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À PROPOS DE NOUS

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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HARMONIZING FREEDOM OF INFORMATION AND TRADE SECRETS IN STATE OWNED ENTERPRISES: WHY PROCEDURES MATTER

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This paper investigates the problem of harmonization between freedom of information and the economic interests of State-Owned Enterprises (SOEs), especially in light of the Brazilian legal framework. Since that topic has hardly been object of academic discussion so far, the paper is limited to an initial approach, based on preliminary findings of the research on ‘economic secrets in State-Owned Enterprises’.

The challenge lies in limiting secrecy to exceptional circumstances, thus preventing it from becoming the rule. In order to face that challenge, it is fundamental to draw on the experience acquired by handling secrets related to national security, which is the typical exception to freedom of information, alongside with the protection of private data.

First, the above mentioned problem will be extend, indicating in further detail why trade secrets in SOEs are a relevant challenge to freedom of information. The following section argues that the democratic supervision of SOEs can learn from the experience of national security secrecy, which is performed mainly through the development of accountability procedures which restrain the discretionary power of authorities. The final section highlights the absence of such procedural elements in the regulation of trade secrets in SOEs.

§ 1 – TRANSPARENCY IN STATE-OWNED ENTERPRISES: BETWEEN PRIVATE AND PUBLIC

Unlike most of other forms of government organizations, State-Owned Enterprises are characterized by their hybrid public-private nature. Public as a consequence of its control by the government, which usually defines the ultimate goals of the company, such as steering relevant and strategic markets – energy, infrastructure, transportation, finances – or providing public services for the population. The private aspect of the SOEs, on the other hand, is usually connected to its organization in the form of a company, which means they are at least partly profit-oriented and often rely on capital from private shareholders.

Because of those hybrid features, designing the legal framework in which SOEs should operate proves to be specially challenging, since it must not only protect the public interest underlying the

creation of the enterprise – which includes the company’s competitiveness and successful economic performance –, but also take into account the private interests of minority shareholders. That’s why many of the general provisions applicable to government bodies are seen as inadequate for SOEs, which usually require greater flexibility in order to operate in competitive market economies.

Transparency rules are a good example of the difficulty in harmonizing the public and private aspects of SOEs. In the public sector, full transparency is increasingly regarded as the ultimate goal, and in the last few decades democratic governments have made significant efforts to grant access to all information held by public bodies¹. After all, Bobbio famously defined democracy as ‘the rule of public power in public’ (1984). In private enterprises, on the other hand, secrecy is still considered the natural option and the disclosure of information is tightly controlled. After all, information is an increasingly valuable resource and its possession can result in a relevant competitive advantage. Companies that wish to survive in a competitive environment must therefore protect themselves from unwanted disclosure of information, which can negatively affect their economic performance.

It is not clear how transparency rules ought to be applied in SOEs, as they are located in the threshold between public and private sector. Should they aim at full transparency, enabling citizens to evaluate their policies and performances? Or would it be better to treat strategic information as an asset, limiting disclosure to tightly controlled circumstances? Those questions can be answered in at least three different ways.

A) The First Option: Full Disclosure

The first course of action available is not to recognize trade secrets held by SOEs as a legitimate exception to freedom of information. In this scenario, transparency prevails over the economic interest of the company, which is thus compelled to disclose any relevant information to the public, no matter the harm it may cause to the activities performed by the enterprise.

It is important to remember, however, that the successful economic performance of the SOE is in the public interest. First of all, due to the public resources invested in creating and maintaining the enterprise, so that the company’s losses are also government’s losses. Secondly, if there are no prospects of financial returns, private partners are less willing to invest in the company, thus threatening the very existence of many SOEs.

Since information has an undeniable strategic value in today’s economy, to impose on SOEs the indiscriminate disclosure of

¹ A good example of such efforts is the Open Government Partnership (OGP), a 2011 initiative aimed at making national and subnational governments more open, accountable, and responsive to citizens. Originally with eight members, OGP has grown to seventy five participating countries by the end of 2016.

information would surely impair their ability to operate effectively in competitive markets and, consequently, their economic efficiency. Of course the world of SOEs is very diverse, and many of them do not face any actual competition nor do they rely on private shareholders. In those cases, one could arguably give up trade secrets in favor of public transparency without causing any significant damages to the company's results. At the other extreme, however, there are many SOEs that do operate in highly competitive global markets (KOWALSKI ET AL., 2013) and in which private shareholders play an important role.

