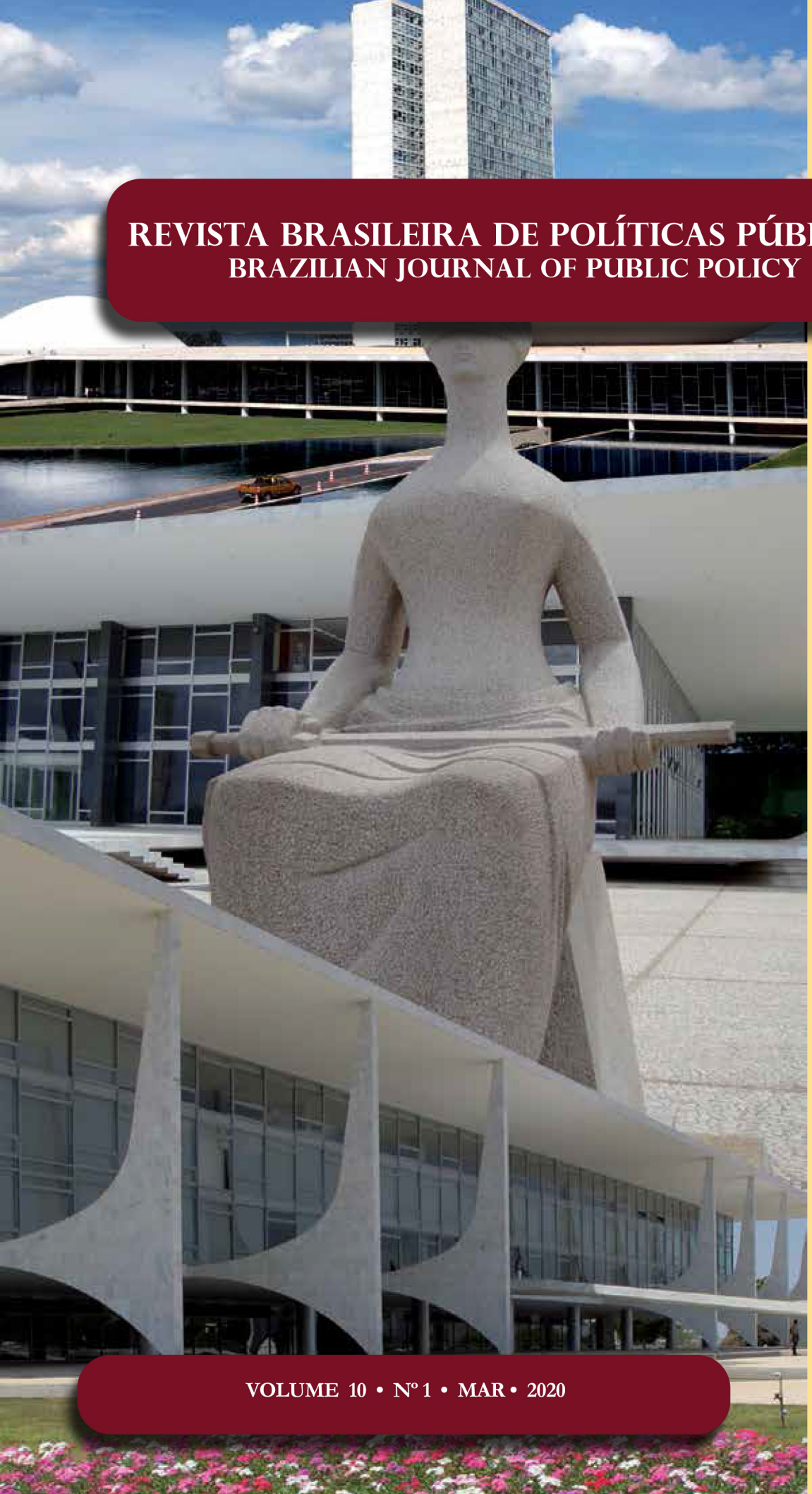

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Changing the bench for a handshake: litigation, administrative resolution and mediation in freedom of information complaints in Chile

Mudar os tribunais por um aperto de mão: contencioso, resolução administrativa e mediação em reclamações de liberdade de informação no Chile

Pablo Contreras

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Sumário

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Changing the bench for a handshake: litigation, administrative resolution and mediation in freedom of information complaints in Chile*

Mudar os tribunais por um aperto de mão: contencioso, resolução administrativa e mediação em reclamações de liberdade de informação no Chile

Pablo Contreras**

Abstract

The paper discusses how Chile has moved between different models of enforcement regarding freedom of information complaints. It shows how the creation of a specialized agency to decide access to public information complaints impacts on the increase of cases and, in turn, the administrative implementation of alternative dispute resolution mechanisms influences the increase of decisions and user satisfaction. By employing a method combining both quantitative and qualitative criteria, the paper evaluates the data available from 20 years of access to information laws. First, it examines how freedom of information was established in Chile by statute, legally entrusting its guarantee through judicial enforcement. Second, the paper reviews the creation of an administrative agency –called Consejo para la Transparencia– in charge of reviewing transparency complaints and expanding the exercise of the right. Finally, the paper describes how the model of conflict resolution has evolved and has received forms of mediation that allow faster resolution of cases and grant greater satisfaction to citizens and public officials.

Keywords: Transparency. Freedom of information. Dispute resolution.

Resumo

O documento discute como o Chile tem se movimentado entre diferentes modelos de aplicação em relação às reclamações sobre liberdade de informação. Mostra como a criação de uma agência especializada para decidir sobre o acesso às queixas de informação pública tem impacto no aumento dos casos e, por sua vez, a implementação administrativa de mecanismos alternativos de resolução de litígios influencia o aumento das decisões e a satisfação dos utilizadores. Ao utilizar um método que combina critérios quantitativos e qualitativos, o documento avalia os dados disponíveis a partir de 20 anos de acesso às leis de informação. Em primeiro lugar, examina como a liberdade de informação foi estabelecida no Chile por lei, confiando

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legalmente sua garantia através da execução judicial. Em segundo lugar, o documento analisa a criação de um órgão administrativo - chamado Consejo para la Transparencia- encarregado de analisar as queixas sobre transparência e expandir o exercício do direito. Finalmente, o documento descreve como o modelo de resolução de conflitos evoluiu e recebeu formas de mediação que permitem uma resolução mais rápida dos casos e proporcionam maior satisfação aos cidadãos e funcionários públicos.

Palavras-chave: Transparência. Liberdade de informação. Resolução de litígios.

1 Introduction

The enforcement of freedom of information (FOI) laws is part of one of the central challenges to achieve higher levels of transparency. How can we ensure that the promise of transparency obligations comes true? When does a citizen effectively access the information that is required? Recent institutional designs have favored the creation of independent agencies to resolve complaints regarding access to public information. Agencies are a key feature of FOI laws. The approach and decisions adopted by these agencies impacts on a reduction of transactional costs for an effective access to information. Therefore, and without the need of legal change, the decisions agencies make will forge the way to make the recollection of public information easier.

