



United Nations  
Educational, Scientific  
and Cultural Organization

# The Right to Information in Latin America

A Comparative Legal Survey

By Toby Mendel



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Published in 2009 by the United Nations Educational, Scientific and Cultural Organization, Quito office

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Toby Mendel has published widely, contributing to numerous ARTICLE 19 and other publications. He is, among other things, the author of the ARTICLE 19 publications *The Public's Right to Know: Principles on Freedom of Information Legislation*<sup>1</sup> and *A Model Freedom of Information Law*.<sup>2</sup> This is the fourth book by Mr. Mendel published by UNESCO, the others being *Public Service Broadcasting: A Comparative Legal Survey*,<sup>3</sup> and *Freedom of Information: A Comparative Legal Survey* (1<sup>st</sup> and 2<sup>nd</sup> editions).<sup>4</sup> His published work covers a wide range of free expression issues including broadcasting, communications rights, defamation, the right to information, the rights of the child, public service broadcasting and false news. He has an honours BA in mathematics from McGill University and a first class LLB (law) from Dalhousie University.

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1 (London: June 1999).

2 (London: July 2001).

3 (Malaysia: UNESCO and the Asia Pacific Institute for Broadcasting Development, 2000).

4 (New Delhi: UNESCO, 2003) and (Paris: UNESCO, 2008).



## Acknowledgements

I would like to thank the following people for providing valuable comments and information on various chapters of this book: Maria Jaraquemada, International Officer, Council for Transparency, Chile; Juan Pablo Olmedo, President, Council for Transparency, Chile; Andres Mejia, Legal Counsel, Instituto Prensa y Sociedad (IPYS), Colombia; Cesar Ricaurte, Director, Fundamedios, Ecuador; Alejandro Urizar, Executive Director, Acción Ciudadana, Transparency International, Guatemala; Marcos Mendiburu, Social Development Specialist, World Bank Institute; Silvana Fumega, Public Sector Expert, Independent Consultant; Issa Luna Pla, Professor, Legal Research Institute, National Autonomous University of Mexico; Miguel Pulido, Coordinator for Transparency and Accountability, FUNDAR, Mexico; Maria Adilia, President of Consultores Profesionales S.A. and Legal Counsel for the Group for the Promotion of The Access to Information Right (Grupo Promotor del Acceso a la Información), Nicaragua; Javier Casas, Legal Area Director, Instituto Prensa y Sociedad (IPYS), Peru; Edison Lanza, Director, Centro de Acceso a la Información (CAInfo), Uruguay; and Gustavo Gómez Germano, Coordinador, Grupo Medios y Sociedad (GMS), Uruguay.

I would also like to thank UNESCO for inspiring and supporting me in the production of this regional study, and to extend particular thanks to Rosa Gonzalez, Eric Lind, Bernarda Ortiz, Andrew Radolf, Pualine Deneufbourg, Günther Cyranek, and Isabel Viera. Eric Lind deserves particular mention for his meticulous editing of the whole draft version of the book.

I would like to dedicate this book to my wife Lilani and my three sons, Caleb, Nathan and Ilan, who provide me with constant support and encouragement in my work, as well as much needed diversion in between.



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## Foreword

**T**he right to information is at the heart of democracy. Only a citizenry that is well-informed about the intentions and actions of their elected leaders can contribute effectively to decision-making processes that affect their future. In the most basic sense, democratic participation depends on a citizen's ability to access the information needed to take ownership within society.

The right to information, if properly implemented, enables a dialogue between the public and officials, thus cultivating good governance and promoting accountability by empowering citizens, journalists and civil society in general with the information they require to combat corruption and act as a watchdog against abuses by authorities. More generally, democratizing access to information, particularly access to information held by public bodies, fosters a political climate of openness, transparency and participation that is the foundation for legitimate democracy.

At the core of peoples' right to information is the understanding that authorities are merely caretakers of information on behalf of the public, that information held by the state is equally the property of the people. When transparency replaces secrecy and power is exposed to public scrutiny, abuses can be curbed, public opinion can be reflected in decision-making, and the state can be held accountable to public interest. Every country in the world needs adequate checks and balances on the exercise of public power, particularly through the right to information and the public oversight this enables.

The interdependence between freedom of expression and the right to information is self-evident. As the Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights stated in 2000, censorship violates not only the right of each individual to express herself, but it also impairs the right of each person to be well informed. The symbiosis of these rights, however, is the product of decades of campaigning, standard-setting and jurisprudence. The fact that the right to information is now considered a fundamental human right underscores the persistent ability of rights discourse to remain relevant in a rapidly changing world where technology and information are more decisive than ever.

The right to information, as this book's chapter on international standards demonstrates, now enjoys substantial global currency as an aspect of freedom of expression. Although the right to access information held by public bodies was recognized over 200 years ago in Sweden, only 13 countries had adopted right to information laws (often called Freedom of Information or Access to Information Laws) in 1990 – only one of them in Latin America. The subsequent twenty years, however, witnessed an explosion of right to information laws, with upwards of 80 such laws now adopted globally, including 11 in Latin America, with another 20-30 under active consideration worldwide.

Recognition of the right to information is also reflected in the growing advocacy of civil society movements and the authoritative statements and international standards from bodies such as the UN and regional human rights systems. As the author of the study, Toby Mendel, highlights: "The idea that public bodies hold information not for themselves but as custodians of the public good is now firmly lodged in the minds of people all over the world."

In both developing and industrialized countries, right to information laws have great potential to strengthen transparency among institutions of representative government, enabling citizens and civil society movements to gather information and mobilize coalitions around policy issues. While a good law is not sufficient to deliver the right to information, it is a necessary precondition, the platform upon which full realisation of this right must build.





Those tasked with drafting or promoting legislation guaranteeing the right to information face a number of challenges. How should the regime of exceptions be crafted so as to strike an appropriate balance between the right to know and the need for secrecy to protect certain key public and private interests? How extensive should the obligation to publish and disseminate information be and how can the law ensure that this obligation grows in line with technological developments which significantly reduce publication costs? What procedures for requesting information can balance the need for timely, inexpensive access against the pressures and resource constraints facing civil servants? What right of appeal should individuals have when their requests for information have been refused? Which positive measures need to be taken to change the culture of secrecy that pervades the public administration in so many countries, and to inform the public about this right?

This book on the Right to Information in Latin America helps to clarify some of these tensions and challenges from a regional, comparative perspective. Importantly, it illustrates the approach taken to enacting right to information legislation in eleven Latin American countries. This publication builds on two editions of a companion book that UNESCO published to great international acclaim (*Freedom of Information: A Comparative Legal Survey*). This timely study builds on this momentum and confirms UNESCO's continued commitment to protect and promote the right to information in line with its strategic objective of enhancing universal access to information and knowledge. Providing an authoritative yet accessible study of the law and practice regarding the right to information in Latin America, this book offers invaluable analysis of what is working and why. We hope that it will assist those promoting the right to information in Latin America to build a strong legal platform in support of this key human right.

Quito, 2009

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## Introduction

The importance of the right to information or the right to know is an increasingly constant refrain in the mouths of development practitioners, civil society, academics, the media and even governments. What is this right, is it really a right and how have governments, and particularly governments in Latin America, sought to give effect to it? These are some of the questions this book seeks to address.

There has been a veritable revolution in recent years in terms of the right to information, commonly understood as the right to access information held by public bodies. Whereas in 1990 only 13 countries had adopted national right to information laws, only one of them in Latin America, upwards of 80 such laws have now been adopted globally, including 11 in Latin America, and they are under active consideration in another 20-30 countries. These include a number of countries in Latin America, such as Brazil, where in April 2009 the government promised to introduce right to information legislation. In 1990, no inter-governmental organisation had recognised the right to information, now all of the multilateral development banks and a number of other international financial institutions have adopted information disclosure policies. In 1990, the right to information was seen predominantly as an administrative governance reform whereas today it is increasingly being seen as a fundamental human right.

Even the terminology is starting to change. The term 'freedom of information' has historically been common usage and this is reflected in the title of the companion publication to this book, *Freedom of Information: A Comparative Legal Survey*.<sup>1</sup> However, the term 'right to information' is now increasingly being used not only by activists, but also by officials. It is, for example, reflected in the title of the 2005 India law granting access to information held by public bodies. The title of this book has been amended to reflect this trend, and the text consistently refers to the right to information rather than freedom of information.

Since the first edition of the companion title to this book was published in 2003, these changes, which were already well underway, have become more profound and widespread. The first right to information law in the Middle East was adopted by Jordan in 2007,<sup>2</sup> so that the trend now extends to every commonly referenced geographic region of the world. Very significant developments in terms of recognition of access to information as a fundamental human right have also occurred since the 2003 publication. These include the first decision by an international court recognising the right to information as an aspect of the general right to freedom of expression, along with similar decisions by superior courts, and more and more emphatic statements by authoritative international bodies and officials about the status of this right.

There are a number of good reasons for growing acceptance of the right to information. If anything, it is surprising that it has taken so long for such an important underpinning of democracy to gain widespread recognition as a human right. The idea that public bodies hold information not for themselves but as custodians of the public good is now firmly lodged in the minds of people all over the world. As such, this information must be accessible to members of the public, unless there is an overriding interest in keeping the information secret. In this respect, right to information laws reflect the fundamental premise that government is supposed to serve the people.

A number of paradigmatic changes sweeping the globe have undoubtedly contributed to growing acceptance of the right to information. These include the transitions to democracy, albeit more or less successful, that have occurred in several regions of the world since 1990. They also undoubtedly include massive developments in information technology which have changed the whole way societies relate to and use information, and which have, broadly, made the right to information more important to citizens. Among other things, information technology has generally enhanced the ability of ordinary members of the public to control corruption, to hold leaders to account and



to feed into decision-making processes. This, in turn or, to be more precise, in parallel, has led to greater demands for the right to information to be respected.

There are a number of utilitarian goals underlying widespread recognition of the right to information, in addition to the principled and global reasons noted above. The international human rights NGO, ARTICLE 19, Global Campaign for Free Expression, has described information as, “the oxygen of democracy”.<sup>3</sup> Information is an essential underpinning of democracy at every level. In the most general sense, democracy is about the ability of individuals to participate effectively in decision-making that affects them. Democratic societies have a wide range of participatory mechanisms, ranging from regular elections to citizen oversight bodies of, for example, public education and health services, to mechanisms for commenting on draft policies, laws or development programmes.

Effective participation at all of these levels depends, in fairly obvious ways, on access to information, including information held by public bodies. Voting is not simply a political beauty contest. For elections to fulfil their proper function – described under international law as ensuing that “[t]he will of the people shall be the basis of the authority of government”<sup>4</sup> – the electorate must have access to information. The same is true of other forms of participation. It is difficult, for example, to provide useful input to a policy process without access to the thinking on policy directions within government, for example in the form of a draft policy, as well as the background information upon which that thinking is based.

Participation is also central to sound and fair development decision-making. The UNDP *Human Development Report 2002: Deepening Democracy in a Fragmented World* points to three key benefits of democratic participation: it is itself a fundamental human right which all should enjoy; it protects against economic and political catastrophes; and it “can trigger a virtuous cycle of development”.<sup>5</sup> Inasmuch as access to information underpins effective participation, it also contributes to these outcomes. A right to information can also help ensure a more balanced participatory playing field. Joseph Stiglitz, whose work on the economic implications of asymmetries of information won him a Nobel Prize, has noted that unequal access to information allows officials “to pursue policies that are more in their interests than in the interests of the citizens. Improvements in information and the rule governing its dissemination can reduce the scope for these abuses”.<sup>6</sup>

Democracy also entails accountability and good governance. The public have a right to scrutinise the actions of their leaders and to engage in full and open debate about those actions. They must be able to assess the performance of the government and this depends on access to information about the state of the economy, social systems and other matters of public concern. One of the most effective ways of addressing poor governance, particularly over time, is through open, informed debate.

The right to information is also a key tool in combating corruption and wrongdoing in government. Investigative journalists and watchdog NGOs can use the right to access information to expose wrongdoing and help root it out. As U.S. Supreme Court Justice Louis Brandeis famously noted: “A little sunlight is the best disinfectant.” Transparency International, an international NGO devoted to combating corruption, devoted an entire annual report to looking at the role of access to information can play in this struggle.<sup>7</sup>

Commentators often focus on the more political aspects of the right to information but it also serves a number of other important social goals. The right to access one’s personal information, for example, is part of respect for basic human dignity but it can also be central to effective personal decision-making. Access to medical records, for example, can help individuals make decisions about treatment, financial planning and so on.

Finally, an aspect of the right to information that is often neglected is the use of this right to facilitate effective business practices. Commercial users are, in many countries, one of the most significant



user groups. Public bodies hold a vast amount of information of all kinds, much of which relates to economic matters and which can be very useful for businesses. A right to information helps promote a fluid information flow between government and the business sector, maximising the potential for synergies. This is an important benefit of right to information legislation, and helps answer the concerns of some governments about the cost of implementing such legislation.

These rationales for right to information legislation apply equally, if not with more force, to less developed as to more developed countries. Democracy is not the preserve of a few select countries but a right of citizens everywhere. Every country in the world needs adequate checks and balances on the exercise of public power, including through the right to information and the public oversight this enables. The right to information can be particularly effective in exposing corruption where there are few other safeguards, as grassroots experience in India with this right has amply demonstrated.<sup>8</sup>

The right to information is most commonly associated with the right to request and receive information from public bodies. This is a key modality by which the right is fulfilled but it is not the only one. Most right to information laws also place an obligation on public bodies to publish information on a proactive or routine basis, even in the absence of a request. The scope of this varies but it usually extends to key information about how they operate, their policies, opportunities for public participation in their work and how to make a request for information. 'Pushing' information out in this way is increasingly being recognised as one of the more effective ways to enhance access to information held by public bodies.

One further aspect of this right is slowly starting to emerge. Unlike the other two aspects of the right, which relate to information already held by public bodies, this third aspect posits a positive obligation on States to ensure that certain key categories of information are available. ARTICLE 19, for example, has long argued that States are under a substantive positive obligation to ensure that citizens have access to information about human rights violations.<sup>9</sup> The 'right to truth' has also been recognised by international courts in the human rights context, and also in the context of environmental threats.<sup>10</sup> This is of particular importance in the aftermath of a period of serious human rights violations, as part of a renewed commitment to democracy and to respect rights. In such cases, it may not be enough simply to provide access to information already held by public bodies; it may be necessary to go further and collect and compile new information to ascertain the truth about the past abuses. The importance attached to this is reflected, among other things, in the truth commissions that have been appointed in a number of countries in the region.

The first chapter of this book, International Standards and Trends, analyses the international basis for claiming the right to information as a fundamental human right. The analysis reviews authoritative international statements, and the decisions of international courts and quasi-judicial bodies, as well as relevant national developments. The second chapter probes the specific implications of the various standards for right to information legislation, analysing this within the framework of nine right to information principles. These chapters are largely incorporated from the second edition of the companion to this book.

These chapters are followed by analyses of the laws of the 11 countries in Latin America which have adopted right to information laws, namely Chile, Colombia, the Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru and Uruguay. Each country section is organised under the same set of headings. A brief introduction is followed by headings on the right of access, procedural guarantees, the duty to publish, exceptions, appeals, sanctions and protections, and promotional measures.

The country/intergovernmental organisation sections are followed by a chapter on Comparative Analysis which highlights similarities and differences in the various laws, following the same structure as the country chapters. It describes, in particular, the main approaches for implementing the principles underpinning the right to information, as well as some of the more innovative systems that have been tried in different countries.



This book aims to provide legal professionals, NGO activists, academics, media practitioners and officials with international and regional information about the right to information in a relatively easily accessible format. It focuses on the comparative practice in terms of national legislation, but also provides information on international standards and principles underpinning the right to information. It is hoped that this regional edition will prove to be a useful resource to those struggling to promote best practice approaches to implementing the right to information in Latin America.

## Notes

- 1 (New Delhi: UNESCO, 2003), 1<sup>st</sup> edition, and (Paris: UNESCO, 2008), 2<sup>nd</sup> edition.
- 2 Formally this was preceded by Israel's adoption of a right to information law in 1998.
- 3 *The Public's Right to Know: Principles on Freedom of Information Legislation* (London: June 1999), Preface.
- 4 *Universal Declaration of Human Rights*, UN General Assembly Resolution 217 A (III), 10 December 1948, Article 21.
- 5 *UNDP, Human Development Report 2002: Deepening Democracy in a Fragmented World*, (Oxford: Oxford University Press, 2002), p. 3.
- 6 Stiglitz, J., "Transparency in Government", in World Bank Institute, *The Right To Tell: The Role of the Mass Media in Economic Development*, (Washington, D.C.: 2002), p. 28.
- 7 Transparency International, *Global Corruption Report 2003: Special Focus: Access to Information* (London: Profile Books, 2003).
- 8 See ARTICLE 19, Centre for Policy Alternatives, Commonwealth Human Rights Initiative and Human Rights Commission of Pakistan, *Global Trends on the Right to Information: A Survey of South Asia* (London: 2001), under 2.8.1 India, The MKSS Movement, pp. 72-75.
- 9 *Who Wants to Forget? Truth and Access to Information about Past Human Rights Violations* (London: ARTICLE 19, 2000), p. 5. Online at [www.article19.org/docimages/869.htm](http://www.article19.org/docimages/869.htm)
- 10 See the section on Information on Human Rights in the chapter on International Standards and Trends.



# International Standards and Trends



## International Standards and Trends

The original version of this book, published in 2003, tentatively stated that, collectively, the evidence, primarily international statements by authoritative bodies, supported the conclusion that the right to information had been internationally recognised. Since that time, there have been a number of important developments. A number of new and more emphatic statements to the effect that access to information held by public bodies is a fundamental human right have been issued. Very significantly, for the first time, an international court, the Inter-American Court of Human Rights, has specifically held that the general right to freedom of expression, as guaranteed under international law, encompasses the right to information.

In 2003, the idea that the right to information had been internationally recognised as a fundamental human right was a bold claim, and so the claim was phrased somewhat tentatively. This is no longer the case and there is very widespread support for this contention. While there are no doubt those who would dispute this claim, they are flying in the face of history and in the face of increasing evidence to the contrary.

As noted, numerous international bodies with responsibility for promoting and protecting human rights have authoritatively recognised the fundamental human right to access information held by public bodies, as well as the need for effective legislation to secure respect for that right in practice. These include the United Nations, regional human rights bodies and mechanisms at the Organization of American States, the Council of Europe and the African Union, and other international bodies with a human rights mandate, such as the Commonwealth.

The primary basis identified in these statements for the right to information is as an aspect of the general guarantee of freedom of expression, and this is the main focus of this chapter. In addition to setting out international standards on the right to information, this chapter also outlines key developments at the national level, on the basis that these demonstrate general recognition of the human rights status of access to information. There is a growing consensus at the national level that access to information is a human right, as well as a fundamental underpinning of democracy. This is reflected in the inclusion of the right to information among the rights and freedoms guaranteed by many modern constitutions, as well as the dramatic increase in the number of countries which have adopted legislation giving effect to this right in recent years.

The right to information has also been linked to the right to the environment, to information about human rights and to the right to take part in public affairs. A right to access information held by public bodies has also been linked to pragmatic social objectives, such as controlling corruption. All of these are discussed briefly in this chapter.

### The United Nations

The notion of 'freedom of information' was recognised early on by the UN. In 1946, during its first session, the UN General Assembly adopted Resolution 59(1), which stated:

Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the UN is consecrated.<sup>1</sup>

Although some of the early laws guaranteeing a right to access information held by public bodies were called freedom of information laws, it is clear from the context that, as used in the Resolution, the term referred in general to the free flow of information in society rather than the more specific idea of a right to access information held by public bodies.



The *Universal Declaration of Human Rights* (UDHR), adopted by the UN General Assembly in 1948,<sup>2</sup> is generally considered to be the flagship statement of international human rights. Article 19, binding on all States as a matter of customary international law,<sup>3</sup> guarantees the right to freedom of expression and information in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR), a legally binding treaty, was adopted by the UN General Assembly in 1966<sup>4</sup> and, as of July 2007, had been ratified by 160 States. The ICCPR guarantees the right to freedom of opinion and expression, also at Article 19, and in very similar terms to the UDHR.

These international human rights instruments did not specifically elaborate a right to information and their general guarantees of freedom of expression were not, at the time of adoption, understood as including a right to access information held by public bodies. However, the content of rights is not static. The European Court of Human Rights, for example, has held: “[T]he [European Convention on Human Rights] is a living instrument which ... must be interpreted in the light of present-day conditions.”<sup>5</sup> Similarly, the Inter-American Court of Human Rights has held that international “human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.”<sup>6</sup>

Those responsible for drafting international human rights treaties were farsighted in their framing of the right to freedom of expression, including within its ambit the right not only to impart but also to seek and receive information and ideas. They recognised the important social role of not just freedom to express oneself – freedom to speak – but also of the more profound notion of a free flow of information and ideas in society. They recognised the importance of protecting not only the speaker, but also the recipient of information. This recognition is now being understood as including the right to information in the sense of the right to request and be given access to information held by public bodies.

### **UN Special Rapporteur on Freedom of Opinion and Expression**

In 1993, the UN Commission on Human Rights<sup>7</sup> established the office of the UN Special Rapporteur on Freedom of Opinion and Expression.<sup>8</sup> Part of the Special Rapporteur’s mandate is to clarify the precise content of the right to freedom of opinion and expression. The issue of the right to information has been addressed in most of the Special Rapporteur’s annual reports to the Commission since 1997. After receiving his initial statements on the subject in 1997, the Commission called on the Special Rapporteur to “develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications.”<sup>9</sup>

In his 1998 Annual Report, the Special Rapporteur stated clearly that the right to freedom of expression includes the right to access information held by the State: “[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems. ...”<sup>10</sup> His views were welcomed by the Commission.<sup>11</sup>

The UN Special Rapporteur significantly expanded his commentary on the right to information in his 2000 Annual Report to the Commission, noting its fundamental importance not only to democracy and freedom, but also to the right to participate and to the realisation of the right to development.<sup>12</sup> He also reiterated his “concern about the tendency of Governments, and the institutions of Government, to withhold from the people information that is rightly theirs”.<sup>13</sup> Importantly, at the same time, the Special Rapporteur elaborated in detail on the specific content





of the right to information.<sup>14</sup> In subsequent reports, the Special Rapporteur has focused more on the implementation of the right to information than on further development of standards.

The UN Special Rapporteur's views on the right to information have been supported by official mandates on freedom of expression established by other IGOs. In November 1999, the three special mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – came together for the first time under the auspices of the human rights NGO, ARTICLE 19, Global Campaign for Free Expression. They adopted a Joint Declaration which included the following statement:

Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.<sup>15</sup>

The mandates now issue a Joint Declaration annually on different freedom of expression themes. In their 2004 Joint Declaration, they elaborated further on the right to information, stating:

The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.<sup>16</sup>

The statement went on to elaborate in some detail on the specific content of the right.