For that reason, even though a conceivable alternative, it is extremely unlikely that SOEs (or lawmakers) simply waive the right to withhold strategic information for the sake of transparency,² even though in specific scenarios it may be possible to adjust the rules to the market conditions in which the company operates.

B) The Second Option: Exemption

If trade secrets are an unavoidable reality, a second alternative in dealing with the dilemma is to exempt SOEs from transparency obligations applicable to other government bodies, especially those related to freedom of information. According to the Global Right to Information Rating, developed by Access Euro³, among the 111 countries with Access to Information legislation, 22 do not include SOEs – including Australia, Austria, Belgium, China, Denmark, France, Greece, Switzerland, Taiwan and Turkey – and other 13 only do it partially – including Canada, Chile, Colombia, Ireland, Italy, Japan, the Philippines and South Korea.

The problem here is that, even though there are legitimate reasons for denying access to information held by SOEs when this disclosure may be detrimental to the company's performance, the simple exclusion of these companies from the scope of freedom of information legislation results in a dangerous gap of public accountability, in two different ways.

First, SOEs seem to provide an environment prone to corruption. On the basis of 224 corruption cases, for instance, a report by the Organisation for Economic Cooperation and Development concluded that 'SOE officials were bribed in 27% of cases but received 80.11% of total bribes' (OECD, 2014, p. 22). Recent corruption scandals in Brazil illustrate how pervasive corruption in SOEs can be. In 2014 an investigation task force unveiled a corruption scheme in Petrobras, a state-owned oil company whose losses have been estimated in over US\$ 6 billion. The same investigation has brought other SOEs under

² For instance, the 'Model Inter-American Law on Access to Public Information', approved by the Organization of American States (AG/RES. 2607 -XL-O/10), may deny access to information when its disclosure 'would create a clear, probable and specific risk of substantial harm, [which should be further defined by law] to [...] the ability of the State to manage the economy [or] legitimate financial interest of a public authority'.

³ Available at <www.rti-rating.org/>.

suspicion, such as Eletronuclear (whose CEO was sentenced to serve 43 years in prison), Eletrobras, the National Bank for Economic and Social Development (BNDES), among others. The explanation for that apparent connection between SOEs and corruption can only be speculated here, but it doesn't seem far stretched to point as plausible reasons (i) the fact that SOEs are often charged with carrying out large infrastructure programs; (ii) the highly technical fields in which they operate, making outside supervision difficult; (iii) the greater flexibility in awarding contracts and choosing commercial partners; and (iv) lack of transparency.

Secondly, even if SOEs were absolutely immune to corruption, opacity can hinder accountability of elected officials. In many cases, the activities of SOEs are a relevant part of the government's political and economical strategies. In recent years, for example, Petrobras and BNDES have played a major role in furthering the economic policy of the Brazilian federal government (MANTEGA, 2005), while Caixa Econômica, another public bank, was fundamental for the success of social policies such as *Programa Bolsa Família* (SOARES, 2012). In this scenario, secrecy can deprive citizens from relevant information about their government's actions⁴. Likewise, problems and difficulties in providing public services may be hidden from society under the pretext of protecting trade secrets.

The importance of accountability in SOEs should not be underestimated. Even though state ownership is not as popular and frequent today as it once was, partly due to the large privatization programs in the 1980s and 1990s, SOEs can still be considered relevant actors in the global economy, especially among emerging economies, where state ownership is often seen as an important tool in promoting economic growth (KOWALSKI ET AL., 2013). Brazil is a good example: in spite of undergoing large scale privatization in the last decades, SOEs still play a central role both in domestic economy and in public services. In 2014, the federal government alone controlled 135 companies – 48 under direct government ownership –, which employed more than five hundred thousand people⁵. In the financial sector, roughly half of all credit operations were performed by government-owned banks, which are also responsible for 40% of all transaction accounts in Brazil (BRASIL, 2015, p. 44).

