Is personal data protection a threat to access to information? A false normative antinomy, but a factual insecurity within Federal Institutions of Higher Education

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Abstract: This essay sought to analyze and understand the existence of any conflict between the Access to Information Law (LAI, Law no. 12,527/2011) and the General Personal Data Protection Law (LGDP, Law no. 13,709/2018), in public transparency within Federal Institutions of Higher Education (IFES). These legislative instruments comprise different disciplines—one focused primarily on public data and the other, on personal data, although they coincide as to the protection of personality rights. Its development was driven by the following questions: is there an apparent conflict in the applicability of these legal contributions? Can the possible insecurity lead to a setback in public transparency? Data was collected by means of a questionnaire applied to 22 federal universities and eight federal institutes, and then analyzed by a methodology combining field study with a qualitative analysis. First, the text presents the scope concerning the Access to Information Law as an instrument for effecting public transparency. Next, it discusses the guidelines of the General Personal Data Protection Law as a representative milestone in informational self-determination. Finally, the paper analyzes the reports on the difficulties faced by institutions in promoting compatibility between the LAI and the LGPD regarding the information requested to the Citizen Information Service.

Keywords: Access to Information Law; General Personal Data Protection Law; Public transparency.

1. PRELIMINARY CONSIDERATIONS

The Access to Information Law (LAI) and, more recently, the entry into force of the General Personal Data Protection Law (LGPD), has enabled the public administration to take a step forward in disclosing and protecting data and information. Although a challenging process, it aims at social participation and greater public control by citizens in the face of transparency.

Transparency, in this context, has gained more muscle in public administration. This is because LAI seeks to make public information available to any citizen, without the bureaucracy requirement of motivation and at any time. In turn, the LGPD aims at strengthening personal data privacy, as well as informational self-determination.

As such, a debate arises about the theoretical and practical convergence between the LAI and the LGPD in the operation and impacts on public agencies, especially in Federal Institutions of Higher Education (IFES).

Given this scenario, this research was driven by the following questions: is there an apparent conflict in the applicability of these legal contributions? Can the possible insecurity lead to a setback in public transparency?

This essay sought to analyze and understand the existence of any conflict between the LAI and the LGPD in public transparency within Federal Institutions of Higher Education (IFES).

First, we carry out an associative discussion between the LAI and public transparency, understanding access to information as a fundamental and financing right, within public administration, of the advancements in social and democratic participation. Next, we discuss the LGPD, focused on the processing of personal data by public authorities, highlighting the debate on informational self-determination, as well as the collection and analysis of personal data. Finally, we analyze the (in)compatibility between the LAI an the LGPD, in its applicability, by IFES based on research applied to citizen information services (SIC).

Our research methodology combined a field study with a qualitative analysis of the questionnaires applied to 22 federal universities and eight federal institutes.

2. ACCESS TO INFORMATION AND ITS ESTABLISHED RELATIONSHIP WITH PUBLIC TRANSPARENCY: *theoretical background and current scenario.*

Incentive to search for information in society, as well as the need to improve policies for full access, is one of the greatest challenges since the enactment of the 1988 Federal Constitution, precisely in Article 5, item XXXIII: "all people are entitled to receive information concerning their private, collective or general interest from government bodies."

A more effective citizen participation in this process, associated with management of public interest and the need for regulation of the constitutional provision, resulted in the publication, in 2011, of Law no. 12,527/2011[4], known as Access to Information Law (LAI), regulated within the Federal Executive Branch by Decree no. 7,724/2012[5].

LAI determines that public agencies and entities disclose, regardless of requests, information of general or collective interest, except those whose protection is provided for in the legal text. This shall be done through all available means and mandatorily on websites (BRASIL, 2011).

In this context, we highlight the constitutional principle of publicity, enshrined in Article 37 of the 1988 Constitution, which, alongside LAI, became key allies in public information disclosure.

In this regard, Article 3 of Law no. 12,527/2011 commends the right to access to information as a fundamental right, as provided for in the Federal Constitution, aiming to subsidize the need for compliance with the principles of public administration.

But such duty to provide access must also be accompanied by the mandatory protection of information by public authorities. In this respect, Law no. 12,527/2011 is clear, establishing in its Article 25 that its is "[...] the duty of the State to control access and disclosure of confidential information produced by its bodies and entities, ensuring its protection."

Generally speaking, protection and access to information should interact, with access being the rule and confidentiality the exception. This confidentiality includes the protection of personal data and information.