The other main UN body with responsibility for the right to freedom of expression is the UN Human Rights Committee (HRC), established under the ICCPR and given responsibility for oversight of its implementation. The HRC both reviews and comments on the regular reports States are required to provide to it on implementation of their ICCPR obligations, and hears individual complaints about human rights abuses from States which have ratified the (first) Optional Protocol to the ICCPR.<sup>17</sup> The HRC has so far declined to comment on the right to information in the context of regular State reports, although this may be partly because these are largely reactive in nature. So far, no individual case on the right to information has been decided by the HRC although it is understood that cases on this are currently pending before it.

## Regional Standards

All three main regional human rights systems – at the Organization of American States, the Council of Europe and the African Union – have formally recognised the right to information. The following section describes the development of these standards.

### Organization of American States

Article 13 of the *American Convention on Human Rights* (ACHR),<sup>18</sup> a legally binding treaty, guarantees freedom of expression in terms similar to, and even stronger than, the UN instruments. In 1994, the Inter-American Press Association, a regional NGO, organised the Hemisphere Conference on Free Speech, which adopted the Declaration of Chapultepec, a set of principles which elaborate on the guarantee of freedom of expression found at Article 13 of the ACHR.<sup>19</sup> The Declaration explicitly recognises the right to information as a fundamental right, which includes the right to access information held by public bodies:

2. Every person has the right to seek and receive information, express opinions and disseminate them freely. No one may restrict or deny these rights.



3. The authorities must be compelled by law to make available in a timely and reasonable manner the information generated by the public sector....

Although the Declaration of Chapultepec originally had no formal legal status, as Dr Santiago Canton noted when he was OAS Special Rapporteur for Freedom of Expression, it "is receiving growing recognition among all social sectors of our hemisphere and is becoming a major point of reference in the area of freedom of expression."<sup>20</sup> To date, the Heads of State or Government of some 30 countries in the Americas, as well as numerous other prominent persons, have signed the Declaration.<sup>21</sup>

The Special Rapporteur, whose Office was established by the Inter-American Commission on Human Rights in 1997,<sup>22</sup> has frequently recognised the right to information as a fundamental right, which includes the right to access information held by public bodies. In his 1999 Annual Report to the Commission he stated:

The right to access to official information is one of the cornerstones of representative democracy. In a representative system of government, the representatives should respond to the people who entrusted them with their representation and the authority to make decisions on public matters. It is to the individual who delegated the administration of public affairs to his or her representatives that belongs the right to information. Information that the State uses and produces with taxpayer money.<sup>23</sup>

In October 2000, in an important development, the Commission approved the *Inter-American Declaration of Principles on Freedom of Expression*,<sup>24</sup> which is the most comprehensive official document to date on freedom of expression in the Inter-American system. The Preamble reaffirms the aforementioned statements on the right to information:

CONVINCED that guaranteeing the right to access to information held by the State will ensure greater transparency and accountability of government activities and the strengthening of democratic institutions; ...

The Principles unequivocally recognise the right to information:

3. Every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
4. Access to information held by the state is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

The OAS General Assembly has followed up on the Principles by adopting resolutions on access to public information every year since 2003. These resolutions highlight Member States' obligation to "respect and promote respect for everyone's access to public information", which is deemed to be "a requisite for the very exercise of democracy." The resolutions also call on States to "promote the adoption of any necessary legislative or other types of provisions to ensure [the right's] recognition and effective application."<sup>25</sup>

In the Declaration of Nueva León, adopted in 2004, the Heads of State of the Americas stated:

Access to information held by the State, subject to constitutional and legal norms, including those on privacy and confidentiality, is an indispensable condition for citizen participation and promotes effective respect for human rights. We are committed to providing the legal and regulatory framework and the structures and conditions required to guarantee the right of access to information to our citizens.<sup>26</sup>



A very significant development in 2008 was the adoption, by the Inter-American Juridical Committee in August, of a very progressive set of *Principles on the Right of Access to Information*.<sup>27</sup> This document contains a statement of 10 principles governing the right to information, including that it is a fundamental human right, that it should apply broadly to all public bodies, including the executive, judicial and legislative branches of government, and all information, that exceptions should be clearly and narrowly drawn and that there should be a right of appeal to an administrative body against denials of the right.

## Council of Europe

The Council of Europe (COE) is an intergovernmental organisation, currently composed of 47 Member States, devoted to promoting human rights, education and culture. One of its foundational documents is the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR),<sup>28</sup> which guarantees freedom of expression and information as a fundamental human right, at Article 10. Article 10 differs slightly from guarantees found in Articles 19 of the UDHR and ICCPR, and Article 13 of the ACHR, in that it protects the right to “receive and impart”, but not the right to “seek”, information.

The political bodies of the Council of Europe have made important moves towards recognising the right to information as a fundamental human right. In 1981, the Committee of Ministers, the political decision-making body of the Council of Europe (composed of Member States’ Ministers of Foreign Affairs) adopted Recommendation No. R(81)19 on Access to Information Held by Public Authorities, which stated:

- I. Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities. ...<sup>29</sup>

In 1994, the 4<sup>th</sup> European Ministerial Conference on Mass Media Policy adopted a Declaration recommending that the Committee of Ministers consider “preparing a binding legal instrument or other measures embodying basic principles on the right of access of the public to information held by public authorities.”<sup>30</sup> Instead, the Committee of Ministers opted for a recommendation, which it adopted in February 2002.<sup>31</sup> The Recommendation includes the following provision:

### III

#### *General principle on access to official documents*

Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including national origin.

The rest of the Recommendation elaborates in some detail on the content of the right. Principle IV, for example, delineates the legitimate scope of restrictions on access to information, while Principles V and VI address matters of procedure. The Recommendation also addresses forms of access (Principle VII), costs (Principle VIII), the right to have any refusal of access reviewed (Principle IX), promotional measures (Principle X) and proactive publication (Principle XI).

In May 2005, the Committee of Ministers tasked a group of experts with “drafting a free-standing legally binding instrument establishing the principles on access to official documents.”<sup>32</sup> After a process of drafting, lead by the Council of Europe’s Group of Specialists on Access to Official Documents (known by the acronym DH-S-AC), the Council of Europe Convention on Access to Official Documents was adopted on 27 November 2008. The Convention has been subjected to intense criticism by a wide range of actors, including civil society groups, official information commissioners from a number of European countries, the OSCE Representative on Freedom of the Media and even the Parliamentary Assembly of the Council of Europe.<sup>33</sup> At the same time, it



represents a very important step forward in terms of recognition of the right to information as a key democracy and fundamental right.

The *Charter of Fundamental Rights of the European Union*,<sup>34</sup> adopted in 2000 by the (now) 27-member European Union, sets out the human rights to which the Union is committed. Article 42 of the Charter grants a right of access to documents held by European Union institutions in the following terms:

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

The Charter is based on the constitutional traditions of Member States, so its recognition of the right to information suggests that this right has not only become ubiquitous, but is widely perceived as a fundamental right by European Union States.

Originally just a 'political' document, the Charter, as amended, was set to become legally binding by virtue of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Reform Treaty).<sup>35</sup> Article 6(1) of the Treaty of the European Union, as amended by the Treaty of Lisbon, would provide, in part:

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.<sup>36</sup>

The Treaty of Lisbon did not come into force,<sup>37</sup> but this development still represents very widespread consensus in Europe that the right to information is a fundamental right.

## African Union

Developments on the right to information at the African Union have been a more modest. However, the African Commission on Human and Peoples' Rights adopted a *Declaration of Principles on Freedom of Expression in Africa* in October 2002.<sup>38</sup> The Declaration is an authoritative elaboration of the guarantee of freedom of expression found at Article 9 of the *African Charter on Human and Peoples' Rights*.<sup>39</sup> The Declaration clearly endorses the right to access information held by public bodies, stating:

### IV *Freedom of Information*

- I. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

The same Principle goes on to elaborate a number of key features of the right to information.

## The Commonwealth

The Commonwealth has taken important concrete steps to recognise human rights and democracy as a fundamental component of the system of shared values which underpin the organisation. In 1991, it adopted the *Harare Commonwealth Declaration*, which enshrined its fundamental political values, including respect for human rights and the individual's inalienable democratic right to participate in framing his or her society.<sup>40</sup>



The importance of the right to information was recognised by the Commonwealth nearly three decades ago. As far back as 1980, the Law Ministers of the Commonwealth, meeting in Barbados, stated that “public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information.”<sup>41</sup>

More recently, the Commonwealth has taken a number of significant steps to elaborate on the content of that right. In March 1999, the Commonwealth Secretariat brought together a Commonwealth Expert Group to discuss the right to information. The Expert Group adopted a document setting out a number of principles and guidelines on ‘freedom of information’, including the following:

Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.<sup>42</sup>

These principles and guidelines were endorsed by the Commonwealth Law Ministers at their May 1999 Meeting in Port of Spain, Trinidad and Tobago. At the same time, the Ministers formulated a number of key principles governing the right to information.<sup>43</sup> They also called on the Commonwealth Secretariat to take steps to promote these principles, including by assisting governments through technical assistance and sharing of experiences.

The Law Ministers’ Communiqué was considered by the Committee of the Whole on Commonwealth Functional Co-operation whose report, later approved by the Heads of Government,<sup>44</sup> stated:

The Committee took note of the Commonwealth Freedom of Information Principles endorsed by Commonwealth Law Ministers and forwarded to Heads of Government. It recognized the importance of public access to official information, both in promoting transparency and accountable governance and in encouraging the full participation of citizens in the democratic process.<sup>45</sup>

The Commonwealth Secretariat has taken some concrete steps to promote the right to information in member countries. It has, for example, drafted model laws on the right to information and on privacy.<sup>46</sup>

## International Jurisprudence

### Inter-American Court of Human Rights

In a 1985 Advisory Opinion, the Inter-American Court of Human Rights, interpreting Article 13, referred to the dual nature of the right to freedom of expression, which protected both the right to impart, as well as to seek and to receive, information and ideas, noting:

Article 13 ... establishes that those to whom the Convention applies not only have the right and freedom to express their own thoughts but also the right and freedom to seek, receive and impart information and ideas of all kinds... [Freedom of expression] requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.<sup>47</sup>

The Court also stated: “For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinion”, concluding that “a society that is not well-informed is not a society that is truly free.”<sup>48</sup> Although



the Court did not go so far, at that time, as to recognise the right to access information held by public bodies, it did provide a solid jurisprudential basis for such recognition.

In an extremely significant development, the Inter-American Court of Human Rights, in a decision rendered on 19 September 2006, specifically held that the general guarantee of freedom of expression at Article 13 of the ACHR protects the right to access information held by public bodies. Specifically, the Court stated:

77. In respect of the facts of the present case, the Court considers that article 13 of the Convention, in guaranteeing expressly the rights to “seek” and “receive” “information”, protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention. Consequently, the said article encompasses the right of individuals to receive the said information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised by the Convention, the State may limit the access to it in the particular case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied.<sup>49</sup>

Inherent in the quotation above are some key attributes of the right to information, namely that restrictions on the right of access may only be imposed consistently with Article 13 and that no reasons need to be provided to access information. The Court went on to elaborate in some length on the legitimate scope of restrictions on the right to information, stating that they should be provided by law, aim to protect a legitimate interest recognised under the ACHR and be necessary in a democratic society to protect that interest.<sup>50</sup>

The Court unanimously held that the respondent State, Chile, had breached the right to freedom of expression guaranteed by Article 13 of the ACHR. Significantly, the Court, also unanimously, required Chile not only to provide the information to and compensate the victims, and to publish the judgment, all fairly routine remedies, but also to adopt the necessary measures through national legislation to give effect to the right to information, and even to provide training to public officials on this right.<sup>51</sup>

## European Court of Human Rights

The European Court of Human Rights has also considered claims for a right to receive information from public bodies. It has looked at this issue in a number of cases, including *Leander v. Sweden*,<sup>52</sup> *Gaskin v. United Kingdom*,<sup>53</sup> *Guerra and Ors. v. Italy*,<sup>54</sup> *McGinley and Egan v. United Kingdom*,<sup>55</sup> *Odièvre v. France*,<sup>56</sup> *Sirbu and others v. Moldova*,<sup>57</sup> and *Roche v. United Kingdom*.<sup>58</sup> In the cases which presented a claim based on the right to freedom of expression as guaranteed by Article 10 of the ECHR,<sup>59</sup> the Court held that this did not include a right to access the information sought. The following interpretation of the scope of Article 10 from *Leander* either features directly or is referenced in all of these cases:

[T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access... nor does it embody an obligation on the Government to impart... information to the individual.<sup>60</sup>

By using the words, “in circumstances such as those of the present case”, the Court has not absolutely ruled out the possibility of a right to information under Article 10. However, these cases involve a wide range of different fact patterns so that, taken together, the rejection of an Article 10 right to access information in all of them presents a high barrier to such a claim. As a Grand Chamber of the Court stated in *Roche* when rejecting the Article 10 claim of a right to access information: “It sees no reason not to apply this established jurisprudence.”<sup>61</sup>





The Court did not, however, refuse to recognise a right of redress in these cases. Rather, it found that to deny access to the information in question was a violation of the right to private and/or family life, guaranteed by Article 8 of the Convention.<sup>62</sup> In most of these cases, the Court held that there was no *interference* with the right to respect for private and family life, but that Article 8 imposed a *positive obligation* on States to ensure respect for such rights:

[A]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life.<sup>63</sup>

This positive obligation could include granting access to information in certain cases.

In the first case, *Leander*, the applicant was dismissed from a job with the Swedish government on national security grounds, but was refused access to information about his private life, held in a secret police register, which had provided the basis for his dismissal. The Court held that the storage and use of the information, coupled with a refusal to allow the applicant an opportunity to refute it, was an interference with his right to respect for private life. The interference was, however, justified as necessary to protect Sweden's national security.<sup>64</sup> It is interesting to note that it ultimately transpired that Leander was in fact fired for his political beliefs, and he was offered an apology and compensation by the Swedish government.

In *Gaskin*, the applicant, who as a child had been under the care of local authorities in the United Kingdom, had applied for but was refused access to case records about him held by the State. The Court held that the applicant had a right to receive information necessary to know and understand his childhood and early development, although that had to be balanced against the confidentiality interests of the third parties who had contributed the information. Significantly, this placed a positive obligation on the government to establish an independent authority to decide whether access should be granted if a third party contributor was not available or withheld consent for the disclosure. Since the government had not done so, the applicant's rights had been breached.<sup>65</sup>

In *Guerra*, the applicants, who lived near a "high risk" chemical factory, complained that the local authorities in Italy had failed to provide them with information about the risks of pollution and how to proceed in event of a major accident. The Court held that severe environmental problems may affect individuals' well-being and prevent them from enjoying their homes, thereby interfering with their right to private and family life. As a result, the Italian authorities had a positive obligation to provide the applicants with the information necessary to assess the risks of living in a town near a high risk chemical factory. The failure to provide the applicants with that essential information was a breach of their Article 8 rights.<sup>66</sup> The decision was particularly significant as it appears that the State did not actually hold the information requested, so that it would actually need to go out and collect it.

In *McGinley and Egan*, the applicants had been exposed to radiation during nuclear testing in the Christmas Islands, and claimed a right of access to records regarding the potential health risks of this exposure. The Court held that the applicants did have a right to access the information in question under Articles 6 and 8 of the ECHR, regarding, respectively, the right to a fair hearing and respect for private and family life. However, the government had complied with its positive obligations through the establishment of a process by which access to the information could be obtained, which the applicants had failed to make use of.<sup>67</sup>

In *Odièvre*, the issue was access to information about the natural mother of the applicant. The Court accepted that this was covered by the right to private life, as guaranteed by Article 8, but held that the refusal by the French authorities to provide the information represented an appropriate balance between the interests of the applicant and the interests of her mother, who had expressly sought to keep her identity secret.<sup>68</sup>





*Sirbu* was slightly different from the other cases inasmuch as the request to access information was really secondary to the main complaint about a failure of the State to apply a domestic ruling to the effect that the applicants were entitled to certain back-pay. The domestic 'Decision' upon which the entitlement to back-pay was based had been classified as secret and the applicants were denied access to it. Notwithstanding this, a domestic court awarded each of the applicants the back-pay due to them, but the government simply refused to provide it, resulting in a fairly obvious breach of Article 6, guaranteeing the right to a fair and public hearing.

In *Roche*, which like *McGinley and Egan* involved claims of medical problems resulting from military testing, the Court held that Article 6 of the ECHR, regarding a fair hearing, was not applicable.<sup>69</sup> Article 8, however, was and in this case the Court held that there had been a breach of the right since the government did not have reasonable grounds for refusing to disclose the information. Significantly, the Court held that the various disclosures that were made in response to requests by the applicant did not constitute the "kind of structured disclosure process envisaged by Article 8".<sup>70</sup> This appears to elevate the status of the right beyond the very particular instances previously recognised.

Although these decisions of the European Court recognise a right of access to information, they are problematic. First, the Court has proceeded cautiously, making it clear that its rulings were restricted to the facts of each case and should not be taken as establishing a general principle.<sup>71</sup> Second, and more problematical, relying on the right to respect for private and/or family life places serious limitations on the scope of the right to access information. This is clear from the *Guerra* case, where it was a considerable leap to find, as the Court did, that severe environmental problems would affect the applicants' right to respect for their private and family life. Although the Court made that leap in *Guerra*, based on overriding considerations of justice and democracy, this is hardly a satisfactory approach. Furthermore, it is fundamentally at odds with the notion of a right to information as expressed by other international actors, which is not contingent on deprivation of another right. In effect, the Court appears to have backed itself into a corner by refusing to ground the right to information on Article 10.

At the same time, there are indications that the Court may be changing its approach. In *Sdruženi Jihočeské Matky v. Czech Republic*,<sup>72</sup> the Court held that a refusal to provide access to information did represent an interference with the right to freedom of expression as protected by Article 10 of the ECHR. The decision included the quotation noted above from *Leander*, and also noted that it was 'difficult' to derive from the ECHR a general right to access administrative documents. However, the Court also noted that the case concerned a request to consult administrative documents in the possession of the authorities and to which access was provided for under conditions set out in article 133 of the law on construction. In those circumstances, the Court recognized that the refusal to grant access represented an interference with the right of the applicant to receive information.<sup>73</sup>

The Court ultimately rejected the application as inadmissible due to the fact that the refusal to disclose the information was consistent with Article 10(2), allowing for restrictions on freedom of expression. In its Article 10(2) analysis, the Court referred to various factors, including national security, contractual obligations and the need to protect economic confidentiality. But the crucial point was that the refusal was an interference, which had to be justified by reference to the standards for such restrictions provided for in Article 10(2). It is hard to assess why the Court engaged in such a different analysis in this case. In some of the other cases noted above, the information was not actually held by the State, an important difference on the facts from the *Matky* case. But in others the State did hold the information. Another possible difference was the presence of a law which, under certain circumstances, did provide for access to information. This, however, seems a shaky basis for engaging Article 10 directly (as opposed, perhaps, to Article 10 in conjunction with Article 14, prohibiting discrimination in the application of rights).<sup>74</sup>

More recently, in an admissibility decision adopted in November 2008, The Court accepted as admissible a case arguing in favour of a right of access to information based solely on Article 10,<sup>75</sup>



again suggesting it has not closed the door to the possibility that the right to information might be included within the scope of the right to freedom of expression. Interestingly, the respondent State in the case, Hungary, is not arguing against the claim that Article 10 protects the right of access to information but has limited itself to arguing that the information in question falls within the scope of the exceptions to this right.

## Information in Specific Areas

### Information on the Environment

During the last 15 years, there has been increasing recognition that access to information on the environment is key to sustainable development and effective public participation in environmental governance. The issue was first substantively addressed in Principle 10 of the 1992 Rio Declaration on Environment and Development:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. ...<sup>76</sup>

In 1998, as a follow-up to the Rio Declaration, Member States of the United Nations Economic Commission for Europe (UNECE) and the European Union signed the legally binding *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (the Aarhus Convention).<sup>77</sup> The Preamble, which sets out the rationale for the Convention, states in part:

Considering that, to be able to assert [the right to live in a clean environment] citizens must have access to information ...

Recognizing that, in the field of environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns ...

The Convention, which came into force in October 2001, requires State Parties to take legal measures to implement its provisions on access to environmental information.<sup>78</sup> Most of those provisions are set out in Article 4, which begins by stating:

(1) Each Party shall ensure that ... public authorities, in response to a request for environmental information, make such information available to the public ...

(A) Without an interest having to be stated.

The Convention recognises access to information as part of the right to live in a healthy environment,<sup>79</sup> rather than as a free-standing right. However, it is the first legally binding international instrument which sets out clear standards on the right to information. Among other things, it requires States to adopt broad definitions of “environmental information” and “public authority”,<sup>80</sup> to subject exceptions to a public interest test,<sup>81</sup> and to establish an independent body with the power to review any refusal to disclose information.<sup>82</sup> As such, it represents a very positive development in terms of establishing the right to information.

A number of specific instruments require the disclosure of information on genetically modified organisms (GMOs), which have been the subject of particular public concern. For example, the



*Cartagena Protocol on Biosafety to the Convention on Biological Diversity*<sup>83</sup> requires States Parties to promote and facilitate public awareness, education, and participation relating to the safe transfer, handling and use of GMOs. Specifically, States are required to:

Endeavour to ensure that public awareness and education encompass access to information on living modified organisms identified in accordance with this Protocol that may be imported.<sup>84</sup>

A European Union directive on the release of GMOs into the environment<sup>85</sup> requires Member States to provide public information on GMO releases. Before marketing any GMO, a notification must be provided containing detailed information about the product and the competent authority within any State where the product is to be marketed must produce an assessment, including as to whether the GMO should be placed on the market and under what conditions. The public must be provided with a summary of the notification and the part of the assessment described above, and be given 30 days to comment.<sup>86</sup> Confidential information is protected, but this may not include any general description of the GMO, the name and address of the entity providing the notification, the location or purpose and intended uses of the release, monitoring methods and plans for emergency responses, and environmental risk assessments.<sup>87</sup>

In an analogous development, the African Union has issued draft model legislation on biotechnology and safety. Where there is an application to release GMOs, State officials are required to make relevant information – including the name of the applicant, the type of GM crop involved and its location – publicly available, subject to confidentiality interests, again excluding the types of information noted in the European Union directive.<sup>88</sup>

### Information on Human Rights

There have also been moves within the international community to recognise specifically the right to information in relation to human rights. In 1998, the UN General Assembly adopted the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* [the Declaration on Human Rights Defenders].<sup>89</sup> Article 6 specifically provides for access to information about human rights:

Everyone has the right, individually and in association with others:

- (a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how these rights and freedoms are given effect in domestic legislative, judicial or administrative systems;
- (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms...