In the attempt to hold SOEs accountable to society, transparency plays an undisputable role. As highlighted by BOBBIO (1980), the government of the economy, unlike traditional power, is performed not so much through laws or decrees, but rather

⁴ In 2014, for example, Brazilian newspapers indicated that the federal government, eager to curb inflation, used Petrobras to control fuel prices. In a year of presidential elections, the strategy was extremely controversial and resulted in major losses for the company. The government, however, hesitated to admit any interference in Petrobras, which denied public access to its pricing policy.

⁵ Subnational governments, especially at the state level, also control a relevant number of enterprises in a variety of economic areas, such as infrastructure, basic sanitation, transport, and so on.

through the control of large economical hubs, including SOEs. As a result, this form of governmental action frequently eludes democratic and judicial review, and that's a reason why BOBBIO calls for a theory of this 'undergovernment', aimed at removing it from the domains of the 'invisible power'. BOBBIO's remarks seem as true today as they did thirty years ago, and even after the privatization of the 1980s and 1990s state-owned enterprises remain too relevant to be left in the shadows.

C) The Third Option: Secrecy as a Legitimate Exception

If lawmakers are to acknowledge trade secrets in SOEs without exempting them from FOI legislation altogether, a middle ground must be found. Therefore, the third – and quite obvious – path available is to treat the dilemma not as an absolute choice between secrecy and transparency, rather as a question about the degree of transparency which should be imposed on state owned-enterprises. After all, *sola dosis facit venenum* – the dose makes the poison.

The abstract formula that summarizes that scenario would be: 'information held by SOEs is public, unless its disclosure may harm a legitimate economic interest of the company'. That formulation reflects a well known FOI principle according to which information is presumed public and access may only be denied in limited and exceptional circumstances.⁶ The structure, therefore, is divided in two parts: first, there is the general rule: 'all information is public'; then, the exception: 'unless there is a legitimate reason for withholding it'.

Although very simple at a first glance, the effectiveness of such formula hinges on the answer to a delicate question: how do we make sure that exception remains an exception? How can we guarantee that 'exceptional' secrecy is not gradually going to expand to the point where it is, *de facto*, the rule?

The duality rule/exception must not be regarded (only) quantitatively. The 'proportion' of data considered secret is a relevant indicator, but so is its quality. The fact that a public body withholds only 5% of all its documents doesn't mean *per se* it complies with the general rule of publicity, because those few withheld documents may contain all information necessary for an effective social control, whereas the remaining 95% could say little about the activities carried out by the organization.

According to BOBBIO (1980), one of the main differences between an autocratic and a democratic regime lies in the fact

⁶ According to the Principles on Freedom of Information Legislation, drafted by ARTICLE 19 and endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression in his report to the 2000 session of the United Nations Commission on Human Rights (E/CN.4/2000/63), 'The principle of maximum disclosure establishes a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only in very limited circumstances' (available at <<http://bit.ly/1YHR4n>>). For more information on the maximum disclosure principle, see MENDEL, 2008.

that, in the first, secrecy is the rule, whereas in the latter it is an exception regulated by laws which do not allow improper extension. In democracies, the exceptionality of secrets proves the rule of publicity, as in the old maxim from Cicero: *exceptio probat regulam in casibus non exceptis*. The challenge thus consists in designing the laws which regulate secrecy in such a way that it is limited to exceptional circumstances, reinforcing the general provision of publicity.

§ 2 – THE REGULATION OF NATIONAL SECURITY INFORMATION: THE BRAZILIAN CASE

The archetypical exception scenario to government transparency, alongside with the protection of personal data, is national security. There is little, if any, dispute about the legitimacy of withholding information for safety purposes, and even the most enthusiastic advocates for public transparency acknowledge the need of secrecy to some extent whenever the safety of people is at stake. Virtually all declarations on the right to information from civil society organizations admit that possibility.⁷

Evidently, that doesn't mean that governments should have a *carte blanche* when it comes to national security; on the contrary, the need to reconcile publicity and national security actions has been the focus of long debates, and attention to this topic has grown in the last few years, partly as a consequence of Edward Snowden revelations about massive surveillance conducted by intelligence agencies. Therefore, if we are to understand which mechanisms can be put into place in order to limit secrecy to really exceptional circumstances, there is no better way to start than to look at the experience acquired by regulation of secrecy for national security purposes.

