significant role. However, investigative reporting is a resource-intensive and relatively expensive practice, which usually takes a long time to mature. An access-to-information request may also jeopardise efforts when trying to access public information and may alert the administration or potential competitors about the imminent coverage.

Journalists also play with political narratives when requesting information for short-term and impact pieces: *'Chile is a country that wants to be compared with OECD standards. Chile is always looking at the OECD to develop standards in areas such as transparency and ministers like to brag about this. So, we took their word and check in detail what information is published and how. This usually delivers good news and immediate reaction from ministers. If they want OECD standards, we are going to give journalistic OECD standards as well' (IECH4).*

In short, the use of access-to-information regulation has enabled journalists to get more information, and potentially improved their work. Journalists are not extremely confident, however, about the effect the law might have on hard-core accountability issues:

Lobby and conflicts of interests are really the most pressing issues I see for our democracy. And, quite frankly, this law helps, but does not deliver all that we need to check on them. (IECH9)

Civil society

Civil society is one of the most noticeable stakeholders in the Chilean RTI arena. Chilean civil society organisations working on this topic show a high degree of professionalism and expertise in the legal area. For instance, Fundación Pro Acceso spearheaded the adoption and controlled the initial implementation of access-to-information law. Fundación Pro Bono – mostly a group of litigating

lawyers, also took part in several litigation cases previous to the adoption of this law. Corporación Participa was a pioneer, mapping the state of the field in terms of access to information before the implementation of the law. Transparency International also played a significant part in terms of monitoring and implementing the law. Civil society tends to use the law for strategic purposes, seeking reform in sectors or pushing for new standards. For instance, Fundación Pro Acceso recently released a study monitoring proactive transparency in the University Sector (Proacceso, 2013). Pro Acceso has long been involved in issues around accountability and transparency in the education sector.

Tag team requests are common in Chile's RTI arena. '*The strategic use of the access-to-information law on topic, usually teaming up with other organisations to advance causes further*' (IECH7, 2013). For instance, Pro Acceso teamed up with a group of bee-keepers to find where genetically-modified crops were grown in Chile. The decision of the Council for Transparency forced the Secretary for Agriculture to release the data and it is now available on a geo-referenced map (Huichalaf, 2014).

A new breed of organisation has emerged in the last three years, combining the use of technology and activism in the transparency field. Ciudadano Inteligente, a Chilean NGO working on transparency and accountability, set up a web portal that allowed people to exercise access-to-information rights on line. The portal created an interface that took information from the ministries and centralized the request process, allowing people to make a request and other users to follow the requests publicly on line. Setting up such a portal was a deliberate strategy to increase the use of access-to-information rights, and was done without involving the government. The use of technology provided leverage and made it impossible for the government not to acknowledge the existence of a demand to improve access-to-information procedures. Ciudadano Inteligente's technical team went to great lengths to ensure e-mails could be delivered, due to the complexity of setting up a proper interface with government services. Finally, the government decided to set up its own portal as a response to the one created by civil society.

Another example is the website *Poderopedia* which allows users to understand who is who in the Chilean political arena, mapping relationships that are usually not known. By using access-to-information requests, public records and private sources of information, the website provides significant information about how the Chilean political system works.

However, civil society is far from a unified and articulated group, even in such a small field as transparency issues in Chile. There is a level of competition in terms of getting resources and

articulating demand which keeps the field dynamic but potentially weak in terms of coordination to advance reform. Civil society in Chile is financed by international organisations such as the Open Society Foundations, the Ford Foundation and Omidyar Network, among others. The difference with the new breed of organisations is also quite noticeable. While the ‘old guard’ of access-to-information fighters were originally concerned with human rights, mostly working in the context of the Organisation of American States, the UN and other international forums, the new breed of organisations have a more focused and ‘hands-on’ approach mediated by technology.

Lawyers and firms: ‘snipers’ in the Chilean RTI arena

In 2012, a British firm decided to request information about the procurement process to buy a military bridge. The Ministry of Defence resisted the release of information, invoking a security exception and a special law that allows the Chilean army to buy war material from a special fund. The firm challenged the decision before the Council for Transparency where the Ministry of Defence invoked the same defence. The information was finally released and the case had serious consequences for the minister involved in this matter (Leal, 2011). As in other RTI arenas, lawyers keep using the law to find evidence of possible wrongdoing in pre-discovery stages. However, lawyers report an increasing use of the law to gain unfair advantage from private or reserved material. While there are no official numbers available, lawyers seem to welcome the new legislation as it is becoming useful in tax, environmental and international law (El Mercurio, 2012).

Innocent requesters

In a small town outside Santiago, a schoolboy requested information about the state of his own educational establishment. In particular, the boy wanted to know why a new building had not been built. The case made the national news and was hailed as an example of an active citizen (Access Info, 2014). Such cases are extremely rare in the Chilean RTI arena. The average citizen remains unaware of access to information as their right, according to surveys from the Council for Transparency. While new technologies can help to deliver better services and establish less friction with citizens, they are still unable to reach and grab the interest of most of the potential users in Chile.

5.2.4 Council for Transparency

The Council for Transparency is the Chilean enforcement institution in charge of promoting the culture of transparency and, crucially, defining what is and is not public information. The establishment of this institution was among the key debates in the adoption of the RTI law.

As noted in Chapter 2, two dimensions are crucial to assess the strength of enforcement institutions: autonomy and capacity to enforce

Autonomy

Table 5.6 shows a summary of the Council's autonomy

Table 5.6: Autonomy

Dimension	Indicator
Screening and appointment process	Process regulated involving consensus among key political parties Senate appoints the Councillors
Stability	Appointments are regularly performed, although there were some issues in the first round of appointments
Oversight	The Judiciary and the Constitutional Tribunal can overrule the Council for Transparency's decisions on several grounds
Resources	The budget is allocated in consultation with the Ombudsman
Perception	20% of the population know about the existence of the Council. Out of this sample, 58% consider the Council an autonomous institution (Council for Transparency, 2014).

In terms of autonomy, the appointment process and the institutional position are crucial to understand what enforcement institutions can do in a RTI arena. The appointment process to the Council is decided by the Senate, which has to confirm Councillors by a special majority. The Council is renewed by thirds and the Presidency of the Council rotates. The first appointment of authorities in the process was an exemplary process where Chilean elites decided to grant the newly-created Council strong legitimacy, naming a Council with expertise and significant political support. As noted by the first President '*that was the virtue of the first Council: it was beyond political parties*' (Olmedo 2012). However, while relevant experience is indeed a prerequisite to become a member of the Council, membership is still a highly political process, as noted by Olavarria (2013). For instance, when in

2012 a new appointment process started, two former Presidents of the Council were not re-appointed, opening a debate about the whole appointment procedure. Civil society noted a lack of consultation for future names and one of the outgoing Councillors noted that *'we knew our decisions would make the political power uncomfortable. It happened during the last Bachelet government and it is happening in this one'* (Urrutia, Que Pasa, 2012).

Even when it was likely that Olmedo and Urrutia would have support in the Senate to continue their work, the government decided not to re-appoint them. The subsequent discussions about who would end up replacing the outgoing councillors cast doubts on the continuity of the Council's work, which would have been unable to make decisions without two members. The reasons behind the decision not to re-appoint Olmedo and Urrutia offer room for several hypotheses, particularly in terms of how politics play in this institution. Urrutia was linked to the government-allied RN, but, during his time on the Council, he faced two cases that made the government uncomfortable, which is one possible explanation for not re-appointing him. Olmedo was close to the leftist PPD but was largely politically independent. Whether or not the reasons were political, the incentives for governments to keep re-appointing councillors that potentially damage their political interests are low, particularly when they have perfectly legal means to appoint other persons. Removing councillors from office in the Chilean case is similar to an impeachment process and has to be approved by the Senate.

In terms of institutional design, the Chilean Transparency Council is a *'rara avis'*. The Council was an ad hoc solution to find a balance between the original proposal from the executive, which would have created an administrative organism resembling a modernization unit, and a more robust horizontal accountability institution such as the one proposed by civil society. As noted by Mendoza (2010), the concept of autonomy is *'the 'vedette' (new centrepiece) of administrative law ... everyone wants to be autonomous and if it is a constitutionally-established autonomy so much the better ... there are more autonomous institutions than others'*. The fact that the Council is an autonomous organisation, independent of the Presidency of the Republic, does not exclude the Council from other controls (as in accounting practices, legality of expenditure and potential legality of certain administrative acts).

As a result, the Council is also subject to other controls. The Council has powers to resolve processes and, crucially, to review the background materials. This power to review the materials of the case has been challenged in a set of cases regarding public servants' email which shows the limits of Chilean institutional design. Mendoza (2010) notes *'the third element of being autonomous is the courage of who*

run the institutions ... the law can declare an institution autonomous as much as it wants, but it always depends on who is actually exercising power ... Autoritas and Potestas are two intertwined concepts'.

In the Chilean case, the enforcement institution is overseen by the judiciary and, potentially, the Constitutional Tribunal. The judiciary can overrule the Council's decision. The judiciary has mostly favoured the government's position, most notably in matters of national security and privacy of emails.

Building legitimacy is also part of standing and holding ground when institutions want to avoid being monitored. For instance, Urrutia (2012) noted that the Federation of Local Councils initially resisted being included in this law under the argument that they were autonomous. Navigating this kind of resistance and other potential threats to the autonomy of the Council is one of the skills of elected members. Building legitimacy, then, is a crucial task that the leadership of the Council, in particular the President, need to balance carefully. For instance, Alejandro Ferreiro, former President and one of the key figures in this setting, notes that '*We prefer to bother people rather than being irrelevant*' (Ferreiro, 2012),¹⁰⁸ a strategy the Council has followed in complex cases, explaining the use of the law and the reasons behind its decisions. As with other institutions, such as the Ombudsman (Uggla, 2006), the Council relies on media and public opinion to raise its profile and gain legitimacy. The Council members are former political leaders, which provides them with political clout, contacts and expertise in handling public opinion. It also leaves them open to having their independence called into question, although such criticism has seldom emerged in Chile as the Councillors took stances that were uncomfortable to right-wing and left-of-centre governments alike.

The Council for Transparency gets its funding from the executive and has struggled to get appropriate funding since it was first set up (Olavarria, 2013). The Council discusses the baseline for the budget with the Presidency and the Ministry of Finance. However, the Council is not allowed to allocate its own budget independently, unlike the Judiciary or other independent bodies in the Chilean RTI arena.

¹⁰⁸<http://www.cnnchile.com/nacional/2012/06/21/consejo-para-la-transparencia-preferimos-ser-incomodos-a-ser-irrelevantes/>

Enforcement capacity

Table 5.7 summarises the enforcement capacities dimension.

Table 5.7: Enforcement Capacity

Dimension	Indicator
Extent of the legal mandate in terms of review processes	Partial access to documents.
Extent of the legal mandate in terms of enforcement practices	Binding
Extent of the legal mandate in terms of imposing sanctions?	Ability to impose pecuniary sanctions established by law.
Resources (staff, budget, capacities) to carry out the assigned tasks	Lack of adequate staff (Olavarria 2013)
Service delivery	Demand side (depending on the type of customer) evaluates the Council favourably, oscillating between 66% and 86% (CPLT, 2013).
Decisions or sanctions effectively applied?	All decisions are effectively applied. Challenges in front of oversight institutions are usually resolved in favour of the Council .

Table 5.8 provides a summary of the current legal challenges to the Council's decisions before the High Courts or the Constitutional Tribunal:

Table 5.8: Number of Council's decisions challenged before the courts

	Constitutional Tribunal	Supreme Court	Higher Tribunal
Challenges presented	15	61	286
Decisions upholding Council's position	5	29	187
Decisions challenging Council's position	5	17	49

Source: [Author based on jurisprudence available from the Council for Transparency website].

The table shows that, if decisions from the Council are challenged, the courts usually uphold the

Council's decisions.

Enforcement capacity is the ability to carry forward two key functions: to solve controversies and to eventually enforce decisions. From a legal point of view, the Council has the authority to resolve potential conflicts which includes the ability to review the material held by the administration. The ability to review the materials held by the administration is crucial because it allows an evaluation of whether exceptions are being fairly applied or not. Furthermore, the ability to impose sanctions is also part of the enforcement capacity of the Councillors. As will be noted, one of the key challenges this institution faces from other units in the public sector is in terms of the capacity to review. According to the Council, a total of 467 institutions are under the scope of Council control. Table 5.9 shows the distribution of these organisations.

Table 5.9: Number of organisations included in the RTI law

Type Institution	Number of units
Ministries	22
Intendencias	15
Subsecretaries	32
Regional Governments	53
Local Governments	345
Total	467

Source: [Guillan 2012].

Table 5.10 provides evidence of the Council's workload since its inception:

Table 5.10: Council for Transparency's workload

	2009	2010	2011	2012
Received Cases	627	985	1608	1820
Non-admissible cases	119	404	564	642
Requester declined to continue	10	91	130	153
Solved cases	275	1172	1476	1848
Decision to partially release information	37	174	221	212
Decision to release information	80	56	449	629
Decision to withhold information	29	147	112	212

Source: [Council for Transparency, 2012].

The table shows a large number of non-admissible cases which are usually the result of a lack of information from the requesters. The table also shows a significant number of decisions ordering the release or partial release of public information.

Table 5.11 provides a summary of the current legal challenges to the Council's decisions before the High Courts or the Constitutional Tribunal:

Table 5.11: Number of Council's decisions challenged before the courts

	Constitutional Tribunal	Supreme Court	Higher Tribunal	Tri-
Challenges presented	15	61	286	
Decisions upholding Council's position	5	29	187	
Decisions challenging Council's position	5	17	49	

Source: [Author based on jurisprudence available from the Council for Transparency website].

The Council has a very detailed process to deal with requests from citizens made up of three broad phases: admissibility, advice and decision-making. The whole process is relatively swift and according to Council surveys, 80% of users are satisfied with the service (Council for Transparency, 2012). The

Council also has a fast track decision-making process in order to facilitate simple cases and to engage in informal talks with public offices in particular situations (World Bank, 2012).

Support from international organisations such as the Inter-American Development Bank (IADB) helped to establish a baseline budget and to develop sound administrative systems. The Council for Transparency would later adopt several NPM practices (Olavarria 2013) showing professionalism and expediency, thus adjusting to the state sector environment in which they have to operate. For instance, the Council has deliberately sought validation of its efforts by securing awards such as '*The most competitive firm of the year*' (Council for Transparency, 2013), as well as the adoption of ISO standards for several processes (Council for Transparency 2012).

Prizes and public recognition are part of building legitimacy for the Council in its day-to-day work. In a competitive and NPM-inspired public sector, legitimation in terms of efficiency is crucial to gain respect from institutions that are under the Council's control. Furthermore, the Council developed a studies area to develop indicators and perspectives about their working environment. This is evidence of a strong institutional capacity which allows the Council to perform its work. Since its establishment, the Council has decided to create a management model that will allow them to carry out their tasks (Olavarria, 2012, World Bank, 2012). However, only the President of the Council is full time while the rest of the Councillors work part time.

The Council has also used the 'stick' in order to enforce its decisions with 57 sanctions. Sanctions include the possibility of seizing up to 30% of the responsible public servant's salary. Most of the sanctions have been applied to local councils, which are the weakest link in this arena.

The above description leads to characterisation of the Chilean Council for Transparency as a relatively independent institution capable of enforcing decisions. According to the characterisation presented in Chapter 2, this is a 'Knight Templar' in the making.

5.3 CONCLUSION: A MIXED ARENA

The Chilean arena fits the description of a mixed arena. Table 5.12 summarises the outputs as proposed in Chapter 2.

