DEPARTMENT OF **TRANSPORTATION**

CASE STUDY

Increasing People's Access to Procurement Information Through the Freedom of Information Program

Background

In July 2016, the President of the Philippines signed Executive Order (EO) Number 2, providing increased access to government information. Covering only the executive branch, the order granted access to users (currently numbering 17,696, according to January 2020 statistics). The process is managed through a program team housed under the Presidential Communications Operations Office (PCOO).

The government also has an open data portal. However, this initiative has stagnated since 2017 and contracting data that was previously available through the portal is no longer accessible. That means the only way researchers and journalists can currently access contracting data is through a Freedom of Information (FOI) mechanism. To ensure public contracts can be properly queried, it is essential to understand how to maximise the effectiveness of this mechanism.

Step Up Consulting, with the support of HIVOS and in partnership with the government FOI - Project Management Office (FOI-PMO), conducted research in 2019 to answer the following questions:

   a. What barriers make it difficult for FOI requesters to access contracting data?

b. What gaps in data management systems and agency processes hinder the provision of contracting data?

c. What opportunities are available to improve access to contracting data using the FOI mechanism?

The Department of Transportation (DOTr) was selected for case study research because it is one of the top 10 agencies in terms of both size of budget and the number of FOI requests it receives.

The DOTr is the government agency responsible for policy, planning, and of transportation activities in the Philippines. It is also in charge of transport regulation through attached agencies including the Land Transportation Office (LTO), the Land Transportation Franchising Regulatory Board (LTFRB) for road transport, the Philippine Coast Guard for maritime transport activities, and the Civil Aviation Authority of the Philippines (CAAP) and the Civil Aeronautics Board (CAB) for aviation. In addition, the DOTr has a crucial role in accelerating the country's economic development through reliable, effective, and efficient transport infrastructure and systems.