Article 6 recognises that the right to know, seek, obtain, receive, hold and disseminate information on human rights is fundamental to the effective promotion and protection of human rights.

These provisions are, for the most part, aimed at securing access to information the State holds regarding human rights and human rights abuse, as well as the right to disseminate this sort of information. They hint, however, at a more profound obligation, one which ARTICLE 19 has long argued in favour of, namely that States are under a substantive positive obligation in this area, including to ensure the availability of information about human rights violations. This is signalled, for example, by the word 'know' in Article 6(a). ARTICLE 19 has, for example, argued that the right to freedom of expression, "long recognised as crucial in the promotion of democratic accountability and participation, also places an obligation upon governments to facilitate the uncovering of information about past human rights violations."<sup>90</sup> In other words, it is not enough for individuals simply to have access to whatever information the State already holds. The State



must also ensure that information about past human rights violations is readily available, including by collecting, collating, preserving and disseminating it, where necessary.

The 'right to truth' has also started to be recognised by international tribunals. In the case of *Barrios Altos v. Peru*,<sup>91</sup> for example, the Inter-American Court of Human Rights took steps towards recognising this right. It noted the strong finding of the Commission in this regard, stating:

The Commission alleged that the right to truth is founded in Articles 8 and 25 of the Convention [guaranteeing the right to a fair trial and the right to judicial protection for human rights], insofar as they are both "instrumental" in the judicial establishment of the facts and circumstances that surrounded the violation of a fundamental right. It also indicated that this right has its roots in Article 13(1) of the Convention [guaranteeing freedom of expression], because that article recognises the right to seek and receive information. With regard to that article, the Commission added that the State has the positive obligation to guarantee essential information to preserve the rights of the victims, to ensure transparency in public administration and the protection of human rights.<sup>92</sup>

The Court did not go quite so far but did note:

[I]n the circumstances of the instant case, the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention.<sup>93</sup>

The *Guerra* case at the European Court of Human Rights also represents an important step in this direction. While the information involved was not formally classified as being human rights related, many would argue that information about environmental risks does fall into this category. Importantly, the Court recognised an obligation on the State to provide information on matters of public importance.

## The Right to Political Participation

International law guarantees citizens the right to participate in political affairs. Article 25 of the ICCPR, for example, guarantees the right of citizens, "[t]o take part in the conduct of public affairs, directly or through freely chosen representatives" as well as, specifically to vote in periodic elections which guarantee "the free expression of the will of the electors".<sup>94</sup>

It is clear that a free flow of information is essential to the ability of individuals to participate. ARTICLE 19 has described information as the "oxygen of democracy".<sup>95</sup> The UNDP's Human Development Report 2002, "Deepening Democracy in a Fragmented World", describes informed debate as the "lifeblood of democracies" and states:

Perhaps no reform can be as significant for making democratic institutions work as reform of the media: building diverse and pluralistic media that are free and independent, that achieve mass access and diffusion, that present accurate and unbiased information.<sup>96</sup>

This has also been recognised by international courts. The IACHR has noted that "a society that is not well-informed is not a society that is truly free."<sup>97</sup> The European Court of Human Rights has repeatedly stated:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man.<sup>98</sup>



It has further stated:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.<sup>99</sup>

The UN Human Rights Committee has also stressed the importance of freedom of expression to the political process:

[T]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.<sup>100</sup>

In a very significant development in Australia, the courts have found an implied right to freedom of political communication based on the democratic system of government, even though the constitution does not include a bill of rights or explicit protection for human rights.<sup>101</sup>

These decisions do not, for the most part, refer specifically to the right to information or the right to obtain information from public bodies. At the same time, it seems clear that it is not possible to judge the actions of a government that operates in secrecy, or to participate in public affairs in the absence of access to information held by public bodies. As the Indian Supreme Court has stated, in finding a right to information as part of the general guarantee of freedom of expression:

Where a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing.<sup>102</sup>

This therefore provides a strong supplementary basis for the idea of a right to information.

## The Fight Against Corruption

The need for access to information held by public bodies as a tool to help tackle the very serious and difficult problem of fighting corruption has been widely recognised. In 2003, Transparency International's annual publication, the *Global Corruption Report*, included a special focus on access to information, highlighting its importance in combating corruption.<sup>103</sup> In the introduction to the report, Eigen notes that access to information is "perhaps the most important weapon against corruption."<sup>104</sup>

This now finds formal expression in the UN *Convention Against Corruption*.<sup>105</sup> The Convention is redolent with references to transparency and openness. It variously calls on States Parties to ensure public transparency generally (Articles 5(1) and 10(a)), openness in relation to civil servants and funding for electoral candidates (Articles 7(1)(a) and (3)), and transparency in public procurement and finances (Articles 9(1)(a) and (2)). Significantly, its provisions on public participation are almost entirely devoted to issues of transparency and information (Article 13). It also has a provision on corporate openness (Article 12(2)(c)).

Article 10 of the Convention provides:

[E]ach State Party shall ... take such measures as may be necessary to enhance transparency in its public administration.... Such measures may include, inter alia:

(a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;



Similarly, the African Union's *Convention on Preventing and Combating Corruption*, adopted in 2003,<sup>106</sup> provides, at Article 9:

Each State Party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences.

This is backed up by a number of other references to transparency in public affairs, including a call for the media to be "given access to information in cases of corruption and related offences" (Article 12(4)).

## National Developments

The proposition that the right to information is a fundamental human right finds strong support in a number of national developments. In many countries, the right to information finds specific constitutional recognition, while in others leading courts have interpreted general guarantees of freedom of expression as encompassing a right to information. The latter is of particular significance as national interpretations of constitutional guarantees of freedom of expression are of some relevance to understanding the content of their international counterparts. The importance of right to information is also reflected in a massive global trend towards adoption of national laws giving effect to this right.

## Constitutional Interpretation

A number of senior courts in countries around the world have held that the right to access information is protected by a general constitutional guarantee of freedom of expression. As early as 1969, the Supreme Court of Japan established in two high-profile cases the principle that *shiru kenri* (the "right to know") is protected by the guarantee of freedom of expression in Article 21 of the Constitution.<sup>107</sup>

In 1982, the Supreme Court of India, in a case involving the government's refusal to release information regarding transfers and dismissals of judges, ruled that access to government information was an essential part of the fundamental right to freedom of speech and expression, guaranteed by Article 19 of the Constitution:

The concept of an open Government is the direct emanation from the right to know which seems implicit in the right of free speech and expression guaranteed under Article 19(1)(a). Therefore, disclosures of information in regard to the functioning of Government must be the rule, and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the Court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest.<sup>108</sup>

In South Korea, the Constitutional Court ruled in two seminal cases in 1989 and 1991 that there was a "right to know" inherent in the guarantee of freedom of expression in Article 21 of the Constitution, and that in certain circumstances the right may be violated when government officials refuse to disclose requested documents.<sup>109</sup>

In an August 2007 ruling, the Constitutional Court of Chile also ruled that the right to access information held by public officials was protected by the general guarantee of freedom of expression. In a case based on an application by a private company for information held by the Customs Department, the Court held that public bodies must first consult with interested third parties before refusing to provide access to information provided by them. It also held that the



overall public interest in disclosure needed to be taken into account before any refusal to disclose might be justified.<sup>110</sup>

In some countries, national courts have been reluctant to accept that the guarantee of freedom of expression includes the right to access information held by the State. The US Supreme Court, for example, has held that the First Amendment of the Constitution, which guarantees freedom of speech and of the press, does not “[mandate] a right to access government information or sources of information within government’s control.”<sup>111</sup> However, this may be because the First Amendment is cast in exclusively negative terms, requiring Congress to refrain from adopting any law which abridges freedom of speech.<sup>112</sup> International, and most constitutional, protection for freedom of expression is more positive in nature, recognising that in some cases State action is necessary to ensure respect in practice for this key democratic right.

### Specific Constitutional Provisions

The constitutions of a growing number of countries provide specific protection for the right to information. Sweden is an interesting example, as the whole of its Freedom of the Press Act, adopted in 1766, has constitutional status. This Act includes comprehensive provisions on the right to information.<sup>113</sup> During the last decade, many countries which have recently adopted multi-party systems, or are otherwise in transition to democracy, have explicitly included the right to information in their constitutions. A few examples from different regions of the world include Bulgaria (1991 Constitution, Article 41), Estonia (1992 Constitution, Article 44), Hungary (1949 Constitution, Article 61(1)), Lithuania (1992 Constitution, Article 25(5)), Malawi (1994 Constitution, Article 37), Mexico (1917 Constitution, Article 6), the Philippines (1987 Constitution, Article III(7)), Poland (1997 Constitution, Article 61), Romania (Constitution of 1991, Article 31), South Africa (1996 Constitution, Section 32) and Thailand (2007 Constitution, Section 56).

In Latin America, constitutions have tended to focus on one important aspect of the right to information, namely the petition of *habeas data*, or the right to access information about oneself, whether held by public or private bodies and, where necessary, to update or correct that information. For example, Article 43 of the Constitution of Argentina states:

Every person shall have the right to file a petition (of habeas data) to see any information that public or private data banks have on file with regard to him and how that information is being used to supply material for reports. If the information is false or discriminatory, he shall have the right to demand that it be removed, be kept confidential or updated, without violating the confidentiality of news sources.

Inclusion of the right to information among the constitutionally guaranteed rights and freedoms is a clear indication of its status as a fundamental human right in these countries. It is particularly significant that so many modern constitutions include this as a guaranteed right, illustrating the growing recognition of it as such.

### Right to information Legislation

Right to information laws, giving practical effect to the right to access information, have existed for more than 200 years, but few are more than 20 years old. However, there is now a veritable wave of right to information legislation sweeping the globe and, in the last fifteen years, numerous such laws have been passed in countries in every region of the world, while a large number of other countries have made a commitment to adopt right to information legislation.

The history of right to information laws can be traced back to Sweden where, as noted above, a law on this has been in place since 1766. Another country with a long history of right to





information legislation is Colombia, whose 1888 Code of Political and Municipal Organization allowed individuals to request documents held by government agencies or in government archives. The USA passed a right to information law in 1967 and this was followed by legislation in Denmark (1970), Norway (1970), France (1978), the Netherlands (1978), Australia (1982), Canada (1982) and New Zealand (1982).

A 2006 Report lists 69 countries with right to information laws, along with another five countries with national right to information regulations and rules.<sup>114</sup> Since then, a number of laws have been adopted – including in China,<sup>115</sup> Jordan and Nepal, as well as in Chile, Guatemala, Honduras, Nicaragua and Uruguay, all analysed in this book – and the total number would appear to be over 80.<sup>116</sup> It is now the case that countries in every region of the world have adopted right to information laws. There is, therefore, a very significant global trend towards adopting right to information legislation. The growing imperative to pass right to information legislation is indicative of its status.

## Intergovernmental Organisations

These national developments find their parallel in the adoption of information disclosure policies by a growing number of inter-governmental organisations (IGOs). Many IGOs, which for most of their existence operated largely in secret, or disclosed information purely at their discretion, are now acknowledging the importance of public access to the information that they hold. A significant milestone in this process was the adoption of the 1992 Rio Declaration on Environment and Development, which put enormous pressure on international institutions to implement policies on public participation and access to information.

Since the adoption of the Rio Declaration, the World Bank<sup>117</sup> and all four regional development banks – the Inter-American Development Bank,<sup>118</sup> the African Development Bank Group,<sup>119</sup> the Asian Development Bank<sup>120</sup> and the European Bank for Reconstruction and Development<sup>121</sup> – have adopted information disclosure policies. These policies, although for the most part flawed in important respects, are an important recognition of the right to access information. Furthermore, a series of rolling reviews at most of these institutions has led to more information being made available over time.

A civil society movement, the Global Transparency Initiative (GTI), has adopted a *Transparency Charter for International Financial Institutions: Claiming our Right to Know*, setting out the GTI's demands for IFI openness.<sup>122</sup> Over time, many international financial institutions are accepting at least some of the key Charter standards and gradually amending their policies to bring them more closely into line with these standards.

In 1997, the United Nations Development Programme (UNDP) also adopted a Public Information Disclosure Policy, on the basis that information is key to sustainable human development and also to UNDP accountability.<sup>123</sup> The Policy enumerates specific documents that shall be made available to the public and provides for a general presumption in favour of disclosure, subject to a number of exceptions.<sup>124</sup> In terms of process, the Policy establishes a Publication Information and Documentation Oversight Panel which can review any refusal to disclose information. The Panel consists of five members – three UNDP professional staff members and two individuals from the not-for-profit sector – appointed by the UNDP Administrator.<sup>125</sup> However, implementation has been problematical.<sup>126</sup>

In May 2001, the European Parliament and the Council of the European Union adopted a regulation on access to European Parliament, Council and Commission documents.<sup>127</sup> Article 2(1) states:

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.



The Regulation has several positive features, including a narrow list of exceptions, all of which are subject to a requirement that disclosure may be refused only where it would pose a risk of harm to the protected interest. The Regulation also provides for an internal review of any refusal to disclose information, as well as an appeal to the courts and/or the Ombudsman.<sup>128</sup> However, there are also problems with the Regulation. For example, some key exceptions are not subject to a public interest override.<sup>129</sup> Furthermore, the Regulation allows a Member State to require other States not to disclose documents without its prior approval.<sup>130</sup>

Pursuant to Article 15 of the Treaty on the Functioning of the European Union, the “institutions, bodies, offices and agencies” of the Union shall conduct their work as openly as possible. The Article goes on to elaborate some basic principles governing the right of access.

## Notes

- 1 14 December 1946.
- 2 UN General Assembly Resolution 217 A (III), 10 December 1948.
- 3 For judicial opinions on human rights guarantees in customary international law, see, for example, *Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) (Second Phase)*, ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); and *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). Generally, see M.S.McDougal, H.D.Lasswell, L.C.Chen, *Human Rights and World Public Order*, (1980: Yale University Press, Princeton), pp. 273-74, 325-27.
- 4 UN General Assembly Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976.
- 5 *Tyrer v. United Kingdom*, 25 April 1978, Application No. 5856/72, para. 31. See also *Christine Goodwin v. United Kingdom*, 11 June 2002, Application No. 28957/95, para. 74.
- 6 *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 31 August 2001, Series C, No. 79, para. 146. See also *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion of 1 October 1999, OC-16/99, Series A, No. 16 (Inter-American Court of Human Rights) and, in particular, the Concurring Opinion of Judge A.A. Cancado Trindade.
- 7 The Commission was established by the UN Economic and Social Council (ECOSOC) in 1946 to promote human rights and was, until 2006, when it was replaced by the Human Rights Council, the most authoritative UN human rights body. UN General Assembly Resolution 60/251, 3 April 2006, establishing the Council, is available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N05/502/66/PDF/N0550266.pdf?OpenElement>.
- 8 Resolution 1993/45, 5 March 1993.
- 9 Resolution 1997/27, 11 April 1997, para. 12(d).
- 10 Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 14.
- 11 Resolution 1998/42, 17 April 1998, para. 2.
- 12 Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 42.
- 13 *Ibid.*, para. 43.
- 14 *Ibid.*, para. 44. See the chapter on Features of a Right to Information Regime for more detail about the standards promoted by the Special Rapporteur.
- 15 26 November 1999. Available at: <http://www.article19.org/pdfs/igo-documents/three-mandates-dec-1999.pdf>.
- 16 Adopted on 6 December 2004. Available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/0/9A56F80984C8BD5EC1256F6B005C47F0?opendocument>.



- 17 The (first) Optional Protocol represents acceptance by States of an individual complaints procedure. While not formally binding, the views of the HRC in such cases are very persuasive and many States accept them as such.
- 18 Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, entered into force 18 July 1978.
- 19 Mexico City, 11 March 1994.
- 20 *Annual Report of the Inter-American Commission on Human Rights 1998, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression*, 16 April 1999, OEA/Ser.LV/II.102, Doc. 6 rev., Chapter III.
- 21 The countries are Antigua and Barbuda, Argentina, The Bahamas, Bolivia, Belize, Brazil, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, St. Vincent and The Grenadines, Suriname, Trinidad and Tobago, Uruguay and the United States of America. Information available at: [http://www.declaraciondechapultepec.org/english/presidential\\_sign.htm](http://www.declaraciondechapultepec.org/english/presidential_sign.htm).
- 22 See IACHR Press Release No. 2/98, 6 March 1998, paras. 14-15.
- 23 Note 20, p. 24.
- 24 108<sup>th</sup> Regular Session, 19 October 2000. Available at: <http://www.iachr.org/declaration.htm>.
- 25 See Resolution 1932 (XXXIII-O/03) on Access to Public Information: Strengthening Democracy, adopted on 10 June 2003; Resolution 2057 (XXXIV-O/04) on Access to Public Information: Strengthening Democracy, adopted on 8 June 2004; Resolution 2121 (XXXV-O/05) on Access to Public Information: Strengthening Democracy, adopted on 26 May 2005; Resolution 2252 (XXXVI-O/06) on Access to Public Information: Strengthening Democracy, adopted on 6 June 2006; and Resolution 2288 (XXXVII-O/07) on Access to Public Information: Strengthening Democracy, adopted on 5 June 2007. See paras. 1 and 2 of the 2007 Resolution.
- 26 Declaration of Nuevo León, 13 January 2004, Heads of State and Government of the Americas, during the Special Summit of the Americas, held in Monterrey, Nuevo León, Mexico. Available at: [http://www.oas.org/juridico/English/summit\\_decl\\_nuevo\\_leon.pdf](http://www.oas.org/juridico/English/summit_decl_nuevo_leon.pdf).
- 27 Adopted at its 73rd Regular Session on 7 August 2008 in Rio de Janeiro, Brazil, OAS/Ser.Q, CJI/RES.147 (LXXIII-O/08).
- 28 E.T.S. No. 5, adopted 4 November 1950, entered into force 3 September 1953.
- 29 25 November 1981, p. 2.
- 30 Declaration on Media in a Democratic Society, DH-MM (95) 4, 7-8 December 1994, para. 16.
- 31 Recommendation No. R(2002)2 of the Committee of Ministers of the Council of Europe to member states on access to official documents, 21 February 2002.
- 32 Decision No. CM/866/04052005. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=857569&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FDC864>.
- 33 See, among others, Opinion No. 270 (2008) of 3 October 2008 of the Parliamentary Assembly of the Council of Europe. Accessed on 14 January 2009 at: <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta08/EOP1270.htm>.
- 34 Adopted 7 December 2000, Official Journal of the European Communities, 18 December 2000, C 364/01. Available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/2004/4/29/Charter%20of%20fundamental%20rights%20of%20the%20European%20Union.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/2004/4/29/Charter%20of%20fundamental%20rights%20of%20the%20European%20Union.pdf).
- 35 Signed on 13 December 2007. Official Journal of the European Communities, 17 December 2007, C 306, Volume 50. Accessed on 14 January 2009 at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>.
- 36 A Protocol to the Treaty of Lisbon limits the application of the Charter in respect of the United Kingdom and Poland.
- 37 Ireland rejected ratification of it but it was approved by all other EU members except Hungary, where ratification had not been completed by the time of the Irish rejection.
- 38 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, The Gambia. Available at: [http://www.achpr.org/english/declarations/declaration\\_freedom\\_exp\\_en.html](http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html).
- 39 Adopted at Nairobi, Kenya, 26 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986. Article 9 is somewhat weaker in its formulation than its counterparts in other regional systems, but the African Commission has generally sought to provide positive interpretation of it.




- 40 Commonwealth Heads of Government Meeting, 20 October 1991, paras. 4 and 9. See also the Millbrook Commonwealth Action Programme, Commonwealth Heads of Government Meeting, 12 November 1995.
- 41 Quoted in "Promoting Open Government: Commonwealth Principles and Guidelines on the Right to Know", background paper for the Commonwealth Expert Group Meeting on the Right to Know and the Promotion of Democracy and Development (London: 30-31 March 1999).
- 42 *Ibid.*
- 43 *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).
- 44 The Durban Communiqué (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 57.
- 45 *Communiqué*, Commonwealth Functional Co-operation Report of the Committee of the Whole (Durban: Commonwealth Heads of Government Meeting, 15 November 1999), para. 20.
- 46 The Freedom of Information Act is available at: [http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/%7BAC090445-A8AB-490B-8D4B-F110BD2F3AB1%7D\\_Freedom%20of%20Information.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BAC090445-A8AB-490B-8D4B-F110BD2F3AB1%7D_Freedom%20of%20Information.pdf) and the Privacy Act is available at: [http://www.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/%7B82BDA409-2C88-4AB5-9E32-797FE623DFB8%7D\\_protection%20of%20privacy.pdf](http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B82BDA409-2C88-4AB5-9E32-797FE623DFB8%7D_protection%20of%20privacy.pdf).
- 47 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, para. 30.
- 48 *Ibid.*, paras. 32 and 70.
- 49 *Claude Reyes and Others v. Chile*, 19 September 2006, Series C No. 151, para. 77 (Inter-American Court of Human Rights). Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_151\\_ing.doc](http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc).
- 50 *Ibid.*, paras. 88-92.
- 51 *Ibid.*, para. 174.
- 52 26 March 1987, Application No. 9248/81, 9 EHRR 433.
- 53 7 July 1989, Application No. 10454/83, 12 EHRR 36.
- 54 19 February 1998, Application No. 14967/89.
- 55 9 June 1998, Application Nos. 21825/93 and 23414/94.
- 56 13 February 2003, Application No. 42326/98.
- 57 15 June 2004, Applications Nos. 73562/01, 73565/01, 73712/01, 73744/01, 73972/01 and 73973/01.
- 58 19 October 2005, Application No. 32555/96.
- 59 Neither *McGinley* nor *Odièvre* involved Article 10 complaints. Both cases were, rather, based on other articles, including Article 8.
- 60 *Leander*, para. 74.
- 61 *Roche*, para. 172.
- 62 In *Sirbu*, there was no holding on the claim of access to information.
- 63 *Guerra*, para. 58.
- 64 *Leander*, paras. 48, 67.
- 65 *Gaskin*, para. 49.
- 66 *Guerra*, para. 60.
- 67 *McGinley* and *Egan*, paras. 102-103.
- 68 *Odièvre*, paras. 44-49.
- 69 *Roche*, para. 125.
- 70 *Roche*, para. 166.
- 71 See, for example, *Gaskin*, para. 37.
- 72 Decision of 10 July 2006, Application No. 19101/03.
- 73 The original French judgment states: "En l'occurrence, la requérante a demandé de consulter des documents administratifs qui étaient à la disposition des autorités et auxquels on pouvait accéder dans les conditions prévues par l'article 133 de la loi sur les constructions, contesté par la requérante. Dans ces conditions, la Cour admet que le rejet de ladite demande a constitué une ingérence au droit de la requérante de recevoir des informations."