Table 5.12: outputs

Availability of public information on a proactive basis	Public Information available proactively at 80% across government units.
Efficiency in dealing with RTI requests	More than 80% of requests are received and 75% get a reply
Accessibility and effectiveness to resolve disputes	There are no formal limits to accessing the Council for Transparency. Courts may charge fees.

Source: [Council for Transparency 2012, Courts of Chile 2014.]

In terms of participation in the policymaking, Chile's adoption of a RTI law shows important issues. First local politicians needed to address a very identifiable problem: corruption scandals. Several accounts mention that these scandals played a significant role in the decision of the government to adopt RTI. In other words, it was Chileans who decided to advance a RTI law as part of their efforts to solve a corruption scandal. The Chilean process reflects the relatively closed nature of Chilean policymaking where techno-pols played a significant role in designing and advocating for these reforms. Participation in this process was low. A few techno-pols (on the government side and on the civil society side) had good understanding and owned the issue. As a result, they were able to set up the networks and find support among certain organisations to advance the agenda. There were few political champions in this matter; thus, the whole of the political system had no real ownership. The civil service was mostly absent from the debate and other horizontal accountability institutions initially resented the establishment of the Council. These differences in who was participating, would then lead to differences in terms of the implementation and eventual outputs of the arena. The policy community in place in Chile gathers around the Council for Transparency and a few specialised bodies in the administration. They are a small and select group of individuals and institutions that are effective in shaping the Chilean arena, as well as being involved in other issues related to integrity and good governance. As a result, the Chilean policy community has a very good level of expertise and a shared understanding of the problems the arena faces. Furthermore, it is a professional and 'up to date' community respected at an international level, yet still does not permeate the whole spectrum of

the Chilean state and society. The Council for Transparency is instrumental as a focal point to engage in discussions. Some of the members of this community have connections with political parties, which reflects the politicised nature of the arena. Most of them would be careful not to stress these connections as they often act in a technocratic capacity.

The Chilean process shows also an interesting interplay between international and national actors in the policy stream. The establishment of the Council for Transparency is the result of this involvement. Chilean policymakers argue that the law was passed due to domestic issues. This is correct. However, these accounts miss a possible counter-factual: the government could have established an alternative measure such as an Anti-Corruption Board or a new decree about integrity in the public service to address these issues. Thus, a second event had to influence government decision-making. I argue that this event was the Inter-American Court of Justice decision that forced Chile, in the light of international pressure, to re-think its approach to RTI. Thus, the decision of the Court had an influence in the policy stream in terms of standards as well as in terms of setting up an autonomous body: the Council for Transparency. Thus the support given by international organisations played a key role in terms of policy design in the policy stream, albeit they directly not intervened in the policymaking process.

As noted Chile has a politicised bureaucracy with some level of professionalism. Chilean public administration tried to adjust for this change but there were coordination issues among several institutions, notably between the enforcement institution and the executive. Chilean core agencies were able to adapt quickly (and deploy sophisticated tactics to delay giving information) while municipalities are still struggling in terms of implementation. Archiving is a major issue in the Chilean RTI arena, as in many other arenas. Retrieving information can be time-consuming and some archives no longer exist. Public servants do take into consideration harsh political realities when answering requests. As a result, behaviours observed in other jurisdictions such as not writing down certain conversations or 'just forgetting' about documents are usual. It should also be noted that public servants dealing with these requests are usually at the higher end of the hierarchy, and therefore, often at least, political appointees. This introduces a different logic when answering requests as well. The New Public Management practices favoured transparency in certain areas, such as fiscal management or public salaries, but did not encourage participation or transparency in more contested areas.

In terms of enforcement institutions, the Chilean Council had to be set up from scratch and gain

its own legitimacy. The Council is now a well-established institution beyond its initial ‘rara avis’ nature. It has forged its role as guarantor of access-to-information rights through skilful leadership, efficient use of relatively scarce resources and professional capacity. The Council took a stand on several issues that were initially against the interests of the parties that had appointed the Councillors, showing a great degree of independence.

However, institutional design still shows that the Council is an institution appointed by the political parties’ agreement or consensus. Most of the Council members played a significant role as ministers, members of parliament or by being close to one political party. It is fair to say that independent candidates are not the majority. This raises the question of the degree of politicization of Council activities, usually operating in a complex and sensitive political environment. A constant challenge to Council activities relates to the power to classify information, which leads to certain state units not providing documents to the Council for review. Furthermore, cases around emails or military defence show complex arguments developed by the other institutions that can review (and limit) the Council’s position about who should be reviewing documents and the so-called privacy expectation from public servants. The role of the courts, the Constitutional Tribunal and the Contraloría General de la República are still relatively grey areas in the Chilean RTI arena in relation to the Council’s autonomy.

Access to information can be used for noble matters or for relatively low political interests, trying either to hurt or embarrass an opponent or a public servant. While most of the transparency narratives have a certain aura of innocence, RTI requests are often political tools to cause damage. This is particularly true in a context where users are still a small and politicised minority and where civil society might also have close links with opposition or government parties, depending on the political contexts. As such, access to information enters into political battles at both micro- and macro-levels. When such instances happen in Chile, there are risks of negative feedback loops that could threaten the Council’s position. Those feedback loops can actually endanger the RTI arena and the enforcement institution.

Cases of average citizens requesting government information using RTI as a tool are rare. Civil society organisations do play a role as intermediaries using access-to-information requests to elicit certain social demands, or as part of larger strategies, but the law is still mainly used by a minority of well-trained people. Journalists increasingly use the law, although it is not one of the most used tools, nor the tool they trust most. In the Chilean context, unequal use and access to information

may be partially a reflection of social inequalities which pervade Chilean society. Challenges to the Council and relatively low use make the Chilean case a space for mixed transparency where institutions are gaining ground, but to fully unleash their potential they need more demand and a stronger enforcement institution.

URUGUAY: A CONTESTED RTI ARENA

In this chapter, I will explore the Uruguayan RTI arena. I will explain how the current situation is linked to three factors already mentioned in this research: the participation in the policymaking process, the level of professionalism in the state bureaucracy and the autonomy and enforcement capacity of RTI institutions. First, I will provide an account of how access to public information emerged in Uruguay, looking at the key players in the early days of RTI. Then, I will analyse the current status of the Uruguayan RTI arena, explain how it operates, and describe its main elements. I will conclude that Uruguay is a contested RTI arena.

6.1 PUBLIC SECRETS ‘A LA URUGUAYA’

In 1985, Uruguay regained its democracy. It was a country where even the cost of MPs’ coffee would be considered secret (IEUYI). Debates in Uruguay in those early years were scarce, and secrecy was the norm. Public records and judicial decisions were supposed to be public, but implementation was a different matter. The decree 500/90 established the public nature of decisions but also established that if someone wanted to check a particular file, he/she should show direct, personal and legitimate interest. The so-called information rights were not visible during the first stage of Uruguayan democracy. As an activist from those early times notes, ‘*This whole agenda was not something politicians in this country were worried about or had the sensibility to understand*’ (IEUYI).

There is little evidence of systematic studies about transparency or access to information in the period 1985–2007. During this period, the core issue on the public agenda about public information was accessing documents from the former military dictatorship. Those documents could shed light on practices, places and people that had disappeared during those years (El Espectador, 2008).

A high-profile case evolved in 2002 in the context of extradition requests linked to the former

military dictatorship. The Argentinian government requested the extradition of a group of Uruguayan military and police members accused of violations of human rights in Argentina and Uruguay. The government refused to let the judiciary decide about this request, using a prerogative in Uruguayan Amnesty law.¹⁰⁹ The law established that the executive could evaluate extradition requests of a political nature and decide whether to investigate certain claims. Andres Alsina, a local journalist, asked for the reasons behind this decision, before the Attorney-General's Office which was in charge of the case. When Alsina made the request, the Attorney-General issued a special ad hoc regulation so as not to release this particular information.

Alsina, supported by a local NGO, challenged this decision in the courts. The request was of crucial importance, as a large sector of public opinion was in favour of the extradition. The legal advice was finally released after a lengthy legal battle which involved an appeal to a higher court. The documents obtained proved that the prosecutor and the government had lied about the arguments not to extradite the military and police members. It also showed a possible breach to the principle of separation of powers, as it is the Supreme Court, not the executive, who should rule about extradition petitions in the Uruguayan legal system (Alsina and Zabala, 2008). The case was the first in which the judiciary acknowledged the existence of an access to information right in the Uruguayan context. For Alsina, '*it was a Pyrrhic victory*' (Alsina and Zavala, 2008) as the information came too late to be used.

An equally illustrative incident took place in 2006 in San Jose, a small district outside the capital. San Jose is a stronghold of the National Party (Blanco Party) and the administration has not changed hands since 1985. Enrique Ravinovich, a local journalist, requested the transcripts and recordings of the Budget Committee of San Jose's Local Council (local government legislative branch).

Rabinovich was after the budget numbers and a particular statement from the Chief Financial Officer. Transcripts and numbers were not traditionally released by local councils. The recording had been done at the request of an alternate legislator who had little experience in these matters and wanted to have an 'insurance' to carefully analyse the discussion. The journalist tried to get the information informally. He did not get far, so he decided to ask for it formally, but it was denied by the Committee and Plenary of the local council, although he was never notified of this.

This decision was supported by all political parties, including the left-of-centre opposition of the

¹⁰⁹This law was approved in 1985 amidst severe controversy. The law established the release of political prisoners as well as the abdication of the punitive power of the state for crimes committed during the military dictatorship. The law was challenged twice in referendums (1985–2011) but was upheld by the citizenry. The Supreme Court of Justice declared the law constitutional but, in a later ruling, declared the law unconstitutional.

day. The decision reinforced a trend in which the local mayor kept not providing the legislature with basic information about tax collection and about how the budget was spent. The journalist decided to take the case to the courts, but was denied amidst a set of unclear arguments, most of them of a formal nature. The political system formed ranks in order to keep the session secret and one government member of the local council defended that, saying that by denying information they were protecting the local council's reputation. It was finally determined that the recordings had been erased and that there had never been an official resolution from the Local Council Budget Committee. In the words of a then member of the left-wing opposition, Rodrigo Campanella: *'I think that our work is strictly for our own purposes and does not need to be in the public domain. I am convinced of this, I do not know of any precedents that state otherwise. Political bargains have back-and-forth moments and citizens should not know them'* (Alsina y Zavala, 2008 p. 30). The case was eventually taken to the Inter-American Commission of Human Rights.

Secrecy was then pervasive in public administration. For instance, in 2006 two journalists sent letters to the three branches of governments asking questions relevant to each one of them. Out of thirty-nine, only four got a satisfactory reply and four others received replies but not the public information required. Most of the letters (31) were unanswered by public authorities. Journalists found extensive evidence of different kinds of resistance in public administration. The set of behaviours included resisting the request, suggesting an informal contact with authorities to obtain public information and questions about the reasons behind the request. Only a few scattered initiatives were launched in 2002 to promote transparency in public procurement, but those were not significant and had no impact.

6.2 TOWARDS A RTI REFORM: FIRST STEPS AND NO OPPORTUNITY FOR REFORM

The first proposal for a freedom-of-information law was put forward by the opposition left-of-centre party, the Broad Front in 2000.¹¹⁰ MP Daniel Diaz Maynard was the main author. The bill was a local project which had some references to the international context but was mostly designed by Diaz Maynard and a close adviser based on local constitutional and administrative legal doctrines.

Initially, all political parties agreed with the proposal. However, it almost immediately ran into

¹¹⁰The Broad Front Party (Frente Amplio) was the main left-of-centre opposition party in April 2000. The country was at the time governed by a coalition of the so-called traditional parties: the Colorado Party and the National Party.

problems as the Ministry of Defence and the Home Affairs Ministry¹¹¹ opposed the project on the grounds that could affect human rights issues (CUP Debates, 2002). Oddly enough, when the government executive was engaging in a politically costly campaign to release public information about procurement and public servant salaries (Busqueda, 2011), it was opposing a RTI law in the Legislative. The main reason for this paradoxical attitude lies in the divisions over human rights, as a RTI law could also allow human rights campaigners to request information about the recent former dictatorship.¹¹² The bill was finally approved in the Chambers of Deputies with the votes of the Broad Front (the opposition party), which had a majority at that time ¹¹³. The debate was dominated by high levels of rhetoric where most government MPs agreed in principle with the law, but focused on various particular details in order not to vote for it (CUP Debates 2002). One of the Government MPs, Fernandez Chaves, said he was not voting due to the party mandate not to do so, although he agreed with the law. (CUP Debates pp. 35–68). One of the advocates at the time remembers that:

It was all very well mannered...they would always meet us, they would always listen to us, but...nothing much happened. (Lanza, 2011)

The idea that some who most need it should receive a certain preference in terms of getting public information was also present in the original project by Dr. Diaz Maynard. In the original project, journalists would receive certain preferences to request public information. Journalists were not the only ones arguing for special rights. The representative of one lobby group, the League of Commercial Defence, mentioned that:

.... Certain data can have a certain protection, meaning that not everyone could ask for it, but, unreservedly, we should have access to it... those [of us] who draw up reports of a commercial nature. (Senate CLC Records, 2003)

In this way, the whole debate was not about public information available to everyone but public information available to specific groups such as commercial lobbies, interest groups and journalists. This particularistic approach to certain rights is consistent with earlier observations from Uruguayan political scientists (Real de Azua, 1964), about the Uruguayan polity (Panizza, 2004, Zubriggen, 2005, Busquets y Piñeiro, 2014). The law passed to the Senate where, according to former Senator Margarita

¹¹¹Unlike other countries, the Home Affairs Ministry in Uruguay is in charge of the police and other security agencies. At the time, Yamandu Fau was the Minister of Defence and Guillermo Stirling the Minister for Home Affairs, both from the Foro Batllista faction of the Colorado Party.

¹¹²At the time, the government was engaged in a reconciliation process and had created a presidential commission to deal with it.

¹¹³This majority was due the absence of some MPs from the government in the Chamber

Percovich (2011), the project ‘was drastically modified’ due to a complex set of negotiations involving a different bill dealing with securing the right to personal data used for commercial purposes. This law was introduced by senior government senators¹¹⁴, to allow data sharing of information that could affect commercial activities. The RTI reform was not approved.

6.2.1 *Policy entrepreneurs get organised*

After this initial blow, a group of civil society campaigners decided to organise a platform named of the Archives and Access to Public Information Group (GAIP).¹¹⁵ GAIP’s main purpose was to advance a freedom-of-information law according to emerging international standards, provided by UNESCO-funded studies (Mendel, 2008). GAIP was in close contact with several international organisations, such as the Open Society Foundations, and managed to get on board two Broad Front MPs: Diego Canepa and Margarita Percovich. GAIP helped to link MPs to international experts and relevant legal doctrines.¹¹⁶ GAIP prepared the draft of a new bill which Broad Front Senator Margarita Percovich promoted in the Senate and which is largely the basis for the current access-to-information law in Uruguay. The bill was aligned with international standards and was influenced decisively by international experts (Lanza, 2011). Support from international organisations such as the Special Rapporteur for Freedom of Expression of the Inter-American Commission for Human Rights helped to raise the profile of these initiatives and was decisive in getting policymakers on board. Unlike other processes in Latin America, the bill was not influenced by big media corporations (Michener, 2010) which were not interested in the agenda (Lanza, 2011).

The absence of these influential players can be traced back to the media market structure in Uruguay, as well as the fact that the media has significant links with the government. Edison Lanza, a journalist who co-led the campaign, notes that:

The Uruguayan media has its own interests, particularly in getting official publicity contracts. As a result, owners of newspaper do not often engage in this kind of activism because it could hurt their interests.

¹¹⁴Senator Brausse from the Colorado Party and Senator Acosta y Lara from the National Party were the leading senators.