Before 2016, DOTr was known as the Department of Transportation and Communications (DOTC), but the creation of the Department of Information and Communications Technology (DICT) that year absorbed the communication agencies. Between 2005–2015, DOTC faced several allegations for corrupt practices, with a few past agency managers indicted for violating the Anti-Graft and Corrupt Practices Act. In recent years, efforts to increase agency transparency has led it to proactively publish financial transactions, including procurement plans and expenditures, on its website. And recently, it has become one of the most active agencies participating in the government's FOI program.
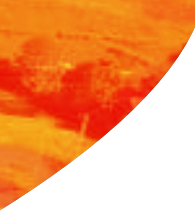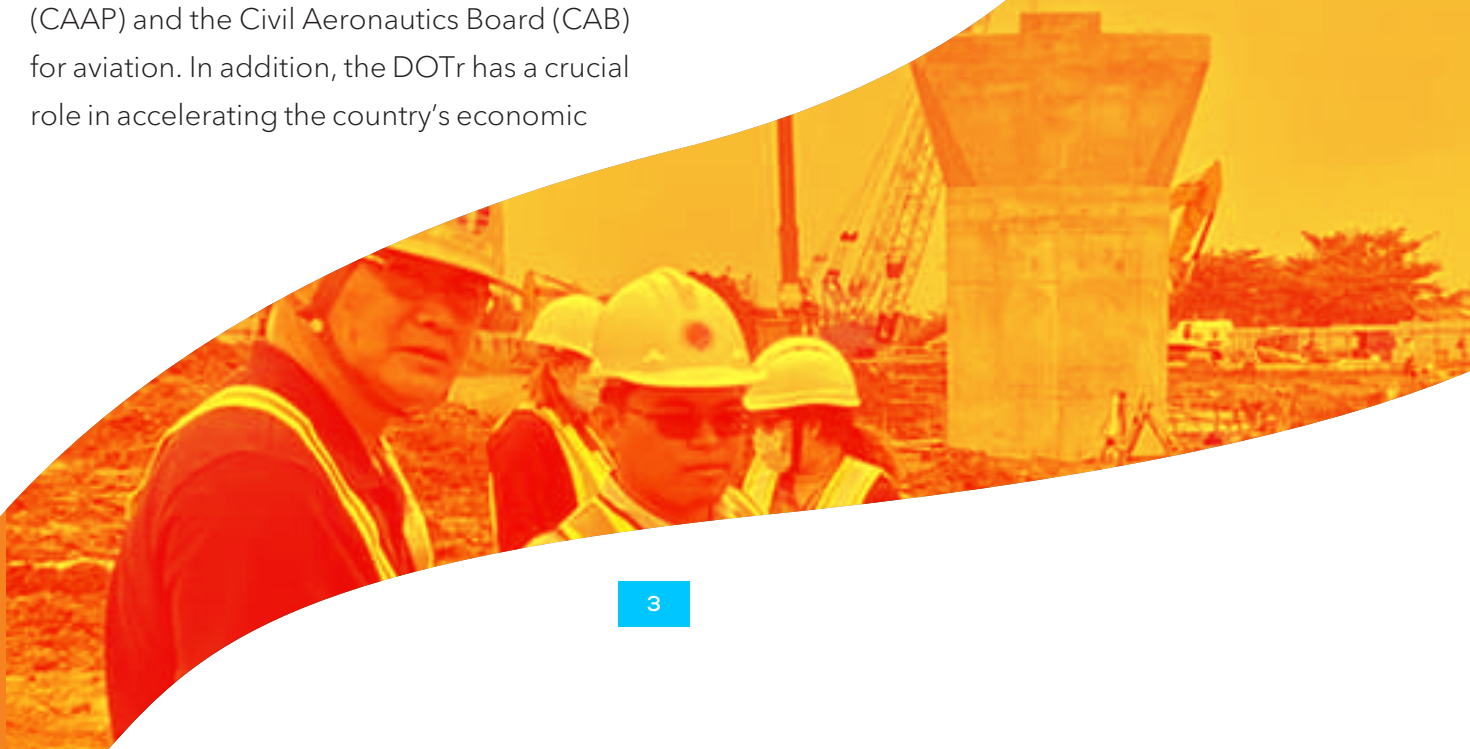
Provision of
Contracting Data
to the public

DOTr proactively discloses the following contracting data on its website, as part of transparency commitments introduced since 2017:

a. Agency Budget – summary figures only, an abstract taken from the General Appropriations Act. Published as scanned PDF.

b. Annual Procurement Plan – full details of what will be procured, excluding specifications. Published as scanned PDF.

c. Supplemental Annual Procurement Plan – full details of what will be procured, excluding specifications. Published as scanned PDF.

d. Annual Financial Reports – consisting of Statement of Appropriations, Allotments, Obligations, Disbursements and Balances; Summary Reports on Disbursement; Annual Physical Report of Operations/ Physical Plan. All published as scanned PDF and only containing summary figures, with no specific details.

e. Status Reports of projects, programs and activities, indicating % of completion of works. Published as excel sheets.

f. Invitation to Bid – for goods, civil works, and consulting services.

As indicated above, the files published cover only 2017-2019. The reports for 2020

will be uploaded when completed. Most of the reports are published quarterly or annually. It appears that no documents on the evaluation of bidders and award of contracts are published proactively. DOTr argues that contracts are restricted in nature and requests for this information must go via the FOI mechanism and be subjected to close review before being granted. The department claims that all procurement activities are accessible via the Philippine Government E-Procurement Services (PhilGEPS). However, documents at PhilGEPS are accessible only to registered users and do not include contract information. PhilGEPS open data is limited to bids, awards, and contract amounts.

The most requested DOTr data via the FOI mechanism is not just about contracts, but also the processes related to the contracting process. The most frequently requested information related to procurement is feasibility studies, design guidelines for infrastructure projects, and data on transport terminals.