Importantly, for LAI requirements, as well as data protection, to be met, public agencies have a legal obligation to grant access and privacy protection.

Consequently, while ensuring access to personal information is due, so is protecting it to ensure the individual's privacy, when necessary. The constitutional basis for access to this type of information rests on Article 5, item XXXIII (first part), Article 37, § 3, item II, and Article 216, § 2, while restriction is guaranteed by Article 5, item X—all under the Federal Constitution.

Access to information and transparency do not walk alone. It is necessary to align with public policies, agencies, and entities to favor and boost social interest in this segment. Such action allows citizens to rely on specialized policies focused on transparency and social control of public acts.

As such, Law no. 12,527/2011 emphasizes in its Article 6 that it is up to public agencies and entities to ensure the transparent management of information, providing broad access to it and its disclosure, and data protection, ensuring its availability, authenticity, integrity and protection of confidential and personal information.

Within Federal Institutions of Higher Education (IFES), whose main purpose is to generate information and knowledge for citizen education, associated with the teaching of legal ethical norms, Platt Neto et al. (2006, *apud* GAMA; RODRIGUES, 2016, p. 51) clarify that

> *beyond ensuring compliance with legal standards, transparency measures in public universities constitute a responsible management policy that favors the exercise of citizenship by the population. Potentially, the attitude can serve as a stimulus to students, teachers and other employees, contributing to the habit of asking for clarification from government entities.*

Given the importance of IFES in developing viable mechanisms in association with strategies to provide access to information, it also plays a social role in democracy. Hence, Oliveira et al. (2013 *apud* GAMA; RODRIGUES, 2016, p. 51) state that

4 BRASIL. Law no. 12,527 of November 18, 2011. Regulates the access to information provided for in item XXXIII of Art. 5, in item II of § 3 of Art. 37 and in § 2 of Art. 216 of the Federal Constitution. Amends Law no. 8,112 of December, 11, 1990. Repeals Law no. 11,111 of May 5, 2005, and provisions of Law no. 8,159, of January 8, 1991, and sets other provisions.

5 BRASIL. Decree no. 7,724 of May 16, 2012. Regulates Law no. 12,527 of November 8, 2011 on access to information provided for in item XXXIII of the main section of Art. 5, in item II of of § 3 of Art. 37 and in § 2 of Art. 216 of the Constitution.

> *in the context of federal [institutes] and universities, which make up the public sector, one must consider the significant social role of these institutions. Considering its mission to generate and disseminate knowledge and its vocation as a potential generator of social transformation, research on this topic becomes relevant.*

Faced with this scenario, in the current COVID-19 pandemic context the public administration, especially the IFES, acquired another prominent role, that of the responsibility and control in increasing access, sharing and use of information, preserving the fundamental rights of individuals and public transparency.

This is because, with the pandemic, large-scale population data collection, storage, and processing became essential for decreasing the knowledge vacuum, enabling quick and efficient responses (ALMEIDA et al., 2020).

Public transparency, to produce effects and be effective in such a context, needs to be visible, with easy-to-find information, providing subsidies for citizens to extract accurate, up-to-date, authentic information—from an opaque transparency to a clear transparency.

Fox (2007, p. 7, *apud* CUNHA FILHO, 2018) distinguishes these two types of transparency, stating that an opaque transparency is one that "involves the dissemination of information that does not actually reveal how institutions behave in practice, either in terms of how they make decisions or in terms of the outcome of their actions," while clear transparency "refers to access to information (i) about policies and programs that reveal reliable information about institutional performance, specifying the responsibility of the public servants involved, and (ii) where public funds go." Only this latter type of transparency is capable of transforming institutional behavior, in order to allow political actors to design strategies for public policy changes.

For public transparency to occur, it is essential and mandatory that IFES present minimal information in its portals, thus standardizing active transparency (made available without request) and passive transparency, in which information is requested at any time and without justification by the citizen. These associated factors corroborate public governance because these autarchies receive billions of reais in annual resources.

While in active transparency information is made available due to interest of the public manager or by legal imposition, in passive transparency the public entity must be prepared to respond to any request by society, provided that such request is not subject to confidentiality (SILVA; BRUNI, 2019, p. 418).

Zuccolotto and Teixeira (2019, p. 7) state that the "debate on transparency has become a central theme on the agenda of almost all organizations, whether public or private."

In short, public transparency and access to information are significant actors for construing a more efficient, participatory, and inclusive public management by means of social control.