¹¹⁵GAIP was formed by the Uruguayan Press Association, the Peace and Justice Service, Amnesty International, Transparency International, the Media and Society Group (GMS), the Communitarian Radio Association, the Institute for Legal and Social studies, the Librarian Association, the Library Sciences School of the University of the Republic and the Action for Civil Rights group.

¹¹⁶GAIP members managed to get some Broad Front MPs, among them Diego Canepa, Margarita Percovich and Javier Salsamendi, to attend a meeting in Buenos Aires where they mingled with international activists in the field and got to understand the rationale behind access-to-information laws. In addition, the British Embassy financed a study tour for Margarita Percovich and other MPs to study how the law works in Britain, which is mentioned by Percovich (Senate Records Commission of Education and Culture, 2006).

(Lanza, 2011)

The principles of the law were mainly inspired by models available at an international level. While there was a previous project, the new one presented was completely different, and accorded with what was considered international best practice at the time. In the words of Edison Lanza: *'We innovated in terms of our legal system, setting up a new kind of legal action, but most of the law was designed following the international principles'* (Lanza, 2011).

6.2.2 Politics and policy in the Senate

The arrival of the left-of-centre party (the Broad Front) in government in 2005, with very well-informed MPs and the presence of a compact group of activists, meant that there was now an opportunity for a RTI law to be approved. The existence of well-articulated international networks supported by the Open Society Foundation and the Inter-American Human Rights system was crucial to getting the proposal off the ground. The now Senator Margarita Percovich introduced a new RTI project based on GAIP's recommendations.

Strong political will was very evident in the initial stages, where Percovich was lobbying ferociously to get the law approved. However, there was also a lack of information and resistance from several stakeholders who provided testimony before the Senate Commission dealing with this law. One crucial issue was access to files from the military dictatorship, which dominated parts of the debate, showing that divisions over human rights were still very much present (Senate Records, 2006). Another set of issues raised during the debate was about who could request information, as local administrative law specialists would argue that requesters should have to demonstrate a specific (legitimate) interest when filling an access to information request. Furthermore, there were also discussions about a possible avalanche of requests and possible collapse of procedures (Del Piazzo, 2006).

On the other hand, some senators were keen on establishing the principle of transparency to send a message to public servants: *'We need to ensure that public servants release information and they don't say 'This information is mine, I will keep it, I won't give it away or I will place obstacles to releasing it'* (Senate Records, June 2008 p. 4). Senators also noted the importance of access to information for private parties: *'Senator Cid mentioned information about the Ministry of Health which is very interesting but there are also other Ministries, such as Agriculture, Fisheries and Livestock, which has a lot of statistical data and information for those who make decisions such as the private sector'* (Senate Records, 26 June 2008 p. 8).

The project stumbled when facing objections from the Agency for the Society of Information and E- Government (ASIEG). ASIEG is an office of the Presidency of the Republic with limited autonomy but significant expertise on e-government. ASIEG was in agreement in trying to approve a privacy law as this was one of its main commitments to international donors, (BID, 2006) as well as to align Uruguayan standards with European privacy regulations. ASIEG insisted on approving a privacy law before an access-to-information law (Senate Records, July 2008). In an unexpected twist of events, the Senate briefly delegated to ASIEG the drafting of the project so it could be aligned with the privacy law. This type of delegation is highly unusual in the Uruguayan legal policymaking process. ASIEG suggested changes in the law around the access-to-information regime, new sets of exceptions, implementation time-lines and also several redrafting of previous articles. ASIEG also suggested an extension from 15 to 20 working days for processing requests and an extension from 10 to 15 years for withholding classified information.

The bargaining process had consequences, particularly for the future enforcement institution. Darbishire (2006) reports an interest from Uruguayan authorities in a Parliamentary Commissioner as a enforcement institution for the RTI arena, similar to the Slovenian access-to-information model. Initial discussions around this topic showed little or no understanding of the institutional design of an independent access to information, as it was confused with a Civil Service Commission, among other institutions (Senate Records, September 7).¹¹⁷ Civil society organisations proposed a Parliamentary Commissioner for this role (Senate Records, November 6) which was initially well received by senators, particularly due to the appointment process proposed which involved screening by the Senate. This proposal was blocked by the Treasury based on the broad reforms Uruguay already had in place, which had led to the creation of several public bodies and increased fiscal costs. (Lanza, 2011, Percovich, 2011). Eventually, after a set of complex bargains, which involved ASIEG and Percovich, it was decided to establish an independent unit within ASIEG to deal with the implementation and control of this law.

As a result of the above-mentioned process, some parts of the law were amended following the advice of local constitutionalists and administrative law experts who were worried about the scope and lack of limits of the initial law, as well as the role of the courts (Senate Records, CEC, 2006). Several terms relating to requests, extensions and classification of information were modified in this instance as well. The process shows a high degree of interaction between state government agencies, a

¹¹⁷For instance, Senator Sanguinetti suggested that access-to-information requests should be handled by the Civil Service Commission.

particular senator and a few civil society groups. The project had several hands working on it which ended up affecting the consistency of the law as well as weakening the original proposal. A significant issue in this policymaking process is the absence of particular events that led political and social actors to set up these laws. The Broad Front had a commitment to this agenda, but there were no corruption cases, nor scandals to help the speedy approval of this law. Therefore, its approval seems to be linked to the political and policy channels and not directly caused by a particular event.

6.3 THE URUGUAYAN RTI ARENA

The current RTI arena reflects the complex decision-making process described above. In this section, I focus on the key elements of the Uruguayan RTI arena: the law, the state, actors and the RTI enforcement institution.

6.3.1 *Uruguayan RTI law*

Table 6.1 summarises the basic principles established in the Uruguayan access-to-information law in Uruguay. The law complies with international standards, but the absence of a specialised unit to deal with conflicts is one of the most significant matters. The inclusion of a human rights clause, which establishes that if access to information is crucial to protect human rights, then information should be released, is also a novelty of the Uruguayan system.

Table 6.1: Characteristics of Uruguayan RTI law

Presumptive right to information held by public authorities.	Information about procedures, decisions and support documents should be public. Information is understood in a broad sense (i.e. not just documents or information produced by the state). All state and non-state entities should be included.
Proactive publication	The government has to publish on-line: structure, functions, normative framework, tenured and contract personnel, contracts (identifying contractors), public funds transfers to third parties, how to make access-to-information requests, subsidies information, auditing information, budget information.
Request mechanism	There are no special provision in the law limiting the request procedure. The government has 20 working days to answer a request and can extend this time limit for another 20 days.
Exceptions and Limits	There is a clear list of exceptions: previous deliberation, ¹¹⁸ generic requests, human rights, national security and national interest (including international relationships and commercial interests). Other limits include classification of information as reserved for 15 years and privacy. The public interest test applies to exceptions. If the state does not answer on time, this represents 'positive silence' and the information should be delivered.
Duty to assist	The law establishes a duty to assist the requester.
Fees	In principle, there is no charge for getting documents. If charges are applicable, they should be proportional.
Conflict resolution System	The law establishes a conflict resolution mechanism through a special unit in the executive.

6.3.2 *The Uruguayan state*

The state is a major player in the Uruguayan governance setting, and, as a result, collects large amounts of information, both public and private. However, the Uruguayan state is a fragmented entity, with relatively low state capacity in some key areas (Ramos, 2008) as well as a slow pace of structural and public management reforms (Panizza, 2004, Panizza, 2008). Furthermore, while Uruguay does have stable policies with relatively good quality, it also has very low quality and unstable policies, such as the case of state sector reform (Bergara et al. 2010). To this, it is necessary to add the existence of a politicised bureaucracy and the absence of professional managers in several units, which also undermines the provision of public information. According to Uruguayan RTI law, every public sector body is subject to this regulation, which means that citizens have the right to request information

from them, and these bodies are mandated by law to publish certain sets of information (proactive disclosure). As a result, every single unit of the Uruguayan state is covered by this law. However, there are some 'grey areas', such as certain types of state-owned enterprises.¹¹⁹

The position of the core agencies

The core agencies collect large amounts of information to have an overall view of the government system. In the Uruguayan case, these core agencies are: the Civil Service, the Office of Management and Budget, the Treasury and ASIEG. Arguably, the combined power of those four institutions to collect information gives an overall picture of virtually all activities of the Uruguayan state. However, not all nodes have the same state capacity or political leverage, and, as a result, some of them have better access and more detailed information than other organisations.

The Civil Service Office is an office of the Presidency of the Republic. Its main mission is to oversee human resource management policy across the Uruguayan state and provide legal advice on hiring public servants as well as consultants. The Office collects crucial information about numbers of staff, positions available, dismissals and disciplinary procedures as well as management information about the civil service. It does this through an electronic register which allows every unit to transfer the information to the Office. However, it also relies on less modern techniques such as faxes or phone calls to collect information.

The Office of Management and Budget¹²⁰ is an advisory office to the President of the Republic. Its main task is to advise the Presidency on investment, budget and planning issues. As a result, the Office covers a wide range of programmes, with national, regional and local impact, coordinating much of the presidency's work. The Office has specialised sections to monitor the execution of the budget, the status of state-owned enterprises, the status of public investments and the performance of the state sector. Thus, it has several information systems in place that collect part of the relevant information which later produces policy analysis and executes programmes on behalf of the presidency.

ASIEG is an agency relatively independent of the Presidency of the Republic¹²¹ the in charge of

¹¹⁹Uruguay has strong tradition of state involvement in the economy and, since the beginning of the 20th century, set up large state companies (SOE) under monopolist conditions and public law regulation. With the development of new public management and the 'hollowing out of the state', new companies emerged owned by traditional SOEs.

¹²⁰In Spanish Oficina de Planeamiento y Presupuesto

¹²¹ASIEG's Director is appointed by the President of the Republic. ASIEG also has a board of directors coming from the private sector and other public sector organisations. These directors are appointed also by the President. ASIEG has a special administrative status (*organo desconcentrado*) which allows the organisation to make decisions in an independent fashion

electronic government policy across the central government, as well as being in charge of advising the Presidency on related matters, such as privacy regulation, transparency and issues regarding the 'knowledge and information society'. As a result, ASIEG implements a wide range of programmes which includes creating portals and setting up new online processes, as well as standardising and setting up basic technical infrastructure across the Uruguayan central government. ASIEG also has two units which deal with the implementation of privacy and transparency regulations, and should be in charge of implementing both policies.

The Treasury¹²² is in charge of designing, implementing and monitoring fiscal policy, which also leads to a prominent role in the budget. The Treasury collects information across the state through several information systems, which provide information on several government programmes and budget execution. The Treasury also performs audits on several organisations and has direct access to land value information.¹²³ Furthermore, the Treasury also controls the tax collection process which allows it to gather a significant amount of information about the Uruguayan population.

Core agencies are important in arenas as they aggregate a significant amount of data which they are able to provide to the centre for decision-making. However, nodes should not be seen as monolithic organisations. Due to the complexity and politicisation of Uruguayan public administration, certain units inside the nodes might not necessarily be aligned with the principal (the President, or the minister). Regardless of this fact, there is a general tendency to share information inside the nodes, but not necessarily among them. These agencies are usually in charge of collecting and releasing large amounts of public information to which they need access to proceed with their complex functions. Yet, there is still a lack of sharing of information in the public sector. This makes sense in the context of a politically responsive bureaucracy, and also in the context of low-quality provision of public information.

However, powerful core agencies are able to pull their weight when information is needed in order to fulfil government tasks. Core agencies are able to get information faster than any other accountability agency such as the parliament or the judiciary and act on it. One senior policy officer in one of the nodes puts it this way: *'When we ask for information it usually appears... it has to. But it all depends on who is asking. We demand information and we get it'* (ISCUY 10).

¹²²In Spanish the Ministerio de Economía y Finanzas

¹²³This is the result of a very odd development in Uruguayan bureaucracy which also concentrates in the Treasury the Tax Authority and the Games and Casino Department. In other words Uruguay did not experience an agencification (Pollit et al. 2004) process the way other countries did.

Archives and information management

In the Uruguayan RTI arena there is one agency in charge of establishing the general policy about archives: the General Archives. In 2007, Uruguay passed a law establishing a set of criteria to implement record management across the Uruguayan state. According to the last census (AGU, 2010), there are 906 archives in the country and most of them lack the proper human resource support to classify information. This is also the result of the lack of a clear policy to recruit archivists and other specialised personnel in information management, as well as a national shortage of this profession. This creates a set of problems for public information holders as they are not able to keep up with the information they have. As one higher civil servant notes: *‘Sometimes, I do not even know the information my unit has, and because we have no clear policy on how to store the information, some people tend not to share the information they have on their computers’* (ISCUY4). Another public servant noted that *‘Information management is extremely complex, we have no expertise and we are usually dealing with pressing issues that were supposed to be sorted by yesterday. We just can’t cope’* (ISCUY2).

The state is very deficient in its handling of archives and information management which results additional work for public servants retrieving information that requesters might need or that they should proactively provide.

Implementation and public bodies

One of the key functions of information holders is to proactively publish public information. This is a duty established in the access-to-information law (Art. 5) which mandates the publication of the institutional mission, salaries of public servants, relevant information for citizens, and budget expenditure and procurement, as well as ways the citizen can contact the state. The last proactive publication measurement available, which sampled 60% of Uruguayan government websites, showed that not one Uruguayan website complied fully with the duties established by law. Furthermore, 70% of Uruguayan websites achieved a medium-low ranking in the index which indicates the relative absence of public information on line (CAINFO-IELSUR, 2010). A recent survey by the Access-to-Information Unit (Del Piazso, 2013) notes that information on line about salaries and resources is still scarce. Table 6.2 summarises this information.

The best-ranked units are usually islands of excellence which collect and store significant amounts of public information¹²⁴. As a result, the flow of public information to the general public is quite low

¹²⁴However, being an island of excellence does not necessarily implies that it will be a transparent one.

Table 6.2: Proactive Transparency in Uruguayan RTI arena

Salaries	57% of the government websites do not show the salaries of public servants.
Resources	58% of the government websites do not show resources from the national budget. 94% of the government websites do not show resources from international loans or other sources.

Source: [Del Piazso, 2013].

and generally of low quality. The lack of a good implementation plan was quickly felt in terms of proactive transparency as well as in terms of request procedures, a campaigner and frequent requester noted: *‘At the beginning, public servants would not even know about the law. They would even try to charge us a legal fee to request information, and they would often not know what to do. To be fair they did not have a warning because the Unit in charge of the policy was set up later on, further down the implementation track’* (ISEUY1). An example of this disarray of public authorities at the very beginning of the implementation of the law is Montevideo City’s initial policy on access-to-information requests. The city council aimed to charge for every request, as well as to apply an automatic extension of twenty working days on every request (El Pais, 2011). The policy changed later on, but today (2014) the city still shows certain practices that hinder the request process, such as the use of a special form and an administrative decree that declares reserved large portions of public information. For instance, a recent request from the website quesabes.uy shows that the council still requires an identity card to process a request (Quesabes, November 2013). As a general rule, local authorities in Uruguay are still struggling with RTI, and some of them still openly resist the principle of access to information (Sena, 2012).¹²⁵

Public organisations with more state capacity and professionals developed internal policies to deal with access-to-information requests, and thus were not taken by surprise by the RTI law.¹²⁶ A social activist adds that *‘Due to the lack of a strong central guidance, each office was on its own. And as with other issues in the Uruguayan state, the ones with more resources released more information, and also tend to fence better when arguing exceptions’* (IEUY3). The Ministry of Foreign Affairs and the Central Bank swiftly set structures in place to deal with information requests and proactive transparency.

¹²⁵ Beyond paper, formats are important in order to use public information on line for other purposes. Friendly formats are usually html and open formats which would allow more access and better use of public information. This situation is now being addressed through the open government data portal and other open data initiatives although success is.

¹²⁶ This is the case for the SOE, Foreign Affairs, the Presidency of the Republic and the Treasury.