The data management structure of DOTr is complicated because the department has a number of attached agencies. DOTr is headed by a Secretary with seven undersecretaries handling operational and sectoral concerns: planning; administration and finance; legal and procurement; road transport and infrastructure; aviation and airports; rail and toll roads; and maritime. Each of these offices, along with the offices of the attached agencies, have their own unique processes and systems.
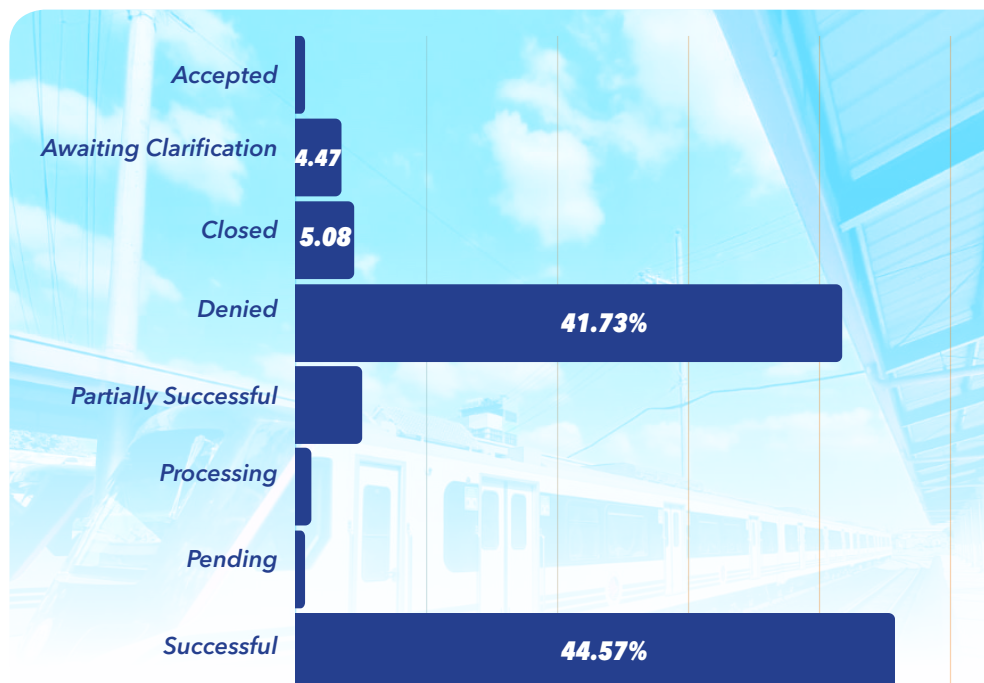
The Communications Office, led by one of the service directors, manages incoming FOI requests for DOTR. The FOI Decision Maker sits under the office of the Assistant Secretary for Communication and Commuter Affairs. When a request is filed, the FOI receiving officers forward the request to the appropriate sector department. The sector offices that hold the data then decide how to respond to the request. The DoTR's FOI manual[1] only covers the DoTR central office, leaving all attached agencies to formulate their own manual and their own FOI processes and procedures.

For example, each user department (sector) or attached agency that initiates a procurement process manages associated activities, from procurement planning to invitations to tender, and keeps files on these activities. When a request comes in through the FOI portal, the receiving officers will forward it to the offices concerned, who will decide whether to grant the request. These offices can also require that a requestor signs a non-disclosure agreement (NDA) prohibiting them from sharing it with others or commenting publicly on the information.

1   https://drive.google.com/file/d/1H-25ctdf3w0is23vmB70A0lgwPWz5dH3/view

Performance of **DOTr** So Far

DOTr is not considered one of the most responsive agencies in the FOI program. In a use-case study, the Affiliated Network for Social Accountability in East Asia and the Pacific (ANSA-EAP) received only two of the five requests it lodged through the FOI Portal. In one of these, the requester was asked by DOTr to sign an NDA. In a similar exercise, the Ateneo School of Government (ASOG) filed requests for contracting-related documents including feasibility studies. DOTR refused access on grounds of trade secrecy.