- 74 For an interesting analysis of the case see Hins, W. and Voorhoof, D. "Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights". Available at: [www.ivir.nl/publications/hins/EuConst\\_Hins\\_Voorhoof.pdf](http://www.ivir.nl/publications/hins/EuConst_Hins_Voorhoof.pdf).
- 75 *Társaság A Szabadságjogokért v. Hungary*, 13 November 2008, Application No. 37374/05.
- 76 UN Doc. A/Conf.151/26 (vol. 1).
- 77 UN Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the "Environment for Europe" process, 25 June 1998, entered into force 30 October 2001. As of September 2007, there were 41 Parties to the Convention. The text of the Convention in various languages is available at: <http://www.unece.org/env/pp/treatytext.htm>.
- 78 *Ibid.*, Article 3(1).
- 79 *Ibid.*, Article 1.
- 80 *Ibid.*, Articles 2(2)-(3).
- 81 *Ibid.*, Article 4(4).
- 82 *Ibid.*, Article 9.
- 83 ICCP, EM-I/3. As of November 2007, the Protocol had 143 parties and another 17 signatories. Available at: <http://www.cbd.int/biosafety/protocol.shtml>.
- 84 Article 23(1)(b).
- 85 Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC. Available at: [http://ec.europa.eu/environment/biotechnology/pdf/dir2001\\_18.pdf](http://ec.europa.eu/environment/biotechnology/pdf/dir2001_18.pdf).
- 86 Article 24, in conjunction with Articles 13 and 14(3)(a).
- 87 Article 25.
- 88 OAU, *African Model National Law on Safety in Biotechnology*, endorsed by the AU Council of Ministers in July 2001. See Articles 5 and 12. Available at: [http://www.africabio.com/policies/MODEL%20LAW%20ON%20BIOSAFETY\\_ff.htm](http://www.africabio.com/policies/MODEL%20LAW%20ON%20BIOSAFETY_ff.htm).
- 89 Resolution 53/144, 8 March 1999.
- 90 *Who Wants to Forget? Truth and Access to Information about Past Human Rights Violations* (London: ARTICLE 19, 2000), p. 5. Online at <http://www.article19.org/pdfs/publications/freedom-of-information-truth-commissions.pdf>.
- 91 14 March 2001, Series C, No. 75.
- 92 Para. 45.
- 93 Para. 48.
- 94 See also Article 23 of the ACHR.
- 95 *The Public's Right to Know: Principles on Freedom of Information Legislation* (London: June 1999), Preface.
- 96 UNDP, *Human Development Report 2002: Deepening Democracy in a Fragmented World* (2002: Oxford University Press, New York and Oxford), p. 75. Available at: <http://hdr.undp.org/reports/global/2002/en/>.
- 97 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 47, para. 70.
- 98 See, for example, *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, para. 49.
- 99 *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.
- 100 UN Human Rights Committee General Comment 25, 12 July 1996.
- 101 See *Australian Capital Television v. The Commonwealth; State of New South Wales v. The Commonwealth* (1992) 177 CLR 106 (High Court) and *Nationwide News Pty Ltd v. Wills* (1992) 108 ALR 681 (High Court).
- 102 *S.P. Gupta v. President of India* [1982] AIR (SC) 149, p. 232.
- 103 Transparency International, *Global Corruption Report 2003: Special Focus: Access to Information* (London: Profile Books, 2003).
- 104 *Ibid.*, p. 6.
- 105 UN General Assembly Resolution 58/4 of 31 October 2003, in force 14 December 2005. As at the time of writing, the Convention had 104 States Parties and 140 signatories. See <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>. The text of the Convention is available at: <http://www.unodc.org/unodc/en/treaties/CAC/index.html>. The Council of Europe has also adopted both a *Civil Law Convention on Corruption*, 4 November 1999, ETS No. 174 and a *Criminal Law Convention on*



- Corruption*, 27 January 1999, ETS No. 173, although neither provide for public access to information. Similarly, the 1996 Inter-American Convention Against Corruption does not provide for access to information.
- 106 Available at: [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Convention%20on%20Combating%20Corruption.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf). As of October 2007, the Convention had been ratified by 24 countries. It came into force in August 2006.
- 107 Repeta, Lawrence, *Local Government Disclosure Systems in Japan*, National Bureau of Asian Research, Paper Number 16, October 1999, p. 3.
- 108 *S.P. Gupta v. President of India*, note 102, p. 234.
- 109 Sung Nak-in, *Korea Country Report* (English summary), presented at the Asian Conference on Civil Society and Access to Government-Held Information, Tokyo, Japan, 13-14 April 2001.
- 110 *Casas Cordero et al v. The National Customs Service*. A Spanish version of the decision is available at: [http://www.justiceinitiative.org/db/resource2?res\\_id=103745](http://www.justiceinitiative.org/db/resource2?res_id=103745).
- 111 *Houchins v. KQED, Inc.*, 438 US 1 (1978), p. 15.
- 112 The relevant part of the First Amendment states: "Congress shall make no law ... abridging the freedom of speech, or of the press, or of the right of the people to peacefully assemble, and to petition the Government for a redress of grievances."
- 113 See the chapter on Sweden.
- 114 Banisar, D., *Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws* (Privacy International, 2006), Appendix A. Available at: <http://www.privacyinternational.org/foi/foisurvey2006.pdf>.
- 115 Technically a regulation and not a law but still with binding legal force.
- 116 See, for example, a list published on 22 September 2008 by Roger Vleugels, listing some 86 countries with right to information laws. Accessed on 14 January 2009 at: <http://www.statewatch.org/news/2008/sep/foi-overview-86-countries-sep-2008.pdf>.
- 117 The World Bank Policy on the Disclosure of Information (Washington, D.C.: World Bank, 1994). The most recent version dates from 2002 and is available at: <http://www1.worldbank.org/operations/disclosure/documents/disclosurepolicy.pdf>.
- 118 OP-102 Disclosure of Information, Inter-American Development Bank, December 1994. The latest version, entitled Disclosure of Information Policy and effective January 2004, is available at: <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=781675>.
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- 122 The Charter is available in various languages at: [http://www.ifitransparency.org/activities.shtml?x=44474&als\[select\]=44474](http://www.ifitransparency.org/activities.shtml?x=44474&als[select]=44474).
- 123 Public Information Disclosure Policy, UNDP, 1997. See para. 3. Available at: <http://www.undp.org/idp/>.
- 124 Paras. 6, 11-15.
- 125 Paras. 20-23.
- 126 See the criticism of the application of the policy by ARTICLE 19 in a press release available at: <http://www.article19.org/pdfs/press/undp-disclosure-policy.pdf>.
- 127 Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. Available at: [http://www.europarl.europa.eu/register/pdf/r1049\\_en.pdf](http://www.europarl.europa.eu/register/pdf/r1049_en.pdf).
- 128 Articles 7 and 8.
- 129 Article 4(1).
- 130 Articles 4(5) and 9. The Regulation has been harshly criticised by some freedom of information watchdog groups. See, for example, European Citizens Action Service, European Environmental Bureau, European Federation of Journalists, the Meijers Committee, and Statewatch, "Open letter from civil society on the new code of access to documents of the EU institutions," 2 May 2001.



# Features of a Right to Information Regime





## Features of a Right to Information Regime

It was argued in the previous chapter that the right to information, and particularly the right to access information held by public bodies, is a fundamental human right, guaranteed under international law as an aspect of the right to freedom of expression. This chapter probes in detail into the framework of standards that should underpin right to information legislation. A number of important interpretative principles have been established in the context of the right to freedom of expression. Further insight into the specific content of the right to information may be gleaned from the various international statements and legal judgments on the right to information noted in the previous chapter. These sources may be supplemented, where appropriate, by established comparative practice on the right to information.

The general guarantee of the right to information under international law, noted in the previous chapter, establishes a general presumption in favour of the disclosure of information held by public bodies. This implies not only that States should guarantee the right to information, but also that effective systems be put in place to give practical effect to it. As Article 2(2) of the *International Covenant on Civil and Political Rights* (ICCPR),<sup>1</sup> notes:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

International jurisprudence on the general right to freedom of expression makes it clear that positive measures may be required to implement this right. For example, international courts have often held that States must not only refrain themselves from engaging on attacks on the media but that they are also under a positive obligation to prevent such attacks from taking place.<sup>2</sup> Positive obligations have also been established in relation to employment situations<sup>3</sup> and various other contexts.<sup>4</sup> The cases noted in the previous chapter establishing a right to information all relied on a positive obligation of States to implement human rights.

At the same time, the right to information permits of some restrictions. Article 19(3) of the ICCPR states:

The exercise of the rights provided for in paragraph 2 of this article [the right to freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Similar rules on restrictions are recognised in regional human rights treaties and many national constitutions. Pursuant to this provision, restrictions must meet a strict three-part test.<sup>5</sup> International jurisprudence makes it clear that this test presents a high standard which any interference must overcome. The European Court of Human Rights, for example, has stated:

Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.<sup>6</sup>



First, any restriction on the right to information must be provided for by law. Restrictions that do not have a legal basis – for example because they occur as a result of the simple exercise of administrative discretion – are not legitimate. This requirement will be met only where the law in question is accessible. Furthermore, it must be “formulated with sufficient precision to enable the citizen to regulate his conduct.”<sup>7</sup> Unduly vague rules, or rules which allow excessive discretion in implementation, will not pass muster. Second, the restriction must pursue a legitimate aim listed in Article 19(3) of the ICCPR. This list is exclusive, albeit quite broad, so that restrictions which pursue other aims, for example to prevent embarrassment to government, are not legitimate.

Third, the restriction must be necessary to ensure protection of the aim. International courts have held that the word “necessary” means that there must be a “pressing social need” for the restriction. The reasons given by the State to justify the restriction must be “relevant and sufficient” and the restriction must be “proportionate to the aim pursued.”<sup>8</sup> Restrictions which go beyond what is necessary, for example by rendering more information secret than is strictly required to protect the legitimate aim, will not pass this part of the test. Furthermore, restrictions must be carefully designed so as to undermine the right as little as possible. Where the aim may be protected by a less intrusive means, that approach must be preferred.

A number of the international standards and statements noted above provide valuable insight into the precise content of the right to information, over and above these general principles. In his 2000 Annual Report, the UN Special Rapporteur on Freedom of Opinion and Expression set out in detail the standards to which right to information legislation should conform (UN Standards).<sup>9</sup> The 2002 Recommendation of the Committee of Ministers of the Council of Europe (COE Recommendation) is even more detailed, providing, for example, a list of the legitimate aims which might justify exceptions to the right of access.<sup>10</sup> Also, the *Principles on the Right of Access to Information* adopted by the Inter-American Juridical Committee in August 2008 (IAJC Principles) provide a detailed description of the standards applicable to the right to information.

Other useful standard-setting documents include the Joint Declaration adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression in 2004 (Joint Declaration),<sup>11</sup> the principles adopted by the Commonwealth Law Ministers (Commonwealth Principles),<sup>12</sup> the *Declaration of Principles on Freedom of Expression in Africa* (African Declaration),<sup>13</sup> the *Inter-American Declaration of Principles on Freedom of Expression* (Inter-American Declaration),<sup>14</sup> the Aarhus Convention<sup>15</sup> and the September 2006 decision by the Inter-American Court of Human Rights affirming a right to information.<sup>16</sup>

Although right to information regimes in different countries vary considerably, there are also a remarkable number of similarities. Where the practice is sufficiently consistent, it may be described as accepted practice which provides further insight into common standards in this area.

A key underlying principle governing the right to information is the principle of maximum disclosure, which flows directly from the primary international guarantees of the right to information. This principle involves a presumption that all information held by public bodies should be subject to disclosure and that this presumption may be overcome only where there is an overriding risk of harm to a legitimate public or private interest. Other key standards are that systems and processes should be established to give practical effect to the right to information and that public bodies should make all reasonable efforts to facilitate access. Furthermore, independent appeals systems should be put in place to prevent undue administrative discretion in interpreting the scope of exceptions to the right of access, as well as other aspects of the Law.

ARTICLE 19 has published a set of principles, *The Public's Right To Know: Principles on Freedom of Information Legislation* (the ARTICLE 19 Principles),<sup>17</sup> setting out best practice standards on right to information legislation. These Principles are based on international and regional law and standards, evolving State practice (as reflected, *inter alia*, in national laws and judgments of national courts) and the general principles of law recognised by the community of nations. ARTICLE 19 has also



published *A Model Freedom of Information Law*,<sup>18</sup> which translates the Principles into legal form. This chapter is organised around the nine primary principles set out in *The Public's Right To Know*.

## PRINCIPLE 1. MAXIMUM DISCLOSURE

### Freedom of information legislation should be guided by the principle of maximum disclosure

As noted above, the principle of maximum disclosure may be derived directly from primary guarantees of the right to information and it encapsulates the core meaning of the right to information. A version of this is explicitly stated as an objective in a number of national laws. The principle of maximum disclosure implies that the scope of the right to information should be broad as concerns the range of information and bodies covered, as well as the individuals who may claim the right.

At a very general level, Commonwealth Principle 2 states: "There should be a presumption in favour of disclosure". IAJC Principle 1 also states: "In principle, all information is accessible." It also reaffirms clearly that access is a fundamental human right, which is an important underpinning for the presumption of disclosure. The Joint Declaration of the special mandates on freedom of expression contains a strong and explicit statement on maximum disclosure:

The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.

More specifically, the UN Standards note: "Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; 'information' includes all records held by a public body, regardless of the form in which it is stored". The Aarhus Convention also defines information very broadly to include "any information in written, visual, aural, electronic or any other material form", although its scope is, in accordance with its purpose, limited to environmental information (Article 2(3)). The COE Recommendation takes a more cautious approach, defining 'official documents' widely as "all information recorded in any form, drawn up or received and held by public authorities" but limiting the scope of this to information linked to "any public or administrative function" and excluding documents under preparation (Principle I). In practice, most national laws do define information pretty broadly, while a minority restrict the scope of information covered on the basis of the use which is made of the information.

An important distinction may be noted here between a right to information (as in the Aarhus Convention and IAJC Principles) and to documents or records (as in the COE Recommendation). The UN Standards refer to both information and records, although the primary right they reference is to access information. This can have a number of important implications, depending on how the rules are applied. Most countries do not impose an obligation on public bodies to create information, although some do give a right of access to information public bodies are obliged to hold, even if they do not, at the time of the request, actually hold it. The extent to which public bodies are required to extract information from records they hold, for example using electronic information technologies or by searching through different records for the information sought, is not settled law, although some effort to extract is clearly required.

A different issue is whether requests for information must identify an actual document or other record, or simply the information sought. Given that most individuals will not be in a position to identify the actual document, the right should be understood as extending to information. In



some extreme cases, however, requests have been refused based on a distinction between a right to access information and to access documents.<sup>19</sup>

Principle IV(1) of the African Declaration sets out the underlying rationale for a broad definition of public bodies, stating: "Public bodies hold information not for themselves but as custodians of the public good". Both the Aarhus Convention and the COE Recommendation define the scope of public bodies widely to include government at the national, regional and other levels, and "natural or legal persons insofar as they perform public functions or exercise administrative authority and as provided for by national law".<sup>20</sup> Aarhus supplements this by also including: "Any other natural or legal persons having public responsibilities or functions, or providing public services" (Article 2(2)).

IJAC Principle 2 makes it clear that all three branches of government should be included, as well as all bodies "which operate with public funds or which perform public functions". Neither the Aarhus Convention nor the COE Recommendation include the judicial or legislative branches of government, a distinction that is also reflected in some national laws, in part based on constitutional divisions of power. Principle II of the COE Recommendation does, however, recognise the importance of access to information held by these public bodies, stating:

However, member states should examine, in the light of their domestic law and practice, to what extent the principles of this recommendation could be applied to information held by legislative bodies and judicial authorities.

International law applies regardless of internal structures, including constitutional rules; States are bound to implement their human rights obligations. This may require special measures – for example, it may be that courts need to implement their own right to information rules, instead of coming under rules passed by the legislature and binding on the executive – but the obligation remains. Furthermore, the experience of countries that do include judicial and legislative authorities, including some that have very strong separation of powers rules, shows that this is perfectly possible.

The ARTICLE 19 Principles take a robust approach, in line with the practice of more progressive right to information laws, to the idea that access to information is a human right, calling for the definition of public bodies to focus on the type of service provided, rather than formal designations, based on a recognition that every legitimate secrecy interest can be addressed through an appropriate regime of exceptions. Principle 1 calls for the definition of public bodies to meet the following standards:

[The definition] should include all branches and levels of government including local government, elected bodies, bodies which operate under a statutory mandate, nationalised industries and public corporations, non-departmental bodies or quangos (quasi non-governmental organisations), judicial bodies, and private bodies which carry out public functions (such as maintaining roads or operating rail lines). Private bodies themselves should also be included if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health. Inter-governmental organisations should also be subject to freedom of information regimes based on the principles set down in this document.

In South Africa, even private bodies are required to disclose information which is needed for the protection or exercise of any right. This is also reflected in Principle IV(2) of the African Declaration, which states: "[E]veryone has the right to access information held by private bodies which is necessary for the exercise or protection of any right". Given present trends to privatise more and more functions which were once considered to be public in nature, this is an important development for the right to information.

International standards also make it very clear that everyone has a right to access information. The UN Standards, as noted above, provide that "every member of the public" has a right to receive information. Similarly, Principle IV(2) of the African Declaration refers to 'everyone', while



Principle 4 of the Inter-American Declaration refers to 'every individual'. Principle 3 of the COE Recommendation also refers to 'everyone' and goes on to note specifically: "This principle should apply without discrimination on any ground, including that of national origin." Some national laws do, however, discriminate, applying only to citizens, although many also apply to everyone.

## PRINCIPLE 2. OBLIGATION TO PUBLISH

### Public bodies should be under an obligation to publish key information

To give practical effect to the right to information, it is not enough simply to require public bodies to accede to requests for information. Effective access for many people depends on these bodies actively publishing and disseminating key categories of information even in the absence of a request. This is reflected in a number of international statements. The UN Standards, for example, state:

Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public...<sup>21</sup>

Principle IV(2) of the African Declaration supports this, stating that, "public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest". Principle XI of the COE Recommendation also calls on every public body, "at its own initiative and where appropriate", to disseminate information with a view to promoting transparency of public administration, administrative efficiency and informed public participation. IAJC Principle 4 calls for proactive publication of a wide range of information, including about "their policies, opportunities for consultation, activities which affect members of the public, their budget, and subsidies, benefits and contracts". Similarly, the Aarhus Convention places extensive obligations on public bodies to disseminate environmental information.<sup>22</sup> Significantly, the COE Recommendation also calls on public bodies to, "as far as possible, make available information on the matters or activities for which they are responsible, for example by drawing up lists or registers of the documents they hold" (Principle X). A few national right to information laws do indeed require public bodies to produce lists of public information although the majority, unfortunately, do not.

The scope of this obligation depends to some extent on resource limitations, but the amount of information covered should increase over time, particularly as new technologies make it easier to publish and disseminate information. The Joint Declaration of the special mandates specifically calls for progressive increases in the scope of pro-active disclosure: "Systems should be put in place to increase, over time, the amount of information subject to such routine disclosure." The longer term goal should be to make information available proactively, so as to minimise the need for individuals to have to resort to requests to access it.

## PRINCIPLE 3. PROMOTION OF OPEN GOVERNMENT

### Public bodies must actively promote open government

In most countries, there is a deep-rooted culture of secrecy within government, based on long-standing practices and attitudes. Ultimately, the right to information depends on changing this culture since it is virtually impossible to *force* civil servants to be open, even with the most progressive legislation. Rather, longer-term success depends on convincing public officials that openness is not just an (unwelcome) obligation, but also a fundamental human right, and central to effective and appropriate governance. A range of promotional measures may be needed to address the culture of secrecy and to ensure that the public are aware of the right to information and its implications for them.



The UN Standards recognise the need for both measures to inform the public about their right to information and to “to address the problem of a culture of secrecy within Government”. Commonwealth Principle 2 recognises this as a positive need, namely to “promote a culture of openness”. The Joint Declaration of the special mandates calls on the government to “take active steps to address the culture of secrecy that still prevails in many countries within the public sector”. It also calls for steps to be taken “to promote broad public awareness of the access to information law” and generally for “the allocation of necessary resources and attention” to ensure proper implementation of right to information laws. IAJC Principle 10 calls generally for measures “to promote, to implement and to enforce” the right to information, including specifically regarding record management, training officials, public awareness-raising and reporting on implementation. Principle X of the COE Recommendation includes the most detailed provisions on what it calls ‘complementary measures’, which should include measures to inform the public and to train officials.

The specific promotional measures needed vary from country to country. The allocation of central responsibility for various measures – for example to a dedicated oversight body such as an information commissioner, ombudsman or human rights commission, or to a central government department – will provide a locus of responsibility for ensuring that adequate attention and resources are paid to this important matter.

A wide variety of measures may be taken to educate the public. The media can play a key role here; the broadcast media can play a particularly important role in countries where newspaper distribution is low or illiteracy widespread. Another useful tool, provided for in many right to information laws, is the publication of a simple, accessible guide on how to lodge an information request.

An important tool to tackle the culture of secrecy is to provide for penalties for those who wilfully obstruct access to information in any way, including by destroying records or inhibiting the work of the oversight body. The Joint Declaration specifically refers to sanctions for those who obstruct access, as does IAJC Principle 9, which states: “Anyone who willfully denies or obstructs access to information in breach of the rules should be subject to sanction.” Such penalties may be administrative, civil or criminal in nature, or some combination of all three. In some countries, for example, there is general provision for damage claims for losses suffered as a result of a breach of the law. The experience with criminal penalties in some countries with longer-standing right to information laws suggests that prosecutions tend to be rare but that these rules still send an important message to officials that obstruction will not be tolerated. Other means that have been tried to address the culture of secrecy include providing incentives for good performers and exposing poor performers, and ensuring legislative oversight of progress through annual reports on the performance of public bodies in implementing the right to information.

In many countries, one of the biggest obstacles to accessing information is the poor state in which records are kept. Officials often do not know what information they have or, even if they do know, cannot locate records they are looking for. Good management of official documents is not only central to effective implementation of the right to information. Information management is one of the key functions of modern government and doing this well is crucial to the effective delivery of every public service goal.