Both have managed to fence requests from activists and MPs in successful ways, arguing in court against the release of specific items of information. This shows that the more professionalized a public bureaucracy is in the Uruguayan context, the more complex the debate around the topic. Professionalized bureaucracies are also at the forefront of classifying large portions of information and declaring this information reserved (Busqueda, 2012, El Pais, 2012). A few organisations set up special procedures to deal with requests, particularly coming through email. For instance, the state-owned enterprise (SOE) ANCAP set up software which establishes a set of procedures to reply on time to the requester. These organisations are rare and often have the budget and understanding of the process to develop such systems. Such a development does not guarantee that organisations are more transparent but does guarantee an adequate work flow for requests.

According to the Uruguayan RTI, the highest level of the office hierarchy needs to sign an order to release public information. This authority is usually a politician. Dealing with an access-to-information law in Uruguay is complex for a public servant. As one higher civil servant noted, *'I know I have to publish information. But sometimes I publish bad news and I feel punished for doing so'* (ISUY2). In a follow-up on an access-to-information request to the National Direction of Fire-fighters, there was a very graphic answer: *'Darling, if I give you that information, tomorrow I will be fired'* (CAINFO, 2011). Thus, information that can be politically used in several accountability processes tends to be scarcer than other types of information. However, public servants are often unable to identify which information is of political use, thus leading to a very conservative approach in terms of releasing public information. Public servants find it difficult to share information in a politicised environment where information sharing could lead to unexpected costs. As one public servant puts it, *'it is very difficult to share information because you may be risking political exposure. Sometimes we have to get information through other channels such as the press, government websites and other sources to avoid asking for it directly'* (ISCUY4). Not sharing information also leads to appropriation of information by public servants. Some public servants exploit access to information that should be public to gain a certain advantage. A former consultant working in the Uruguayan public sector notes, *'We always had to hire someone from the inside because he/she was sitting on the data. In those days, there was no access to public information, but if we did not hire him/her for our project, we would not have been able to work'* (ISCUY5). An activist notes that, *'you tend to notice that some public servants feel they own the information they have, which is wrong'* (IEU3).

Increasingly, the government hires experts in communication (mostly journalists or former journal-

ists) to engage in the process of receiving requests and releasing information. These are the specialists in charge of dealing with the substance of a RTI request. Occasionally, this position is covered by lawyers, although in organisations with a certain degree of expertise and complexity, there is a clear differentiation in terms of roles. These government officials are in charge in the Uruguayan context of ‘chasing’ the information around the organisation, and making sense of the request, as well as engaging with the user.

6.3.3 *Demanding information in the Uruguayan RTI Arena*

There is no official way to know how many requests were received by the administration. This is because the Uruguayan state does not collect or provide any sort of information about how requests work. As a result, it is not really possible to quantify demand, quality and efficiency in terms of requests for information. This is significant in itself, showing the low priority accorded to access-to-information policy. A study developed by a local NGO showed that out of thirty requests to the national government, eleven were answered. Furthermore, among the requests that actually got an answer, five were delivered after the legal deadline. A subsequent study developed by a group of researchers at the University of the Republic (Gandolfo et al. 2012) showed that, out of seventeen requests, four were not answered.

In the course of this research, I designed and co-developed an intervention, setting up a website allowing people to request information from the government through an online portal. The website was developed partly as a research tool and partly as a campaign tool to foster RTI in Uruguay. It covered up to eighty public sector bodies and is now administered by the local NGO DATA. Table 6.3 shows the following statistics

According to this data, the most typical answer from the state is ‘no answer’ or ‘pending reply’. This data seems to be confirmed by studies performed by the Uruguayan government. According to a study (survey) performed by ASIEG in coordination with the Latin American Network of Transparency Institution (2014), only 63% of requests got a reply. In the study, only Ecuador ranked worse, with only 13% of the requests getting a reply.¹²⁷ Pineiro and Rossell (2015) concluded a study in which an average 17.2% of requesters got a positive reply from the administration. There is no information about the profile of requesters in the Uruguayan scene. A survey commissioned by ASIEG (2013) showed that 26% of the population is aware of the law. Around 41% of the people surveyed had

¹²⁷There is no official information available about how many requests were made in this ‘mystery shopping’ exercise.

Table 6.3: Website statistics quesabes

Requests	Numbers	Percentage
Successful	69	22.6
Denied	68	22.5
Pending Reply	128	42
Not held	19	6.5
Other situations	20	6.4
Requests (total)	304	100

Source: [Author's analysis based on Quesabes 2013].

graduate (university) level of studies. The Uruguayan law presents low entry barriers in terms of requesters as it does not discriminate on any grounds, and the law explicitly forbids public servants from asking requesters the reasons behind the request. Nevertheless, requesters note that very often public servants do ask the reasons behind the requests (CAINFO, 2011). The situation described is a direct consequence of the way the law was enacted and implemented. ASIEG and APIU (the Access to Public Information Unit) were reluctant to invest in advertising to promote RTI law use, and for a while the agency line was to be careful not to 'overload' the system. Official attempts to promote the use of the law were rare, apart for a few seminars, and there was no attempt to engage with citizens. A case study working with grass-roots communities in Montevideo showed that there was no knowledge of the law among the population and community-based radio broadcasters (Gandolfo et al. 2012). A proxy for the low level of demand is the number of cases that ended up for review with APIU from 2010 to 2012.¹²⁸

Most of the administration initially refused to engage in request processes by electronic means (e-mail), and there is evidence that some public organisations would only process a request if it met the standards of a particular set of forms they provided (CAINFO, 2011). Activists describe the request process as complex: *'It usually takes a lot of time and effort to make a request, and we tend to use legal jargon in it to avoid problems'* (Da Rosa, 2011). In other words, making an information request is not for everyone and still requires very specific legal knowledge, and there are several barriers average citizens would need to face.

¹²⁸ Only 54 cases ended up for review with the APIU. A safe assumption is that there were more requests but only a few requesters managed to appeal due to various constraints.

Willing and able requesters

Journalists are relevant users of this law. In Uruguay, the Association of Journalists was heavily involved in lobbying for access to information. Furthermore, the first legal ruling stating that citizens had the right to access to information (Alsina v the State) was led by a journalist. The obvious motive in using an access-to-information law is to get more information which can be turned into news. However, this requires a tradition of investigative journalism that is seldom present in Uruguay (Alsina, 2011). Furthermore, the way journalists get information is usually through sources, and eventually, when they have a hint, they make a request to get the information they are looking for. ‘Fishing expeditions’¹²⁹ are costly (as request mechanisms in Uruguay are slow and still pose barriers to requesters), so journalists have no incentive to use the law. One journalist noted that *‘young journalists with fewer networks could be prompted to use this law’* (IEUY6). Once a journalist uses the formal mechanism, other journalists and stakeholders could be alerted, thus potentially thwarting an attempt to get the ‘exclusive’. Researchers tend to get public information through informal means, often getting into direct contact with the public servants dealing with the data. As a result, there is a large degree of personalisation in the way and to whom information is delivered. This does depend on the field of study, as some areas such as economic data from the Central Bank, Statistics Institute and Budget, seem to be generally available to researchers. An important question that often worries researchers is the way data was constructed, which is seldom specified, as well as the integrity of data (i.e. if it is reliable). As an example of this, data produced about criminality in Uruguay tends to be of low quality, and there were no clear parameters to measure the phenomenon through the years, thus historical records are difficult to assemble. When the first Broad Front (left) government took power in 2005, it established a special unit to organise data about criminal activity, which produced a set of comprehensive reports. When the second leftist government took power in 2010, the unit was disbanded for political reasons, and, as result, much of the data collected was no longer available, or showed serious inconsistencies with previous data. Crucially, micro-data that allowed researchers to construct their own data was removed from the website. Researchers in the field noted that this process was *‘severely irregular and showed that we could not rely much in the data the government provided, with the result that we do not really have a full picture about criminality rates in Uruguay’* (IEUY10).

Civil society organisations that specialise in transparency and human rights are the most active requesters. This also suits their mission as most of the funding for their organisations comes from

¹²⁹Another term used in the local jargon is ‘launching a grenade in a fish bowl’.

several international players driving an agenda for transparency and access to information. In Uruguay, there are only five civil society organisations working actively on the field¹³⁰. They are increasingly developing strategies to collaborate with other civil society organisations in different fields where public information could contribute to solving several social issues, such as women's rights, environmental issues and migration. An in-depth study on domestic violence, performed by an alliance of NGOs, showed how limited information is about what it is considered one of the greatest security problems in the country. The study asked the Home Affairs Ministry twenty-nine questions, requesting information about the methodology of collecting data and classifying information about domestic violence and provision of this information, as well as administrative and budgetary aspects of the work the Ministry was doing on this topic. The request unearthed significant new evidence about domestic violence in Uruguay (such as the number of children who died in domestic violence situations), but also uncovered the lack of protocols in terms of collecting data about this topic (Da Rosa y Medina, 2011). The project also uncovered the lack of coordination among agencies that are supposed to register domestic violence incidents: the judiciary, the Education Administration Authority and the Ministry of Social Development. In this context, researchers had to make this information usable in order to make their findings available on line,¹³¹ and also to allow other interested people to access this data. One of the researchers notes that, '*it was a very lengthy process; we had to reconcile data and literally type some of the data into some sort of open format*' (Da Rosa, 2011).

Environmental groups face significant asymmetry of information, as websites usually do not provide all the information needed and government tends to hide meetings about key topics, (IEUY 2011). Much of the information also requires specific abilities in terms of analysis and these groups usually have little access to funds or legal advice. Three high-profile requests have been made so far with relative degrees of success.¹³²

'Snipers' use of the RTI law with resources

Interest groups are also increasingly using this law. Interests groups usually have access to funding and legal advice, and in this way they are able to fight their way through the proper institutional channels,

¹³⁰Centro de Archivos y Acceso a la Informacion (CAINFO), Transparency International (Uruguay), Datos Abiertos, Transparencia y Acceso a la Informacion (DATA), the Press Association of Uruguay (APU) and the Peace and Justice Service (Serpaj)

¹³¹The project website is <http://www.infoviolenciadomestica.org.uy/> accessed 15th August 2011

¹³²The requests were about: the status of the Aratiri project (to the Presidency and the Ministry of Transport), information about a report on pulp-mill pollution (to the Ministry of Foreign Affairs) and information about a contract between an SOE and an American oil firm (CAINFO, 2012).

including, when necessary, litigation. An example of interest groups using Uruguayan RTI law are public sector trade unions.¹³³ They are increasingly using the law to strengthen their positions in labour negotiations.¹³⁴ CIPA, a 'non-official' trade union related to the telecommunication SOE ANTEL, requested information about the numbers of staff affiliated to the official trade union. This information was crucial for CIPA, as the union needed to get recognition from the International Labour Organisation and labour authorities in Uruguay. This was denied on the grounds that a union was already in place. After a lengthy battle, information was released and granted (180.com, 2011). A similar process was followed by a police trade union demanding information from the Home Office about police officer membership in several trade unions so that the most representative union could be established.¹³⁵ Another interest group particularly active in terms of requests for access to information are environmental groups.¹³⁶ Businesses associations are increasingly using this law to advance their purposes. LIDECO, an association for the defence of commerce, managed to secure access to data about firms working in the agriculture sector after a litigation process. Lideco noted that:

The guarantees and trust LIDECO offered through its institutional development in terms of information management and as leader in good practices in the matter, have been key to ensuring a judicial decision in favour of our claim. (Antunez, 2012)

The statement shows that powerful actors with certain level of prestige in the arena are more likely to get information than others that haven't established their credibility. MPs are slowly becoming part of the group of users of access-to-information legislation.

Traditionally, MPs used their legislative prerogative to request information from the government¹³⁷.¹³⁸ Lack of answers is attributed to 'lack of political will' or 'bureaucratic issues'. A prominent senator from the opposition party mentioned that he does not use them any more as 'It is pointless'

¹³³Unlike other countries in the context of this research, trade unions in Uruguay are powerful actors and represent 36% of the workforce, the highest rate of unionisation in Latin America (UNHCR, 2012). Public sector trade unions have an even higher rate of unionisation.

¹³⁴As a result of the left's return to power, Uruguay reinstated collective bargaining negotiation in most areas of work. Establishing who has access to the bargaining table is often defined by which trade union represents more workers in the industry.

¹³⁵Judicial Decision 354/2011 available at www.poderjudicial.gub.uy

¹³⁶Uruguay has allowed a new mining project (Aratiri) in the countryside, as well as the construction of an important pulp mill plant which led to significant debates about possible damage to the River Plate and Uruguay.

¹³⁷The Uruguayan Constitution grants MPs the right to request information about public affairs from ministers (Art.118). Furthermore, Law 17673 establishes that ministers should reply in 45 days. This could be considered a 'sui generis' access-to-information right.

¹³⁸Requests tend not to be answered by ministers, regardless of the party in power. Statistics from the Parliament show that during the period 2000–2005 (Colorado Government), 2132 out of 4777 requests were answered. During the period 2005–2010 (Left Government), 1680 requests out of 2491 were answered. The current administration seems to be continuing this trend, as 136 requests have been answered and 183 have not been answered (Senate Website, 2012).

(Cabrera, 2011). However, when MPs used the RTI law, the government replied promptly.¹³⁹ If MPs' RTI requests are successful, then a key question is to establish why MPs do not use it more often. Initial evidence shows that MPs might not be fully aware of the potential of the RTI law and perceive their prerogative to request information as more important or useful.¹⁴⁰ However, there are also political motivations not to use this law. An opposition MP notes that:

Sometimes we prefer to use our prerogatives because it allows us to score political points. We show that the government is not going to answer, and we document that we did something about the topic, but it is not very effective. (IAUY5)

Another opposition MP notes that:

If you get the information, through the law, or through a reply, it is because the government wants to send a political message.... We usually ask when we have previous information by other means that official documents exist. (IAUY7)

Thus, MPs will tend to use the law as long as they get political points out of it. A clear example of this is the case of an opposition MP requesting data about the celebration ceremony for the newly-elected government in 2010, paid for by the previous one. President Vazquez mentioned at the time that he was 'offended by the opposition asking for the cost, as it was an investment in democracy' (Portal180, 2010). Finally, after a RTI request by a recently elected opposition MP, the President released the information. Not doing so could have risked a judicial action at the end of his term (El Pais, 2011).

Local-level MPs are also using the law. For instance, a group of local MPs from Paysandu requested information about the accounts from the traditional local 'beer festival'. According to rumours several providers were not paid, thus the opposition decided to use the law to get the raw numbers (El Telegrafo, 2013). By now MPs, particularly in opposition, have incorporated this tool into their options to control government. Companies have not used this law systematically yet in Uruguay. There are a few records of companies making use of this law, particularly in public purchase processes, as well as to gather evidence for judicial proceedings.

¹³⁹In the context of this research, I have so far identified three cases where MPs have used the law: a request to the President of the Republic about the cost of a celebration ceremony for the newly-elected government (180.com.uy, 2011), a request to obtain a copy of a contract between the government and an important company in the forestry sector, and a third request about the hiring of three professionals in the Presidency of the Republic (Presidency of the Republic, Resolution P/153/2012).

¹⁴⁰As a matter of fact, a Colorado MP is looking to change the legislation to align the answer deadline of the legislative prerogative with the RTI Law. The current regulation establishes that, to answer a prerogative request, the government potentially could have up to 105 days, while the equivalent under the RTI law is twenty days.

Innocent requesters

Individuals acting on their own are very unlikely to request public information. First, the state has done little to promote demand and, as a result, a large proportion of citizens are still unaware of this right. When individuals engage in using and quoting the law, they are usually disgruntled with local or national services, and they activate request mechanisms. One individual detected during the course of this research requested information from the local council of Montevideo that should have been posted on the website. Montevideo Council denied this information; eventually, he went to court and got access to this information.