3. LUKEWARM TRANSPARENCY? THE GENERAL PERSONAL DATA PROTECTION LAW

Debates about the protection of certain personal information already existed within the Access to Information Law because the issue of privacy has been latent in legal discussions for years. As society became complex, the need to address the privacy of individuals gained muscle, be it in relation to he State and its forms of surveillance, or in relation to other private entities.

In its modern version, the right to privacy meant the right to be left alone; but with the growth of the media and personal information retrieval, this understanding has proved insufficient in face of the complexity of social relations. Information has become extremely relevant, especially, as Doneda (2019) points out, for two recurrent factors: efficiency and control. Data collection and processing enables greater efficiency in the provision of products and services, as well as greater state or private control, positive or otherwise, over a range of social and individual activities.

But the issue moves away from a mere expansion of the idea of privacy to a right to keep personal information confidential, for many times the interested party does not wish to keep their personal information hidden, but rather to provide it according to their convenience and opportunity. A main facet of privacy is therefore based on control over the circulation of personal information or its smallest part—the data.

Is against this background that the General Personal Data Protection Law (LGPD) was enacted. Unlike the Access to Information Law, whose raison d'être is to increase transparency, with protection

of personal information geared towards the idea of restriction, the LGPD focuses on the right to informational self-determination, that is, the right to have control over one's personal data.

The idea of circulation and control of personal data becomes clear when one observes the rights listed to the individual by Article 18: confirmation of processing, access to data, correction of said data, portability, anonymization, blocking, deletion, and clear information about the consequences of a refusal of consent. It is not, therefore, a legislation that prescribes data confidentiality and blocking.

The Brazilian General Personal Data Protection Law follows the global trend of creating norms on the topic, albeit with a certain delay, since some countries had already enacted a law on the matter about 20 years ago[6]. This worldwide movement occurred due to the frank understanding that data has become an essential input for moving the economy and, why not, politics. As Professor Ana Frazão (2019, p. 24) writes:

> *Obviously, the phenomenon, far from being restricted to the economic sphere, has countless repercussions in the individual spheres of citizens, and leads to the total restructuring of social and political relations. Consequently, data have gained cross-cutting importance, becoming vectors of individual lives and freedoms, as well as of society and democracy itself.*

In this sense, guaranteeing informational self-determination to citizens goes beyond the private sphere, entering into the public sphere and the possibility of manipulations and distortions capable of generating social conflicts or directing a large number of people to opinions and actions that do not derive from free will[7]. It is also worth noting that the LGPD applies to both private sector and public entities; therefore, all need to adapt to the legislative dictates, although the latter has some specific regulations, as well as grounds for processing less dependent on the acceptance of the data owner.

On this topic, the LGPD highlights: "This Law provides for the processing of personal data, including in digital media, by natural person or legal entity under public or private law." In its Chapter IV, the law addresses specifically Public Authority, directing the grounds for processing carried out by the entities: "to meet its public purpose, in the pursuit of public interest, with the objective of executing legal competencies or fulfilling the legal attributions of the public service." Besides this delimitation, the LGPD places two more direct obligations on public entities regarding data processing, namely: transparency of the legal hypotheses that underlie the processing and designation of the Officer in charge, figure responsible for assisting in the best application of the law in the organizational sphere.

This transparency obligation, detailed in Article 23, item I, states that, besides the hypotheses of the exercise of its competencies, the entity must indicate the updated legal basis, the purpose and the processing practices used to perform personal data processing. Such details should preferably be on the institution's websites. It is also indispensable to indicate the channel used for obtaining information and requests on the topic. Within the Federal Executive Branch, according to Ordinance no. 581/21, Article 7, item XV, the FalaBr system[8] is the option for recording manifestations.

We note, therefore, that, also in relation to the Government, citizens are guaranteed to know the reasons and grounds for collection of their personal data. In other words, even in the face of collection often based on legal grounds for public service provision, informational self-determination must still be respected and promoted.

Nevertheless, given that our argumentation so far shows no conflict between public transparency and the protection of personal data and information, in practice its implementation has not been so smooth. It is not uncommon to wonder whether the LGPD has brought new restrictions for granting information under the custody of public authorities; after all, there are also personal data in public documentation.

In this paper we intend to concentrate our efforts on discussing this difficulty in Federal Institutions of Higher Education. Certainly, education institutions, as entities of indirect public administration, also need to consider the LGPD their actions, whether focused on the effectiveness of teaching, community outreach or research.

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6 Such as Argentina and its *Ley de Protección de los Datos Personales* (Personal Data Protection Law) no. 25,326, issued in 2000.