How can we assess the impact of agencies in FOI enforcement? One way to analyze the influence and impact of an independent agency is to examine the evidence of cases decided under such institutional arrangement. In other words, the creation of an independent agency should impact on the number of FOI cases decided.

The case of Chile is particularly illustrative for this approach, since it shows a 20-year continuum in which it is possible to study the transition from a legal recognition of FOI to the creation of an independent agency as an enforcement game changer. The right of access to public information was recognized in Chile in 1999, through a legal reform. However, a mere legal right was not sufficient to bring about a change in the conditions of state transparency. If the requested state agency did not reply or deliver the information, the requester had to file a suit before courts which entails attorneys' fees to begin charging. Time and legal costs were considerable obstacles to access public information. For a decade, only a few disputes reached the courts with meagre results, as it is examined in section II of the paper.

In the meantime, in 2005, Chile amended its Constitution to enshrine a constitutional principle of publicity applicable to all State bodies and agencies. And then, in 2006, the Inter-American Court of Human Rights found Chile responsible for violating the right of access to public information of one of its citizens, as part of the human rights obligations to which States parties of the American Convention on Human Rights are subjected to[1]. Contrary to what one might think, the constitutional recognition of the principle and the international protection of FOI as a human right, did not bring about a significant change in the number of cases. The normative change occurred at the level of primary norms –to use Hart's terminology–[2] but it did not make any significant impact on more transparency claims.

The real change will take place with the creation of a state agency specialized in transparency and access to public information. In 2009, the Law No. 20,285 on access to public information came into force, which created the Council for Transparency. The Council became the main tool for the promotion of the right. The law also created a procedure that made it possible to qualitatively expand the exercise of the right and the levels of transparency in the country. If in the first year of operation, the Council resolved 274 cases,

[1] Case of Claude Reyes *et al.* v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151.

[2] HART, H. L. A. *The concept of law*. 2. ed. Oxford: Clarendon Press, 1994. p. 79ff.

but in 2018, the Council solved 5,805 cases, which shows an increase of 2118.6% in the number of cases[3]. This explosion alone demonstrates the explosion of demands for access to information.

The access to information requests procedure has been facilitated both at the legal level and through administrative changes and technological tools. From a legal point of view, the procedure allows any person to make information requests and if the request is not fully satisfied, the same person can complaint before the Council for Transparency. Both procedures do not require legal assistance of lawyers and they are completely free. And from an administrative and technological point of view, the Transparency Council has implemented a Transparency Portal –a website that allows requests for access to information, cases follow--up and, eventually, to direct complaints before the Council. The digitalization of the administrative process made it possible to reduce transaction costs associated with both requests and the complaint process.

These developments have expanded FOI, but the new turn in terms of access to public information is being generated beyond the creation of an agency and legal and technological changes. In 10 years of the Law No. 20,285, the experience accumulated by the Council for Transparency and the type of cases solved by the Council, have allowed managing FOI complaints switching the adjudicatory decision of the Council for a mediation that anticipates the resolution of the complaint itself. This process is known as "Anticipated Conflict Resolution System" (in Spanish, "Sistema Anticipado de Resolución de Conflictos" or SARC). The SARC process seeks to solve the case with the agreement of the required state body, in matters of "less complexity".[4] Although there have been some precedents of the use of this system since 2010, its intensive use has been implemented since 2016. From that year, the composition of the type of cases decided by the Council for Transparency has changed. In simple terms, in that year, the number of cases decided under SARC amounted to 1,158, out of a total of 4,277, which is equivalent to 27,05% of the total number of cases in 2016. This percentage keeps rising, as it is examined in section IV of this paper. The evolution of the type of cases decided and their composition allow us to understand how the Council has mutated in its functions, from an administrative agency that mainly adjudicated cases to one that manages complaints through mediation mechanisms.

This paper provides a look at dispute resolution for requests and complaints about access to public information. Unlike the reflection on this issue, for example, in the United States –where academic debate focuses on the litigious phase and its operating costs–,[5] the Chilean case allows us to examine how the change in the enforcement model improves access to public information, by increasing the number of complaints that were inhibited under a judicial model and by facilitating their resolution through a successful administrative mediation process.

This paper studies the change in the model of enforcement of transparency obligations, from a litigation model to an increasingly mediation model. The transformation of the model is based on the analysis of the figures of 20 years in which Chile has gone through different legal rules and institutional designs to promote access to public information. In the last phase, the Council for Transparency has changed the management of complaints to strongly favor mediation as a way of resolving cases.

The hypothesis is as follows: the creation of a specialized agency to decide access to public information complaints impacts on the increase of cases and, in turn, the administrative implementation of alternative dispute resolution mechanisms influences the increase of decisions and user satisfaction.

[3] The data has been obtained from the same Council for Transparency through a freedom of information request. Every file can be found and downloaded here: https://bit.ly/2wuOHqe. Last visited: 01 june 2019.

[4] CONSEJO PARA LA TRANSPARENCIA. Dirección Jurídica. Unidad de Admisibilidad y SARC. *Procedimiento:* Admisibilidad. 2018. p. 9.

[5] GRUNEWALD, M. Freedom of information act dispute resolution. *Administrative Law Review*, v. 40, n. 1, p. 34, 1988.; VAUGHN, R. Administrative alternatives and the Federal Freedom of Information Act. *Ohio State Law Journal*, v. 45, p. 202-208, 1984.; RELYEA, H. Federal freedom of information policy: highlights of recent developments. *Government Information Quarterly*, v. 26, p. 317, 2009.; KWOKA, M. The Freedom of Information Act trial. *American University Law Review*, v. 61, n. 2, 2011.

The methodology used is diverse, incorporating both quantitative and qualitative criteria. This paper evaluates the data available from 20 years of access to information laws. The information was obtained in the following way. For the first decade of the regulation of the law (1999-2009), we have chosen to collect the data from the secondary literature that has studied the judicial resolution of access to information claims. Based on the sample obtained, judicial decisions –as primary sources– were collected both from official sources, such as the Judicial Archive, and from electronic search platforms, using VLex. Two methods were carried out to review the jurisprudence of the second decade (2009-2019), in which the Council for Transparency plays a leading role. First, the Transparency Portal, administered by the Council, was used to extract its open data on requests and complaints. Secondly, a request for access to public information was made to the very same Council for Transparency, in particular to obtain the samples made by the Directorate of Studies. The examination and analysis of the data was carried out under qualitative criteria of institutional design, that is, by examining the incentives that hindered or favored the number of cases resolved –both in the judicial model and in the Council's model–, as well as in user satisfaction, measured by the Council's Directorate of Studies.

The paper is structured as follows. Section II explains the origin of the right of access to public information in Chile but demonstrates how legal –and even constitutional– recognition did not have a significant impact on the number of cases litigated but, rather, complaints were scarce. Section III analyses the creation of the Council for Transparency and its role as a game changer, reviewing case data and its explosion in relation to the first decade of the right of access to information. Section IV examines a new shift in the resolution of transparency cases: the creation and intensive use of SARC as a method of resolving complaints through mediation. The paper concludes that the Chilean model of enforcement of access to public information demonstrates increasing requests and complaints by citizens and that its exercise has been facilitated by the creation of an independent agency that today favors mediation mechanisms in the resolution of disputes.