The Joint Declaration of the special mandates calls for systems to be put in place to improve record management, stating: “Public authorities should be required to meet minimum record management standards. Systems should be put in place to promote higher standards over time.” Commonwealth Principle 4 also recognises that “Governments should maintain and preserve records”. Principle X of the COE Recommendation calls on States to ensure the proper management of records so as to facilitate access, as well as a need for “clear and established rules for the preservation and destruction of their documents”. A number of national laws do address this, for example by giving a minister or the independent oversight body a mandate to set and enforce standards for record maintenance.





## PRINCIPLE 4. LIMITED SCOPE OF EXCEPTIONS

### Exceptions should be clearly and narrowly drawn and subject to strict “harm” and “public interest” tests

Assessing the legitimate scope of exceptions to the right to access information is complicated. On the one hand, an overbroad system of exceptions can seriously undermine the right. In some cases, otherwise very effective right to information laws are largely undermined by an excessively broad or open regime of exceptions. On the other hand, it is obviously important that all legitimate secrecy interests are adequately catered to, otherwise public bodies will legally be required to disclose information even though this may cause disproportionate harm.

The complexity and yet importance of this issue is reflected in international standards. At a very general level, Commonwealth Principle 3 states that exceptions to the right of access should be ‘limited’ and ‘narrowly drawn’. Similarly, the Inter-American Principles note that limits to the right of access should be ‘exceptional’, previously established by law, and respond to “a real and imminent danger that threatens national security in democratic societies” (Principle 4. This seems to ignore the many other interests that are widely recognised to warrant limitations on the right of access, such as personal privacy and law enforcement. IAJC Principle 6 states simply that exceptions should be “established by law, be clear and narrow”, while Principle 7 stipulates that the burden of proof of justifying any denial of access rests with the public body refusing a request.

The UN Standards also call for exceptions to be established by law and narrowly drawn, providing:

A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest.

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Exceptions must conform to the standards under international law for restricting freedom of expression. This is clear from general principles and was also the subject of extensive elaboration in the September 2006 decision of the Inter-American Court of Human Rights which recognised a right to information as part of the more general right to freedom of expression.<sup>23</sup> This means that exceptions must be provided for by law and protect an interest recognised as legitimate under international law, both of which are specifically recognised in several of the international statements.

Different right to information laws recognise different legitimate aims which may be the subject of an exception to the right of access, and this is a subject of some controversy. The COE Recommendation provides a detailed and exclusive list of the possible grounds for restricting the right to information in Principle IV, titled “*Possible limitations to access to official documents*”, as follows:

1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
  - i. national security, defence and international relations;
  - ii. public safety;
  - iii. the prevention, investigation and prosecution of criminal activities;
  - iv. privacy and other legitimate private interests;
  - v. commercial and other economic interests, be they private or public;
  - vi. the equality of parties concerning court proceedings;
  - vii. nature;





- viii. inspection, control and supervision by public authorities;
- ix. the economic, monetary and exchange rate policies of the state;
- x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

It is clear from both general principles and from the various authoritative statements on the right to information that it is not legitimate to refuse access to information simply because it relates to one of the interests noted above. The ARTICLE 19 Principles set out a three-part test for exceptions as follows:

The three-part test

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and
- the harm to the aim must be greater than the public interest in having the information.

Several international statements specifically mention the need for a risk of harm, as well as the possibility of release in the public interest notwithstanding such a risk, including the Inter-American Principles and UN Standards noted above. Principle IV(2) of the COE Recommendation recognises both the need for harm and the public interest override, stating:

Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.

The Aarhus Convention similarly permits requests for information to be refused only if “disclosure would adversely affect” a number of listed interests (Article 4(4)). The Aarhus Convention also recognises a form of public interest override, providing:

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment. (Article 4(4))

The dual ‘harm’ and ‘public interest override’ approach finds clear support in the Joint Declaration of the special mandates, which states:

The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information.

Complex legal analysis is not required to see that exceptions should be limited to situations where disclosure of the information would pose a risk of harm; this is simply common sense. The defence forces hold a lot of information that is tangential to their operations, for example relating to purchases of food or pens. It is clearly not legitimate to deny access to this information on the basis that it simply relates to defence spending, since disclosure would not harm a defence interest.

In a small number of cases, harm is implicit on the nature of the exception. This is the case, for example, for protection of legally privileged information or where disclosure would represent a breach of confidence. However, the vast majority of exceptions which do not include a specific reference to harm – sometimes referred to as class exceptions – do not have such in-built harm and therefore fail to pass muster under this part of the test.

In some countries, exceptions are themselves subject to limits (exceptions to exceptions) to take into account cases where there will be no harm to the legitimate aim. An example of this is where the information is already publicly available, in which case any harm will already have been done, or where an affected third party has consented to disclosure, in which case the harm is effectively waived.



No matter how carefully a regime of exceptions is crafted, there will always be some cases where the larger public interest is served by disclosure of the information, even though this does cause some harm to a protected interest. This is so in part because it is not possible to draft exceptions so as to take into account all overriding public interests and in part because particular circumstances at the given time may mean that the overall public interest is served by disclosure. An example would be sensitive military information which exposed corruption in the armed forces. Although disclosure may at first sight appear to weaken national defence, eliminating corruption in the armed forces may, over time, actually strengthen it.

It is also well-established in practice that where only part of a record is confidential, the rest should still, if possible, be disclosed. This finds support not only in very widespread national practice but also in Principle VII of the COE Recommendation and Article 4(6) of the Aarhus Convention.

Although not strictly part of the three-part test set out above, overall time limits on withholding information help ensure that 'stale' harms do not serve to keep information secret indefinitely. In many cases, the risk of harm which originally justified a limitation disappears or is substantially reduced over time. For example, most right to information laws provide some sort of protection for internal deliberative processes or the provision of advice within government. While this may be justified in the short-term, the risk of disclosure in 15 or 20 years can hardly be expected to exert a chilling effect on the free and frank provision of advice, a key interest protected by this exception. Hard 'historical disclosure' time limits create a presumption that the original harms no longer pertain, after which continued withholding of the information needs to be specially justified.

## **PRINCIPLE 5. PROCESSES TO FACILITATE ACCESS**

### **Requests for information should be processed rapidly and fairly and an independent review of any refusals should be available**

Guaranteeing the right to information effectively in practice requires not only proactive disclosure by public bodies (the obligation to publish) but also that anyone be able to request and to receive any information they hold, subject to the exceptions. This, in turn, requires that clear procedures be established according to which public bodies process requests for information. It also requires a system for independent review of internal decisions by public bodies.

Processes for accessing information are complex and this normally occupies a large part of right to information laws. At the same time, this is not as high profile as some other right to information standards and so occupies relatively less prominence in international statements on the right to information. The UN Standards call for a requirement for public bodies "to establish open, accessible internal systems for ensuring the public's right to receive information", specifically referring, in this regard, to the need for "strict time limits for the processing of requests for information" and for notice to be given for any refusal to provide access which includes "substantive written reasons for the refusal(s)". The Joint Declaration of the special mandates calls for procedures to "be simple, rapid and free or low-cost".

IAJC Principle 5 calls generally for "clear, fair, non-discriminatory and simple rules" for processing requests. It goes on to make it clear that these should include "clear and reasonable timelines, provision for assistance to be given to those requesting information, free or low-cost access, and does not exceed the cost of copying and sending the information, and a requirement that where access is refused reasons, including specific grounds for the refusal, be provided in a timely fashion".



The COE Recommendation contains by far the most detail on processes, establishing a number of specific standards, including the following:

- requests should be dealt with by any public body which holds the information, on an equal basis and with a minimum of formality;
- applicants should not have to provide reasons for their requests;
- requests should be dealt with promptly and within established time limits;
- assistance should be provided “as far as possible”;
- reasons should be given for any refusal to provide access; and
- applicants should be given access in the form they prefer, either inspection of the record or the provision of a copy (Principles V-VII).

Most of these standards are reflected in the provisions of the Aarhus Convention (see, in particular, Article 4).

It is also well-established that any refusal by a public body to disclose information, or any failure to deal with requests in the prescribed manner, should be subject to appeal. Many national laws provide for an internal appeal to a higher authority within the same public body to which the request was made. This is a useful approach, which can help address mistakes, build confidence among lower-ranking officials to disclose information and ensure internal consistency.

It is, however, crucial that a right of appeal to an independent body be available to review decisions made by public bodies. Absent this, individuals cannot really be said to have a *right* to access information held by public bodies, but merely a right to have their requests for information considered. Absent independent review, much information, for example revealing corruption or incompetence, may never be disclosed.

While the various international statements on the right to information right to clearly call for independent review, they are somewhat less clear as to the nature of that review and, in particular, whether review by a dedicated, independent oversight body – such as an information commission, ombudsman or human rights commission – is required or whether review by the courts – which in many countries oversee government actions by default – is sufficient. Some of the standards seem to refer implicitly to an oversight body and some refer to both an independent body and the courts.

Commonwealth Principle 5 simply calls for decisions to refuse to disclose to be “subject to independent review”, while the Joint Declaration of the special mandates calls for a right to appeal such refusals “to an independent body with full powers to investigate and resolve such complaints”, suggesting that something other than the courts may be envisaged. The COE Recommendation refers to the right to appeal to a “court of law or another independent and impartial body established by law”. The same language is reflected in Article 9 of the Aarhus Convention. Principle IV(2) of the African Declaration, for its part, refers to two levels of appeal, “to an independent body and/or the courts”. IAJC Principle 8 also calls for two levels of appeal, to “an administrative jurisdiction” and to the courts.

In practice, the more progressive right to information laws do provide for an appeal to an independent oversight body. This is far more accessible to ordinary people seeking information than the courts and has a proven track record as an effective way of ensuring the right to information. It does not matter whether a new body is established for this purpose or the task allocated to an existing body, such as a human rights commission or an ombudsman. What is important is that the body be adequately protected against political interference. There is also merit in providing for an appeal from the oversight body to the courts. Only the courts really have the authority to set standards of disclosure in controversial areas and to ensure the possibility of a full, well-reasoned approach to difficult disclosure issues.



An important aspect of appeals, also widely respected in better practice national laws, is that public bodies seeking to deny access to information should bear the onus of proving that such a denial is legitimate. This flows from, indeed is central to, the idea that access to information is a right and also to the presumption of openness which should, at a minimum, dictate that the burden of proof should lie on the party seeking to deny access. Few international standards address this issue; the Joint Declaration of the special mandates, however, states: "The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions."

## **PRINCIPLE 6. COSTS**

### **Individuals should not be deterred from making requests for information by excessive costs**

The charging of fees for gaining access to information is another difficult issue. On the one hand, if fees are excessive, they will pose a barrier to access, and hence undermine the right. On the other hand, the provision of access does impose costs on public bodies which they should have some means of recouping. Several of the international statements on the right to information touch on this issue. The UN Standards, for example, note that the cost of access "should not be so high as to deter potential applicants and negate the intent of the law itself". IAJC Principle 5, noted above, calls for access to be provided "free or low-cost". Principle VII of the COE Recommendation is more specific, calling for consultation of documents to be free and any fees charged for copies not to exceed the actual costs incurred.

The Aarhus Convention has reasonably detailed rules on fees, with Article 4(8) stating:

Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.

In practice, there is wide variance in the way that different countries approach the question of fees for access to information.

## **PRINCIPLE 7. OPEN MEETINGS**

### **Meetings of public bodies should be open to the public**

The ARTICLE 19 Principles include the idea of open meetings. The rationale underlying the right to information applies, as a matter of principle, not only to information in recorded form, but also to meetings of public bodies. In other words, it should make little difference whether the information in question is transmitted via a permanent record or orally during a meeting. The UN Standards support this, stating: "The [right to information] law should establish a presumption that all meetings of governing bodies are open to the public".

In practice it is rare, although not unknown, for right to information laws to require meetings of public bodies to be open. Some countries have separate laws on this.



## **PRINCIPLE 8. DISCLOSURE TAKES PRECEDENCE**

### **Laws which are inconsistent with the principle of maximum disclosure should be amended or repealed**

International law does not dictate how States implement its rules, including in the area of fundamental human rights, and this is also true of the right to information. As a result, it is up to States to determine how to address the issue of exceptions to the right of access. At the same time, almost all States have a range of secrecy laws on their books, many of which fail to conform to the standards noted above, in particular in relation to exceptions. They are, therefore, under an obligation to put in place some mechanism to address this problem.

Over time, a commitment should be made to review all laws which restrict the disclosure of information, with a view to bringing them into line with the right to information law. As Principle IV(2) of the African Declaration states: “[S]ecrecy laws shall be amended as necessary to comply with freedom of information principles”.

However, this is in most cases at least a medium-term solution. A more short-term solution, which allows for more-or-less immediate effect to be given to the right to information, is to provide that the law establishing the right to information shall take precedence over secrecy laws. Where possible, this should be achieved through applying a restrictive interpretation of secrecy laws. However, where a more serious conflict which cannot be resolved in this way presents itself, the right to information law may override the conflicting secrecy law.

This is not as controversial as it may at first sound. The Joint Declaration of the special mandates provides: “The access to information law should, to the extent of any inconsistency, prevail over other legislation.” Furthermore, many right to information laws take this approach. Most right to information laws include a comprehensive set of exceptions which protect all legitimate confidentiality interests (indeed, many may be criticised for being over-inclusive in this regard), so there should be no need for this to be extended by secrecy laws. Some system of resolving conflicts is certainly necessary to avoid placing civil servants in a position where they are prohibited from divulging information under a secrecy law and yet required to do so under a right to information law. Resolving this in favour of openness is consistent with the basic presumption underlying the right to information.

The issue of classification of records should, in principle, be relatively simple to deal with. Classification is simply the assessment of an individual official as to the sensitivity of a record and it should never be treated as an independent ground for refusing to provide access to that record. Instead, the actual contents of the record should, at the time of any request relating to those contents, be assessed against the exceptions. In practice, however, many right to information regimes do effectively recognise classification as a separate exception.

## **PRINCIPLE 9. PROTECTION FOR WHISTLEBLOWERS**

### **Individuals who release information on wrongdoing – whistleblowers – must be protected**

If officials may be subject to sanction, for example under a secrecy law, for mistakenly releasing information pursuant to the right to information, they will be likely to exhibit a tendency to err in favour of secrecy, which they are anyway more familiar with. As a result, many right to information laws provide protection from liability for officials who, in good faith, disclose information pursuant to right to information legislation. This protection is important to change the culture of secrecy within government and to foster a climate of openness.



Similar protection is provided in many countries to individuals who release information on wrongdoing, or whistleblowers. It is often unclear whether disclosure of information on wrongdoing is warranted under the law, even if that law includes a public interest override, and individuals seeking to disclose information in the public interest cannot be expected to undertake a complex balancing of the different interests which might come into play. Providing them with protection helps foster a flow of information to the public about various sorts of wrongdoing. Principle IV(2) of the African Declaration states:

[N]o one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society.

The UN Standards also call for protection from “any legal, administrative or employment-related sanctions for releasing information on wrongdoing”. They define wrongdoing as “the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body”. The ARTICLE 19 Principles add to this definition of wrongdoing the exposure of a serious threat to health, safety or the environment, whether linked to individual wrongdoing or not.

## Notes

- 1 UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.
- 2 See, for example, *Commission Nationale des Droits de l'Homme et des Libertes v. Chad*, October 1995, Communication No. 74/92 (African Commission on Human and Peoples' Rights); *Miranda v. Mexico*, 13 April 1999, Report No. 5/99, Case No. 11.739 (Inter-American Commission on Human Rights) and *Özgür Gündem v. Turkey*, 16 March 2000, Application No. 23144/93 (European Court of Human Rights).
- 3 See, for example, *Fuentes Bobo v. Spain*, 29 February 2000, Application No. 39293/98 (European Court of Human Rights); and *Wilson and the NUJ and others v. the United Kingdom*, 2 July 2002, Application Nos. 30668/96, 30671/96 and 30678/96 (European Court of Human Rights).
- 4 See, for example, *Vgt Verein gegen Tierfabriken v. Switzerland*, 28 June 2001, Application No. 24699/94 (European Court of Human Rights); *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria*, 19 December 1994, Application No. 15153/89 (European Court of Human Rights); and *Plattform Ärzte für das Leben v. Austria*, 25 May 1988, Application No. 10126/82 (European Court of Human Rights).
- 5 See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991 (UN Human Rights Committee), para. 9.7.
- 6 *Thorgeirson v. Iceland*, 25 June 1992, Application No.13778/88, para. 63.
- 7 *The Sunday Times v. United Kingdom*, 26 April 1979, Application No.13166/87, 2 EHRR 245, para. 49 (European Court of Human Rights).
- 8 *Lingens v. Austria*, 8 July 1986, Application No.9815/82, 8 EHRR 407, paras. 39-40 (European Court of Human Rights).
- 9 Report of the Special Rapporteur, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.
- 10 Recommendation R(2002)2 the Committee of Ministers to Member States on access to official documents, 21 February 2002.
- 11 Adopted on 6 December 2004. Available at: <http://www.unhchr.ch/hurricane/hurricane.nsf/0/9A56F80984C8BD5EC1256F6B005C47F0?opendocument>.



- 12 *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).
- 13 32nd Ordinary Session of the African Commission on Human and Peoples' Rights, 17-23 October 2002, Banjul, The Gambia. Available at:  
[http://www.achpr.org/english/declarations/declaration\\_freedom\\_exp\\_en.html](http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html).
- 14 Adopted by the Inter-American Commission on Human Rights at its 108th Regular Session, 19 October 2000. Available at: <http://www.iachr.org/declaration.htm>.
- 15 *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, UN Doc. ECE/CEP/43, adopted at the Fourth Ministerial Conference in the "Environment for Europe" process, 25 June 1998, entered into force 30 October 2001.
- 16 *Claude Reyes and Others v. Chile*, 19 September 2006, Series C No. 151.
- 17 (London: 1999). Available at: <http://www.article19.org/pdfs/standards/righttoknow.pdf>.
- 18 (London: 2001). Available at: <http://www.article19.org/pdfs/standards/modelfoiaw.pdf>.
- 19 The UNDP, for example, has, absurdly, refused requests on the basis that their policy does not give access to documents other than those already published. See a protest letter on this by ARTICLE 19, available at: <http://www.article19.org/pdfs/press/undp-disclosure-policy.pdf>.
- 20 See COE Recommendation.
- 21 See note 9.
- 22 See, for example, Article 5.
- 23 *Claude Reyes and Others v. Chile*, 19 September 2006, Series C No. 151. See, in particular, paras. 88-92.





# Country Chapters

Chile





## Introduction

Article 8 of the Political Constitution of the Republic of Chile of 1980,<sup>1</sup> as amended, provides that the exercise of public functions shall be governing by strict compliance with the principle of probity. The acts and resolutions of public bodies, as well as their bases and procedures, shall be public. Secrecy may only be established by a “law of qualified quorum” in cases where publicity may undermine the ability of these bodies to perform their functions, the rights of others, the security of the nation or the national interest.

Act No. 19,653 concerning “Administrative probity applicable to the body of State Administration” was promulgated on 14 December 1999 and Decree Law 1/19,653 was published on 17 November 2001 to give effect to this law. Together, they provided for a limited right of access to public information, including by request. However, these laws did not give effect to international standards in this area and, in a seminal judgment of 19 September 2006, the Inter-American Court of Human Rights held Chile to be in breach of its international obligation to respect the right to freedom of expression for failing to provide access to certain environmental information.<sup>2</sup>

The Inter-American Court called on Chile, among other things, to “adopt, within a reasonable time, the necessary measures to ensure the right of access to State-held information, pursuant to the general obligation to adopt provisions of domestic law established in Article 2 of the American Convention on Human Rights”. Chile responded by adopting Law No. 20.285 on Access to Public Information, which was published in the Official Gazette on 20 August 2008 (RTI Law).

The RTI Law is, on balance, a strong one, although it has some weaknesses. Among other things, the Law defers to other laws in the area of secrecy, imposing only weak conditions on these other laws, while the exceptions set out in the Law are not subject to a harm test or public interest override. Another weakness is that only private corporations which are 50% State owned are covered by the law, while private bodies which operate with public funding or which undertake public functions are not. At the same time, it provides for a strong and independent administrative oversight body, the Council for Transparency, and gives it a wide mandate both to promote implementation of the Law and to hear complaints about denial of the right to information. This could potentially overcome many of the weaknesses and result in practice in a strong right to information in Chile.

## The Right of Access

Article 10 of the RTI Law sets out clearly the right of everyone to access information held by public bodies, subject to its provisions. This is supported by Article 11(g), which establishes the Principle of non-discrimination in the treatment of anyone requesting information. The Law does not include any statement of its purposes or objectives. Such statements can be useful interpretive tools for officials, the oversight body and the courts when they are called upon to decide on the parameters of the law, and particularly the scope of exceptions.

Article 5 defines as “public” all acts and resolutions of public bodies, including the documents that give it a “direct and essential basis or compliment, and the procedures that are used for this dictation”, as well as information relating to the elaboration of the budget, and all other information “in the power of” public bodies, regardless of its format or how it is supported, its date of creation, origin or classification. This is limited by the exceptions in this law and those foreseen in other laws. The Principle of relevance set out in Article 11(a) basically repeats this, as does Article 10.



This definition appears, in the end, to be quite broad but it is also rather confusing and could be misunderstood. In particular, it could be understood to be limited to information which is directly related to the core work of public bodies, whereas all information should be covered. Furthermore, it is limited to information not covered by an exception in either the RTI Law or laws of qualified quorum (i.e. passed by a special parliamentary majority). A better approach would be to define information very broadly to include confidential information, but then limit access to this information by reference to the exceptions. This would allow for the harm and public interest tests for exceptions to be assessed at the time of a request rather than the current *a priori* exclusion of confidential information from the overall scope of the law.

The RTI Law takes a dual approach to which bodies are covered by the Law. The bodies governed by the Law are defined generally in Article 2 as including ministries, governors' offices, regional governments, municipalities, the armed forces and security forces and bodies created to facilitate the work of the administration. These bodies are subject to the detailed obligations spelt out in the RTI Law. Article 1(5) further defines public bodies by reference to Article 1 of the General Bases of State Administration Organic Constitutional Law (Ley Orgánica Constitucional de Bases Generales de la Administración del Estado). This law, in turn, uses a similar definition, making specific reference to public corporations.

A number of other public bodies – namely the Comptroller General, the National Congress, the Central Bank, the courts, the Attorney General's Office, the Constitutional Court, Electoral Justice and public corporations, defined as corporations created by law, or in which the State has over 50% of the shares or a majority of the board members, are subject only to the general obligations spelt out in Article 8(2) of the Constitution, referred to above, and Articles 3 and 4 of the RTI Law.