7 This is a well-known reality, particularly regarding consumption in the context of virtual marketing. The search for data on individuals themselves, or groups, elaborating interest and consumption profiles, as well as identifying their vulnerabilities, to exploit them to encourage the acquisition of goods and services.

8 System created and maintained by the Comptroller General of the Union, to provide citizens with the possibility of registering manifestations with the Ombudsperson, as well as requesting online access to information.

4. FEDERAL EDUCATIONAL INSTITUTIONS AND THE IMPLEMENTATION OF THE LAI AND THE LGPD

Federal Institutions of Higher Education are responsible for the professional education of thousands of Brazilian students, but they are also producers of scientific research and services for the population, through their various outreach projects, hospital structures, among others. Therefore, they produce and store a wealth of information and data that is of public interest. They are not, however, among the most demanded agencies of the Executive Branch, and, on the other hand, they rank high regarding omissions. Interestingly, in the ranking of active transparency, the first places are occupied by federal educational institutions[9].

Although these institutions already dealt with the restricted access information provided for in the LAI and other regulations, the LGPD has required many measures to meet the new requirements and questions about the possibility of making information available by the Citizen Information Service. Considering the context, we investigated the perception of those responsible for answering at the Information Service as to the difficulties of combining the LAI and the LGPD in the daily handling of access requests.

First, we present the methodological procedures adopted in the research and, next, we carry out the data analysis concerning the initial convergence, or not, between the LAI and the LGPD in Federal Institutions of Higher Education

4.1. METHODS

Our methodology combined a field study with a qualitative and exploratory approach. As such, based on the Access to Information Law, we carried out, between June/July 2021, a study to understand the existence or not of a conflict between the LAI and the LGPD, in the course of public transparency activities by Federal Institutions of Higher Education (IFES).

Using an open questionnaire, we requested information from 110 Federal Institutions of Higher Education (IFES), via the Citizen Information Service (SIC), obtaining responses from 22 federal universities and eight federal institutes, which represents 27% of the total sample.

The questionnaire comprised the following questions:

> *a) Has the institution ever denied access to information due to doubts regarding the application of the LGPD? If you feel comfortable, could you inform the reason for the denial?*
>
> *b) Do you see a conflict between the LGPD and the LAI? Why?*

The results obtained are discussed below.

4.2. RESULTS AND DISCUSSIONS

As highlighted, this paper investigated the existence of practical difficulties within Federal Institutions of Higher Education (IFES) after the LGPD came into force, despite no apparent established contraposition, theoretically speaking.

As pointed out in the methods section, only 27% of the Citizen Information Services (SIC) who received the questionnaire sent back responses. Although this low response rate represents a limitation to the present study, it still fulfills the proposal of highlighting the practical difficulties. That said, the first question was proposed to broadly understand whether the LGPD was already being invoked to justify denying access to requested information. Moreover, if the respondent felt the need, they could report any case that occurred.

Of the respondents, only six stated categorically to have denied requests for access to information based on the General Personal Data Protection Law. The answer is quite interesting and generates a series of questions, such as: is the basis for denying access when personal data is requested still primarily Article 31 of the LAI? Or are there, in fact, few requests by the information service that refer directly to personal data, their presence being only a matter of concealment?

Some details offered by respondents helps us understand this context:

> *Not due to doubts, no. There are two types of situations: the first is denial of access to personal information, which the SIC/UFG denies upon receipt of the request; the second type is fear of providing information but, with the guidance of the SIC /UFG, we are able to clarify any doubts and the information is*

9 According to the "Access to Information Law" panel, maintained by the Comptroller General of the Union on July 31, 2021.

provided. I can say that I did not record any denial of access to information due to doubts. But it is correct to say that there is resistance due ignorance, yes. I reaffirm: resistance that did not result in denial of access, due to the clarification work we did.

As the transcribed answer shows, our intention was to obtain a denial of access in situations where, previously, access would have been granted. Hence the use of the expression "doubt." What we see are denial of access due to personal data requests, but it remains to be seen whether such denial is now justified by the LGPD. On the other hand, there is the assertion that doubts emerged due to the issuance of the LGPD.

The responses also highlighted, even those who answered no, that the IFES seek help from the LGPD Officer or other instances, to verify the personal data to be hidden before sending the answer:

we inform that we have no record of any denial of access to information due to doubts regarding the LGPD and its implementation. UFRGS has a Personal Data Processing Officer, who is always consulted by the UFRGS Ombudsman, responsible for SIC/UFRGS, when requests for information on personal data are received.