2 Creating a new right: freedom of information as a legal right and its constitutional transformation

In Chile, FOI is a fundamental right, recognized by the Constitutional Court,[6] and, at the same time, a human right, as declared by the Inter-American Court of Human Rights.[7] To understand the status of the right, it is necessary to review the historical trajectory of several reforms and changes that led to this recognition.

The original text of the Constitution did not contain any express reference to a principle of publicity of the acts of State bodies or a FOI right. The incorporation of rules of transparency and FOI, would be done progressively through different reforms to the legal system. The direct antecedent of FOI begins at the legislative level, in 1999, with the amendment of the Organic Constitutional Law No. 18,575, [8] which created a right of access to public information for every person. The right allowed anyone to request information from any agency of the Executive branch of the government. This right was limited on the grounds of secrecy or reservation established by the law, and its violation was subject to complaint before the courts.

The new legal right –though it changed the paradigm regarding public authorities' conduct–, had several limitations. At least three of them should be highlighted.[9] In the first place, the right was only enforceable

[6] Decision of the Chilean Constitutional Court (hereinafter, "STC"), R. 634-06, c. 9-10.

[7] Case of Claude Reyes *et al.* v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151.

[8] Law N° 19.653, on Administrative Integrity.

[9] *See*, in general, HARASIC, D. Historia de la consagración del derecho fundamental de acceso a la información pública en Chile. *In:* LETELIER, R.; REJEVIC, E. (eds.). *Transparencia en la administración pública.* Santiago: Thomson Reuters, 2010.; OLMEDO, J.

against agencies inside the Executive branch of the government, excluding the National Congress or the Judiciary and other state bodies that have constitutional autonomy –such as the Central Bank or the Constitutional Court. Secondly, although the grounds for secrecy were established in the law, the President of the Republic was allowed to create new cases of secrecy which were expanded by the equivalent to an executive order, reversing the general rule of publicity. Finally, the legislation placed the burden of enforcement upon individuals: there was not an independent agency in charge of enforcing FOI obligations, nor a special procedure for the protection of the right.

Progress towards the constitutionalization of FOI will take a decisive step with the constitutional amendments of 2005. In particular, article 8, paragraph 2, which created the constitutional principle of publicity. Such principle provides the following:

> The acts and resolutions of the organs of the State, as well as their foundations and the procedures they use, are public. However, only a law of qualified quorum may establish the reservation or secrecy of those or of them, when the publicity affects the due fulfillment of the functions of said organs, the rights of persons, the security of the Nation, or the national interest.

Although transparency and publicity was considered as part of an implicit principle of Chilean constitutionalism,[10] the constitutional reform clearly established the scope and limits of transparency. Given its location in the constitutional text and the literal text of the provision, every state body is bound by this principle (and not only the Executive branch of the government, as was the case with Law No. 19,653 mentioned above).[11] In addition, the Constitution prescribes that information can be secret but only if it is established by a law of qualified quorum –that is, those that require an absolute majority of the deputies and senators (art. 66 of the Chilean Constitution)– and under four strictly defined grounds: the due fulfillment of the functions of the organ, the rights of persons, the security of the Nation or the national interest.

At the same time, there were two events that ended up sealing the fundamental character of FOI: its recognition as a human right under the American Convention on Human Rights and its recognition as a constitutional right by the case law of the Chilean Constitutional Court.

In the first case, the Inter-American Court of Human Rights – precisely in a case against Chile – would declare that freedom of expression includes not only a freedom in terms of a non-interference state obligation, but also the right to *seek, receive* and impart information and ideas of all kinds.[12] It will be the first international tribunal to recognize FOI as a positive obligation of States. Subsequently, it will be followed by the Human Rights Committee[13] and, albeit with hesitations and nuances, by the European Court of Human Rights.[14]

Acerca del proceso de institucionalización del derecho de acceso a la información pública en Chile. *In:* LETELIER, R.; RAJEVIC, E. (eds.) *Transparencia en la administración pública*. Santiago: Thomson Reuters, 2010.; VVAA. *Hacia una nueva institucionalidad de acceso a la información pública en Chile*. Santiago: Fundación Pro Acceso, 2008. p. 9-67; ALLESCH, J.; OBANDO, I. El amparo del derecho de acceso a la información pública. *Ius et Praxis*, v. 11, n. 2, 2015.

10 EVANS ESPIÑEIRA, E. *La Constitución explicada*. Santiago: Lexis Nexis, 2006. p. 14; CONTESSE, J. La opacidad del legislador y la indulgencia judicial: jurisprudencia y práctica sobre el acceso a la información pública en Chile. *In:* GONZÁLEZ, Felipe (ed.). *Libertad de expresión en Chile*. Santiago: Universidad Diego Portales, 2006. p. 103ff.

11 SÁNCHEZ, Moisés. Nueva institucionalidad de acceso a la información pública en Chile: comentarios legales. *In:* VVAA. *Hacia una nueva institucionalidad de acceso a la información pública en Chile*. Santiago: Fundación Pro Acceso, 2008. p. 19; FERNÁNDEZ, M. Causales de secreto o reserva en el ordenamiento jurídico chileno. *In:* VVAA. *Hacia una nueva institucionalidad de acceso a la información pública en Chile*. Santiago: Fundación Pro Acceso, 2008. p. 38; RUIZ-TAGLE, P. Los derechos fundamentales ante la reforma del 2005. *Revista de Derecho Público,* Universidad de Chile, v. 68, p. 47, 2006.

12 Claude Reyes *et al.* v. Chile (2006) §76.

13 HRC. *General comment No. 34: Article 19 (Freedoms of opinion and expression)*. 102nd session 2011, CCPR/C/GC/34, at ¶18; Toktakunov v. Kyrgyzstan, Comm. No. 1470/2006, 7.4 (2011).

14 GISBERT, R. Bustos. The right to freedom of expression. *In:* GARCÍA ROCA, J.; MACHETTI, P. Santolaya (eds.). *Europe of rights:* a compendium on the European Convention of Human Rights. Leiden: Martinus Nijhoff Publishers, 2012. p. 374; CONTRERAS, P. *Secretos de Estado:* transparencia y seguridad nacional. Santiago: Thomson Reuters, 2014. p. 26-28; HERNÁNDEZ, M. El derecho de acceso a la información pública en el ordenamiento jurídico español: legitimación subjetiva, derecho aún no fundamental y balance crítico. *Transparencia & Sociedad,* v. 4, 2016.

In the second case, the Chilean Constitutional Court recognized the constitutional nature of FOI.[15] The Court affirmed that it is an "implicit" right under the Constitution, "as an essential mechanism for the full validity of the democratic regime [...]."[16] The ruling interpreted the right as deriving from the democratic clause of the Constitution (article 4), freedom of expression (article 19 No. 12) and the constitutional principle of publicity (article 8). For the Court, the purpose of the right is "to guarantee a democratic republican regime that guarantees the control of power, obliging the authorities to be held accountable by individuals".[17]

The strategy of legalizing and recognizing FOI in the Constitution, but under a judicial enforcement model, did not have a major impact or penetration in Chilean society. In this stage of FOI developments, there was not a unified effort to promote this right. For example, from the point of view of the number of requests for access to information, it is not possible to determine reliable data since the request procedures were not centrally administered nor processed on a digital basis. Therefore, between 1999 and 2009, it is not possible to determine the number of requests for access to public information.