As a first step in that direction, in this part I analyze how the Brazilian Freedom of Information Act (FOIA)⁸ regulates the withholding of information for security reasons. I do not intend to dwell on details, but to present the overall strategy adopted by the lawmakers, which I argue can be divided into two complementary processes: first, on a conceptual level, there is what I call the *denaturalization of secrecy*; secondly, there is *proceduralization*.

A) The *Denaturalization of Secrecy*

The idea that information held by government agencies is presumed public is relatively recent. Until not so long ago, the general public only had access to those documents voluntarily

⁷ See 'The Public's Right to Know: Principles on Freedom of Information Legislation', mentioned in footnote 5, above, as well as 'The Global Principles on National Security and the Right to Information (Tshwane Principles)', available at <<https://osf.to/24OsfjM>>, and the 'Principles on the Right of Access to Information', drafted by the Inter-american Juridical Committee (CJI/RES.147 - LXXIII-O/08).

⁸ Law n. 12.527, of November 18, 2011.

disclosed by the authorities (*see* SCHUDSON, 2015). Even today, in spite of the growing acceptance of the right to information, the presumption of publicity is far from being uncontroversial, and many officials resist granting access to information solely on discretionary grounds.

In that scenario, confidentiality is the standard situation and demands no further justification. No one has to state which documents are to be kept away from the public: their secrecy is merely an attribute of the information they contain.

The paradigm shift towards openness changes everything. If information is *prima facie* public, someone must define when and on which grounds access should be restricted. This is what I call *denaturalization*, the process through which secrecy is no longer seen as the *natural state*, but as the consequence of a decision by an authority. Brazil provides an illustrative example: whereas the 1991 Law on Archives stated that ‘documents which, if disclosed, would endanger the security of society and of the State [...] are *originally* confidential’⁹, the 2011 FOIA established that information must be classified by competent authorities in order to be considered as secret.

Information may only be legitimately withheld, therefore, when it is duly *classified*, that is, when an authority formally decides that the concrete data or document falls within the scope of a legal exception to the general rule of transparency. The denaturalization process thus transforms the content of information in a necessary, but not sufficient, condition of secrecy.

That’s why denaturalization is indispensable for the limitation of secrecy. As long as secrecy remains a general standard, no one is really responsible for it and, therefore, one can hardly control it. Legal decisions, on the other hand, must fulfill a series of formal requirements and that enables control and review. Any attempt to withhold information without prior classification is invalid and the responsible authorities are then liable for the consequences of the illegal act.

The question then turns to the list of requirements which must be met for a classificatory decision to be considered valid. That’s where the proceduralization of secrecy comes into play.

B) The Proceduralization of Secrecy

Legal decisions imply some degree of discretionary power; otherwise, there may be application, but no decision. Discretionary power, however, is not *arbitrary* and must be exercised within the limits defined by law and in accordance with its goals. Proceduralization here means the definition of formal criteria along the deliberation process which enable external control, thus narrowing the discretionary power of the decision maker.

⁹ Law n. 8.159, of January 8, 1991, article 23, §1°.

My analysis indicates that proceduralization of security-related secrecy in the Brazilian FOIA resorts to six main elements, which are expanded below: (i) narrow legal definitions; (ii) legal competence; (iii) justification; (iv) possibility of review; (v) publicity; and (vi) time limits.

1) Narrow legal definitions

The process of legal reasoning is often described as the application of an abstract rule to a set of facts. In the case of secrecy, since the right to information sets a presumption of publicity in its favor, the decision maker must evaluate whether or not the information under scrutiny falls within the scope of a legal exception.