Articles 3 and 4 provide generally that public office must be exercised transparently and that these authorities must "strictly comply with the principle of transparency of public office", which consists of respecting the disclosure of "acts, resolutions, proceedings and documents, as well as its foundations" and enabling access by individuals through the procedures envisaged in the Law. The Transitory Dispositions also create some specific obligations for these bodies but they are not subject to the more detailed provisions in the main body of the law.<sup>3</sup>

This dual approach is presumably based at least in part on constitutional separation of powers rules, which prohibit the legislature from imposing the more detailed rules in the main body of the law on these constitutionally independent bodies. At the same time, the end result is a far less specific and detailed openness regime for these other bodies.

There are also shortcomings in the main definition of public bodies. It would presumably cover all statutory bodies, but it would be preferable to state this explicitly. It is not clear why public corporations are not included in the main body of the law, as presumably there are no constitutional problems with imposing obligations on them. Furthermore, the scope of coverage of these bodies, based on 50% or more State ownership, is very limited, given that a much smaller percentage of ownership is often enough to give full control of a publicly owned company. It would be preferable if the definition at least covered all bodies that the State effectively controlled. Furthermore, private bodies undertaking public functions, even if they are not State controlled, should ideally be captured by the definition. Finally, many right to information laws also include bodies that are substantially publicly funded, or to the extent of their public funding, even if they are not actually owned by the State. This gives effect to the principle that the right of access should extend to the expenditure of all public funds.

The right of access appears to apply to everyone, as Article 10 refers to 'any person', without limitation, for example based on citizenship.



## Procedural Guarantees

Article 11(f) sets out the general Principle of facilitation, which requires the mechanisms and procedures for giving effect to the right to information to enable the exercise of the right and to avoid imposing obstacles or impeding access.

Pursuant to Article 12, requests must be made in writing or via “websites” and contain the full name and address of the applicant, a clear description of the information sought, a signature and the name of the public body to which the request is directed. Reasons may not be required for lodging a request (Article 11(g), Principle of non-discrimination). Where a request is deficient, the applicant will be notified of this and given five days to remedy the problem. It is presumed that the reference to lodging requests via a website would include emailed requests. Ideally, provision should also be made for requests to be lodged orally. Also, there is no provision for assistance to be provided to applicants to help them formulate their requests appropriately. Such assistance is of particular importance to persons who are illiterate or disabled.

Requests must be responded to within 20 working days, which may exceptionally be extended for another ten working days where gathering the information is difficult, in which case the extension must be communicated to the applicant before the expiry of the first 20 day deadline (Article 14). Furthermore, Article 11(h), setting out the Principle of opportunity, requires public bodies to provide information as rapidly as possible, avoiding any delaying tactics.

Where the public body “is not competent to handle the request” or does not hold the information, it shall transfer the request to the appropriate body, informing the applicant of this. Where a public body which might hold the information cannot be identified, or the information “belongs” to several bodies, the applicant will be informed of this (Article 13). This appears to be based on an inappropriate notion of ‘ownership’ of information by public bodies whereas bodies should instead be required to provide access to any information they hold. Where the information has a close connection with another public body, they may consult with that body before releasing the information.

Article 20 provides for consultation with third parties where the information sought might affect their rights. The public body shall communicate with the third party within two days of receipt of the request, notifying them of their right to oppose the request, and giving them three days to respond in writing, giving their reasons as to why the information should not be disclosed. Where no opposition is entered, it is assumed that the third party does not object to disclosure. Where opposition is entered, this is taken into account (see below, under Exceptions). This is useful, but the timelines it provides for may be unreasonably short in practice.

Where a request is refused, notice must be provided in writing of this fact, specifying the legal grounds for the refusal, along with reasons. The Law provides generally that any abuse of discretion in this regard will be appropriately sanctioned (Article 16).

Information must be provided in the form and through the medium specified by the applicant, unless this would incur excessive costs, in which case the information may be provided in an available medium. However, the Law requires public bodies to put in place the appropriate technical mechanisms to be able to deliver information effectively (presumably electronically) (Article 17). This latter is a progressive provision which will help to prioritise electronic provision of information, which should, over time, prove to be far more efficient for public bodies.

Article 11(k), specifying the Principle of gratuity, states that access to information shall be free, subject to the provisions of the Law. This is elaborated upon in Article 18, which states that only the costs of reproducing the information and “other values the law specifically authorizes” to deliver the information may be charged but that delivery of the information may be suspended until payment is made. This is an appropriate fee regime but it would be preferable to provide for a centrally set schedule of fees for these matters, and particularly for reproduction charges, to avoid



different fees being charged by different public bodies. Furthermore, it would be appropriate to provide for fee waivers for impecunious requesters and for requests in the public interest. The Law also prohibits any conditions being placed on the use to which information provided pursuant to it may be put (Article 19). Although this is implicit in many right to information laws, it is still useful to make it explicit in the RTI Law.

### **Duty to Publish**

Article 7 of the RTI Law sets out the main proactive publication obligations for most public bodies. This list includes the following types of information: organic structure and function of different units; the enabling normative framework; all staff – permanent, temporary and outsourced – along with their salaries; contracts for different types of goods and services, indicating the contractor, main partners and so on; all transfers of funds to any natural or legal person, directly or through competition; all acts and resolutions that affect third parties; how to access services provided by the body; the design, budget and access criteria for subsidy programmes and other benefits, minus any sensitive personal data; any mechanisms for citizen participation; budget information, including on how it was spent; audit results; and a list of all other bodies in which the public body participates, along with the basis for such participation.

This information must be provided in a complete and up-to-date fashion on the websites of public bodies, and in a manner that makes it easy to access. Public bodies which do not have websites must provide this information via the website of the ministries upon which they “depend or are related to”. For information relating to contracts which have been submitted to the Public Buying System, the public body should provide a link on its website to the public buying website. Furthermore, all information that has been published in the Official Diary and all information that relates to the “functions, competences and responsibilities” of public bodies must be made available in an up-to-date version on the website (Article 6).

These are reasonably comprehensive provisions, although they are quite general in nature and a lot will depend on how broadly (or narrowly) they are interpreted. For example, the reference to budget information could be understood in many different ways. Many right to information laws provide for more detail in relation to budget and financial information. Furthermore, consideration should be given to providing for the amount of information that must be made available to be increased over time, as public bodies increase their capacity in this area. It is probably unrealistic to expect them to make all of this information available in short order. Finally, the RTI Law focuses heavily on websites as a vehicle for dissemination of information proactively. Consideration might be given to requiring public bodies to make information available in other ways as well, including to ensure that communities most affected by development projects are aware of them.

### **Exceptions**

The RTI Law does not include a complete regime of exceptions. Instead, it preserves secrecy rules in other laws (Article 21(5)), albeit only laws of qualified quorum. These laws must be passed by a special majority in both houses of parliament. Although this is not uncommon in right to information laws, it would be far preferable if the right to information law provided for a complete regime of exceptions that was not permitted to be extended by other laws. The exceptions in these other laws may well not respect the openness standards the right to information law seeks to establish so that allowing them to be preserved will not bring about the desired degree of openness.

Furthermore, many right to information laws which preserve secrecy rules at least impose some conditions on the classification of information, which the Chilean RTI Law does not (apart from conditions on the length of classification (see below)). However, a positive feature of the RTI Law is Article 23, which requires public bodies to keep an up-to-date index of documents deemed to be confidential. It is not clear from the RTI Law whether this list is itself intended to be a public document.



The RTI Law does not impose a harm test for most of the exceptions it establishes; in most cases, the only requirement is that release of the information would 'affect' an interest, which does not necessarily imply a negative impact. Furthermore, it does not include a public interest override, whereby information must still be released if the overall public interest would be served, even if this would cause harm to a protected interest. These limitations on exceptions which are missing from the Law – namely the harm and public interests tests – are central to ensuring that the regime of exceptions is narrow and appropriate. The former is particularly central since one cannot justify the withholding of information where no harm would result from disclosure. The absence of these limitations is a serious shortcoming of the RTI Law.

The exceptions do not include a built-in severability clause, but Article 11(e) establishes the Principle of divisibility, whereby if only part of a document is confidential, the rest shall still be disclosed. Presumably this amounts to the same thing.

The RTI Law includes detailed rules limiting the duration of confidentiality, pursuant to Article 22. Where a "qualified quorum law" declares information confidential, it will maintain that character until another law of the same hierarchical status changes this. Otherwise, the Law appears to provide that information pursuant to it loses its confidential character after five years, although this may be extended for another five years upon petition by the public body or any individual, after evaluating the damage that disclosure would cause. Notwithstanding this, information shall remain confidential indefinitely where it relates to national defence, including military or strategic planning documents, or where it may affect Chile's territorial integrity, the "interpretation or compliance with an international treaty", defence of Chile's international rights or have a severe effect on foreign policy. Finally, the results of polls or surveys shall be confidential until the end of the presidential term in which they were ordered.

Although it is welcome that the RTI Law imposes some limitations on the duration of confidentiality, these provisions are problematical. They do not appear to impose any time limits on information declared confidential by another law. The categories of information which are indefinitely confidential are highly problematical. For the most part, they lack any reference to harm and it is unclear why information relating to the interpretation of an international treaty should be confidential, unless it is the subject of a legal case (in which case, it should be covered by an exception in favour of legally privileged information). Similarly, it is not clear why the results of polls or surveys should be subject to a special and blanket form of confidentiality, even if this is limited to the remaining duration of the presidential term.

The specific exceptions established in Article 21 are as follows:

- Information the disclosure of which would affect "the proper compliance" by a public body with its functions, particularly where:
  - it undermines the prevention, investigation or prosecution of a crime, or involves information necessary for legal and judicial defences;
  - it is preliminary information or deliberations prior to the adoption of a "regulation, measure or policy", without prejudice to openness once the measure has been adopted; or
  - the request is generic in nature and refers to a great number of documents, or to satisfy the request would unduly divert the resources of the public body.
- Information the disclosure or communication of which "affects" the rights of individuals, particularly their security, health, private life or commercial rights.
- Information the disclosure or communication of which "affects" the security of the nation, or maintenance of public order or security.
- Information the disclosure or communication of which "affects national interests", particularly in relation to health, international relations or public economic interests.
- Information which another law (defined as a "qualified quorum law") deems confidential, in accordance with Article 8 of the Constitution, quoted above.





Article 15 provides that where requested information is already available in published form, a request shall be satisfied by indicating to the applicant the manner in which the information may be accessed in this form.

Finally, pursuant to Article 20, where an interested third party provides a grounded objection to the release of information, the public body may not release that information unless the Council (see below) resolves otherwise.

For the most part, these exceptions refer to interests that are deemed legitimate as grounds for confidentiality under international law and in other right to information laws. The reference to the rights of others is, however, too generic in nature. Better practice right to information laws do not allow exceptions beyond the specific interests listed in the Chilean Law, and this latter should similarly restrict itself to this list. It is also excessive to render confidential all preliminary documents, without reference to any harm that disclosure might cause. Instead, a specific interest – such as integrity of the decision-making process or the free and frank provision of advice – should serve as the basis of the exception. The reference to “national interests” is far too broad and could be abused to render an extremely wide range of information confidential; once again, exceptions in other right to information laws are limited to the specific interests listed in the Chilean Law, which should also be so limited. Finally, the Article 20 rule gives far too much power to third parties to block disclosure. While it is appropriate for them to be able to make representations in cases involving requests for information affecting their interests, simply doing so should not impose confidentiality on that information, subject only to a Council override. It is enough if the public body is required to take third party representations into account.

### Appeals

Article 11(i) of the RTI Law provides for the Principle of control, whereby there shall be constant oversight of compliance with the norms established by the law and disputes shall be resolved by an “external organism”. Pursuant to Article 24, once a request has been denied or the time limit for a response has expired, an applicant may lodge a complaint with the Council for Transparency established by the Law. The complaint must be lodged within 15 days and must set out clearly the nature of the claim. Pursuant to Article 8, individuals may also lodge complaints with the Council about a failure of a public body to meet its proactive disclosure obligations (Article 8). Individuals residing outside of a city where the Council has an office may lodge a complaint with the governor’s office, which shall forward it to the Council.

Upon receiving a complaint, the Council shall forward it to the public body concerned, and any interested third party, who shall have ten working days to present observations. In appropriate cases, the Council may hold a hearing (Article 25). The Council shall normally decide upon a complaint within a further five days (Article 27). Where the Council decides in favour of the applicant, it shall set a reasonable term for delivery of the information and may, if appropriate, point out the need for a disciplinary investigation. Otherwise, if the Council upholds the confidentiality of the information, this will also apply to all of the papers that formed the basis for the Council’s decision; if the decision is to disclose the information, the same papers shall also be public (Article 26).

The provision for an independent administrative appeals body is a welcome one, which, although not very common in Latin America, is well established around the world as a key tool for ensuring the right to information in practice. At the same time, there are some problems with this procedure. First, the grounds for complaint are rather narrow. They do not, for example, include cases where excessive fees are charged or the information is not provided in the form requested, and arguably they do not apply in cases of a late, but positive, answer to a request. Second, the remedial measures the Council may order are rather limited in nature. It would be preferable, for example, if it could order such things as compensation to the applicant, where warranted, or require the public body to undertake training or put in place other structural measures. The rule that the documents of the Council shall be confidential in case the complaint is rejected is inappropriate.



The Council is a public body and it should be governed by the exceptions set out in the law in the same way as any other public body. Finally, it is not clear what powers the Council has when investigating a complaint, for example whether it may review the information claimed to be confidential or compel witnesses to testify before it in the event of a hearing. These are powers which have been allocated to oversight bodies in better practice right to information laws.

Applicants may, within 15 days, lodge an appeal against a decision of the Council with the Court of Appeals (Article 28). It would appear that public bodies can do the same, except when a complaint is based on Article 21(1) (dealing with information the disclosure of which would undermine a criminal investigation or internal information before a decision is adopted). Where an appeal is lodged against a decision to disclose information, the appeal will suspend the disclosure (Article 29). As with complaints to the Council, other interested parties will be notified and given an opportunity to make representations within ten days. Strict timelines for dealing with appeals are set out in the law. There is no appeal from a decision of the Court of Appeals (Article 30).

The Council for Transparency is established by the RTI Law as an autonomous public body with its own legal personality, housed in Santiago and with a general mandate to promote transparency and a detailed mandate that includes, among other things, resolving information disputes (Articles 31-33). Members of the Executive Board of the Council are proposed as a group by the President to the Senate, which must either accept or reject the whole group (Article 36). A number of politically connected individuals – including Representatives and Senators, members of various courts, governors, mayors, prosecutors, administrators of political parties and the like – are prohibited from being appointed as members of the Board (Article 37). Appointments are for six years (although the initial appointments are staggered), and individuals may be reappointed once. The members appoint their own president, who shall serve for 18 months and may not be reappointed (Article 36).

Members of the Board may be removed by the Supreme Court, upon request of the President or upon request of at least ten members of the House of Representatives, for incapacity, misconduct or manifest negligence. Members may also resign or be removed for 'overwhelming incompatibility' as voted on by a majority of the remaining members (Article 38). The Law also sets out clear rules regarding the remuneration of members (Article 39) and rules of operation, including the adoption of statutes, which shall be proposed by at least three-fourths of all members to the President (Articles 40-41). Finally, funding for the Council shall come from funds allocated from the national budget, property transferred to it or acquired by it, and any donations it receives, which shall be tax exempt (Article 44).

Overall, these are good provisions for ensuring the independence of the Council. In the end, however, as with all such bodies, the effectiveness of the Council will depend more on the individuals who are actually appointed than formal legal provisions. Early indications are that independent individuals have been appointed to this body.

## Sanctions and Protections

Article 11(j) establishes the Principle of responsibility, according to which non-compliance with the rules in the RTI Law shall engage the responsibility of public bodies and may open them up to sanctions. The head of a public body shall be responsible for denying, without ground, access to information and may be sanctioned with a fine of between 20%-50% of his or her salary. A similar fine may be levied for a failure to deliver information on time and, in case of persistence, this shall be doubled and the head may be suspended for five days (Articles 45-46). Unjustified non-compliance by anyone with the "norms on active transparency" shall attract a similar fine (Article 47). Any sanctions ordered shall be posted on the website of the Council and the respective public body within five days of their having being ordered (Article 48).

It is important for a right to information law to provide for sanctions and so these provisions are welcome. At the same time, the regime of sanctions could be improved in a number of ways. It is



not clear why different provisions apply to the head of a public body and other officials, or why the latter is so much broader in scope (any failure to apply the norms versus only a failure to provide access to information). It would be simpler and clearer if the same regime applied to everyone. It might also be fairer if sanctions were only applied in cases of wilful, wrongful or negligent failures, so as not to place officials at risk for any mistakes they make, even if in good faith. On the other hand, at least potentially more severe sanctions should be available for repeated and wilful failures to apply the law, probably including the possibility of imprisonment.

The Law does not provide protection for those who release information in good faith pursuant to it. This is important to give officials the confidence to release information pursuant to the new law, given that they have been used to operating largely in secret in the past. The Law also fails to provide protection for those who release information in good faith that reveals wrongdoing (whistleblowers), although these find protection in Law N° 20.205 of 2007.<sup>4</sup> This is also important to promote a flow of information in the public interest.

### Promotional Measures

The RTI Law includes relatively few promotional measures. It does generally allocate responsibility to the Council to undertake a wide number of positive measures to promote the right to information. The functions of the Council include, among others, promoting transparency in public office, setting standards for compliance with the Law and ensuring implementation of those standards, formulating recommendations to public bodies to improve their performance, making recommendations for normative change, undertaking training activities, promoting public awareness of the law, issuing reports on transparency and compliance by public bodies with their obligations, ensuring appropriate protection of confidential and personal information, and collaborating with others working in this area, both national and international. The Law also notes that, apart from information specifically required to be confidential, all of the acts and documents of the Council shall be public.

This is an impressive list of activities for the Council which, if performed effectively, would go a long way to ensuring the success of the Law. At the same time, a few more specific instructions might be useful to ensure that the Council does perform its tasks. Many laws specifically require a central promotional body like the Council to publish and widely disseminate a guide to using the law. This body is also often specifically required to report on activities to implement the law, including on requests and how they have been dealt with. For this purpose, public bodies are put under a corresponding obligation to report to the central body on their own processing of requests.

Better practice right to information laws also put in place a system to promote sound record management by public bodies. This should include a system for setting mandatory minimum standards (a task that could be undertaken by the Council) and allocating responsibility to a central body to oversee compliance with these standards. Finally, many right to information laws require each public body to identify a central official who is responsible for oversight of that body's obligations under the law, including to receive and process requests. This ensures a central locus of responsibility, as well as a clearly identifiable point of access for the public.

### Notes

- 1 Supreme Decree No. 1.150 of 1980. Article 8 was amended by Law No. 20.050 of 2005.
- 2 *Claude Reyes and Others v. Chile*, 19 September 2006, Series C, No. 151. See the chapter on International Standards and Trends for an analysis of this case.
- 3 The main part of this chapter will use the term public bodies to refer to the first set of public bodies defined here and the obligations outlined in the chapter are those from the main body of the Law rather than the specific obligations for the second set of bodies referred to in the Transitory Dispositions.
- 4 Ley que Protege al Funcionario que Denuncia Irregularidades y Faltas al Principio de Probidad (roughly translated as Law that Protects Civil Servants that report irregularities and offenses to the principle of probity).

Colombia





## Introduction

Article 74 of the 1991 Constitution of Colombia includes a general guarantee of the right of every person to access public documents, unless restricted by law. The Constitution also includes a number of related provisions. Article 15 provides that “individuals have the right to know, update, and rectify information gathered about them in data banks and in the records of public and private entities”, otherwise known as the right of Habeas Data. Article 23 establishes the right of every person to present respectful petitions to the authorities for reasons of general or particular interest and to obtain a quick and pertinent response (normally 15 days). Article 112 protects parties and political movements that do not participate in government (i.e. opposition parties), including their right to “access official information and documentation”, except as restricted by law. Article 135(3) protects the right of each chamber of parliament to solicit such information as it may need from government, although this does not extend to “information regarding instructions in diplomatic matters or negotiations of a classified nature” (see Article 136(2)).

Law 57 of 1985 by which the Disclosure of Official Acts and Documents is Ordered (RTI Law) was published in the Official Diary on 12 July 1985. It establishes a general right of access to information held by public authorities. As far back as 1888, in Colombia’s first Code of Municipal and Political Organization, individuals in Colombia have a right to request information held by public authorities.<sup>1</sup> It is also supported by Law 594 of 2000, the Public Archive Law, Article 27 of which states that everyone has the right to consult documents held in public archives and to solicit copy of those documents, unless they are classified by law.

Compared to other right to information laws, the Colombian RTI Law is very brief and it fails to elaborate on many matters that are normally included within the scope of such a law, perhaps because it was the first country in Latin America to adopt such legislation. The most significant weakness in this regard is that the Law fails to include any promotional measures, which may seriously undermine implementation in practice. The procedural rules are also rather limited, the Law does not even define what is covered by the term information and the definition of public bodies is rather limited in scope. The Law does not include any regime for exceptions, instead deferring to other laws in relation to this key issue. There is no provision for either internal complaints or appeals to an independent administrative oversight body, or any protection for good faith disclosures. However, the Colombian Administrative Code<sup>2</sup> does establish some regulations and procedures to support the presumption of disclosure in the RTI Law.

On the other hand, the Law does include some positive features. Where public bodies fail to respect the timelines for responding to requests, they must provide the information to the applicant and any failure to do so will result in the responsible official losing his or her job. It would appear that fees may only be charged where reproduction of a larger number of pages of information is required. And the Law includes relatively extensive proactive publication obligations.

## The Right of Access

Article 12 of the RTI Law provides that every person has the right to access information in documents held by public bodies and to request copies of those documents, as long as they are not declared confidential by law. This is a clear statement of the right of access. The Law does not include any statement of its purposes.

The Law does not include a definition of what constitutes information. There is, however, a longish list of types of public bodies covered by the Law, including the Attorney General, ministries,



administrative departments, state governments, mayors' offices, administrative organs created by departmental assemblies, municipal councils, 'public establishments', State industrial or commercial companies, mixed corporations ('mixed economy societies') where over 50% of the capital is owned by public bodies, any other entity over which the Comptroller General holds fiscal authority, and 'popular election corporations', whose role is to oversee actions by the governors (Articles 14 and 27). This appears to be limited to the executive branch of government, excluding the legislative and judicial branches, save for limited proactive publication rules in relation to the former. It might also not include some bodies created by the Constitution or other laws. It does include State corporations, but not necessarily private bodies working under public contracts. And it also fails to include private bodies undertaking public functions without public funding.

It is clear from Article 12 of the Law that the right of access extends to everyone, not just to citizens.

### **Procedural Guarantees**

The RTI Law is, overall, very weak on procedural rules and many matters that are provided for in other right to information laws are missing from the Colombian law.