Despite the fact of the lack of central data concerning FOI requests, it is possible to investigate the number and type of claims about the denial of access to public information. These are judicial disputes that were initiated on the occasion of a refused request. From a qualitative point of view and as a part of a doctrinal analysis, the studies by Contesse[18] and Allesch and Obando[19] can be reviewed. On the basis of the information reconstructed by these studies and the direct inspection of the Judicial Archive, it is possible to determine the following figures.

In ten years, only few FOI legal disputes can be traced. Table 1 summarizes the data found:

Table 1 – List of FOI cases between 1999 and 2009

First instance tribunal	Id. No.	Date	Name of the case	Decision	Appeals court	Id. No.	Date	Decision
3° Juzgado Civil Valparaíso	C-3767-2004	3/17/05	Casas Cordero con Dirección Nacional de Aduanas	Access	C.A. Valparaíso	755-2005	5/25/05	Denies
25° Juzgado Civil Santiago	C-2755-2002	11/19/02	Moral con Superintendencia Energía y Combustible	Partial access	C.A. Santiago	585-2003	10/15/03	Access
7° Juzgado Civil Santiago	C-7195-2006	8/11/06	Operaciones El Escorial S.A. con Superintendencia Casinos y Juegos	Access	C.A. Santiago	7321-2006	11/27/06	Access
3° Juzgado Civil Valparaíso	C-394-2004	6/9/04	Olmedo Bustos con Dirección General de Aduanas	Access	Unappealed	Not applicable	Not applicable	Not applicable
23° Juzgado Civil Santiago	C-32-2002	7/31/02	Vigneaux Bravo con Contraloría General de la República	Access	Unappealed	Not applicable	Not applicable	Not applicable
Corte Suprema	1380-2007	7/3/07	Lagos Lira y Fajardo Rojas con Ministro Relaciones Exteriores	Denies	Not aplicable	Not applicable	Not applicable	Not applicable
7° Juzgado Civil Santiago	C-19-2003	6/23/03	Claude Reyes con Banco Central de Chile	Access	C.A. Santiago	6016-2003	9/26/03	Denies
29° Juzgado Civil Santiago	C-4173-2000	6/12/01	Claude Reyes con Corporación Nacional Forestal (CONAF)	Access	C.A. Santiago	5226-2001	12/11/01	Access
26° Juzgado Civil Santiago	C-3449-2001	12/7/01	Manzur Nazal y otros con Servicio Agrícola Ganadero	Access	C.A. Santiago	1295-2002	12/4/02	Denies
1° Juzgado Civil Valparaíso	C-3326-2005	7/31/06	Casas Cordero con Dirección General de Aduanas	Access	C.A. Valparaíso	2336-2006	8/29/07	Denies
10° Juzgado Civil Santiago	C-2961-2003	6/30/03	Colbún S.A. con Secretaría Ejecutiva de Comisión de Energía	Denies	C.A. Santiago	308-2004	3/25/04	Denies
30° Juzgado Civil Santiago	C-3019-2001	8/9/01	Baquedano Muñoz con Dirección de Relaciones Económicas Internacionales	Denies	Unappealed	Not applicable	Not applicable	Not applicable
12° Juzgado Civil Santiago	C-3673-2001	12/26/01	Morales con Subsecretaría de Bienes Nacionales	Denies	C.A. Santiago	1899-2002	4/16/02	Denies
16° Juzgado Civil Santiago	C-12090-2004	8/31/05	González con Gendarmería de Chile	Access	C.A. Santiago	10487-2005	8/29/06	Access
7° Juzgado Civil Valparaíso	C-796-2001	6/15/01	Bartucevic Saánchez con Intendente V Región	Denies	Unappealed	Not applicable	Not applicable	Not applicable
29° Juzgado Civil Santiago	C-12695-2004	(IM)	Olmedo con Superintendencia de Electricidad y Combustibles (IM)	(IM)	(IM)	(IM)	(IM)	(IM)
26° Juzgado Civil Santiago	C-2449-2001	(IM)	(IM)	(IM)	(IM)	(IM)	(IM)	(IM)

Source: own representation based on data collected from Contesse (2006), Allesch & Obando (2005) and the Judicial Archive.

This sample allows us to observe the behavior of the courts in the resolution of transparency disputes. First, based on the information collected, it is possible to find 17 court cases but in two cases it is not possible to reconstruct the information. Based on the 15 cases in which information was obtained, 10 were reviewed in the second instance by an appellate court. The results, in terms of access to public information, are limited. Most of the courts ordered the denial of access to information. 9 of the 15 cases (60%) rejected access to information and only 6 cases (40%) ordered the release of information.

15 STC R. 634-07.

16 STC R. 634-07, cons. 9º.

17 STC R. 1990, cons. 25.

18 CONTESSE, J. La opacidad del legislador y la indulgencia judicial: jurisprudencia y práctica sobre el acceso a la información pública en Chile. *In:* GONZÁLEZ, Felipe (ed.). *Libertad de expresión en Chile.* Santiago: Universidad Diego Portales, 2006.

19 ALLESCH, J.; OBANDO, I. El amparo del derecho de acceso a la información pública. *Ius et Praxis*, v. 11, n. 2, 2015.

While it is not possible to accurately confirm all possible FOI litigation in this period, this sample allows us to understand that the enforcement of a legally recognized right through courts is practically anecdotal and required overcoming the obstacles of the various judicial processes, both in the first and second instance. The scarce numbers presented here will contrast with the enormous progress and increase in requests for access to information and its subsequent enforcement through the Council for Transparency.

3 The Council for Transparency as a game changer

In 2009 – a decade after the creation of FOI as a legal right in Chile – the promise of transparency was yet to be fulfilled. Congress passed a special law aimed at protecting FOI. Law No. 20,285 on Access to Public Information was published on August 20, 2008 and entered into force on April 21, 2009. Law No. 20,285 embodied the right of access and the principle of publicity through rules and institutions, including the creation of the Council for Transparency as the body that guarantees the right. This section describes how the law and the creation of the Council was a game changer in terms of FOI.

The law created a new procedure for information requests. State bodies must deliver the requested information, if it exists, if it is in their possession, if it does not affect a cause for secrecy, and in the manner required by law. The State has a period of 20 working days to deliver the information, and it is exceptionally extendable for 10 more working days, when "circumstances exist that make it difficult to gather the requested information" (article 14 of the Transparency Law). The procedure is free of charge and does not require the legal assistance of an attorney.