Category	Value
Accepted	
Awaiting Clarification	4.47
Closed	5.08
Denied	41.73%
Partially Successful	
Processing	
Pending	
Successful	44.57%

As of February 2020, according to data compiled by the FOI Project Management Office, the Department received 985 e-FOI requests. 42% were denied – one of the highest denial rates across agencies participating in the FOI program.

The reasons given by the agency for denied requests related to public procurement were that they included trade secrets or that data was unavailabile, even for specific contractual documents including concession agreements, technical studies of proposed airports, and feasibility studies. These documents do exist, but there appears to be no effort given to locating them. In one request, the reason for denial was that the document is still in draft form. Quoting the letter communicating the decision to the requester, DOTr says, the requested information:

> *"are still under evaluation by other Government agencies, partake the nature of an information or document comprising drafts of decisions, orders, rulings, policy and decisions memoranda that are addressed to the Government Officials concerned who are yet to finalize its recommendation and decision whether to approve or disapprove the projects. Hence, pending the decision or resolution of these Government agencies on the approval or disapproval of the projects, the same cannot yet be disclosed or disseminated to the public." (DOTr response to requester, 2018)*

ANSA-EAP, however, questioned this decision, saying that….

> *"that information from a discussion, re-evaluation, or draft document on plans for government service delivery projects has great public value as it affects key project implementation decisions.*
>
> *The Legal Division's claim of exception for this type of information is merely an opinion and must thus be challenged. When does information become privilege and qualify as state secret? The tentative or unpolished characteristic of project information cannot serve as basis for it. There is more benefit than danger in publicly sharing the way projects are being developed as it invites more ideas and better innovations. Planning and project-development activities are not supposed to be secretive, and have long been opened to participatory processes. Information generated during this stage should be made accessible to the public."*

There were many instances like this, where DOTr denied FOI requests because the agency is compelled by law to do so.

Challenges to
Providing Contracting Information
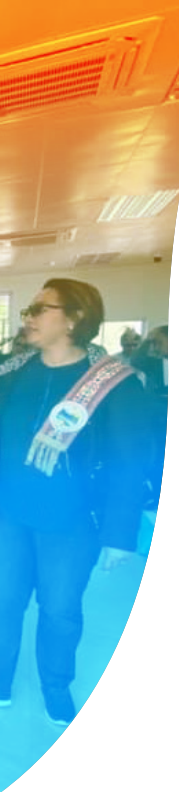## to Users

Different agencies working in silos

Operationally, DOTr is a large agency with operating units that behave independently of each other. The Land Transportation Office (LTO), for example, is a sectoral office in charge of all land transportation activities, with regional offices across the country. It has its own Management Information Systems (MIS) division that does not connect to the department's agency-wide MIS function. In an interview conducted for this project, we learned that rather than providing the DOTr with the necessary data for a particular request, the LTO asked the DOTr receiving officer to instruct the requester to file a request to the LTO instead. LTO has a separate online channel at the eFOI portal.

Similarly, when the LTO was asked for data that could be provided by the Land Transportation Franchising and Regulatory Board (LTFRB), another DOTr sectoral office, the LTO FOI receiving officer denied the request and asked the requester to contact the LTFRB. Like LTO, LTFRB also has a separate channel in the eFOI portal. Because DOTr agencies act as if they are independent of each other, the process of requesting the information is extremely cumbersome and government resources are wasted. It is difficult for citizens requesting information to know what agency to go to. As one requester said: "I assumed that when you want to know information regarding transportation concerns, you can ask DoTR as that is their mandate. Apparently, they want us to learn their organizational structure so that we can have a proper request. To make the lives of

citizens easy, they could have published their data assets, so we know where to go."

Lack of a comprehensive data inventory

DOTr does not have an inventory of all its data assets. One reason that it is slow in responding to eFOI requests is that it does not have a comprehensive inventory of its data assets, where they reside, who manages them, and how they are stored. Every time a request comes in that the department has not been asked before, the eFOI receiving officers need to determine whether (1) they have the data, (2) which agency or department within DOTr has them, and (3) who has authority to decide whether to grant access. When they successfully process a request, they add the data to their current incomplete and provisionally organized data inventory.

