



## ***Puerto Rico:***

# ***Analysis of the Access to Information and Open Data Laws***

## **Executive Summary**

**May 2020**

In 2019 Puerto Rico adopted two laws to guarantee individuals the right to access information held by public authorities (the right to information or RTI) in the form of the Law on Transparency and Expedited Procedure for Access to Public Information (Transparency Law) and the Law on Open Data (Open Data Law). This follows the recognition of this right as a fundamental right in 1982 by the Supreme Court of Puerto Rico. In addition, federal agencies are covered by the United States' Freedom of Information Act (FOIA). Although this is a positive step, the rules on transparency in these two laws fall far short of international standards in this area. As a result, they fail to establish and protect an effective right to access public information for the people of Puerto Rico.

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

This Analysis is based on international standards regarding the right to public information, as reflected in the RTI Rating, a tool for assessing the strength of legal frameworks for RTI prepared by the Centre for Law and Democracy (CLD) and Access Info Europe, and better legislative practices from democracies around the world.

As a territory of the United States, Puerto Rico is not included in the main RTI Rating, which focuses on countries. To obtain an independent assessment and international ranking of the recently enacted Transparency and Open Data Laws, the Transparency Network of Puerto Rico sought the expertise of CLD.

The overall score of the Puerto Rican legal framework, based on the RTI Rating and broken down by category, is as follows:

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

This score would place Puerto Rico's legal framework for the right to information in 87<sup>th</sup> place out of the 128 countries currently assessed on the RTI Rating, or in the least favorable one-third of these countries. This is clearly a weak position that should be substantially improved.

The government of Puerto Rico must take seriously its obligation to implement the international and constitutional right to information and amend the laws to do so. We note that within the Inter-American human rights system a model Inter-American Law on Access to Public Information has been developed. This Model Law is robust, obtaining 142 points out of a possible 150 in the RTI Rating. As such, it provides an excellent benchmark for the government and other stakeholders in Puerto Rico to improve current laws.

# ANNEX

## Recommendations

### 1. Right of Access and Scope

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

### 2. Duty to Publish

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

### 3. Requesting Procedures

- a. Article 6(2) should make it clear that the information it lists is the only information that a requester may be required to provide to lodge a request for information.
- b. Articles 5(3) and (4) should be amended to make it clear that information officers must provide (reasonable) assistance whenever requesters require it, including to clarify their requests or where they are having problems lodging a request due to illiteracy or disability.
- c. A set period of time within which information officers must provide an acknowledgement of a request should be added to Article 6(1).
- d. The law should require public authorities to transfer requests to other authorities where they do not hold the information themselves but are aware of other authorities which do hold it.
- e. Article 8(2) should be amended to remove cost as a grounds for not providing information in the format preferred by the requester, taking into account the fact that the requester is already bound to cover the cost of reproducing the information.
- f. The law should provide for requests to be responded to as soon as possible, with the ten working day limit being a maximum period. Consideration should be given to applying the ten-day limit to all requests, including those

made at regional offices. Finally, consideration should be given to adding in conditions for when extensions to the original time limit may be claimed.

- g. The references to “other related costs” and “fees expressly authorised by law” in Articles 7(4)(c) and 8(1) of the Transparency Law should be removed so as to make it clear that fees will be limited to the costs of reproducing and sending the information.

#### **4. Exceptions and Refusals**

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

#### **5. Appeals**

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

- d. The law should provide explicitly that in an appeal before either the administrative oversight body or the courts, the concerned public authority bears the burden of proving that it acted in accordance with the rules.
- e. The law should explicitly grant both the administrative oversight body and the courts the power to order public authorities to put in place such structural measures as may be required to ensure that they are able to comply with their legal obligations in relation to the processing of requests.
- f. Consideration should be given to adding a system of internal appeals to the RTI rules, if this is deemed to be useful.

## **6. Sanctions and Protections**

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

## **7. Promotional Measures**

- a. The rules on information officers should apply to all bodies covered by the access rules, not just government bodies.
- b. The law should provide for some training to be given to all officials, in addition to the in-depth training it already calls for in the case of information officers.
- c. In addition to the reporting by information officers, a central body should be tasked with preparing an overall report on what is happening in terms of implementation of the RTI rules, ideally on an annual basis.
- d. A central body should be tasked both with overall responsibility for ensuring appropriate implementation of the RTI rules and with raising public awareness about the law and the right of individuals to make requests for information.
- e. The law should create a proper records management system involving the setting of records management standards, the provision of training on this and a system to monitor performance and to address cases where public authorities are not meeting minimum standards.
- f. Consideration should be given to requiring public authorities to publish lists of the main records they hold or at least of the categories of records they hold.