However, mavericks are usually rare in the RTI arena. The website quesabes.uy, set up in the context of this research, provides a glimpse of certain behaviours that individuals using the portal start to exhibit. For instance, lack of a reply from the administration triggers requests to website administrators about the reason behind this. Users also tend to request that new units to be added to the portal. User comments on the website help each other with different ways to frame or interpret replies from the administration. In this way, individuals with different interests also collaborate, enabling more ‘social’ access-to-information requests in the digital age. However, the number of users still does not suggest that there is a huge demand but suggests that, given the chance, people might make requests. Requests on this website shows no indication of vexatious requests.

6.3.4 A weak enforcement institution: APIU and the role of the judiciary

In the Uruguayan RTI arena, there are two organisations in a position to order the release of public information: the Access to Public Information Unit (APIU) and the judiciary. Following the framework presented in Chapter 2, enforcement institutions can be classified on the basis of two dimensions: independence and enforcement capacity.

Autonomy

Table 6.4 provides a summary of Uruguay’s enforcement institution independence:

APIU is a semi-autonomous institution dependent on ASIEG and ultimately dependent on the Presidency of the Republic. The Board of Directors consists of the ASIEG Director and two other members appointed by the President of the Republic according to a set of merit criteria.¹⁴¹

¹⁴¹In Uruguayan administrative law APIU is known as ‘organismos desconcentrado’. Under this modality of administrative law, the President cannot directly give orders to the Unit, but will ultimately decide if decisions from the Unit are

Table 6.4: Autonomy

Dimension	Indicator
Screening and appointment process	Appointed by the President without scrutiny
Stability	Appointments were not regularly performed
Oversight	The Courts, the Administrative Tribunal and The President can overrule the decision coming from the APIU
Resources	Budget allocation is not clearly established and is decided by the Presidency
Perception	Not available

However, there is no scrutiny from the Legislative to the appointment of APIU members, unlike the cases of Chile and New Zealand analysed in this work. Members of the board are not paid a salary and payment consists of a insignificant stipend.¹⁴² This situation led to one of the first appointed Councillors to resign, noting that *'matters were becoming more complicated and delicate... It was not serious to work in this way, not to fully devote ourselves to the work APIU really demands'* (Sanchez 2012). The first Board was composed of three councillors and it took the authorities seven months to appoint new councillors, leaving APIU somewhat paralysed. The tenure of another member of the board was not renewed and the executive filled the position with the first non-lawyer: an archivist. The design leads to a lack of legitimacy in terms of the board of directors, which, although technically competent, have no political support. APIU authorities maintain that they are technically independent but admit that the lack of political independence is an issue (Lanza y Da Rosa, 2012).

The Unit set up a consultative forum with members of civil society, academia, the judiciary, the state prosecution and the private sector to deliberate on and recommend policy options. There is no formal way of appointing members of this forum and the term of the appointment is not clear. The consultative forum seldom met initially after its creation and had little say on the policy process.¹⁴³ APIU performs five functions in this arena: implementing the law across the Uruguayan state, proposing second-level regulation, providing advice to the government, acting as a liaison with civil society and academia, and settling disputes between public organisations and requesters. This

challenged. Theoretically, once the President appoints the members, he cannot fire them, and in this way members are independent.

¹⁴²In contrast, the sister Privacy Unit has its own staff; the board of directors is paid and has so far carried out significant work implementing the privacy law.

¹⁴³It did play a role advising the government to accept email requests as valid forms of communications.

particular institutional design implies that APIU's decisions can be abrogated by the President of the Republic. Furthermore, their decisions can also be challenged before the Administrative Tribunal.

Enforcement capacity

Table 6.5: APIU Enforcement Capacity

Dimension	Indicator
Extent of the legal mandate in terms of review processes	Does not have access to documents.
Extent of the legal mandate in terms of enforcement practices	Non Binding
Extent of the legal mandate in terms of imposing sanctions?	No mandate to sanction
Resources (staff, budget, capacities) to carry out the assigned tasks	Does not have its own resources)
Service delivery	Not available
Decisions or sanctions effectively applied?	Decisions are recommendations and depends on the will of the administration. Decisions are often challenged.

Implementation of RTI law has been complex and the Unit did not produce a robust implementation plan.¹⁴⁴ Table 6.5 provides a summary of the enforcement dimension in Uruguay. According to its own data, APIU has managed to increase the level of reporting from several public offices, as well as to establish a network of RTI points of contact. Proactive transparency publication and classification of information activities should have been carried out a year after the law was approved, but were not in place.¹⁴⁵ By October 2009, the Unit issued a guideline to units to produce a self-evaluation of the implementation process. By August 2010, the Unit issued specific regulations and guidelines on how to proceed in terms of implementation. Some specific measures, such as the organisation of seminars and setting up a website, were also part of the implementation effort. In terms of advice to other public bodies, the Unit is increasingly providing advice, but reactively rather than proactively. As a result, the Unit has no capacity to reach public bodies that are not interested or willing to

¹⁴⁴There is no record of strategic planning processes from 2010-2013. This is a difference with the processes of the Council for Transparency

¹⁴⁵The law was approved on 17 October 2008.

comply. In terms of settling differences between the requesters and the state, the Unit so far has issued 187 recommendations to public bodies, an average of 37 recommendations per year.¹⁴⁶

Recommendations do not translate themselves into release of information, and some public bodies challenge recommendations by ignoring them or challenging APIU competency in the matter. An example of this is case 009/2011 where the Central Bank challenged APIU criteria on reserved information. The Bank eventually went to court and fought a legal battle to keep this information reserved. Furthermore, it also obtained a decree from the President revoking APIU's decision and confirming that it has no competency on the matter. In a nutshell, the President revoked the decision of the allegedly independent institution, which shows the fragility of APIU's position.

APIU's position can be also challenged in front of a Supreme Administrative Tribunal. In the case 23/009, APIU ordered the telecommunications SOE to release information about public spending in official publicity. The Presidency decided not to intervene in this case, but the SOE challenged this decision before the Supreme Administrative Tribunal who ended up confirming APIU's decision to release the information. However, the Tribunal noted that APIU did not have the power to order the release and also noted it had no power to review how public bodies classify information.

A former Councillor noted that, *'The only tool we really have is an annual report about the law, but there is no possibility to sanction, and as a result the public bodies fulfil their duties according to the will they have to be transparent; thus, the power of the APIU is diminished'* (La Diaria, 2012).

To put together an Annual Report, APIU relies on self-reporting mechanisms from public authorities. Table 6.6 shows the degree of compliance through the years

Table 6.6: Number of reports received by APIU

Year	2010	2011	2012	2013
Number of reports received/ number of public authorities	17/203	44/203	19/203	61/203

Source: [Author, based on APIU, 2013].

The low level of compliance shows that APIU has neither the ability nor the resources to force these authorities to comply with basic duties under the Act.

¹⁴⁶Data available from 2009 to 2015. In 2012, one of the members of the board resigned and, as a result, the board cannot function.

The role of the judiciary

According to the law, requesters can access the lower administrative courts in the capital and the lower civil courts in the rest of the country to sue the state. The process takes only six working days, and the ruling can be appealed before a Higher Tribunal. Potentially, the Supreme Court of Justice could intervene but only if points of law are at issue.¹⁴⁷ Courts have been active in terms of reacting to access-to-information demands. Demand has been relatively low, but the courts have usually upheld access-to-information requests. Up to 2012, twenty rulings were challenged in second-level courts. So far, it has not been possible to retrieve the number of rulings at low-level courts. An initial search of private databases shows that out of fifty cases, in forty the judge granted access to information. In this way, the judiciary is setting a powerful precedent for openness. One activist notes that *'some of these cases are fairly obvious, and a waste of time for the tribunal; others are more complicated and deserve attention from the judiciary'* (Lanza, 2012).

However, there is a set of cases that end up being informally resolved by the judge through transactional mechanisms. In other words, the Judge decides not to issue a ruling if the matter is relatively simple. This is usually the case with 'positive silence' (when the state does not release the information in due time) or where it has been a matter of internal communication inside a public organisation and there is goodwill on the side of the state to releasing public information. As activists note (CAINFO 2012), courts are not necessarily consistent when denying or granting access to information. This is the result of having the judiciary deciding on individual cases, which links back the policy adoption process and previous institutions in place.

The legal process is relatively fast but it comes at a cost for the judiciary. As soon an access-to-information request is processed, all the tribunal activity stops to deal with the request. As a result, access-to-information requests, if used extensively, can create backlogs for other cases in the same office. Furthermore, requesters need to have access to a lawyer in order to activate this process.

Lawyers' fees can be expensive and public interest litigation is relatively unknown in Uruguay. The judiciary plays an increasingly political role mediating conflicts between political actors about access to information. As opposition MPs begin to realise the power of RTI requests, judges are called upon to decide on these matters. For instance, in 2012 a MP from the Colorado Party demanded information about the state of public works on the Uruguay River. The river is administered by

¹⁴⁷The court could intervene only on points of law or when dealing with issues that are related to a violation of the constitution of the republic.

Argentina and Uruguay and there are debates about jurisdiction, joint infrastructure projects, etc. The government classified information about certain works as reserved and the MP demanded of the Foreign Affairs Ministry to know their status and cost. The judge decided in favour of the Ministry, noting that he understood the concerns of the MP, but was unable to deliver the information at that stage (El Observador, 2012). The judiciary also acted to uphold the constitutionality of the law. In Uruguayan legal tradition, only the Supreme Court can strike down legislation. The Court upheld that the law was constitutional after it was challenged by the Cable TV association (El Observador, 2013). The challenge originated when a local journalist asked for data on then number of client each Cable companies had. All companies resisted the release of this data, asserting that the application of the law was against free enterprise and commercial interests in their case. The Supreme Court asserted that the case was of constitutional importance and that the law was essential to ensure transparency in markets. Activists note that courts, while usually ensuring the access-to-information principle, also have problems in terms of applying a unified criteria. This can be explained by the fact that judges are still dealing with a new subject, there is little jurisprudence on this matter, and the judicial structure ensures that each judge can provide his/her own interpretation of the law.

6.4 URUGUAY: INITIAL FEEDBACK LOOPS

The Uruguayan RTI arena is still evolving and subject to possible feedback loops. For instance, in June 2013 the government decided to reform the access-to-information law, introducing a set of new exceptions which included protection of policy advice and the possibility of classifying information ‘on the spot’ when a request is made. The drafting came from the executive and was spearheaded by Senator Topolansky who was an early defender of the RTI law. The opportunity came amidst a budget review which usually does not go through the same checks as an average law, due to time and attention constraints. Civil society organisations quickly reacted, noting that there was no consultation process in place through the formal institutional channels. Several organisations mounted an online campaign, asking the government to withdraw the initiative and have a consultation on the matter. The government refused and the amendment passed the Chamber of Deputies, where further amendments were introduced establishing exceptions that severely limited RTI (Declaracion.uy, 2014).

Several MPs noted that APIU had become a nuisance for several state-owned enterprises and some of them lobbied extensively behind the scenes to secure the modifications. Civil society gathered international support from several international NGOs and the visit of the Special Rapporteur for

Freedom of Expression, Frank La Rue, was also instrumental in raising issues about the reform. The national Ombudsman made a recommendation to desist and reconsider this reform. The senate finally decided to withdraw the amendment but Senator Topolansky requested that legislative measures should be in place by the end of the year. The government established a consultation mechanism and a new reform was introduced with partial agreement from civil society. It included more legal powers to APIU, a harm and a public interest test and the new exception about policy advice was modified. The new amendment could be defined as a compromise. It is likely that, depending on the issues discussed and the use of RTI, more feedback loops like this will emerge from injured parties. In addition, while in this particular case civil society was successful enough in mounting a campaign and engaging policymakers, there is no guarantee that such success will be replicated as more tension grows in the system. The feedback loops indicate that the early statements from senators praising the principle of transparency and the use of data changes dramatically once information is put into action by interested parties.

6.5 A CONTESTED RTI ARENA

According to the typology presented in Chapter 2, Uruguay is a contested arena. Table 6.7 shows the dimensions and outputs in this arena.

Table 6.7: Outcomes

Availability of public information on a proactive basis	Fulfilment of proactive publication duty is less than 60% (average) across government units.
Efficiency in dealing with RTI requests	Not efficient or effective; 42% of requests go unanswered.
Accessibility and effectiveness to resolve disputes	There are no formal limits to accessing APIU. Courts may charge fees.

Source: [Author, based on CAINFO, 2012APIU, 2013, Que Sabes 2012].

The current status of the Uruguayan RTI arena can be explained analysing the three factors mentioned in this research: participation in the policymaking process, professionalisation of public administration and independence of enforcement institutions.

RTI emerged in Uruguay as part of a larger quest for human rights linked to previous abuses of the former dictatorship. It was always an agenda of a small group of activists that, when the Broad Front came into power, managed to influence key decision-makers to pursue this agenda, turning

Senator Percovich into a true political champion and entrepreneur for this cause. The agenda was largely supported in this last phase by international foundations such as the Open Society. Most of the policy was put in place by civil society following international standards, but the powerful ASIEG also played a role, introducing changes that weakened the law. Crucially in this adoption phase, the idea of an independent enforcement institution was discarded and control of this function effectively ended up in the hands of ASIEG through the creation of APIU. ASIEG was more worried about privacy than transparency and this meant that resources and focus were directed more to this goal, leaving APIU as a shadow enforcement institution. In addition, decisions about institutional design with no proper screening process ended up being adopted, affecting the structure and roles of the enforcement institution which largely depends on ASIEG. Lack of participation on the part of key actors and an absence of technocratic advice explains the current design of the law.

The timing of the approval and implementation helped to diffuse responsibilities between the outgoing administration and the new administration that arrived in 2010. As a result, there were discontinuities in policies and positions in terms of transparency initiatives. Michener (2010) speculates that the delay in approving the law at the end of the presidential mandate was a conscious decision on the part of the executive to leave a complex topic for the new administration to implement. This delay had lasting effects and led to the law being poorly implemented, but it is more likely that ASIEG's autonomy and focus on privacy were responsible for this rather than the Presidency itself.

Uruguay's politicised state bureaucracy fulfils the law partially. Part of this is explained by a relative lack of resources for implementation but the other part has to do with the secrecy ethos public servants and politicians have developed over the years. Information could be used politically and, as a result, could damage public servants' and politicians' careers. Information is not only hidden from the public but also from other public organisations to be used for various political purposes. Therefore, to establish a regime that operates under the assumption that all information is public is a dramatic change in what is effectively a fragmented public bureaucracy. Some organisations are able to deal more professionally with requests, releasing information but also establishing a complex patterns of resistance. Less professional organisations are still dealing with implementation problems and change.

In Uruguayan public administration, the ultimate decision to release public information or not is taken by a political appointee. As a result, requests are often perceived as a threat from a political perspective. Resistance, obstruction and no response are part of this logic. Such a degree of politicisation leads to very complex dynamics in terms of releasing public information and most requests are

deemed 'political'. The lack of structured processes to deal with RTI requests also shows the degree to which informality and lack of state capacity play a role. For instance, while Uruguay is perceived as a leader in e-Government in the region, a significant number of government agencies are still unable or unwilling to answer an FOI request through electronic means, as the *quesabes.uy* experience shows. Furthermore, the Uruguayan public administration did not fully incorporate an NPM logic and, as a result, metrics barely exist in several public organisations and access to these numbers is difficult and usually contested. Oddly enough, sometimes it is the public service that gets more benefits from the release of this information, as it allows more coordinated action which can be affected by political mistrust. The weaknesses in terms of archives and information management processes led to problems in terms of retrieving public information and are endemic to the whole system.