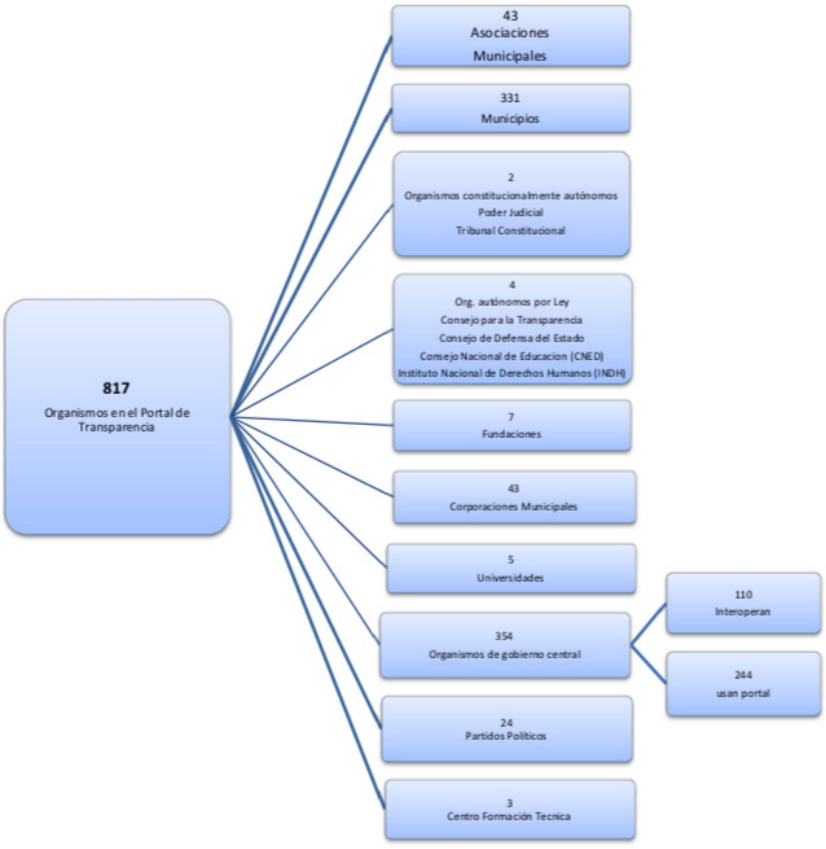
Beyond the law and the new procedure created, the fact that a new specialized entity was in charge of the administration of the system brought significant changes in a short time. One of the measures with the greatest impact was the creation of a Transparency Portal, a website that allows people to easily and quickly exercise their rights.[20] The Transparency Portal, as such, is administered by the Council and has been developed from agreements with different public agencies that have been integrated into the platform, since there is no legal obligation to do so.[21] By simplifying the procedure for managing requests, both for users and for public officials, the Portal has quickly added numerous agencies. The Portal started its operations in 2013. As of April 2019, the Portal has a total of 817 public bodies using the Portal.[22]

[20] See: www.portaltransparencia.cl. Last visited: 01 june 2019.

[21] From: https://www.portaltransparencia.cl/PortalPdT/web/guest/quienes-somos. Last visited: 01 june 2019.

[22] CONSEJO PARA LA TRANSPARENCIA. Informe Mensual de Estadísticas. Abril, 2019. p. 4.

Table 2 – Public agencies that use the Transparency Portal

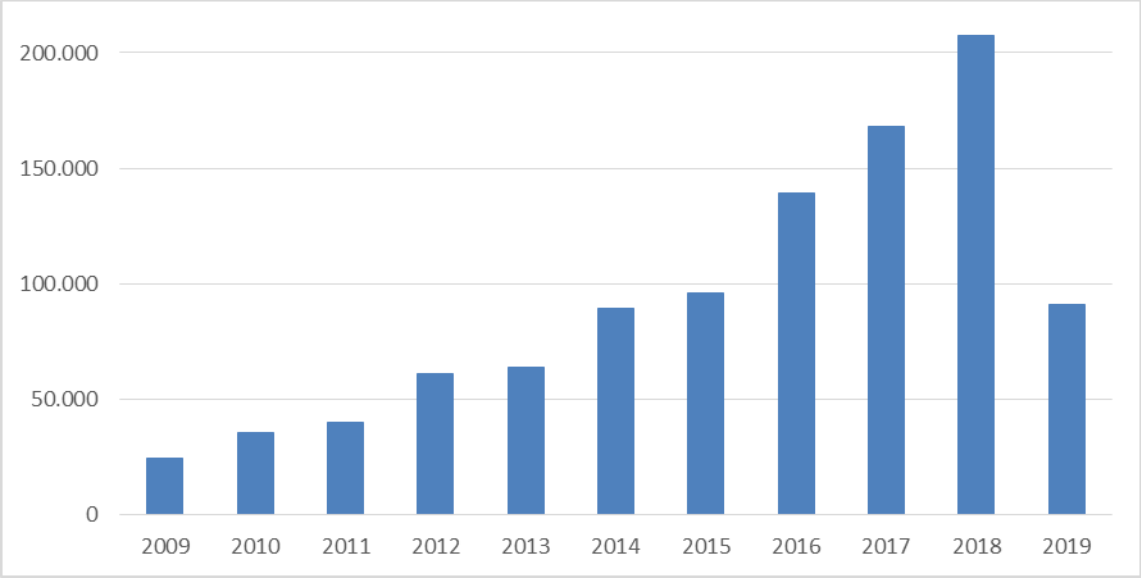


Source: Consejo para la Transparencia (2019), p. 7.

The site allows the creation of a profile and enter requests for access to information. Through a system of alerts, if the request is not answered within the deadline or the information is denied, the person can immediately file a complaint with the Council for Transparency, whose procedure, although not completely electronic, allows the process to be followed and the information to be obtained electronically once the complaint is favorably resolved.

The figures obtained from the Council for Transparency allow us to conclude that Law No. 20,285 and its digital implementation has allowed a significant number of requests for access to information to be made. In comparison with other countries, the figures for recent years far exceed the use of similar laws to make requests for access to information. This may have multiple explanations. In the case of Chile, in the decade of 1999-2009 there were no figures that would allow comparison with the last 10 years (2009-2019). However, since Law No. 20,285 came into force and then, since the implementation of the Portal, the number of requests has increased systematically over time.

Table 3 – Number of FOI requests, 2009-2019



Source: own representation based on data collected from Consejo para la Transparencia (2019b). Information collected from the year 2019 is updated to 26.04.2019.

The digital implementation of the requests and claims, together with an independent and specialized agency, allowed a leap in the use of the law and its enforcement. Unlike the decade of 1999-2009, when we did not have records regarding requests for access to information, there is now a digital repository of almost all requests, whose information can be downloaded and is available in open data.[23] With regard to the number of requests for access to information, the Council has stated that in 10 years of the law a number of 1,000,000 requests have been made.[24] According to the then President of the Council, "[t]he country can be proud to have the most intensely used transparency system by citizens in the world[,]" adding that Chile has "four times more requests for information per capita than Mexico, 10 times more than England, which are the international benchmarks in the matter and left long before us".[25]

To check the information, access to the reports of the Council's Directorate of Studies was gained.[26] The report reconstructs the figures from different sources, since the Portal only began operating in 2013. Through a projection and reconstruction of the figures of the Ministry of the General Secretariat of the Presidency, it determines that as of April 2019, 1,016,647 requests for access to public information were made.[27] In relation to the comparison with other countries, the Council collected statistical information from England, Mexico, Uruguay and Serbia, but it is not based on this selection. In any case, the available information is easily contrastable with the official sites of the Information Commissioner's Office of England,[28] the National Institute of Transparency, Access to Information of Mexico,[29] the Unit of Access to Public Information of Uruguay,[30] and the Commissioner for Public Importance and Personal Data Protection.[31] According to

[23] From: https://www.portaltransparencia.cl/PortalPdT/web/guest/opendata-y-analisis. Last visited: 01 june 2019.