That means the degree of discretionary power attributed to the decision maker is proportional to the amplitude of the exceptions foreseen by the law. Undetermined legal definitions may be applied to a broader range of documents and data than narrow, concrete rules. Vagueness is, therefore, a great obstacle to the limitation of secrecy (PERLINGEIRO, 2015, p. 45). That's why the principles of the right to information include the idea that any exceptions should be regulated in detail by the law (*see* footnote 6, above).

When the Brazilian Constitution states information must be public, except when indispensable for the security of the State and the society,¹⁰ one can always point to the vagueness of such concept and wonder whether it is any guarantee at all for the freedom of information. In order to narrow that extremely broad definition, article 23 of the Brazilian FOIA determines that information can only be regarded as indispensable for security purposes when its disclosure may: (i) jeopardize national defense or sovereignty or the integrity of the national territory; (ii) harm or jeopardize the nation's negotiations or international relations; (iii) jeopardize the life, safety or health of the population; (iv) represent significant risk to economic, financial or monetary stability, (v) harm or jeopardize strategic plans or operations from the Armed Forces; (vi) harm or jeopardize projects of research and scientific or technological development; (vii) jeopardize the safety of institutions or of national and foreign high authorities and their families; (viii) impair intelligence activities, as well as ongoing investigations related to prevention or repression of illegalities.

According to the Brazilian FOIA, in order to classify any information, the authority must refer to at least one of these eight scenarios. It's true that article 23 can still be accused of being too vague, since many of the adopted terms are extremely broad

¹⁰ Article 5. [...] XXXIII – all persons have the right to receive, from the public agencies, information of private interest to such persons, or of collective or general interest, which shall be provided within the period established by law, subject to liability, except for the information whose secrecy is essential to the security of society and of the State.

themselves, such as ‘economic stability’, ‘national sovereignty’ or ‘safety of institutions’. Nonetheless, if compared to the general exception of ‘safety purposes’, article 23 provides narrower definitions which restrain the freedom of the decision maker.

2) Competence

If the lawfulness of secrecy depends on a legal decision, who is entitled to make that decision? Just as important as narrowing the exception rules is the definition of the authorities that have the attribution to apply them, because, although seemingly elementary, competence is a fundamental aspect in the limitation of secrecy. When information held by public agencies is presumed to be restricted, there is no one I can hold accountable for the withholding of information. Competence is, therefore, a premise of accountability.

The Brazilian FOIA specifies which officials are entitled to classify information and to what extent. According to article 27, for a document to be considered top secret the classificatory decision must be approved by the president, the vice-president, a minister, a head of the Armed Forces or a chief of a diplomatic mission. The other security gradings (secret and confidential) are available to a wider range of authorities, but still very limited if compared to the size of the administration. Any withholding of information without the approval of the competent authority is invalid. As a result, by limiting the range of authorities entitled to classify information, the law creates obstacles for the trivialization of such decision.

Competence and jurisdiction also enable liability. Not only is it considered a violation to withhold information without a lawful restriction by a competent authority, but also the classification of information for unlawful reasons (such as hiding the evidences of illegal action) may result in the removal of the authority from public service, in addition to civil and criminal liability.

3) Justification

If the legal exceptions to transparency are relatively broad or vague, the mere indication by the authority that certain documents fall within its scope does not suffice. For external control to be effective, the classificatory decision must be justified, that is, it should explicitly demonstrate how the specific information is relevant for security purposes.

The presentation of specific reasons for the withholding of information is widely acknowledged as a principle of the right to know. The Tshwane Declaration of Principles (*see* footnote 6, above), for instance, states that ‘the burden of demonstrating the legitimacy of any restriction rests with the public authority [...]’. In discharging this burden, it is not sufficient for a public authority simply to assert that there is a risk of harm; the

authority is under a duty to provide specific, substantive reasons to support its assertions’.

The Brazilian law incorporated that idea, and article 24 prescribes that the classificatory decision must entail the reasons which justify it. The sole paragraph, however, allows that the decision be kept in secret for the same time of the classified information, which certainly hinders, or at least postpones, any possibility of social oversight. Nonetheless, the absence of justification can lead to the annulment of the classification, as well as to the liability of the competent authority.