Even the sectoral agencies do not have a complete and comprehensive data inventory. This problem is not unique to DOTr. On November 11, 2016, the Presidential Communications Operations Office issued FOI Memorandum Circular No. 1, series of 2016, requiring all agencies, departments, bureaus, government-owned and controlled operations, state universities and colleges, to submit an inventory of data assets. While DOTr sectoral agencies were able to submit, these were incomplete and purely for compliance purpose only.

Absence of a centralized database

The absence of a centralized repository also aggravates this problem. A central repository would allow the FOI receiving officer to quickly locate, pull-out, and positively respond to the request, assuming there are no legal impediments to prevent the disclosure of the data. This would dramatically shorten response times and save a requester from being passed from one agency to another within a single government department.

According to one DOTr official who spoke on the condition of anonymity, a centralized database would be easy to establish if there was the interest and political will. He said the majority of DOTr's systems and processes are digitized and that each operating unit has a functioning management information systems department. But there seems to be no interest to do it. "No one wants to rock the boat because this requires coordination across the different operating units."

Lack of a clear legal mandate and guidelines in the disclosure of contracting data

The Philippines does not have comprehensive guidelines defining what constitutes public information that citizens should have access to. There are different interpretations of what

publicly accessible information means.

The Philippine Constitution does adopt a full disclosure policy of all its transactions involving public interest (Section 27, Article 2) and that each citizen is guaranteed the right to information of public concern (Section 7, Article 3).

While the Constitution explicitly recognizes that this right is limited to certain conditions prescribed by law, it is silent about what these limitations are. Executive Order No. 2 signed by President Rodrigo Roa Duterte instructs the Department of Justice to define these exceptions, which it identified as national security, executive privilege, law enforcement and protection of public and personal safety, personal privacy, official privileged and confidential information, premature disclosure, confidential information under banking and finance laws. These guidelines remain vague and are subject to several interpretations.

An eFOI request for a feasibility study on the PNR South Long-Haul (Manila to Bicol) Project submitted on October 15, 2019, was denied by DOTr because of trade secrets and intellectual property rights. This is inconsistent with a decision a year prior, which granted a request for feasibility studies on five airports, subject to the condition that the requester photocopy the feasibility studies within DOTr premises.

Within a single agency the interpretation of what can be disclosed or not is applied unevenly. The railway sector office denies the requests using its own interpretation of an exception provision while the Air Transport Planning Division approves them.

Apprehension to Disclose Contracts

Across the DOTr, there is an uneven attitude towards data and information disclosure. As illustrated above, some units within the department can be liberal in granting access to data and information, while in others, the default is to deny requests. Moreover, some data and documents are considered easier to disclose than others. For example, the documents listed in the DOTr People's Manual[1] as procurement-related data for disclosure includes a list of projects, accomplishments and technical reports and status of projects. It does not include more sensitive documents that DOTr holds sacred such as, for example, contracts.