[24] From: https://www.consejotransparencia.cl/cplt-celebro-1-millon-de-solicitudes-de-acceso-a-la-informacion-a-organismos-del-estado/. Last visited: 01 june 2019.

[25] From: https://www.consejotransparencia.cl/cplt-celebro-1-millon-de-solicitudes-de-acceso-a-la-informacion-a-organismos-del-estado/. Last visited: 01 june 2019.

[26] CONSEJO PARA LA TRANSPARENCIA. Sin título [Estadísticas de solicitudes de acceso a la información], 2019b and CONSEJO PARA LA TRANSPARENCIA. Minuta comparación internacional: sistema de transparência. 2019c.

[27] CONSEJO PARA LA TRANSPARENCIA. Sin título [Estadísticas de solicitudes de acceso a la información]. 2019b.

[28] From: https://ico.org.uk/about-the-ico/our-information/annual-reports. Last visited: 01 june 2019.

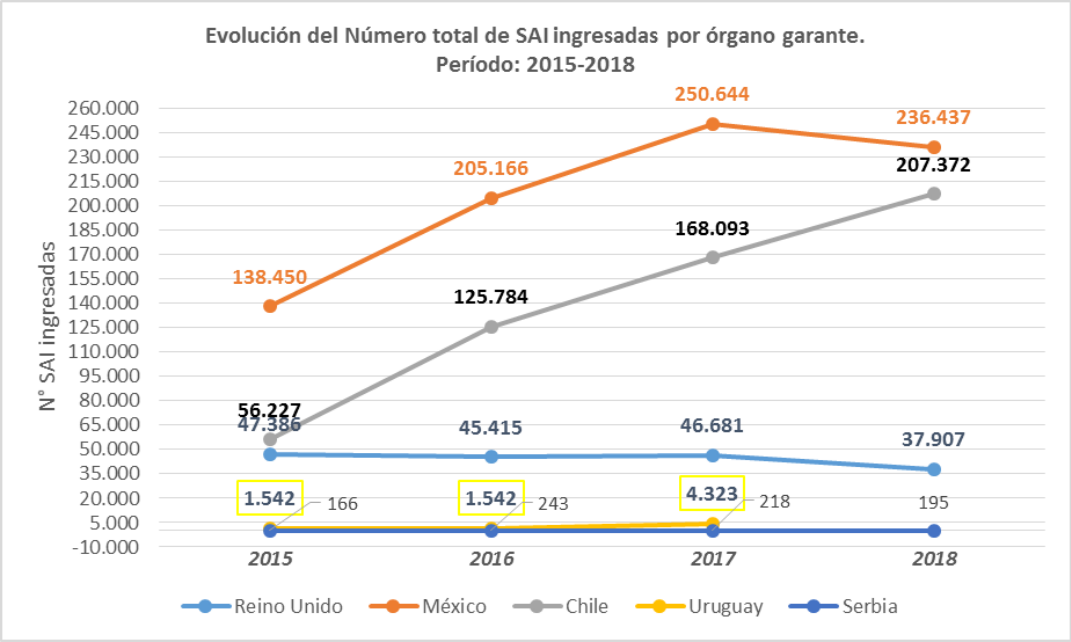
[29] From: http://snt.org.mx/index.php/informacioninteres/estadisticas. Last visited: 01 june 2019.

[30] From: https://www.gub.uy/unidad-acceso-informacion-publica/datos-y-estadisticas/datos/responsables-de-transparencia. Last visited: 01 june 2019.

[31] From: https://www.poverenik.rs/en/o-nama/monthly-statistical-reports.html. Last visited: 01 june 19.

the report, the number of requests for access to information can be summarized in the following table:

Table 4 – Evolution of the total number of requests for access to information in the United Kingdom, Mexico, Chile, Uruguay and Serbia

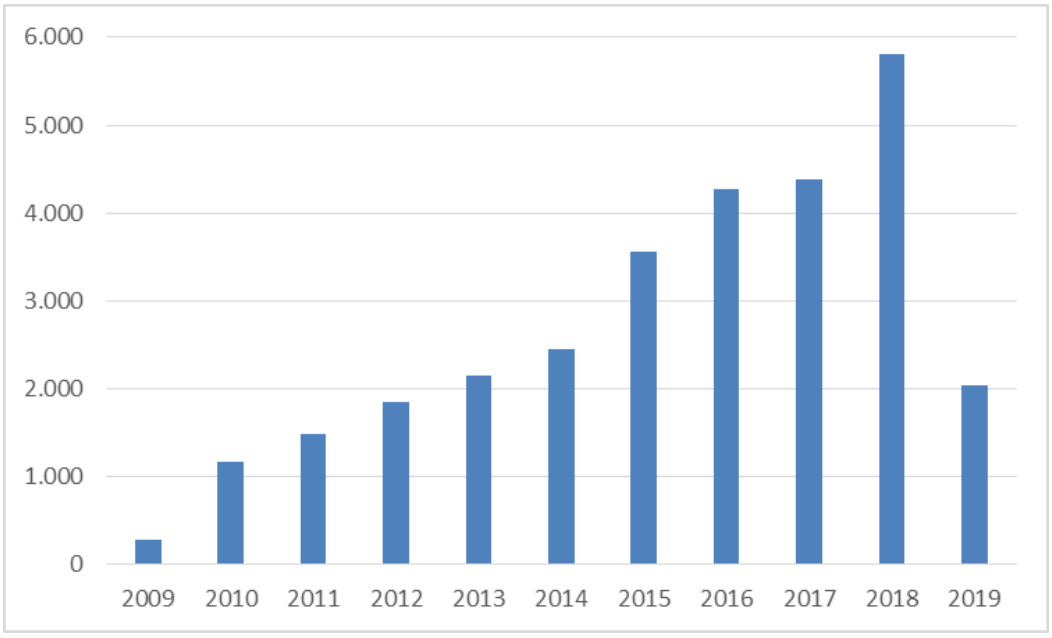


Source: Consejo para la Transparencia (2019c), p. 5.

Based on the information collected, it is possible to determine that there are more than 200,000 requests for access to information per year, starting in 2016. By year and in total, there are far more countries with legislations that served as a source for the creation of Law No. 20,285 –such as England and Mexico – and other countries that have specialized agencies – such as Uruguay or Serbia.