The weakness in terms of institutional design has major implications for the release of public information, as well as in the performance of the arena. The fact that the executive is able to revoke an order from APIU (and the fact that this has already happened), as well as the lack of political support for its functions, shows that it has a limited range of action. Furthermore, the fact that APIU's decision can also be challenged before an Administrative Tribunal casts a shadow over the organisation's effective enforcement power. The result is that, as a consequence of poor institutional design, there is often uncertainty about how requests should be solved.

The legacy of a strong judiciary is the key to ensuring the RTI is upheld. The Uruguayan judiciary has delivered in terms of granting access to information as well as standing up for the constitutional principle it represents. However, attacks on this principle have so far been blunt and unsophisticated. It is likely that more complex issues about the scope of the law and which organisations should be included might affect how the judiciary deals with RTI requests. Furthermore, the fact that the judiciary is also subject to the law (and often replies to requests) gives it more standing to intervene, but the lack of understanding and doctrine in this field offers poor guidance to lower-level judges on how to deal with this matter. In addition, the unintended consequence of the legal mechanism is that it can potentially create a backlog in judges' offices, and this might well pose questions about its effectiveness, as it is not sustainable in the long run. The more political the nature of the requests become, the more likely it is that the judiciary will end up mediating between politicians, as in other areas of Uruguayan political life.

Uruguay is still a contested arena where RTI is becoming an institution, but the limits are not yet clear. Uruguayan civil society is key demanding information and initiating accountability actions.

The degree of success of these actions largely depends on the involvement of the judiciary, where effective accountability can be achieved.

RTI ARENAS: A COMPARATIVE OVERVIEW

In the previous chapters, I provided a full account of three different RTI arenas: functional, mixed and contested. In this chapter, I provide a comparative overview, aiming to synthesise this work. First, I set out to compare these arenas based on the three main factors that shape them: participation in the policymaking process, professionalisation of the state bureaucracy, and enforcement institutions. Second, I compare the actors working in these arenas. Third, I look at change in RTI arenas, examining how feedback loops evolved in the selected cases. Finally, I look at the outputs these arenas exhibit and how they vary across the different types.

7.1 ELEMENTS CONFIGURING A RTI ARENA: PARTICIPATION, STATE BUREAUCRACY AND RTI ENFORCEMENT INSTITUTIONS

In this research I argued that RTI arenas based on similar principles end up working differently leading to different outputs. In Chapter 2 I noticed that all these arenas share a RTI law establishing similar principles about the availability of public information. I argued that there are three elements that help to shape RTI arenas: participation in the policymaking process, the professionalisation of state bureaucracy, and RTI enforcement institutions. In this section, I return to the definition provided in Chapter 2 and compare these elements for each arena.

7.1.1 *Participation in the policymaking process*

I argued that participation in the policymaking process by relevant stakeholders leads to robust policy design and the establishment of a policy community able to support the implementation of RTI laws. The New Zealand case shows how participation contributes to setting up a functional RTI arena. First, the large number of submissions to the Danks Committee, coming from different parts of New

Zealand society, is a strong indication of how local individuals and organisations were engaged in this debate. Second, an active civil society, aware of developments overseas, but grounded in New Zealand reality, contributed to the robustness of policy design. Third, a group of fairly progressive civil servants took the job of promoting the OIA inside the civil service and played a pivotal role in designing this law. Unlike other cases in this research, the participation of a small but influential part of the civil service proved beneficial for the establishment of this RTI arena. The level of participation and the influence certain participants exerted led to the establishment of a functional RTI arena. In fact, this was the policy community that would be crucial for implementation and addressing feedback loops in the NZ RTI arena.

In the Chilean case, participation came mostly from a small group of civil society advocates with a legal background. A group of influential techno-polis pushed this agenda forward with the support of two key politicians. This was not a large nor particularly open community. The process was influenced by one international factor: international foundations and the Inter-American Court of Justice (IACJ) in terms of policy. The IACJ ruling was instrumental in affecting the policy channel and setting up the Council for Transparency. International foundations were instrumental in providing support for civil society activists. These developments led to the establishment of a small, active and professional policy community where not all the stakeholders were represented, which would later affect the implementation process.

The Uruguayan case shows how a small and determined group of activists, with the support of one political champion and international foundations, can push for a RTI law. The process was mediated by strong interests who opposed the law and eventually managed to prevent the establishment of an independent institution. International institutions, in particular international foundations and the Inter-american Human Rights system, also played a role in providing policy ideas and support. The process led to the establishment of a small and dislocated policy community with little influence over the implementation process.

Table 7.1 provides a synthesis of the above-mentioned processes

International support is important and plays a role in fostering participation. The cases of Uruguay and Chile show how different international actors can aid the process by affecting the policy channel in Kingdon's (1984) terms. However, external support cannot per se deliver a robust and functional RTI arena. The case of NZ shows that the involvement of a small but influential group of politically neutral public servants and civil society advocates can deliver in terms of robust policy design without

Table 7.1: Characteristics of participation

Case	Level of Participation	Key actors
New Zealand (Functional RTI)	High level of participation	Civil Society and Civil servants
Chile (Mixed RTI arena)	Low level of participation	Techno-pols, small civil society group and two political champions
Uruguay (Contested Arena)	Low level of participation	Civil society + political champion

external support or influence. Thus, is participation by relevant stakeholders what makes a difference in these cases. Evidence indicates that while international actors are influential in terms of policy ideas, but remains relevant is the participation of local stakeholders

One of the striking characteristics in most of the cases is the absence of political champions when these laws are first proposed. In New Zealand, the process was largely driven by civil society and public servants. In Chile, corruption scandals forced the hands of politicians to look for a solution, which included RTI. In this case, champions emerged as a result of a political agreement, after a lengthy battle on the part of civil society. In Uruguay, the issue was linked to human rights and the shadow of a military dictatorship. After a lengthy battle by civil society organisations, one senator was instrumental in securing the law.

Politicians following this agenda have a mixture of incentives and carry out a vital task. In New Zealand, the few MPs involved saw the law as a way to limit Muldoon's government. In Chile, politicians used this agenda to show compromise and promote a 'beyond parties' approach. In Uruguay, politicians linked this struggle to campaigns related to human rights. In short, there were incentives but not sufficiently strong to persuade a large number of politicians to support these laws initially. Once the laws are to be discussed in parliament, it is difficult to oppose them. In all cases, only a few politicians decided to support this agenda, persuaded colleagues and secured consensus.

7.2 PROFESSIONALISATION OF THE STATE BUREAUCRACY

The second factor that I argued shapes these arenas is the professionalisation of the bureaucracy. A more professional bureaucracy leads to the ATI arena working more efficiently.

New Zealand shows the implementation of RTI by a professional bureaucracy. Such implementation

was initially resisted by the bureaucracy. However, once processes were in place, the New Zealand civil service carried the policy and implementation forward. They would occasionally do this even against the will of their political masters. The role of the Information Authority was key to securing a certain degree of coherence in the system. Once this institution was gone, problems of consistency emerged in the New Zealand arena. In Chile, by contrast, bureaucracy does not exhibit the same level of professionalism. As a result, the implementation of RTI was initially patchy with some units openly resisting publishing information. In addition, a politicised bureaucracy has much stronger incentives to retain information than a more professional one. Accountability lines in Chilean bureaucracy are very much aligned with parties. Having said this, Chilean bureaucracy managed to implement the law with a good degree of success over the years, particularly in terms of proactive transparency.

In Uruguay, bureaucracy is even more politicised. Political appointees decide which information is going to be released and how. This affects the way the system operates as the incentives of bureaucrats and politicians are very much aligned. Public servants have little incentive to release information as it could cost them in terms of their career. With a less professional bureaucracy also comes the problem of poor implementation. A weak implementation unit with few resources is unable to cope with a systematic implementation of the law. This causes problems, especially for core agencies who could benefit from having more public information available so as to be able to perform their roles.

In all three cases, professionalisation of the bureaucracy plays a crucial role in securing the implementation of RTI. Even against its own interests, a professional bureaucracy will implement the law. The different incentives of bureaucrats and politicians aids in this process. In addition, the bureaucracy gets to establish a new process that, in the end, also justifies new structures and new jobs. Professional bureaucracies are particularly astute when using RTI for strategic release of material to advance their interests, as the NZ Treasury case shows. However, the state is not a monolith, nor is the bureaucracy. Thus, even in the best scenario, some organisations might resist processing a request or publishing certain information properly. Some organisations have more resources and are more politically astute when dealing with RTI than others. Core agencies remain key players in these arenas and often benefit from information release to perform their functions.

Public records (and more generally information management) remain the Achilles' heel of all RTI arenas. As noted by White (2007), RTI requests are the 'tip of the iceberg'. Once a request arrives, a set of events and procedures unfold in a given office. Such procedures usually end up as simple questions such as: *Where is this information? Do we have it? Do we have to collate it and if so how?* This

is the realm of information policies and archives which is usually neglected by public organisations. In this research, I found evidence that archives were usually under-resourced, even before RTI laws came into being. RTI laws exposed the need to have information readily available and to have procedures for retrieving it. Information management policies also regulate how information should be collected and registered. When such policies are not properly established or followed, information quality suffers, affecting requesters and other stakeholders in the arena alike. The collation process obviously affects transparency as public servants take decisions on what to keep and what to release. Poor information policies have an impact on RTI arenas. Information policies are related to each organisation's capacity and its awareness of the value of information.

Table 7.2 outlines the points made above.

Table 7.2: Politicisation of Bureaucracy

Case	Level of Professionalism	Expected process
New Zealand (Functional RTI)	Professional bureaucracy	Processes are in place in terms of publication and receiving requests. Process often consistent
Chile (Mixed RTI arena)	Politicised bureaucracy with professional management	Processes are in place with some political interference
Uruguay (Contested arena)	Politicised bureaucracy + Political management of the request	Processes are not consistent

7.3 RTI ENFORCEMENT INSTITUTIONS

I argued that autonomy and enforcement capacity of RTI enforcement institutions played a key role in shaping RTI arenas. In this research, I compared three models of such an institution.

In New Zealand, the Ombudsman managed to establish itself as an autonomous and able institution. History played an important role, as the Ombudsman's Office was already an established institution in New Zealand. It was respected by the civil service and, as a result, it was fairly routine for the Ombudsman to interact with it. Other institutions such as the judiciary played a significant role in defending the Ombudsman when challenged. While, paradoxically, the Ombudsman's Office can only make recommendations, most of its recommendations were unchallenged. Thus, the Ombudsman was an autonomous and effective institution to which requesters could turn.

In Chile, the establishment of the Council for Transparency was the result of a complex bargain. As a specialist institution, the Council managed to secure its place and influence in the arena. However, issues in terms of the appointment and re-appointment of councillors, as well as complex cases where the Council encountered resistance from the courts, show limits to its autonomy, though most of the Council's decisions are backed up by the courts and the Constitutional Tribunal. It is an effective organisation able to deliver on its main mission, although it does face challenges in terms of resources.

In Uruguay, the absence of an autonomous institution leaves the arena at the mercy of implementation agencies. APIU is not autonomous and can be challenged by several actors in this arena. The President, the Administrative Courts and even the judiciary can overturn APIU's decisions. There is no screening process for APIU's officials. The appointment process experienced problems in the past, effectively undermining the agency's independence. The lack of resources also makes APIU a regulator with little opportunity to engage with public servants. Thus, while APIU does play a role in implementing this law, it is a weak role. The judiciary remains Uruguay's most relevant institution when information is denied, which comes at a cost for the requesters and the regulator.

All three models exhibit evidence that the autonomy and enforcement capacity of these organisations are crucial factors for their success, regardless of their institutional form. Legacy can play a role (as in the case of NZ), but the Chilean case offers an example of how a new institution can emerge. Coordination with other horizontal accountability institutions is important to secure the establishment of these institutions in the early days. In all cases, these organisations are often called on to decide on complex matters, effectively acting as arbiters in highly political disputes, highlighting the importance of establishing independence and ability in a RTI arena. Furthermore, in all three cases, leadership of these organisations is an important factor. Successive leaders of these organisations dealt with politically complex issues, which required certain political and administrative skills. Leadership can be shared or individual, but is one of the salient points. When effective leadership is in place, these institutions thrive and are able to exercise their powers fully.

7.4 ACTORS

Actors exhibit a similar set of behaviours in all arenas. Journalists are often one of the key supporters and most active users of RTI. However, they are not always keen on using it as it can affect traditional ways of working or information could be obtained too late to be used.

A very particular type of organisation in civil society is also present in all arenas. These NGOs

usually emerge as part of a campaign for freedom of information. Their core mission is to promote RTI and fill access-to-information requests, evaluating the implementation of RTI policies. These NGOs are usually small, with a legalistic outlook and supported by international foundations. They operate with small budgets, facing several constraints in terms of material and human resources. They play a crucial role, particularly in the early days of implementation, when testing the system is needed. Increasingly, these NGOs worked with others to expand RTI use, developing joint requests with other organisations according to relevant issues on the political or social agenda. In New Zealand, use of RTI was closely associated with the environmentalist movement, which played an important role in advancing RTI in the first five years. As RTI awareness expanded, other organisations such as unions, universities and civic associations started using the law.

Politicians are usually latecomers to the use of RTI. Only a few of them used RTI to pursue their political agendas. Once politicians understood the value behind RTI, they become avid users, as the New Zealand case demonstrates. Politicians know that the lack of a reply is still something they can use, particularly in opposition, to embarrass the government. Once politicians become users of RTI, they legitimise the instrument, making it an integral part of their toolbox. Politicians mostly request information to score political points, which usually results in different treatment at the receiver end. In addition, a politician may already have information in advance when making a RTI request.

Corporations are increasingly a player in RTI arenas. Corporations are taking advantage of RTI, particularly to analyse regulation or to gather evidence in trials. Increasingly, the civil service resist these requests which are considered intimidatory in all three arenas.

In Chile and Uruguay, individual requesters are few. Most individual requesters are lawyers representing clients. Individual requesters do not engage, which reflects the lack of information about these policies and the difficulties in terms of access. This is one of the most worrying aspects of RTI arenas, as the lack of requests coming from individuals challenge the democratic ideal behind these laws. New Zealand offers a rare case where individuals did request information. In some cases, this was linked to their own personal information as New Zealand RTI law included a section on this.

A new breed of organisations is also emerging in these countries. These organisations used open software to set up portals that would allow citizens to ask for information from the government. In doing so, they created a new channel of communication which, although it was not official, was difficult for authorities to ignore. These organisations designed processes influencing how users could request public information. The websites were a service, but crucially, also a political statement about

how RTI should work. In all the arenas, the websites created reactions, forcing the government to acknowledge this new reality. In Uruguay and Chile, the government decided to create its own portals. The websites did not fully democratise access-to-information request processes but they acted as an indicator of how a system works. However, sustainability of these tools might be an issue. Except for the Chilean case,¹⁴⁸ these websites have no support except from volunteers.

RTI laws put pressure on the civil service. In particular, across the three arenas analysed, the matter of 'free and frank advice' or confidential advice to ministers emerges as a common issue. The discussion is embedded in the nature and role of the civil service in each country and how it should operate. By exposing the workings and names of civil servants, RTI erodes one of the basic principles of traditional ('Weberian') bureaucracies: anonymity. Furthermore, it allows a set of complex games between bureaucrats and ministers and might promote not recording/writing down decisions or advice. There is no easy solution to this particular conundrum. By exposing information about how the government makes decisions, RTI contributes greatly to accountability in a democratic society. On the other hand, it may lead to gaming among politicians and public servants and behaviours such as not writing down advice or lying about its existence in the first place. The level of sophistication of arguments about this issue and feedback loops associated with it shows how civil servants and activists alike worry. While all the arguments about releasing or not releasing could be justified, the bottom line is that the problem is how information is framed, used, by whom and to what effect. Thus, it is the connection with political use (not the information per se) that is problematic. Such a problem requires assessment according to its particular context, with case-by-case analysis under the principles of RTI, and it is unlikely to be solved at a normative level. What emerges from the research in this particular area is that in functional arenas, where bureaucrats and politicians exhibit different incentives in dealing with public information requests, sophisticated games develop between ministers and civil servants. Where political interests are more aligned, such behaviours are less common.