4) Possibility of Review

The Tshwane Declaration of Principles also sustains that freedom of information legislation should include ‘prompt, full, accessible, and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts’. By submitting the classifying authority to independent review, either hierarchical or by the courts, the room for abuse and arbitrary withholding of information grows narrower.

Brazilian legislation admits the possibility of review in at least three ways. First, any citizen can petition the authority responsible for the restriction, or its superior, to request reevaluation of the classified document, in accordance with article 29 of FOIA. In regard to information categorized as secret or top secret, article 35 foresees the review by the Joint Committee on Information Reassessment, which consists of representatives from several ministries. Finally, although there is no specific provision in the FOIA, classificatory decisions are also subject to judicial review, as every other administrative act in Brazil.

The existence of multiple review layers assures that the classificatory decision is not final or irrevocable, which greatly reduces the risk of abuse or unlawful withholding of information by public agencies.

5) Publicity

As contradictory as it may appear at first glance, the limitation of secrecy can only be achieved with some degree of publicity. The classified information itself, of course, must remain confidential, but the classificatory decision must be publicized, or else it would be impossible for society to identify unlawful withholding of information. After all, a citizen can only appeal against a classificatory decision if he knows it exists.

As already mentioned, the Brazilian FOIA considers the classificatory decision itself secret (article 28). The existence of such act, however, must be made public. Article 30 demands that every public agency publish on its website a roster of every document classified in each grading (top secret, secret or

confidential), identified for future reference, as well as a list of all information declassified in the prior twelve months.¹¹

That active disclosure of information gives visibility to the extent of secrecy in public agencies. The monitoring of the development of such records through time provides society with a further indicator of the transparency policies of its government.

6) Temporality

The withholding of information for security reasons is instrumental, that is, it is justified by its utility to an end: protect society and institutions. Therefore, whenever that information ceases to be of significant impact on security, there is no longer a justification for the access restriction. The ultimate consequence of this idea is the abolition of eternal secrets. BOBBIO (1980) summarizes that conclusion: ‘one of the principles of a constitutional state: the public character is the rule, and secret is the exception, and even so an exception which doesn’t make the rule any less valid, for the secret is only justifiable if limited in time’.

It is not always easy, of course, to determine when exactly information ceases to be indispensable for security purposes, and unlawful withholding of information, even if not eternal, can still produce a lot of harm. Nevertheless the definition of temporal limits contributes to restrain discretionary power, especially when authorities are expected to justify not only the classification of the document, but also the time imposed at the moment of the decision.

In Brazil, article 24 of FOIA sets deadlines proportional to the security grading of information. Top secret documents may be withheld up to 25 years, whereas secret and confidential information only 15 and 5 years, respectively. As already mentioned, the grading influences also the definition of the competent authority for the classification, so that longer restrictions are usually a prerogative of higher ranks of the public administration.

§ 3 – TRADE SECRETS IN BRAZILIAN SOEs: THE ABSENCE OF PROCEDURES

How about the regulation of trade secrets in SOEs? Does the Brazilian law provide similar or analogous procedural elements, which enable limitation of secrecy to exceptional circumstances? The answer appears to be negative. More than that, a closer look reveals that trade secrets haven’t gone through the process of *denaturalization* at all and are still, to a large extent, regarded as a

¹¹ Article 30 can be seen as the minimum compliance level to Principle 23 of the Tshwane Declaration exemplifies: ‘A public authority that holds information that it refuses to release should identify such information with as much specificity as possible. At the least, the authority should disclose the amount of information it refuses to disclose, for instance by estimating the number of pages’.

mere attribute of the information held. When it comes to commercial interests, there is no actual decision to be made: information simply *is intrinsically secret*.

As a consequence, the withholding of information for economic purposes lacks all procedural elements which would enable external control. First of all, Brazilian law does not provide any specific definition of commercial secrets in SOEs. Article 22 of FOIA mentions briefly as a legitimate exception to freedom of information ‘the industrial secrets resulting from economic activities directly carried out by the state’. The definition of ‘industrial secret’ is, however, extremely uncertain and is usually associated with information protected as intellectual property, such as patents or industrial designs.