The intensive use of the law is manifested in its enforcement through demands for transparency. According to information obtained from the Council for Transparency, the number of FOI claims made in this decade totals 29,419 (including active transparency claims and access to information protections). Over the years, we have grown from 274 transparency complaints resolved in 2009 to a total of 5,805 in 2018. This information can be graphed as follows:

Table 5 – Number of FOI decisions, 2009-2019



Source: own representation from the data collected from Consejo para la Transparencia (2019e). Information collected from the year 2019 is updated to 26.04.2019.

The numbers of transparency claims continue to grow over time, along with the increase in requests for information. In this case, one can observe the distance between the sample of 17 cases litigated in courts in the decade 1999-2009 and only the first year of Law No. 20,285, in which the Council for Transparency resolved 274 claims, that is, an increase of more than 1,600% in a single year, approximately. The system created by Law No. 20,285 has turned what once was a province of the judiciary into an administrative management of FOI conflicts and complaints. With an independent agency, not only has the number of cases litigated and resolved increased –now before the Council and not the courts– but the figures show a steady growth in administrative or quasi-jurisdictional resolution on the part of the Council.

4 Changing courts for mediation

The procedure for legal claims under Law No. 20, 285 does not currently have rules that enable the use of alternative dispute resolution (ADR) mechanisms, unlike other countries.[32] As it has been pointed out, one of the factors that allow this type of mechanism to be more successful is that "it is preferable for the legislation on access to information to expressly state that the body competent to resolve complaints, appeals or amparo is empowered to seek an agreement between the parties".[33] To date, such a mechanism has been adapted by the Council for Transparency without a clear legal mandate consistent with the basic rules that govern complaints proceedings. In any case, Congress is discussing an amendment to the Law No. 20,285 which, among other matters, includes an express rule on the matter.[34]

[32] DUNION, K.; ROJAS, H. Sistemas alternativos de resolución de conflictos y derecho de acceso a la información pública: análisis de las experiencias escocesa, inglesa e irlandesa. *Transparencia & Sociedad*, n. 3, p. 80-81, 2015.

[33] DUNION, K.; ROJAS, H. Sistemas alternativos de resolución de conflictos y derecho de acceso a la información pública: análisis de las experiencias escocesa, inglesa e irlandesa. *Transparencia & Sociedad*, n. 3, p. 80, 2015.

[34] See: Cámara de Diputados, Boletín 12.100-07. Avaliable at: https://www.camara.cl/pley/pley_detalle.aspx?prmID=12616&prmBoletin=12100-07. Last visited: 01 june 2019.: "Article 24 bis: From the presentation of the claim or *amparo*, the Council may

Shortly after its creation, the Council for Transparency decided to mount an ADR pilot.[35] This plan sought to anticipate the resolution of the case through the introduction of negotiation and mediation techniques between the Council and the required state body.[36] The central idea was that officials trained with the Harvard's negotiation method[37] could embark on an early exit from the procedure before the award decision by the Board of Commissioners of the Transparency Council. According to Rojas, the criteria for selecting cases at the time were as follows: (i) that the cases were of low or medium complexity, (ii) that it would only apply to claims for access to information (and not for breach of active transparency obligations), and (iii) that the request wasn't fulfilled by the State and the deadline for doing so was already expired.[38] As we will review below, criterions have not varied considerably in the current SARC formulation as stated in the original Council for Transparency documentation.[39]

The purpose of the pilot program was described as follows in the Council's 2010 Institutional Report: "[t]he Alternative Case Resolution System procedure was developed to contribute to decongesting the workload in the processing of substantive cases, give greater prominence, control and satisfaction of the parties, reduce processing times (opportunity principle), give greater flexibility in the search for solutions (facilitation principle) and selectivity and efficiency in the use of resources (procedural economy principle)".[40] Accordingly to the report, "anticipated processes of conflict resolution were implemented [...], promoting preliminary instances of agreements between citizen-public organization streamlining the processes of information delivery. In this process, 80% of the cases presented were successful".[41] In accordance with the study by Rojas,

> [t]he implementation of SARC had a positive impact on case management: increasing the number of cases resolved, increasing the level of satisfaction of complainants and liaisons, decreasing processing times, decreasing the number of pending cases, contributing to the increase in substantive decisions, increasing efficiency in the use of resources.[42]

SARC is now formalized in the official documents of the Council for Transparency. In a procedural manual of the unit in charge of the admissibility analysis of cases, it is stated that the SARC procedure may be applied according to the following. First, "less complex" cases. The document does not give a definition of this concept but it does give examples: these are cases in which "information that has already been declared public is denied; arguments are invoked that do not innovate with respect to the consolidated jurisprudence of the Board of Commissioners, or when the basis of the protection is that the body did not respond to the request for information".[43] Under such hypotheses, the unit initiates negotiations with the requested body.

The SARC procedure is completely informal and depends only on the steps that the official can take

promote alternative instances of conflict resolution between the applicant, the requested body and the third party involved, if any. If the parties are not satisfied with a proposed solution, in the event that any of the parties has opted to provide information or opinions, this may not be considered as evidence in the final resolution of the case.
Likewise, the provisional decisions adopted by the Council, during this instance, shall not disqualify it from deciding the case definitively".

35 CONSEJO PARA LA TRANSPARENCIA. *Memoria institucional*. 2009. p. 39.

36 ROJAS, H. Sistema alternativos de resolución de amparos al derecho de acceso a la información en el Consejo para la Transparencia. *Derecho Público Iberoamericano*, n. 7, p. 195-196, 2016.

37 See: Harvard Negotiation Project. Available at: https://www.pon.harvard.edu/category/research_projects/harvard-negotiation-project/. Last visited: 01 june 2019.

38 ROJAS, H. Sistema alternativos de resolución de amparos al derecho de acceso a la información en el Consejo para la Transparencia. *Derecho Público Iberoamericano*, n. 7, p. 196, 2016.

39 CONSEJO PARA LA TRANSPARENCIA. Dirección Jurídica. Unidad de Admisibilidad y SARC. *Procedimiento:* admisibilidad. 2018.

40 Consejo para la Transparencia Memoria institucional, 20010, p. 41.

41 Consejo para la Transparencia Memoria institucional, 20010, p. 16.

42 ROJAS, H. Sistema alternativos de resolución de amparos al derecho de acceso a la información en el Consejo para la Transparencia. *Derecho Público Iberoamericano*, n. 7, p. 201, 2016.