Pursuant to Article 15, the authority to grant access to information shall be given by the head of the public body, or a public servant authorised by him or her, suggesting that this is also the person with whom which requests should be lodged. Otherwise, the Law is silent as to the manner in which requests should be made, in particular failing to specify what information must be provided as part of a request, whether reasons may be required for requests and whether requests may be made electronically, orally and so on. The Law does make it clear that requests may be lodged either by the requester personally or by an accredited legal representative. These weaknesses in the RTI Law are at least partially addressed by the Administrative Code, as developed by the jurisprudence of the Constitutional Court.

According to Article 25, responses to requests must be provided within ten days. In case this deadline is not met, the Law assumes that the request has been approved and the information must be provided within three more days. This is a progressive provision which will put some pressure on officials to meet the timelines. Furthermore, any official who refuses to provide the information in such cases will be sanctioned by losing his or her job. In addition, the Constitutional Court has highlighted the obligation to provide a response to a request for information, which may not be met with silence. Article 23 provides that requests by journalists working for mass media outlets shall be given priority.

The Law does not include any provisions relating to transfer of requests or for consultation with any third parties who supplied the requested information, although this is addressed by Article 33 of the Administrative Code. Article 25 of the RTI Law implies that at least some basic notice – i.e. of the fact that the request has been refused – must be provided where this is the case. Article 21 provides further that any refusal of access must be motivated, indicating the legal provisions upon which such refusal is based, a more fulsome notice rule, although there is no requirement to inform requesters of their right to appeal against such refusal.

The Law does not specifically provide for different forms of access, although Article 15 does refer to both the idea of reviewing information in person and getting copies of documents. Furthermore, Article 16 requires any consultation to take place in office hours and, 'if necessary', in the presence of an official, although it is not clear why this might be required.

The provisions on fees are a bit confusing. Article 17 allows public bodies to charge for the 'expedition of copies' when the number of copies makes this necessary, implying that smaller requests shall be free. The rate shall be set by the official with authority to provide the information,



but may not exceed the cost of reproduction. Pursuant to Article 18, where the public body cannot reproduce the documents, or the requester deems the rate to be too high, the head of the public body may select the place where copies will be made, with all costs to be paid by the requester.

It is not clear what number of copies might trigger the necessity requirement of Article 17 or why the cost of reproduction would be significantly different at a public body than at any other place. It also seems anomalous and potentially problematical for the head of the public body to choose an alternative copying location while the requester is expected to pay for this. A better system would be for a consistent rate to be set centrally and for all public bodies to charge this rate for copies. The rules also fail to provide for fee waivers for poor requesters or for requests in the public interest.

## Duty to Publish

The rules on proactive disclosure are relatively well-developed, comprising some 11 articles. The main means of disseminating information foreseen by the Law is through official bulletins or gazettes. Article 1 provides generally for the nation, departments and municipalities to include in their respective official gazettes any information that the public should know regarding the management of public affairs or to maintain effective control over the activities of officials, and anything else that is required by law to be published to have legal effect. Article 2 sets out a list of categories of information that must additionally be published in the Official Diary, including laws adopted by the National Congress, government decrees, executive resolutions, contracts that are required by law to be published, and acts of other public bodies or delegated bodies that create 'objective situations' of general interest.

Pursuant to Article 5, each department shall issue a bulletin or gazette containing, among other things, the departmental assembly's ordinances, the acts of the assembly and executive board relating to the execution of the budget and the management of personnel, the governor's decrees and resolutions, contracts, where fiscal norms require this, and acts of various bodies that create 'objective legal situations' of general interest. Article 4 requires these bulletins or gazettes to be published at least once a month. The body responsible for these publications will determine how many copies are needed, taking into account the need for free distribution to public offices, universities, the media, professional bodies and associations (Article 11).

Article 3 provides that, where the volume of information warrants, the government may authorise the publication of additional bulletins or gazettes to disseminate the acts of ministries, administrative departments and dependent bodies. However, the Official Diary will continue to contain acts signed or authorised by the President. Pursuant to Article 10, 'Jurisdictional and Commissary Councils' may order the publication of additional bulletins or gazettes to disseminate information relating to their work. Article 6 also allows assemblies to publish other publications. None of these publications replace departmental assemblies' annual reports (Article 7).

Pursuant to Article 28, the Congress' Memoirs will publish acts of those authorities which handle the budget for the legislative branch, along with information about their management of their personnel.

Apart from Article 11, relating to the number of copies, the Law does not address the question of dissemination of this information. It also does not build in a system to lever up the amount of information subject to proactive publication over time. Furthermore, the reliance on hardcopy publications – namely bulletins and gazettes – deprives the system of the advantages of Internet publication. However, since 2002, the government has gradually brought into force an electronic government strategy that has improved the amount of public information available through the Internet, at least in relation to the executive branch.





### Exceptions

The regime of exceptions in the RTI Law is not very clear. Article 12, setting out the basic right of access, suggests that it is limited to documents which are not rendered confidential by law or the Constitution, or that have any relation to national security or defence. There is otherwise no list of exceptions in the Law, and so it would appear simply to defer to other laws on this issue rather than deal with it directly.

Article 13, as modified by Article 28 of Law 594 of 2000, provides that confidentiality lasts only for 30 years, following which documents are deemed historical and must be made available. This is a long period of confidentiality, particularly for relatively less sensitive information. Where information has already been published, the requester shall be made aware of this and of the date and place of such publication, provided that if the publication is no longer available, the request shall be treated in the normal fashion (Article 22). This is a positive gloss on this otherwise common rule, which should prevent applicants from being unable to locate the information sought.

A number of articles limit the scope of exceptions. Article 19 provides that administrative investigations shall not be deemed confidential, with the proviso that in responding to any request for such documents, any information provided by those accused of committing the wrong must be included. Furthermore, if a particular document is confidential, the rest of the file or case shall still be made available, a sort of limited severability clause. Otherwise, however, the Law does not include a severability clause.

Pursuant to Article 20, confidentiality shall not apply when other officials request information relating to their work, although the requesting official shall respect confidentiality by not passing on the information further.

This regime of exceptions is problematical primarily because it does not include a list of exceptions, instead deferring this to other laws, which presumably fail to provide the sorts of limitations on exceptions that are commonly found in other right to information laws, namely the restriction of exceptions to cases where there is a risk of harm to protected interests and the application of a public interest override so that information will still be made available where this is in the overall public interest. At the same time, the Colombian Constitutional Court has issued several rulings in which it has ordered the disclosure of information denied on the basis of national security.<sup>3</sup>

### Appeals

The RTI Law includes only one provision relating to appeals, Article 21, which provides for an appeal to the Court of Administrative Disputes with jurisdiction over the territory where the documents are found. The official handling the request shall send the relevant documents to the Court, which shall decide the case within ten working days, not including the time taken to send the documents to the Court.

This is a very limited regime for appeals, particularly inasmuch as no provision is made for an independent administrative oversight body, such as is found in better practice right to information laws. Such oversight bodies have proven to be very important in ensuring proper implementation right to information laws, given the prohibitive costs and time involved in taking information appeals to court.

### Sanctions and Protections

Article 29 provides that non-compliance with or violation of any of the provisions in the Law constitutes bad conduct and will be sanctioned with 'destitution'. Article 25, as already noted, provides for officials to be removed from their job for failing to apply the rules relating to breach of the timelines for responding to requests.



These are reasonable sanction provisions although they are somewhat limited based on the fact that the Law itself is also limited (i.e. it does not detail as many obligations as a more in-depth right to information law would). The Law fails to provide any protection for good faith disclosures, either pursuant to the law or to expose wrongdoing (whistleblowers).

## Promotional Measures

The RTI Law does not include any promotional measures whatsoever, in what is a very serious shortcoming. The lack of any such provisions is likely to prove a significant hurdle to efforts to implement the Law.

## Notes

- 1 Law 4 of 1914.
- 2 Decree 1 of 1984.
- 3 See decision T-1025 de 2007, among others. Available at: [www.constitucional.gov.co](http://www.constitucional.gov.co).

# Dominican Republic





## Dominican Republic

### Introduction

The Constitution of the Republic of Dominica of 1994,<sup>1</sup> does not provide for a general guarantee of the right to information. Article 8(1) does provide for free access by the media to official and private news sources, subject to certain constraints, but this is quite a different matter.

The General Law on Free Access to Public Information (RTI Law) was adopted in 2004 to give effect to the right to information.<sup>2</sup> Overall, the RTI Law is a reasonable one, which should help foster public access to information. There are, however, a number of serious shortcomings, including limitations in the scope of application as regards information covered, a seriously overbroad regime of exceptions, which recognises secrecy provisions in other laws and which does not include a harm test or public interest override, limited sanctions for breach of the law and an absence of protection for those that disclose information in good faith, and a very limited package of promotional measures.

At the same time, the Law does include some positive and innovative features, including shorter timelines for refusals to provide access, and a broad duty of proactive publication, including to facilitate public consultations on the development of regulatory rules.

### The Right of Access

Article 1 of the RTI Law states that everyone has the right to request and receive “complete, truthful, adequate and timely information” from a range of public bodies. Article 2 elaborates on the nature of the right by stipulating that it includes the right to access information in files held by the public administration and to be informed periodically of the activities undertaken by public bodies, as well as to obtain copies of documents. However, where a special law regulates access to administrative information, the “precepts and procedures” of that law shall apply, provided that the rules on appeals and sanctions set out in Articles 27-31<sup>3</sup> shall still apply (Article 31).

This is a strong statement of the right of access, although the reference to ‘truthful’ information could be unhelpful if interpreted to mean that where a public body held inaccurate information, it should not be provided. Instead, this should be interpreted to mean that the response to a request should itself be ‘truthful’, in the sense of not hiding anything. The limitation in favour of other laws is a potentially serious shortcoming, particularly if those other laws contain unduly broad regimes of exceptions or procedures that are less conducive to the right to information than those of the main RTI Law.

The RTI Law does not include a specific section on purposes or objectives. The preamble refers to several international documents, including the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *Inter-American Convention on Human Rights*, as well as the Constitution. It also recognises the right of access to information as a ‘source’ for developing and strengthening democracy, as it allows citizens to “analyze, judge and evaluate the actions or their representatives” and generally promotes administrative transparency.

Information is defined in Article 2(para.) as all documents recorded “in writing, optically, acoustically, or in any other way”, but only insofar as such documents have “ends or objectives of a public nature”. Furthermore, draft documents are not included. Article 6 elaborates on this, providing that the public bodies must promote access to all information created or obtained by them, or in their possession or control, including any information relating to the public budget



or from private financial institutions that serves as the basis for an administrative decision, and records of official meetings.

This definition is *prima facie* very broad but it is subject to unfortunate limitations. The proviso that it covers only documents that have public ends introduces an unnecessary further decision-making step into the access process, and gives officials an opportunity to deny access for illegitimate reasons. It would be preferable simply to include all information held by a public body on the assumption that this is inherently for public ends, or that it might be relevant for the public to know that public bodies are holding information that is not for public ends. Furthermore, the exclusion of draft documents is a very significant one, not found in better practice right to information laws. Instead, all information should be covered, subject only to the exceptions in the law, which should recognise the need for public bodies to have some space to develop draft documents. At the same time, the guarantee of open records of official meetings is an innovative feature which could help to open up public bodies.

The right of access applies to information held by all “organisms and entities” of both the centralised public administration, and autonomous or decentralised State bodies, including the National District and municipal bodies. It also applies to self-regulating bodies, public enterprises and those with State ‘participation’, anonymous societies and companies, private bodies that receive State funds, and the legislative and judicial branches of government (Article 1). Article 4(para.) specifies that political parties must provide information on the identity of those that contribute to them, as well as the “origin and destiny” of their funding. This is broad in scope and presumably already covers all bodies established by law, although it might be useful to specify this. The RTI Law does not, however, appear to apply to private bodies which conduct public functions without public funding.

As noted, Article 1 provides that everyone has the right to access information, which is not, therefore, limited to citizens.

### **Procedural Guarantees**

Pursuant to Article 7, a request for information must be in writing and contain the name and “character” of the applicant, a clear and precise description of the information sought, as well as the public body to which the request is directed, the reason for the request and the ‘address’ to which the information should be sent. It is unfortunate that reasons must be provided for a request, contrary to clear international standards and better national practice on this. It is not for officials to assess applicants’ reasons for exercising their right to information. Where a request does not contain all of the requisite information, the public body must inform the applicant of this and provide support to help the applicant remedy the problem.

Article 8 provides for requests to be processed within 15 working days, which may “exceptionally” be extended for another ten working days where gathering the information is difficult, in which case the reasons for the extension must be communicated to the applicant before the expiry of the original 15 days. Where a request is to be rejected, written notice of this must be provided within five days of receipt of the request (Article 7(3)). Failure to respect these timelines will be considered to be a breach of the law (Article 10), a progressive provision which should help promote compliance. The idea of providing for a shorter timeframe for rejecting requests is an interesting innovation in the RTI Law and this is an impressively short period for rejections. At the same time, five days may be unrealistically short in some cases, for example where other bodies need to be consulted.

Where a request for information is directed at a body that does not hold the information, or “is not competent to deliver the information”, it shall forward the request to the competent public body. In no case shall this cause the request to be rejected (Article 7(2)). The RTI Law does not



specifically provide for consultation with third parties where they have provided the information sought. However, where the consent of a third party is required, the applicant may request the public body to ask for such consent. Where it is not provided within the established timeframe for responding to the request, it is deemed to have been denied (Article 19). It is not clear why a third party should effectively have a veto over the disclosure of information; exceptions should be based on objective criteria, not personal vetoes.

As noted, written notice must be provided where a request is rejected. Such notice must include the “legal reasons” for the denial of access (Article 26).

Article 2 provides for a right to obtain copies of documents. Article 11 elaborates on this, providing that information may be delivered in person, by telephone, fax, mail or email, or in formats available via a website. Article 12 further provides that a secure system must be established for providing information to citizens, including with appropriate technical “precautions”, such as encryption and electronic signatures. It is not clear why these should be necessary for the provision of information other, perhaps, than of a personal nature. The RTI Law does not, however, appear to provide for applicants to specify the means by which they would like to access the information, for example by inspection or in a specific format (such as electronically or in print form).

Article 14 provides for free access to information, as long as no copy of the information is required. In any case, the cost must be reasonable and be calculated on the basis of the actual cost of providing the information. However, Article 15 provides that public bodies may set rates for searching for and reproducing information, as long as this does not undermine the right of access. Differentiated rates may be set for cases where the information is to be used for commercial purposes, and fee waivers may be established for educational, scientific, non-lucrative or public interest requests.

It is not clear how Articles 14 and 15 can be reconciled, since the former appears to exclude the possibility of charging for searching for information, while the latter does the reverse. Better practice is not to charge for the cost of searching for information, among other things because this is at least partly a function of how well a public body keeps its records, which applicants should not have to pay for. Furthermore, it would be preferable if fees were set centrally, so as to avoid a patchwork of fees across the different public bodies.

## **Duty to Publish**

All public bodies must, pursuant to Article 3, provide “permanent, up to date” information on a range of general issues including: their budgets, resources and expenditures and the execution of the same; their programmes and projects and the execution thereof; calls for tenders, contests, sales and their results; a list of categories of officers and employees, their functions and pay scales and any sworn asset declarations required by law to be filed; a list of beneficiaries of public assistance programmes, subsidies, grants and pension or retirement funds; statements of their public debt, along with payment deadlines; the regulatory framework governing them, including laws, decrees, regulations and other norms; “indexes, statistics and official values”; the regulatory, legal and contractual framework, including conditions, negotiations, rates and sanctions for the rendering of any public services; and any other information required by law to be published. This is supplemented by Article 7(4), providing for proactive publication of information in a simple and accessible form about how to make requests for information, how to fill in request forms and where to go to lodge complaints or queries regarding access to information.

Pursuant to Article 5, all public bodies must, in future, develop websites to ensure direct access to public information, for free and without having to make a request. The article sets out three principles governing the development of such websites: they should provide information on the



structure, staff, operating norms, projects, management reports and databases of the body; they should include a communications function for customers or users to lodge queries, complaints and suggestions; and they should carry “procedures or bilateral transactions”.

These are progressive and extensive proactive publication obligations. Given the cost of providing information on a proactive basis, consideration should be given to including some system for levering up the amount of information provided on a proactive basis over time. For example, public bodies could be required to set out plans for achieving and exceeding these goals over time, to be approved by an external, independent body. This is perhaps of particular importance in relation to the development of websites, which are listed as a ‘future’ activity in the RTI Law.

Chapter III of the RTI Law, containing Articles 23-25, includes a unique and progressive feature, namely a regime for the proactive dissemination of information about the development of regulatory rules by public bodies, with a view to ensuring appropriate wider public consultation on such matters. Article 23 provides for public bodies to publish, through official or private media of wide circulation, including electronic media, draft regulations of a general nature they intend to adopt, whether these affect relations between individuals and the public body or are because individuals demand this to exercise their rights. Such publication must take place ‘sufficiently’ in advance of the planned date of adoption, presumably to facilitate public participation.

Public bodies must provide for proactive publication for purposes of consultation in their budgets and, where they have a website, must include a special section on the website providing this information in a up-to-date fashion, and in a clear and understandable form to the average citizen (Article 25).

Article 26 sets out a special regime of exceptions to the above, including where non-publication is in the overall public interest, where publication may affect internal security or international relations, where publication may create confusion, where, due to the nature of the issue, such publication may harm the normative value of the regulation, or where, due to urgency, it is necessary to expedite a budget regulation without prior consultation. These exceptions are problematical (see below) and it would be preferable for the larger part simply to subject this special proactive publication system to the general regime of exceptions in the law, which should protect all legitimate reasons for confidentiality.

### **Exceptions**

Article 2 provides generally that the right of access may be limited where provision of the information may affect national security, public order, public morality or wellbeing, and the rights to privacy, intimacy and reputation. Articles 17 and 18 contain a comprehensive regime of exceptions to the right to information. Indeed, the regime of exceptions is far too broad, and this is a serious shortcoming in the RTI Law.

The RTI Law does not specifically establish how it shall relate to other laws or, in particular, whether, in case of conflict, it shall dominate or be subject to secrecy laws. This is an important issue for right to information laws which should receive specific attention so as to avoid confusion. However, Article 2, noted above, suggests that it leaves in place secrecy provisions and systems in other laws. This is clearly contrary to best practice, whereby right to information laws override inconsistent secrecy laws, so as really to impose a new regime of openness to replace past secretive practices.

A few of the exceptions in the RTI Law are class exceptions, in the sense that they do not require any harm at all. This is the case, for example, for information linked to defence, information defined in contracts as confidential, the provision of advice as part of the deliberative process, and information relating to legal cases which is subject to a legal or judicial order of confidentiality.





International standards and better practice make it clear that all exceptions should be subject to a harm test.

The rest of the exceptions use a combination of 'harm' tests. In some cases, the RTI Law simply refers to the risk that information 'may affect' an interest, although it is presumed that the effect must be negative in nature (and hence involves some sort of harm). In other cases, terms such as 'may harm', 'may compromise' or 'can harm' are used. Although a form of harm test, these are weak in the sense that the risk of harm required is very low. A better formulation would be 'likely to cause harm' to the protected interest.

The RTI Law does not include a public interest override, whereby information should still be disclosed where this would be in the overall public interest, even if the disclosure would cause harm to a protected interest. This is unfortunate as the public interest override is an important means of ensuring that information of key public importance is still disclosed. A very limited public interest override is provided for in relation to personal information, where, if the applicant proves that the information is of public interest and relates to an ongoing investigation, it should still be disclosed.

The RTI Law also does not include a severability provision, whereby if some of the information in a document is confidential, the rest should still be disclosed if it may reasonably be separated from the confidential part. Once again, this is an important practical disclosure provision.

Pursuant to Article 21, where another law does not prescribe a period of reservation, the regime of exceptions in the RTI Law shall last for five years, after which the information shall be accessible. This is a short and progressive overall time limit, albeit subject to longer periods set out in other laws.

The specific exceptions listed in Article 17 of the RTI Law are as follows:

- Information "linked to" defence or security that has been classified in accordance with a law or executive decree.
- Information which can affect international relations.
- Information the immediate disclosure of which can affect a public measure.
- Information which may affect the banking or financial systems.
- Information the disclosure of which may compromise a legal strategy of a public body or breach legal privilege.
- Information classified as confidential to protect strategic or scientific technological, communication, industrial or financial projects, where disclosure may harm the national interest.
- Information the disclosure of which may harm a State administrative investigation.
- Information the disclosure of which may undermine the equality of a competition.
- Information defined in contracts as confidential in terms of legislation on administrative hiring.
- Information which contains advice as part of a deliberative process prior to a decision, provided that this exception ends when the decision is made, if that decision refers explicitly to the advice.
- Information the disclosure of which could cause harm to the commercial position of a private party or of the State.
- Information in relation to a specific case which is the subject of a judicial or legal order of confidentiality.
- Information the disclosure of which could undermine privacy or the life or security of individuals.
- Information the disclosure of which could risk public health and safety, the environment or public interests in general.



Pursuant to Article 18, requests for information may also be denied where provision of the information may “affect preponderant private interests and rights”, including where the information contains personal data and to disclose it would constitute an invasion of privacy, unless the applicant proves disclosure of the information is in the public interest and could help solve an ongoing investigation by another public body, the affected person consents, or another law provides for its publication. Where such consent is required, it must be express and where consent is not obtained within the established timeframe, it shall be considered to have been denied (Article 19). Article 18 also rules out disclosure of information the disclosure of which may affect the right to intellectual property or copyright.

Finally, Article 13 provides that, where information has previously been published, applicants may be notified of this fact instead of being given direct access to the information.

For the most part, the exceptions listed in these articles refer to legitimate protected interests, such as security, international relations, commercial competitiveness and so on. Some, however, are not found in other right to information laws. It is, for example, legitimate to protect the ability of the government to manage the economy, but the RTI Law is much wider, protecting all aspects of the banking and financial systems. Similarly, it is legitimate to protect public economic interests, but the RTI Law goes further and protects all strategic and scientific interests. The RTI Law also protects a number of interests that are very vague and hence susceptible to wide interpretation, and which are also not protected in other right to information laws, such as ‘public measures’, ‘national interests’ and the “public interest in general”.

### Appeals

Article 27 provides for a right for an applicant to appeal against any decision with which he or she disagrees to a “superior authority” within the same public body, a form of internal appeal (see also Article 26(2)). Such an appeal can be a useful way of resolving problems given that superior officers often have greater confidence to disclose information, particularly in the early stages of implementation of a right to information law.