7.5 CHANGE IN A RTI ARENA: FEEDBACK LOOPS

As discussed in Chapter 2, RTI arenas change. Change is the result of conflict that emerge in these arenas. When someone decides to file a RTI request, that is a statement about things he/she wants to find out. As noted by several public servants and requesters in this research, RTI is not a way to

¹⁴⁸The Chilean website was discontinued by Fundacion Ciudadano Inteligente in 2013 as a result of the launch of the government website. The New Zealand website www.fyi.org.nz is still in operation with support of the New Zealand Herald. The case was not discussed at length in this work due to the historical period covered.

‘ask in a friendly way for information’. Such conflicts usually escalate and end up generating feedback loops which are moments when actors decide to challenge the status quo of a RTI arena. Feedback loops are usually about the scope of the law, matters of procedure and the powers of the enforcement institution.

In the New Zealand case, feedback loops were positive, enhancing RTI. The 1987 reform included more units in the Act, as well as establishing a clear timeframe. The next feedback loops supported and expanded the role of the Ombudsman, limiting the veto power of the executive. Furthermore, this RTI arena survived major changes such as the NPM and MMP reforms. The ability to survive the test of time and the positive feedback loops is directly linked to participation and the establishment of a policy community able to steer these changes. In Chile, feedback loops have yet to materialise. A case about access to government e-mails triggered a reform that may have regressive results. In any case, feedback loops in Chile will remain at the margins.

In Uruguay, the government pushed for what initially was a regressive reform as a result of a high-stakes game about education. A campaign from a small and determined group in civil society was decisive and managed to stop what initially was a reform aimed at broadening exceptions. The campaign led to a complex bargain. Eventually, a deal was struck with government to set up a new legal exception not to release public information, but also to include a public interest test. The initial proposal, the complexity of the bargaining process and the subsequent developments show the dislocations among the small policy community in Uruguay. Table 7.3 provides a summary of the outputs in each arena

Table 7.3: Feedback loops

Case	Feedback loops
New Zealand (Functional RTI)	Feedback loops at the margins. Usually to expand RTI
Chile (Mixed RTI arena)	Feedback loops at the margins with some important developments to expand RTI
Uruguay (Contested arena)	Feedback loops can be serious. ‘Up for grabs’ scenario

7.6 DIFFERENT RTI ARENAS WORKING DIFFERENT LEADING TO DIFFERENT OUTPUTS

In this research, I argued that arenas can be characterised by three types of outputs : availability of public information, efficiency in dealing with RTI requests and accessibility and effectiveness in terms of conflict resolution.

In New Zealand, availability of public information was high and remained this way over time. The Information Authority played a significant role in this until it was disbanded. In addition, some civil servants and public organisations saw an opportunity to use information in advancing their policies. A professional bureaucracy was able to control the flow of information according to their interests. In terms of efficiency when processing requests, New Zealand's bureaucracy was able to respond to requests within a reasonable length of time and, after an initial patchy implementation, the system adjusted to and complied with timeframes. The New Zealand Ombudsman's Office operated as an independent institution to resolve disputes. When it was initially challenged, other institutions played a role in securing its role. The Ombudsman's Office provided an accessible and effective system to resolve conflict.

The Chilean experience shows initial reticence to implement proactive transparency, but information has gradually become available at a central level, though local governments are still a challenge in the Chilean RTI arena. At a local level, there are still issues about how requests are received and processed. In some organisations at a central level, some minor issues remain in terms of implementation. The Council has established itself as a legitimate mechanism to resolve conflicts, though there have been issues about appointments and certain important disagreements with the courts. The Council is an accessible and effective unit to seek solutions to conflicts.

Uruguay shows a lack of public information proactively published. Furthermore, there are serious problems in terms of receiving and processing requests. Uruguay does not have an independent institution to resolve disputes. The administrative unit in place provides an accessible but ineffective process. The only way to secure resolution of a conflict is through the courts, which is usually costly. Table 7.4 provides a comparative overview

To sum up, in this chapter I provided a synthesis of this comparative endeavour. I compared how participation, state bureaucracy and RTI enforcement institutions differ in all the case studies, thereby shaping RTI arenas. Furthermore, I also compared the elements of a RTI arena and the outputs,

Table 7.4: outputs

Case	Outputs
New Zealand (Functional RTI)	<ul style="list-style-type: none"> • Full proactive availability of public information • Efficiency in handling requests • Accessible and efficient resolution of conflicts for users of the law
Chile (Mixed RTI arena)	<ul style="list-style-type: none"> • Almost full proactive availability of public information • Partial efficiency in handling requests • Accessible and efficient resolution of conflicts for users of the law
Uruguay (Contested Arena)	<ul style="list-style-type: none"> • Partial proactive availability of public information • Inefficiency in handling requests • Lack of accessible and efficient resolution of conflicts for users of the law

as well as how they change over time. In the next chapter, I will draw my conclusions from this comparative exercise.

CONCLUSION: RIGHT-TO-INFORMATION ARENAS REVISITED

‘We shall not cease from exploration And the end of all our
exploring Will be to arrive where we started And know the place
for the first time’

— T.S. Eliot, *Little Gidding*

In this research I asked: *Why do RTI regimes that operate under similar principles work differently, leading to different outputs?* I argued that three factors are important to answer this question: participation in the policymaking process, the level of professionalisation of the state bureaucracy and the autonomy and enforcement capacity of RTI enforcement institutions. In particular, I showed how the configuration of these factors contributes to shape three kind of RTI arenas: functional, mixed and contested. I showed in the previous chapter how these configurations lead to different outputs. In this final chapter, I draw conclusions from this comparative endeavour.

First, I outline the contributions this work adds to the current state of the field. Second, I provide a set of recommendations for practitioners. Third, I outline a research agenda for future studies in the matter.

8.1 MAIN CONTRIBUTIONS OF THIS WORK IN THE CONTEXT OF THE CURRENT STATE OF THE LITERATURE

Literature in this field is often concerned about how these policies emerge. As noted in the introduction, part of the literature deals with why countries adopt RTI in the first place. Among these explanations,

there are arguments about the role of international organisations (Berliner, 2014), the role of ideology and capitalism (Stubbs, 2008), policy transfer and emulation processes and the role political systems play in this (Bennet, 1997), or the role played by historical sequencing and political organisation (McLean, 2011). I decided to take a different approach, emphasising the participation of key stakeholders in the policymaking process and previous institutions in place, advancing a middle-range theory (Merton, 1949).

My contribution is to highlight that who participates in the policymaking process and how, determines the robustness of policy design and the establishment of a policy community able to influence the way implementation works. In this way, the ‘details’ of how these laws are set up make a difference regarding design and implementation. The former contrasts with other explanations in the literature, such as the one provided by Michener (2014) where the size and composition of the cabinet in terms of the numbers of political parties included, seems to play a role in how strong these laws are. My cases show governments with a large single-party or coalition majorities, approving relatively strong laws, but with very different actors involved in the process in each case. My argument is that the interaction between technocrats, civil service, civil society and politicians explains the robustness of these laws and links to the type and quality of implementation later on, as all of these actors are involved in it. This connection is not often stressed in the literature, hence one of my core arguments here: the ‘details’ in the policymaking at a meso level matter. The nuts and bolts of these early decisions are crucial to understanding the evolution of RTI arenas. Thus, my argument does not seek a grand explanation of this phenomena. It is a nuanced, evidence-based into the making of these regimes.

About the point mentioned above, unlike Berliner (2014 p. 489) who finds no evidence that the involvement of international institutions is significant to explain the rise of RTI arenas, the cases presented here suggest otherwise. Chile and Uruguay were influenced by international organisations at crucial moments of policy formation. Donors, development banks and international technocrats played a role in the policy stream in both cases. Influence by external actors does not imply that Uruguayans or Chileans did not ‘own’ their process, but it does say that different international networks influence the policy stream. My explanation, limited to my cases, levels participation by key stakeholders and certain events drive the approval and design of these laws. It is the specific intertwining of actors and events that matter.

The literature also indicates that the state is a central player in RTI arenas. Several works by Roberts

(2000, 2004) and Piotrowski (2008), among others, showcase how the state adjusts procedures to resist or adapt to the way RTI works. The bureaucracy that holds the information is the same bureaucracy that is in charge of retrieving and eventually releasing it. My contribution in this aspect is to highlight the role the professionalism of a bureaucracy plays in the way RTI arenas work. While it is true that bureaucracies may well resist the release of information, they do this in several forms. In particular, the alignment of incentives between civil servants and politicians explains several differences in how different RTI regimes work. When the interests of politicians and civil servants differ in terms of accountability, bureaucracy might implement the law in a more impartial way. When politicisation is high, it affects the way requests are processed and information released, usually in a negative manner. This work also shows that the state is not a monolithic entity, thus, even if a case shows a good degree of professionalism in the public service, there may well be organisations that will still resist the application of RTI or proceed in a less professional manner. My explanation does not exclude the possibility that the outputs in RTI arenas could also be affected by issues of resources or previous capacity. However, the three cases I showed that lack of good archive policies and information management affects professional and less professional bureaucracies alike. My work also contributes to understanding key actors at a meso level in the state, showing it is not a monolithic entity.

As noted in the introduction, there is a small stream of literature in this field dealing with enforcement institutions in RTI arenas (Neuman, 2009, Holsen and Pasquier, 2012). This literature argues in favour of specialist institutions dealing with RTI regimes. RTI enforcement institutions are not often explored in detail or from an empirical perspective. My contribution to this emerging literature is to stress that regardless of the institutional form, two characteristics are important for these institutions: autonomy and enforcement capacity. A specialist institution may act as a focal point for the policy community as the case of Chile shows, thus empowering such community. Setting up these institutions is also mediated by history and context. Institutions that work in one place might not work in other places in terms of resolving conflicts in these regimes. However, if there are adequate autonomy and enforcement capacity, then resolving conflicts in a RTI arena will be more likely.

The literature available contains a few frameworks giving evidence of demand or the behaviours of public servants (Michener and Worthy, 2013, Pasquier and Villeneuve, 2007, Snell 2011). My contribution to the literature in this particular field is to design a framework to capture several elements that relate to each other in these arenas. In this way, the framework allows for a holistic

view of RTI. By deploying this framework, I am able to capture the way the state, requesters and norms work; in other words, the 'dynamics' of RTI in the cases provided. The framework provides a conceptual device, theoretically anchored, which could be used to structure further comparisons in this field.

From an empirical viewpoint, this work adds a new perspective and more empirical material to the three cases. In the New Zealand case, I revisit the work done by previous researchers (Hazell, 1989, Snell, 2001, White, 2007). Like Snell (2001), I argue that the New Zealand case is a functional system due to the role early designers played, as well as the previous existence of the Ombudsman. I also stress in the New Zealand case the role of a competent bureaucracy. For this particular case, I am also able to provide a more comprehensive explanation to understand the way the regime worked in those early years and why it remains a functional arena. In the Chilean case, I contribute with a systematic study considering the history, the role of the civil service and the role of enforcement institutions. In the Uruguayan case, I provided what is to the best of my knowledge the only systemic study, as well as contributing an analysis assessing the current state of the Uruguayan RTI arena. The website quesabes.uy is, as of today, the only source for information about how, and if, the Uruguayan state answers FOI requests.

The distinctive characteristic of my work is to consider, from a middle-range theory perspective, how three key factors – namely participation, state bureaucracy and RTI enforcement institutions – shape the way RTI works. I also stress that decisions made at a very early stage in these arenas shape the way they work. I show how these early decisions and the inherited institutions combined, leading to certain outputs. In this way, this work joins others signalling the considerable impact policy inheritances have upon the substance of policymaking (Heclo, 1974 p.63). Further, when change comes to these regimes, it is possible to connect the degree of these changes with the way RTI regimes were originally configured, explaining the 'persistence' of these regimes in the face of significant challenges. In historical institutionalist terms, once the pattern has been established, it is difficult to change it. Thus, my contribution is based on a broad 'path dependence' view of politics. I argue that a set of initial conditions matters in term of policy design and outputs. Those conditions are often fluid, and a few key actors can play a dominant role as I have shown through this work. The historical sequencing of these reforms is also important to understand how the cases arrived at where they are today.

Finally, there is the issue of change in RTI arenas. To explain change I introduced the concept of

feedback loops, which aims to capture how RTI arenas evolve over time. This concept is anchored in a historical institutionalism tradition and helps to explain why RTI regimes continue to evolve in a certain way. Further, it helps to explain why the configuration initially established persists and is difficult to change. Once a RTI law has been established each arena evolve, generating feedback loops through the accumulation of conflicts. Conflicts are usually about central issues in the arena that key actors want to change. Once conflicts are significant in an arena they will trigger a feedback loop. Feedback loops are points of time in which an arena face a potential reform. Each type of RTI arena develops different feedback loops. Differences between feedback loops are a matter of degree. Functional arenas tend to develop feedback loops that offer an opportunity to improve elements of the RTI law, and often reforms are 'discussions at the margins'. Mixed arenas tend to develop feedback loops where there is a possibility to reform central elements of RTI. Contested arenas tend to develop feedback loops where everything is 'up for grabs'. As feedback loops evolve a 'branching out' process starts to unfold reinforcing the dynamics of each RTI arena. Feedback loops operate as a device not only to explain the persistence of these regimes, but also potential gradual change. As noted by Mahoney and Thelen (2010) historical institutionalism can provide room to explain change in gradual ways. Thus, feedback loops can lead to 'virtuous' cycles of reforms or can lead to the weakening of RTI institutions in each arena. To stress the importance of previous institutions in place in each arena as well as to stress the importance of 'positive returns' and 'path dependence' are traditional features of an historical institutionalism approach to public policy (Peters, 2012). In this work, I attempted to add value to the RTI literature offering this particular view.

Naturally, this work has limits. First, the cases I selected come from relatively small, democratic and comparable countries and from countries where the state plays a central role. As it was acknowledged in Chapter 2, this approach might be unable to explain how RTI works in places where there is no state, or where the state is fragile. Furthermore, the theory advanced here might also be unsuitable in the case of federal states, which are considerably more complex. In short, my findings are applicable to the cases I presented, and I invite others to build on them and disprove or refine my claims. Second, as this work has a broad base in historical institutionalism, it shares in some of the criticisms this approach face. Peters et al.(2007) note that there are challenges to historical institutionalism such as: explaining policy initiation, the role of politics, the evolution of policies, the role of ideas structure, and the role of agency.

Historical institutionalism face challenges when explaining change, at the origins and through the

evolution of the policies (Peters et al. 2007). I address this challenge by going into a detailed and structured explanation of how these policies emerged and were set up. In short, by using Kingdon's heuristic, I acknowledge that these arenas were not 'just there' but had a complex history which actually affects how they are configured. Furthermore, I present the different options policymakers had when setting up RTI and potential counterfactuals. For instance, had the IACJ not intervened in the Chilean case, the Council for Transparency might not be there in its current form. There is, of course, a risk in terms of analysing events in retrospect and fitting evidence to the theory developed. However, all the claims in this work can be verified and potentially contested, thus mitigating this risk. As noted by Peters et al. (2005), ideas are a powerful force often not taken into account. For instance, it would be difficult to explain the rise of neoliberalism and the significant change in the welfare state without reference to the underlying political ideology. In the three cases, I traced how certain ideas in the policy stream were critical to putting the enforcement institutions in place. Feedback loops can be influenced by ideas about secrecy or the role of government in certain areas. For instance, doctrines of 'national security' can influence the introduction of more exceptions to RTI laws. However, because this work is interested in a middle-range explanation, I argue that ideas alone cannot deliver change. Ideas need to interact with structures and actors to effect change in a RTI arena.