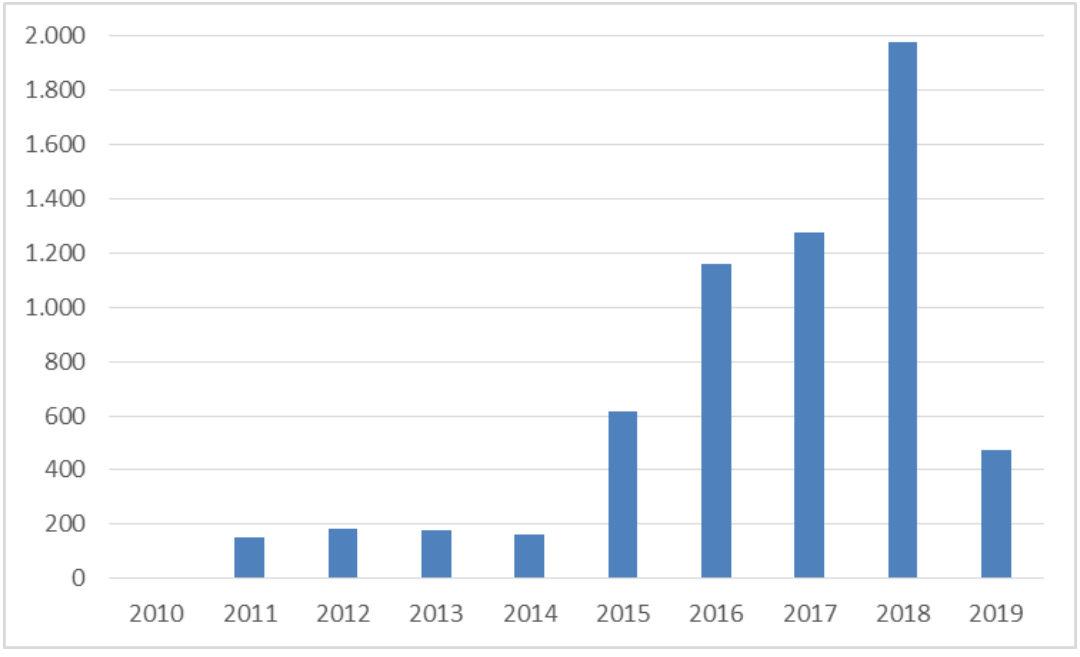
43 CONSEJO PARA LA TRANSPARENCIA. Dirección Jurídica. Unidad de Admisibilidad y SARC. *Procedimiento:* admisibilidad. 2018. p. 9.

among the interested parties. This can be done by contacting the public body via email or phone call and presenting arguments as to why the information should be provided or how to assist the public body in responding to the request for access. This informality of the administrative procedure has allowed for "conversation" between the independent enforcement agency and the public body required to comply with the law. Based on the conversations, the jurisprudential criteria of the Transparency Council itself are clarified in order to guide the action of the public body. It is also allowed to clarify when the information does not exist or when a response must simply be given to the information requestor's concern. In short, SARC mediated information for the management of the conflict and its prompt resolution.

The alternatives that can be generated with this mechanism are the following: i) withdrawal, in which the information applicant agrees with the information obtained through SARC; ii) declaration of delivery of the information, when the information corresponds to that requested but the applicant has not declared its withdrawal; iii) decision of inadmissibility, when the body accredits that it complied with its delivery obligations in a timely manner; and iv) the failure of SARC, when the information is not provided, does not satisfy the applicant or what was provided does not correspond to what was requested, thus the claim for access to the information follows its procedure for an effective decision by the Board of Commissioners.

This procedure has only intensified in recent times. Starting in 2015, the Transparency Council adopts an institutional decision to hire personnel to initiate procedures exclusively within the framework of SARC, aiming to reduce the time taken to decide cases and favor the expectations and satisfaction of those involved in the procedure.[44] Although there was already a pilot that worked the first 5 years of the Council,[45] it wouldn't be until 2015 that the numbers of cases closed through SARC would start to change dramatically. The following graph explains the evolution of cases decided through SARC.

Table 6 – Number of SARC decisions, 2009-2019



Source: own representation from the data collected from Consejo para la Transparencia (2019e). Information collected from the year 2019 is updated to 26.04.2019.

[44] CONSEJO PARA LA TRANSPARENCIA. *Memoria institucional*. 2015, §2, 7.

[45] ROJAS, H. Sistema alternativos de resolución de amparos al derecho de acceso a la información en el Consejo para la Transparencia. *Derecho Público Iberoamericano*, n. 7, p. 203-216, 2016.

Since 2010, a total of 6,183 cases have been resolved by the SARC mechanism. This figure represents 21% of the total number of cases resolved by the Transparency Council in its 10 years of operation. Although a fifth of all decisions have been mediated through SARC, the interesting thing is to review the trend and the numbers that have been generated since 2015, in which SARC's work in the solution of cases is resolutely installed. In the first 5 years of operation of the Council (2009-2014), 9,366 cases were resolved but only 679 cases were mediated by SARC, which constitutes 7% of the total number of cases in that period. From 2015 onwards, the ratio changes considerably. Between 2015 and 2019[46] a total of 20,053 cases have been resolved, of which 5,504 correspond to those mediated by SARC, i.e. 27% of the total cases. If one looks only at 2018, one can analyze how SARC is increasing its case resolution rate, since of the total of 5,805 cases resolved, 1,980 were mediated by SARC, which constitutes 34% of the total number of cases in that year. The next third corresponds to inadmissible cases and the last third to cases meriting a substantive decision.[47] In conclusion, today SARC represents a third of the type of cases resolved by the Council for Transparency.

Its relevance in the process of resolution of cases it is not only demonstrated by its growth, on the part of the Council. In addition, it shows better numbers of satisfaction of users and public officials. Accordingly to the Council's "2018 Public and Private Client Satisfaction Study", 90% of public officials charged with responding to requests for access to information prefer SARC to the regular case-decision procedure.[48] Users value the SARC instance because it makes it faster to have an outcome on the complaint.[49]

5 Conclusion

The Chilean model of FOI enforcement has moved from a litigious model to a model of mediation. It has changed the bench for a handshake. In 20 years of different legal regulations on transparency and access to information matters, Chile has legally recognized FOI, first with legal rank, but later under a constitutional basis. However, legal recognition alone does not make FOI effective. The following lessons can be drawn from a review of existing data in Chile.

First, that implementing a transparency law with an independent agency is a game changer. The Council for Transparency, through various actions, enabled an unprecedented extension in access to public information requests. The numbers obtained from the Council's 10 years of operation show a system in expansion and with a considerable growth of FOI requests, per capita, in relation to countries with similar legislations.

Second, that the administrative management of transparency conflicts has been transformed from a quasi-jurisdictional adjudicatory model to a model of increasingly mediation among the participants of a transparency complaint process. The expansion of mediated solutions today reaches a third of the total decisions of the Council for Transparency and exhibits high rates of satisfaction among those who enter this procedure.

The evidence of the Chilean case provides empirical basis to the theoretical advantages of ADR, in managing administrative processes such as transparency and access to information. The volume of data allows confirming the trends in this matter and contrasting the success of enforcement models based on judicial litigation and those that favor the intervention of a specialized agency with ADR mechanisms.

[46] Information collected from the year 2019 is updated to 26.04.2019.
[47] CONSEJO PARA LA TRANSPARENCIA. *10 Años*. 2019f. p. 65.
[48] CONSEJO PARA LA TRANSPARENCIA. *Estudio de satisfacción de clientes privados y públicos:* resultados generales. 2018b. p. 43.
[49] CONSEJO PARA LA TRANSPARENCIA. *Estudio de satisfacción de clientes privados y públicos*: resultados generales. 2018b. p. 25.

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