There is a default rule that contracts cannot be disclosed. In 2018, a researcher requested the Engineering, Procurement, and Construction contract and the Operations and Maintenance contract for the Light Railway Transit (LRT) Line 1 Extension Project. DOTr rejected the request, saying these are sensitive commercial documents and are therefore exempt.
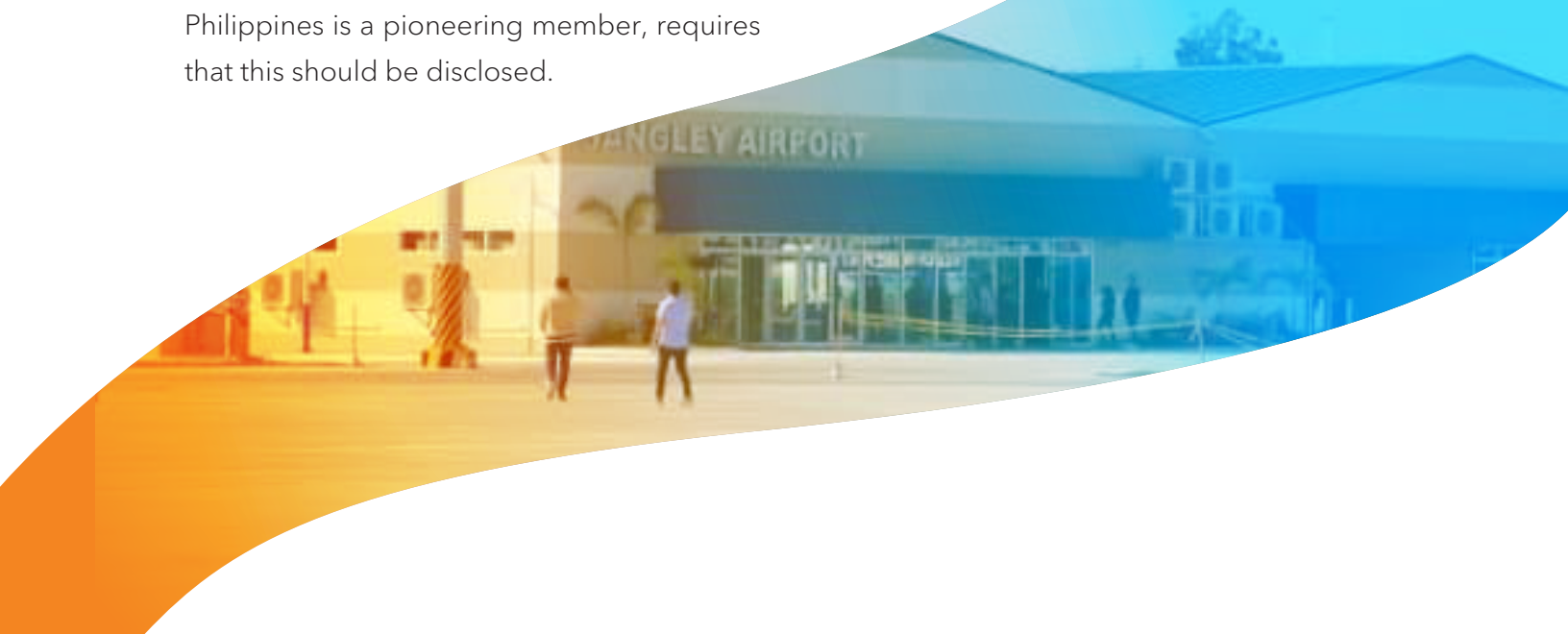
1   https://drive.google.com/file/d/1H-25ctdf3w0is23vmB70A0lgwPWz5dH3/view

Opportunities for Improvement

The DOTr case study highlights at least three areas that are required for a successful FOI program: (1) clear and unambiguous guidelines, (2) a working data management system that serves the FOI function, and (3) an organizational culture that encourages transparency and accountability. Coming up with clear and unambiguous guidelines may be difficult because there is currently a lack of interest to do so. The Department of Justice (DOJ) has defined the exceptions and leaves the interpretation to agencies. When asked whether procurement-related data, like contracts, are covered by the FOI, the DOJ says it depends on the nature of the contract and the standard operating procedures of the agency. But, the Open Contracting Data Standard, a global initiative of which the Philippines is a pioneering member, requires that this should be disclosed.

A letter of request and signing of a non-disclosure agreement – requirements that DOTr ask from FOI requesters – are not necessary.

A data management system may be easy to establish. Still, in the case of the DOTr, the organizational integration to allow a more efficient data management system is a significant hurdle. DOTr appears to be moving towards a more cohesive way of working, but how this process will unfold in terms of actual operational impact, especially for FOI, remains to be seen.