Another recent piece of legislation, the Statute of State-Owned Enterprises (Law 13.303, of June 30, 2016), states that ‘the criteria for the definition of what ought to be considered strategic, commercial or industrial secret will be set in an executive decree’ (article 86, §5). Such regulation, however, still doesn’t exist and the exact circumstances, which allow the restriction of information held by companies, remain imprecise.

Likewise, since there is no decision to be made, there is no legal competence to the imposition of secrecy and it is unclear who is entitled to determine which documents or data may be disclosed and which are to be treated as secrets. Of course, the decision eventually has to be made, especially in response to FOIA requests, but at that point the restriction is not seen as an autonomous decision, rather as a mere fact.

Since FOIA denials have to be justified and are subject to revision by the Ministry of Transparency, one could argue that the trade secrets are externally controllable. The justification in those cases, however, is usually vague and does not meet the requirements of classification for security purposes. Also, the ministry’s analysis, although partly restraining the discretionary power of the SOEs, often defers to the argument of the company, without further inquiry into the actual harm the disclosure of the information would provoke.

Most importantly: the absence of an autonomous decision regarding trade secrets enables secrecy to remain both invisible and eternal. Because there is no need to ‘classify’ information, it is impractical to evaluate the extent of secrecy in SOEs and one can only find out if any given information is secret or not by means of a FOIA request. In addition to that, there are no time limits for trade secrets, even after they cease to be relevant for the company’s activities.

Brazilian SOEs are expressly subject to FOIA. However, the possibility of invoking commercial interests for withholding information has led to the application of a peculiar transparency regime, which differs from other institutions controlled by the government. For instance: whereas the salaries of public officials are considered public and accessible information, according to a

ruling by the Supreme Court¹², SOEs are dismissed from the disclosure of the same information regarding their employees.¹³ The list of FOIA requests which were denied on the basis of trade secrecy includes: number and geographic distribution of employees, organizational chart, copy of contracts, value of sold assets, tax receipts from public procurements, records of board of administration's meetings, work methodology, auditing reports¹⁴.

CONCLUSIONS

As a consequence of its hybrid public-private nature, State-Owned Enterprises find themselves in a delicate situation when it comes to transparency. The challenge is to protect information relevant for the companies' performances while at the same time maintain secrecy as an exceptional measure to be adopted only in limited circumstances.

In the national security realm, Brazil sought to harmonize secrecy and transparency through the development of procedures which empower society to control decisions made by public officials responsible for the classification of relevant documents and information. Those different procedural elements act together to limit the discretionary power of authorities and to inhibit the unlawful expansion of secrecy.

Secrecy in SOEs, on the other hand, hasn't been the focus of the same attention by Brazilian lawmakers, and its regulation lacks almost all the elements which enable effective control by society. Even though that conclusion is limited to Brazil, it is not hard to imagine that many countries face similar problems, particularly those where SOEs are still significant actors in the economy.

Trade secrets and security-related secrets are different and there is no reason to believe they should be regulated in equal terms. Nonetheless, the experience accumulated with information necessary for security purposes should not be overlooked, and it teaches us two valuable lessons.

First, it is important to acknowledge secrecy as a consequence of a decision. Only by doing this can we bring it to the realm of accountability. Secondly, procedures play a major role in narrowing the discretionary power of authorities, thus diminishing the risk of abuse and illegitimate withholding of information. If trade secrets are to be harmonized with the principles of the freedom of information, lawmakers around the globe shouldn't spare efforts in designing effective procedures

¹² Supremo Tribunal Federal, Recurso Extraordinário com Agravo n. 652.777, April 23, 2015.

¹³ A noteworthy exception is the State of São Paulo, which has publicized the salaries of SOEs' employees on the internet since 2015.

¹⁴ The requests and denials can be consulted in <<http://bit.ly/2jmeJYy>>. The mentioned cases were registered under the following protocol IDs: 99903.000329/2014-78, 00190.024893/2013-11, 99923.000691/2015-91, 00190.015163/2014-19, 00190.024892/2013-77, 00190.502923/2015-04, 99909.000277/2013-07, 99923.000047/2015-13.

aimed at limiting secrecy to the exceptional circumstances in which it is justified, and only for the time it is actually necessary.

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