No, because we have a long history of fulfilling requests for access to information and we had already processed data to make it available, complying with the LAI. Considering that the LGPD complements the LAI, there may eventually be consultations to the responsible committee about some specific aspects in specific situations.

Among the positive responses, that is, those who said they had denied access based on the LGPD, the following data was pointed out as restricted: e-mails, CPF number, race/ethnicity of servers and students, telephone number, information about verification committees and values for the previous fiscal year[10].

As for the second question, about a possible conflict between the legislations, only three respondents stated categorically that there is a conflict between the laws in question. Most, however, see no evident conflict, but difficulties to its implementation:

I don't see a conflict; I believe they compliment each other. However, after the LGPD there is a greater concern about the conceptualization of what constitutes a personal data or not, in certain cases. I believe this doubt can give the impression of a possible conflict.

I wouldn't say conflict, but it can be quite confusing... In these situations, the LAI allows access to information, but the LGPD restricts, especially when it involves the individual.

Not between the legislations, no. It [conflict] exists in the application of laws by public agents. Especially for those who still bear the culture of information secrecy, who see in the LGPD the possibility of a broader interpretation to continue to deny access to information e social participation in public administration, due to insecurity, maintenance of power, privilege and authority.

We don't see it as a conflict, but rather as possible difficulties in understanding both laws, as well as the convergence of legal provisions. Even though the LAI is 10 years old, it is notorious how a large portion of public servants still lack familiarity with the law ans its day-to-day application. Therefore, the enactment of the LGPD represents another challenge for the training of the entire staff in the application of both laws.

The highlighted answers point to a practical doubt in applying legislation that, perhaps, already existed even before the LGPD, when evaluating Article 31 of the LAI itself, that is, when discussing the so-called personal information. Some respondents even pointed out that the LGPD is a necessary addition to better define personal information:

The LAI already had guidelines related to personal data processing, which are in line with the LGPD. In turn, the LGPD detailed such guidelines—until then lacking in the LAI—, such as the data owner's consent to their data being made available, notification to the data owner of the processing of their data, and the adjustment that must exist between the processing employed and its purpose.

10 Importantly, in the case of values the previous fiscal years, access denied based on Article 31 of the LAI and reinforced after issuance of the LGPD were reviewed, when the appeals were judged, by the Comptroller General of the Union, reaffirming that remuneration amounts cannot be denied transparency. As an example, see decision issued in Case 23480.020673/2020-88 (CGU, 2020).

According to our findings, therefore, operators of the citizen information service at the IFES se no incompatibility *a priori* between the Access to Information Law and the General Personal Data Protection Law. On the other hand, there is a frank recognition of the difficulties and practical insecurities in effecting passive transparency with the advent of the new legislation. The question remains, however, whether, in fact, the issues were not already existing by virtue of Article 31 of the LAI and were accentuated by the LGPD.

5. FINAL CONSIDERATIONS

This paper investigated the possible existence of a conflict between the Access to Information Law and the General Personal Data Protection Law both in theory and in the daily practice of citizen information services at Federal Institutions of Higher Education. To do so, we had to the resume topic of transparency and access to information, whose expressiveness has changed significantly with the advent of the LAI, since a true system was created to promote the availability of public information without, however, losing sight that Public Administration also keeps information that do not deserve wide disclosure, either because its is related to protecting the security of society and the State or because of other legal restrictions, besides the personal information protection clause in Article 31.

Next, we address the new guidelines brought by the LGPD. Although of a completely different basis from the LAI, both legislations converge, since the Government is also subject to the preservation of citizens' informational self-determination.

In short, it is up to the public administration to provide transparency qualified by the protection of information or data that, if widely known, may harm the public interest or the privacy of the individual, and furthermore to inform the latter about the grounds and use of their data, even if the activities are performed when providing a public service requested by the citizen.

Once the theoretical bases were established, we started to investigate the topic within the IFES. As stated above, we sent a questionnaire by e-mail to the citizen information services with two questions about the application of the LGPD when judging the accessible nature of information, as well as if the agents perceived any kind of conflict between the legislations.

The brief survey showed that the service agents saw no legislative opposition, but were, in practice, facing some difficulties regarding the interpretation of the data law, whether it would impose a certain upsurge in the availability of certain data that would previously have been made available. The examples given, however, brought up only situations already discussed in the context of Article 31 of the LAI.

In conclusion, in practice, what seems to exist is a lack of clear identification of information and personal data that can be disclosed, considering the context of Public Administration, especially in the case of the IFES, which deal with information from users of the public services offered.

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