In addition, as Peters et al. (2010) argue, institutionalist accounts often emphasise a particular view of public policy. In short, this is a world of public servants and policymakers, forgetting sometimes the role politics plays in policies. In this view, politics and political incentives matter, and historical institutionalist accounts sometimes forget this. In this research, I showed the role politicians played in all cases. The focus of this comparative endeavour has been to explain the connection between the policymaking process and the outputs in these arenas. I acknowledge and explore the role of political champions in these arenas, as well as the political use of public information. However, my work seeks to shed light on the connections between policymaking and outputs. Such an analysis would not be possible focusing only in the reasons for politicians to adopt these laws, which has, up to a point, been explored by others in the literature (McLean, 2010, Michener, 2014)

In this work, I argued that the combination of three factors led to different types of RTI arena. In this way, I argue that these arenas evolve in a particular way through a reinforcing logic that leads them on a path to being functional, mixed or contested. The argument of this work might then be interpreted as saying that arenas are 'locked' into a certain way of working once feedback loops keep evolving. However, by introducing the concept of 'feedback loops' in RTI arenas and noting

RTI arenas have a conflictive nature, I also seek to show that these arenas are spaces where power is being disputed. In short, while these arenas might exhibit patterns, a feedback loop could well result in major change, depending on the context of the arena. As a *middle-range theory*, this work might not be able to explain unexpected and unprecedented changes in RTI arenas which could be the result of larger forces at play, such as a regime change or a dramatic reform of government institutions. However, as Berliner (2014) has previously noted, this work argues that arenas are quite resilient even in the face of large-scale reforms, as the New Zealand case shows. As with many other institutionalist accounts, this work does not offer a predictive outlook on arenas, but identifies the structural elements that are likely to matter in the event of a reform.

There are other caveats about this work and the literature in general. RTI is usually connected with notions of transparency and accountability. The explanation and the framework are agnostic about the relationship between RTI and transparency. As noted, transparency has several meanings but implies the availability of information about an actor for other actors to exercise accountability. Some definitions focus more on the mere availability of information and others are more demanding, focusing more on the fact that information should be inferable. The kind of transparency one finds in a RTI arena is influenced by the way the principle of availability of public information works, but also by other factors such as the capacity of civil society and other stakeholders to use information, larger issues such as education levels in a given society, and also the civic ethos in those societies. The fact that more or less information is available does not indicate *per se* that there is more transparency in several definitions.

In addition, the framework is agnostic in terms of how RTI relates to accountability. As noted by Fox (2007), the relationship between accountability and transparency is complex. In some of the cases presented here, the release of public information led to certain accountability outputs: politicians or public servants resigned and mistakes were corrected. However, just because there is more information available does not guarantee accountability will happen. Accountability institutions also have problems in terms of independence and ability. Depending on the context, such institutions could use information released to act but some of them might not be able to do so. The release of public information (often a complex and conflictive matter) is just one step towards fostering accountability in a given setting.

8.2 THE IMPLICATIONS OF THIS RESEARCH FOR PRACTITIONERS

Practitioners in this field come from different backgrounds. Journalists, public servants, funders, activists, politicians and lawyers among others are the most frequent actors in these arenas. Due to the limited number of cases analysed in this research, the conclusions are not necessarily applicable to other cases. The following points might be useful for actors either promoting these institutions or dealing with frustration as a result of what seems to be faulty implementation.

Participation in this process by civil society and the public service is important. If there is involvement by a group of able activists in civil society and an able group of public servants, it is likely that reforms will endure. Taking into account local views, experiences and feedback is essential for these reforms to endure. On the other hand, if processes are exogenous as part of grand design exercises or international experimentation, then these reforms are likely to be another case of policy transfer with no real embedment in a domestic political system. This is particularly relevant for funders and international organisations that usually promote '*best practices*' without taking local factors into consideration. There is a role for these organisations to play and this role is often in the 'policy stream'. Participation ensures these reforms a certain degree of sustainability as actors will have incentives to drive the agenda forward, establishing policy communities that will help this agenda to evolve. However, sustainability also depends on expanding the use of the instrument and securing enforcement institutions that work properly. As a result, donors should consider significant engagement not only when instituting a reform but also when a reform needs to be sustained, nurturing the policy community that works around the issue. Challenges to these reforms usually emerge when the reforms gain visibility and when engagement in terms of capacity for civil society and enforcement institutions is most needed.

Expanding the use of these laws beyond the traditional circle of users is important in terms of fostering democratic regimes. While reformers and donors usually seek a 'killer case' where political accountability is the direct result of the use of a RTI law, these are rare. Furthermore, they might not even be desirable as they could create feedback loops which can jeopardise the stability of the system. Cases where vulnerable groups use the law to advance their case or where social issues are being resolved thanks to the availability of public information and its use by several parties are worthy of support. This implies collaboration between organisations which are specialists in the RTI field and other organisations. In short, it requires working more with 'trusted intermediaries' (Roberts, 2014) rather than just focusing on what information does.

Practitioners should realise that RTI is an important institution, structuring new behaviours in

a given system. The dramatic change from secrecy to openness is not always administered easily in all societies. For instance, when data about schools is published, it can indeed create side effects such as discrimination against the excluded population. But these side effects are also related to the production process, framing, the media and other contextual factors that should be taken into account. In Uruguay, not to disclose the names of recipients of social programmes as it could lead to potential discrimination against them could be criticised, as public money should be open to scrutiny as to how it is spent (MIDES, 2008). Furthermore, it could be argued that some of these people might be on the payroll of political parties. In Mexico, this situation is completely different and information is shared publicly. The limits of privacy and potential side effects should be considered in the context of each arena.

Once these reforms are set in place, governments should acknowledge they are permanent. Therefore, lack of investment in RTI management can only backfire. Information processing units and people handling requests should be given a clear role in the organisation. Information-related professions are often ignored in the public service and people dealing with these requests are often seen as 'bad news'. In at least two of the cases (Chile and Uruguay), people sent to work in archives are not competent and the assignment is usually seen as a punishment rather than a promotion. This is part of a larger problem in terms of how these professions are treated, but it is crucial for information management.

Reforms may be intended to be permanent but the early stages of implementation are often a very messy process. It takes significant time for the public service to adjust to the very idea that public information should be released and that it goes beyond the mere proactive publishing of sets of public information. In all cases, problems in terms of receiving requests, processing them and information published are very common at the beginning of the implementation process. Some of them are just part of the nature of a RTI arena and the conflict it poses about who gets the information and how. One of the most common fears regarding these reforms is the '*avalanche of requests*'. This did not happen in these cases. Although there can be a spike of requests early on, it does not materialise later.

Finally, a note of caution. RTI regulation does not operate as a magic fix for all the problems of asymmetry of information in a given polity. While more information will be released and a new logic can potentially be put in place, actors still use their resources and strategies to get public information. Furthermore, RTI establishes a principle but does not cover all the possible applications of this principle, which are in constant review in these arenas. Nor does it resolve the issue of information appropriation by public servants or other actors with privileged access to public information. It

makes such practices more difficult and potentially penalises them, but they are not eradicated just by the introduction of a law. Therefore, it should be understood that RTI might help to improve transparency in a given society, but it does not create transparency *ipso facto*. It is a foundation, and it is unlikely that it alone will be able to reduce asymmetry of information among several actors in an arena.

8.3 FUTURE RESEARCH

This research articulates an argument explaining how RTI arenas work and the different outputs they produce. As RTI arenas become increasingly established, more research could add to our understanding of how they work and the outcomes these arenas produce. First, more research could test and either confirm or question the framework provided in this work. Thus, by adding more cases, different elements of the framework could emerge. In particular, it would be possible to explore the connection of several behaviours exhibited by requesters and public servants and different types of arenas. It would be possible to explore if certain ritualised behaviours are attached to a particular type of arena configuration. From a theoretical perspective, this would add value by connecting historical, contextual and previous legacies to behaviours exhibited in these arenas. There is also a case for exploring further the role of ideas in setting up RTI laws, particularly in terms of how political actors justify their adoption and use, as well as how these ideas influence later reform. In addition, by exploring several historical processes in depth, it should be possible to understand better what kind of participation contributes to certain outcomes, adding to the ideas advanced in this work and by McClean (2011).

Second, the evolution of public information will be strongly associated with technological developments in the information science/management field. As a result, it will be necessary to expand the understanding of information production processes, the classification of information and techniques that allow using this information for several purposes in the context of the state. In this research, I observed a new breed of organisations setting up web portals to promote demand for public information, as well as governments adopting such portals. Little is understood about the way they work and how these new developments affect users of the law, as well as the civil service. More research should focus on this particular area and would have the potential to improve service delivery and efficiency.

Another development connected with the evolution of technology is the rise of the 'open data' movement. This movement shows that public information combined with other sources of information

can potentially create social and economic value. Open Data implies that information should be released in certain open formats, allowing its reuse, which assumes that there are processes and structures ready for its release. As noted in this research, proactive transparency is still a complex issue. A recent ruling by a UK court (McNally, 2014) shows that requesters have the right to get the information in their preferred format. The implications for the public sector of this kind of ruling, as well as for requesters, are fundamental. Requesters might be able to use data in several ways to advance their campaigns, run analyses and potentially even improve and enrich the information. Such dynamics are going to affect these arenas and need to be better explored. These new breeds of organisations could build visualisations and generate analysis which could reach basically everyone with an internet connection. However, such information should be published in a special format and in a reliable and timely manner. Should public information be provided in a special format and if so which? What kind of capacity does this new way of publishing information demand? How does the state evolve as an 'info-producer'?

Third, the evolution of public information and transparency is linked with privacy. Exploring the ethical, normative and technical limits that citizens have in terms of sharing information that could be in the public domain can affect RTI arenas. How these limits are set and the cultural factors that affect them should also be part of future research endeavours. Fourth, the relationship between information and unintended consequences needs to be better explored. In the context of this research, cases about education and social services show an inherent tension between the right to know and potential discrimination due to the release of public information. If information is released about beneficiaries of public services, would they be discriminated against? Evidence in these cases is still very sketchy and the dynamics of how this happens is poorly understood. There is an obvious relationship with what actors might understand as transparency and eventual accountability in a given case.

Fifth, this research shows that initially RTI promotion and use is dominated by elites. As a result, only a few people and organisations use RTI regulation to get information they need and could potentially be used to foster change. If RTI is to fulfil its democratic ideals, then a better understanding of how the weakest groups in society are to benefit from it is needed. Conversely, a discussion should be encouraged about RTI empowering already powerful groups in society who are the only ones with the access, knowledge and capability to use this tool. Thus, it is necessary to understand better the users and uses of these laws in given contexts, to understand the effects of these laws in terms of more transparency and redistribution of power.

Sixth, there are still serious difficulties in collecting data in this field. Numbers of RTI requests, resolutions from enforcement institutions and the working of these kinds of laws in general is often poorly documented. This indicates the need to collect better data and develop a better understanding of the use of these laws. Experiments based on web portals could also aid in understanding more about users' perception and uses of the law in the digital age. More systematised data at a comparative level could provide benefits by developing reliable indicators based on empirical evidence in this field.

Seventh, the role of the media in the use of public information should be explored more consistently. The fact that only a small group of reporters are avid users of these instruments shows unequivocally that not all media is engaged in using public information and potentially sharing what they find. In a world of data, this means that potentially other journalists can build on previous work more easily, but incentives to do this remain elusive. Practices such as mentioning that information was obtained through RTI are beneficial as they show the usefulness of the instrument but not enough to harness all the potential that it has to offer.

In this research, I tried to show the complexity of factors that affect a crucial institution for our democracies. The conflictive nature of public information will remain, even when technology solutions promise a frictionless world of information; and could help to enhance delivery and understanding of public information. There is not such a thing as a frictionless RTI arena even in a tech utopia. Conflict about who gets public information, when it is used and how, will be at the core of these arenas. RTI laws work in complex ways. We should embrace complexity and a multiplicity of actors to foster solid RTI institutions that can promote more transparency and accountability. Promoting strategies to foster these institutions should take into account previous institutional legacies and contexts. Even if imperfectly implemented, RTI remains an essential institution for a democratic society in the 21st Century. Conflict about public information is a healthy sign. Like clean air, public information is easily taken for granted and only missed when it is already too late.

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ANNEX: LIST OF INTERVIEWS

NEW ZEALAND

- ISNZ 1 Interview former New Zealand senior civil servant, Wellington, November, 2012
- ISNZ 2 Interview New Zealand civil servant, Wellington, November 2012
- ISNZ 3 Interview New Zealand former Ombudsman, November 2012
- SNZ 4 Interview New Zealand former Ombudsman, November, 2012
- ENZ 1 Interview New Zealand senior academic
- IENZ 2 Interview New Zealand former policy advisor
- IENZ 3 Interview New Zealand journalist
- IENZ 4 Interview New Zealand lawyer

CHILE

- IACH 1 Interview Senator, Chilean Senate, April 2012
- IACH 2 Interview former Member Council for Transparency April 2012
- IACH 3 Interview, Member Council for Transparency April 2012
- IACH 4 Interview former politician April 2012
- IACH 5 Interview former politician April 2012
- IACH 6 Interview politician April 2012
- ISCH 1 Interview Civil Servant Council fro Transparency April 2012
- ISCH 2 Interview Civil Servant Council for Transparency April 2012
- ISCH 3 Interview Civil Servant Public Administration April 2012
- ISCH 4 Interview Civil Servant Central public administration April 2012
- ISCH 5 Interview Senior Civil Servant central public administration April 2012
- ISCH 6 Interview senior civil servant public administration April 2012
- ISCH 7 Interview civil servant public administration April 2012
- ISCH 8 Interview civil servant central public administration April 2012
- IECH 1 Interview Senior Editor Newspaper April 2012

- IECH 2 Interview academic April 2012
- IECH 3 Interview academic April 2012
- IE CH 4 Interview journalist April 2012
- IE CH 5 Interview civil society expert April 2012
- IE CH 6 Interview civil society expert April 2012
- IECH 7 Interview civil society expert April 2012
- IE CH 8 Interview civil society expert April 2012

URUGUAY

- IAUY 1 Interview former president of the Republic September 2012
- IAUY 2 Interview senator September 2012
- IAUY 3 Interview senator September 2012
- IAUY 4 Interview former senator August 2011
- IAUY 5 Political appointee August 2011
- IAUY 6 Interview Member of Parliament August 2011
- IAUY 7 Interview member of Parliament August 2011
- IAUY 8 Former political appointee August 2011
- IAUY 9 Former political appointee August 2011
- IAUY 10 Local legislative authority August 2011
- IAUY 11 Local legislative authority August 2011
- IAUY 12 Political Appointee August 2011
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- IAUY 14 Member of the Judiciary August 2011
- ISC UY 1 Senior Public servant central administration, August 2011
- ISC UY 2 Senior public servant central administration September 2012
- ISC UY 3 Senior public servant central administration August 2011
- ISC UY 4 Public servant central administration September 2012
- ISC UY 5 Public servant central administration September 2012
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- ISC UY 7 Public servant central administration August 2011
- ISC UY 8 Senior public servant central administration August 2011
- ISC UY 1 Activist August 2011
- ISC UY 2 Activist August 2011
- ISC UY 3 Activist August 2011
- ISC UY 4 International Expert August 2011

- ISC UY 5 Activist August 2011
- ISC UY 6 Journalist August 2011
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- ISC UY 11 Expert August 2011
- ISC UY 12 Expert August 2012