Article 16 provides generally for a right to appeal to the Resource of Appeal where an applicant has been “hindered” in his or her right to information. Pursuant to Article 28, applicants may appeal from the decision of the superior officer, as provided for in Article 27, to the Superior Administrative Court, within 15 working days. Article 29 provides for an appeal to the Resource of Appeal before the Court of Administrative Litigation where a request has not been satisfied within the established time frame. In this case, the applicant must specify the steps he or she has taken, including by providing copies of written requests for information, along with the harm the delay has caused. If the case is accepted, the Court shall require the public body to explain the cause of the delay, after which the Court will decide on the case and, where it upholds the claim, it will set a term for the public body to respond by providing the information.

The relationship between appeals to the Superior Administrative Court and to the Resource of Appeal before the Court of Administrative Litigation are not clear, although the latter procedure appears to be designed to focus on delays, while the former procedure is not so constrained.

These procedures for appeal to the courts are useful but experience in other countries has demonstrated that effective implementation of the right to information is greatly facilitated where applicants can appeal to an independent administrative body against access to information failures. This is far less time-consuming and expensive than appeals to courts, which are outside the reach of the vast majority of those seeking access to information.



## Sanctions and Protections

Article 9 of the RTI Law provides that breach of the established timelines for responding to a request for information, as well as any other conduct that violates or hinders the right to information, shall constitute a “severe fault” on the part of the responsible officer or his or her functions, without prejudice to any other sanctions.

Pursuant to Article 10, breach of the time limits, or providing illegitimate reasons so as to hinder access, shall be considered to be a breach by the public body of the RTI Law, with the consequence that those responsible will receive the sanctions provided for in the Law. Pursuant to Article 30, the sanction for arbitrarily denying or hindering access to information is imprisonment for six months to two years, and a ban from being employed as a civil servant for five years.

Sanctions for breach of the right to information are an important means of promoting respect for the right in practice. At the same time, these provisions suffer from a lack of clear coherence and flexibility. It would be simpler if the law provided that any wilful breach of the right of access, whatever form it might take (i.e. not just breaching the time limits or providing illegitimate reasons for denying a request), would lead to sanctions. Establishing a minimum term of imprisonment for such an offence is too severe and it would be preferable to provide for a range of sanctions, from fines to imprisonment in more serious cases, so that the sanction may be adapted to the wrong done. Furthermore, it would be useful to consider the idea of sanctions being applied directly to public bodies which fail to respect the right to information, as these problems are often systemic in nature, going beyond just one or two officials.

The RTI Law does not provide for protection for those who disclose information in good faith either pursuant to the law or to expose wrongdoing. The former is important to give civil servants a sense of confidence to apply the new right to information law properly given past tendencies of excessive secrecy. The latter is an important information safety valve, ensuring that information of key public importance does get revealed.

## Promotional Measures

The RTI Law includes very few promotional measures, a serious shortcoming given the importance of these to making the new law work in practice. Article 4 provides generally that public bodies shall put in place internal systems for managing information of public interest, both to be able to respond to requests and to be able to provide it on a proactive basis. This is useful but it would be preferable if the law provided a more effective system to ensure proper record management, for example by identifying a central body with the power to set and implement record management standards throughout the civil service.

Article 22 describes journalistic investigations into public activities of public bodies as “manifestations of a social function that has transcendental value” for the right to information. As a result, public bodies should provide “special protection and support” for the media, including by guaranteeing journalists access to documents, administrative acts and other “elements” that illustrate the above, on terms no less favourable than anyone else.

It is not clear what the real purpose of these provisions is, since they really only guarantee that journalists should not be discriminated against in relation to the provision of information, something which is already implicit in the RTI Law. Furthermore, although it is true that the media play a special role in relation to access to information, it is not necessary to privilege them in this regard, something which is very rarely found in other right to information laws.

Otherwise, the RTI Law lacks a number of promotional measures included in many other right to information laws. It does not require public bodies to appoint information officers, a useful way



of ensuring that there is a single central contact point for applicants wishing to make requests for information. It does not identify a central body with general responsibility for promoting implementation of the law and public awareness of the right to information, including by producing and disseminating widely a guide on how to use the law. It does not require public bodies to undertake training of public officials with a view to ensuring proper implementation of the law. And it does not establish a system of reporting on implementation, so that this can be monitored, and weakness identified and addressed, and so that the legislature is given a formal opportunity at least annually to consider implementation of the law. Together, these omissions are serious.

## Notes

- 1 Adopted by the National Assembly on 14 August 1994, as amended.
- 2 Law Number 200-04, promulgated on 28 July 2004.
- 3 It is assumed that the reference should be to Articles 26-30, since these constitute two separate and complete chapters of the RTI Law, and the referring article is itself Article 31.

Ecuador





## Introduction

Article 18(2) of the 2008 Constitution of Ecuador provides that everyone, either individually or collectively, has the right to access information held by public bodies or by private bodies that receive State funds or that perform public functions. This right shall not be limited except as provided for by law, and may not be limited at all in the context of human rights violations. Article 91 provides for legal action to protect the right to information where this has been denied, in whole or in part, whether explicitly or informally. Pursuant to Article 265, all information on the formulation, approval and implementation of the budget must be public and must also be proactively disseminated to the public through the appropriate media.

The Organic Law on Transparency and Access to Public Information (RTI Law)<sup>1</sup> was adopted in 2004 to give effect to the right to information. Overall, the Law provides fairly strong protection for the right to information, although it has some important shortcomings. The procedural rules are relatively brief, omitting a number of rules found in most right to information laws, such as regarding notice to be provided upon refusal of access, the right to stipulate the form in which one would like to obtain access and rules on transfer of requests where this is necessary. Instead of spelling out in detail exceptions to the right of access, the RTI Law instead refers to other laws for this, thereby leaving in place the prior regime of secrecy, which is not tailored to international standards on openness. The Law also fails to provide for an appeal to an independent administrative oversight body, although it does require the Public Defender's Office to provide support for legal cases before the courts.

The Law also includes a number of positive features, including a strong set of objectives, wide scope of application and broad proactive publication requirements. It attempts to limit undue classification of information by requiring public bodies to provide a list of such information, to be reviewed semi-annually by the National Congress. It provides for a good regime of sanctions for those who obstruct access to information, although it does not support this with protections for those who release information in good faith. Finally, it has a number of useful promotional provisions, including by placing central responsibility on the Public Defender's Office to ensure good record management and compliance with proactive publication rules, and to report semi-annually on the lists of classified information. Finally, it includes very progressive training and educational obligations, with the former applicable not only to officials but also to civil society, and the latter imposed on universities and schools.

## The Right of Access

The right to access information held by public bodies is set out in Article 1 of the RTI Law, which stipulates that this is a "right of the people, guaranteed by the State". Article 2 of the Law sets out its objectives, which include to guarantee the right to information in order to comply with constitutional and international law rules relating to transparency and accountability, to promote oversight of public administration and resources with a view to making "true social control more effective", to protect personal information, to democratise Ecuadorian society and to enable citizen participation in and oversight of public decision-making. Similar values are expressed in the Preamble to the Law.

These objectives are further bolstered by Article 4, which sets out the principles governing the application of the Law, the first of which states that public information belongs to the citizens. Other principles are that the exercise of public power and funds is subject to the principle of openness and that transparency is a means to promote participation in decision-making and public accountability. Article 4 also contains an interpretive principle, stating that those responsible for



interpreting the Law, which it refers to as an “Organic Law”, must do so in the manner which is “most favourable” for the exercise of the rights it guarantees.

Taken together, these are a strong set of objectives which should provide a sound interpretive basis for the Law. It is encouraging that they refer explicitly to the matter of interpretation, thus giving concrete direction as to how they should be used.

Public information is defined in Article 5 as any “document in any format that is in the power of the public institutions” covered by the Law, whether such documents were created or obtained by them, or are under their responsibility, or produced using State resources. This is a very broad definition, which should capture not only information actually held by public bodies but also information held on their behalf. Although the term ‘public’ is used throughout the Law in front of ‘information’, as defined this simply means information held by public bodies; it is not, therefore, a term which qualifies the scope of information covered.

Article 3 defines the scope of the law in terms of the bodies covered as including the entities that Article 118 of the Constitution<sup>2</sup> defines as making up the public sector and the entities described in Article 1 of the Law, along with a list of other entities which includes: legal persons whose actions relate exclusively to the management of State resources; private bodies – including corporations, foundations and NGOs – to the extent that they are in charge of providing or administering public goods or services, or that have agreements or contracts with public bodies that serve public ends; private bodies that perform public functions or are funded from public resources, to the extent of this public link; and other private legal persons that possess public information. Article 3 notes that access to information held by elected representatives shall be governed by the Constitution and the organic law governing them. Article 1, for its part, refers to bodies that “have participation of the State or are its concessionaires”, according to the organic law governing the Comptroller of the State; State employee and public servant organisations; and bodies of higher education and NGOs that receive State support. Pursuant to Article 16, political parties are required to publish electronically their annual reports containing detailed information on the use of funds assigned to them.

Article 118 of the Constitution refers to all legislative, executive and judicial bodies, electoral bodies, bodies which exercise control and which regulate, autonomous bodies, and bodies created by the Constitution or by law for purposes of exercising public power, providing public services or promoting economic development.

Taken as a whole, this would appear to be a very wide definition indeed, covering all bodies that can be said to have any link with the public sector or the provision of public benefits.

As noted, Article 1 provides that access to information is a right of “the people”. Although Article 4 does refer to citizens, the right would not appear to be so limited. Article 19, providing for the lodging of requests for information, refers simply to ‘a party’ wishing to access public information.

### **Procedural Guarantees**

The RTI Law contains very brief rules on the processing of requests. Article 19 provides that requests for information must be in writing to the head of the relevant public body and contain the identity of the applicant and the location of the information, which is presumably meant to indicate a description of the information. It would be preferable to specify clearly that requests may be made electronically and, ideally, even orally. The Law does not require public bodies to provide assistance to requesters, even those who are disabled or illiterate, contrary to good practice in other countries. It also does not specifically provide that applicants do not have to provide reasons for their requests, although this should flow from the principles and objectives of the Law, noted above.





Article 20 stipulates that the right to information does not place an obligation on public bodies to create or produce information that they do not hold. Where this is the case, the public body shall inform the applicant of that fact in writing. This is the situation with most right to information laws.

But Article 20 goes on to state that the right to information does not give applicants a right to demand that public bodies “perform evaluations or analyses of the information they possess”, compile or collect information that is contained in different parts of the body or among different public bodies, or provide “summaries, statistical data or indexes”. This is more controversial than the rule on non-creation of information and appears to reflect a conservative approach to the difficult issue of what public bodies should be required to do to answer requests. Most right to information laws do require public bodies to collect information that is spread among different documents, although some do not and some make provision for the applicant to cover the cost of this where it is time-consuming. Better practice laws also require public bodies to conduct automated processing of information, for example to extract information from electronic databases.

Article 9 provides that requests must be responded to within ten days, which may be extended for another five days “for duly justified causes”, provided that notification is given to the applicant. This is a short but adequate timeframe for answering requests, but it would be preferable if conditions were placed on the reasons that might justify an extension. Ideally, even shorter timeframes could be established for urgent requests, for example where the information is needed to defend a human right or to protect life or liberty.

The Law is silent as to a number of procedural matters addressed in most right to information laws, such as transfer of requests where the information is held by another public body, the right of interested third parties to make representations as to why information should not be disclosed, the notice that must be provided to applicants whose requests for information have been refused, and the issue of whether requesters have a right to specify the form in which they would like to receive the information.

Article 4(b) does provide that access to public information shall generally be free, apart from the costs of reproduction, which will be regulated by the norms of this Law. The Law does not, however, include other rules relating to fees. It is welcome that access to information shall be free, but it would be preferable if the law contained more detail on the costs that may be levied for reproduction of documents. In particular, it would be useful to specify that a central body is responsible for setting a schedule of fees for this, to be followed by all other public bodies. Ideally, fee waivers for impecunious applicants and for requests in the public interest might also be provided for in the Law.

## **Duty to Publish**

The main provision on proactive publication is Article 7, which calls for the proactive publication on the website of the public body as well as through “the necessary media”, of a long list of categories of information. This information shall be organised by subject, type of document or chronology, so that it may be easily accessed.

The categories include: structural information about the body, such as its organic structure, legal basis, internal regulations and procedures, goals and objectives, current plans and programmes; the complete directory of staff of the body, along with remuneration and additional income and benefits, and the collective contracts in place at the body; the services it offers and how to access them, along with application forms and procedures; financial information, including “complete” information on the annual budget of the body, income, expenses and results for each budget line, credit contracts, travel expenses and work reports, and the results of internal and government audits; detailed pre-contractual and contractual information for work provided,



as well as information on companies that have broken contracts; mechanisms of accountability; and the name and contact details of the information officer. All public bodies must also publish, biannually, by subject, an index of all files they have classified as confidential (Article 18).

Article 7 also places some specific obligations on particular public bodies. The Judicial Function, Constitutional Court and Court of Administrative Litigation shall disclose the full text of all final decisions, while State “control organisms” shall disclose the full text of all resolutions and reports adopted. The Central Bank shall also disclose indicators and other relevant information concerning competitions in a form that is easily understandable for ordinary citizens, while ‘sectional’ organisations shall inform citizens in a timely fashion about the resolutions they adopt, through publication of the “acts of the respective sessions” as well as their plans for local development.

Other articles set out obligations directed at specific public bodies. The National Congress shall provide, in an updated form on its website, the full text of all draft laws presented to it, indicating which Permanent Specialised Commission is responsible for them and the names of the sponsors (Article 14). Pursuant to Article 15, the Supreme Electoral Court shall publish the amounts received and spent in each election campaign, within 60 days of receipt of electoral expense reports. Political parties must, as noted, electronically publish their annual reports containing information about the expenditure of public funding (Article 16).

Finally, pursuant to Transitory Disposition the Second, public bodies must, within one year of the Law coming into force, put in place Internet portals to facilitate proactive publication.

These are extensive and progressive proactive publication rules. At the same time, there is perhaps excessive reliance on website dissemination, to the detriment of other means of dissemination to ensure that at least some key information reaches communities for which it is particularly important. Consideration might also be given to providing for an appropriate timeframe for public bodies to meet these proactive publication obligations, since it is probably unrealistic to expect them to meet these obligations quickly.

### **Exceptions**

The RTI Law does not include a full list of exceptions to the right of access, leaving this mainly to other laws (Article 17(b)). Pursuant to Transitory Disposition the Fourth, information that is not allowed to be classified by either the RTI Law or other laws must be declassified within two months of the RTI Law coming into force. Although this is a positive rule, there is no requirement that exceptions include a harm-test and no provision for a public interest override. The Law also fails to provide for severability, so that where only part of a document is confidential, the rest of it will still be disclosed.

The reliance on secrecy rules in other laws is an unfortunate aspect of the RTI Law which seriously undermines its effectiveness. It basically leaves in place the pre-existing system of secrecy and fails to superimpose on it the modern standards of openness which are appropriate to access as a fundamental human right.

Article 18 of the Law does at least impose some limitations on classification of information. Classification may not be attached to a document after a request has been made. In general, information shall remain classified for 15 years from the date of classification, or for a shorter period of time if the reasons giving rise to classification in the first place no longer apply. At the same time, classification may be extended where the underlying reasons for it are still relevant. However, the National Congress, by an affirmative vote of an absolute majority of its members, may declassify information. The National Security Council will be responsible for the rules regarding classification of information relating to national security, and only it may declassify such information.



Limits on the period of classification are welcome, although these are weak rules compared to those found in many right to information laws. Fifteen years is a long period for general classification, and it may be extended, apparently indefinitely. Requiring a vote of an absolute majority of the members of the National Congress is an extremely high barrier to declassification of information. It would be far preferable if an administrative oversight body could also undertake this function.

As noted above, all public bodies must provide, biannually, a list of files by subject that they have classified and this list may not, itself, be considered confidential (Article 18). Pursuant to Transitory Disposition the Fourth, this must be done within six months of the Law coming into force. This is a positive measure that will allow the public to assess the extent of classification, so that they may take steps to address what they perceive to be anomalies.

Article 17 provides for classification, with grounds, by the National Security Council for reasons of national defence, in conformity with Article 81(3) of the Constitution, which in turn refers to national defence and secrecy laws. It provides a list of four types of such information, namely:

- Plans and orders for defence, mobilisation, special operations, and military bases and facilities.
- Information on intelligence, particularly intelligence plans, operations, reports and counter-military intelligence.
- Information on the location of armaments, unless secrecy in this regard would cause danger to the public.
- Funds allocated for purposes of national defence.

Pursuant to Article 6, no personal information is subject to disclosure, including data derived from individual's "very personal and fundamental rights", including those in Articles 23 and 24 of the Constitution, which provide a long list of guaranteed rights.

Although the list of examples of national security information in Article 17 is probably intended to narrow the scope of this otherwise potentially extremely broad exception, they are still very expansive in nature. The inclusion in this list of all funds allocated to national defence is particularly problematical. It would be far preferable if the Law limited classification on grounds of national security to information the disclosure of which would pose a serious risk of substantial harm to national security, and subjected it to a public interest override.

It is also problematical that Article 6 excludes all personal information from the ambit of the Law, although it is not quite clear from the wording whether all personal information is covered or only information relating to personal and fundamental rights. Instead, privacy should be posited as an exception to the general presumption in favour of disclosure (i.e. instead of as an exclusion from it), and only information the disclosure of which would harm a privacy interest should be covered.

## Appeals

The RTI Law does not provide for an internal appeal to a higher authority within a public body when a request for information has been denied. It also fails to provide for an appeal to an independent administrative body. The former is a useful way of addressing many refusals to provide access to information as higher-ranking officials often have the confidence and authority to release information where their subordinates have refused to do so. Experience in other countries has shown that a right of appeal to an independent administrative oversight body is essential to successful implementation of the right to information. Although an appeal to the courts is useful, it is simply too expensive and time-consuming for most requesters.



Article 11(f) of the Law provides generally that the Public Defender's Office has the responsibility to promote – either upon request or by its own initiative – legal actions to promote the right to information where it has been denied. Article 13 supplements this, providing that where a citizen demonstrates that there are problems with the information provided on the website of a public body, he or she may demand that it be corrected, and any refusal to do so may be appealed to the Public Defender's Office to intervene.

Article 22 provides that, without prejudice to any action before the Constitutional Court, any person who has been denied access to information, whether expressly or not, or provided with incomplete, altered or false information, may appeal this (enter a "resource of access to information") before any civil court. The application for review must contain the identity of the applicant, the factual and legal arguments supporting the claim, the contact details of the public body that denied access and the nature of the legal claim.

The court shall accept the case within 48 hours, absent a reason for delay, and, on the same day the appeal is entered, will summon the parties to be heard in a public hearing, which should itself be held within 24 hours. The decision must be provided within two days of the hearing, even if the respondent public body is absent. Grounds for denial must be proven by reference to the indexed list of classified information and, if this is justified, the judge will uphold it. Otherwise, the judge will order the information to be provided to the applicant within 24 hours, subject to any appeal by the public body to the Constitutional Court.

Where judge deems there to be a risk to the safety of information subject to an appeal, he or she may order the placement of seals on the information, and/or apprehension, verification or reproduction of the information.

The decision of the judge may, within three working days, be appealed before the Constitutional Court, which shall decide the matter within 90 days (General Disposition). The decision of the Constitutional Court in the matter will be final.

### **Sanctions and Protections**

Article 10 provides generally that those who are responsible for administering or managing information will bear administrative, civil and/or criminal responsibility, along with the public body, for any actions or omissions that result in the hiding, alteration, or loss or destruction of documents. This is supplemented by Article 18, which provides that the release of classified information before the expiration of its period of classification in breach of the rules set out in that article will lead to administrative, civil and/or criminal responsibility. Article 6, for its part, provides that the illegal use or disclosure of personal information will lead to "pertinent legal actions". Similarly, Article 21 provides that the denial of access to information or failure to respond to a request within the stipulated timeframe will lead to administrative, judicial and constitutional responsibility, with the sanctions envisaged in the Law.

Article 23 provides for sanctions for officials who illegally deny access to information, which includes denial of access in full or in part, altering information or providing false information. The sanction will depend on the severity of the fault and, without prejudice to any civil or criminal responsibility, shall lead to a fine equivalent to one month's pay, suspension from duty for 30 calendar days without pay or being removed from the position, where the official persists in denying the information. Such removal does not absolve the public body from complying with any obligation to provide access to the information. Sanctions will be imposed once the judicial appeal has been concluded. Legal representatives of public bodies that hinder or refuse to comply with "judicial resolutions to this regard" will be fined \$100-\$500 per day, payable to the judge in chambers, again without prejudice to any civil or criminal responsibility.



These are welcome measures which should go some way to preventing obstructive activities from public bodies. The graduated sanctions for failures to meet openness obligations is particularly welcome. It is, however, unfortunate that the Law provides for sanction for those who release classified information. While, ultimately, this is appropriate if exceptions are consistent with the three-part test, at the same time, it sends an unfortunate message to officials that mistakes in the application of the law will not be tolerated, and is thus likely to perpetuate the culture of secrecy.

Unfortunately, the RTI Law fails to provide protection for officials who release information in good faith pursuant to it. This is important to overcome historic practices of operating in secrecy and to give officials the confidence to release information pursuant to the new law. The Law also fails to provide protection for those who release information that reveals wrongdoing (whistleblowers), as long as they acted in good faith. This is also important to promote a flow of information in the public interest.

## Promotional Measures

Article 9 provides generally that the head of each public body is responsible for ensuring that that body meets its openness obligations. The Law does not, however, specifically require public bodies to appoint information officers who would be responsible for receiving and processing requests for information. This is a useful approach which ensures that those wishing to lodge requests for information have a central place to do so.

The Public Defender's Office is given overall responsibility for the promotion and oversight of the right to information, including by overseeing compliance by public bodies with their obligations. This includes specific obligations, including to ensure that information is filed in accordance with the rules set out in the Law of the National Archives System, to prepare a national evaluation report on the proactive publication of information by public bodies on an annual basis, based on their websites and other information distribution systems, and to inform the National Congress, every six months, about the indexed list of classified information (Article 11). The Law does not, however, place an obligation on this body to promote wider public awareness of the new law and the rights it establishes, or to publish a guide for the public on how to use the law.

Article 10 provides generally that public bodies must ensure that they maintain their records in good condition so as to ensure that they can fulfil their right to information obligations, including by putting in place "technical norms" for information management. The Law of the National Archives System will regulate the period of time that documents must be kept, and the preservation of confidential information. The National Archives Law shall, within 180 days of the RTI Law coming into force, be amended to harmonise its provisions with the right to information norms (Transitory Dispositions, Sixth).

While these provisions are welcome, it would be preferable if a central system were put in place for ensuring that minimum standards of record management were set and implemented. A central body could be given responsibility for setting such standards and given the power to require all public bodies to adhere to them.

Article 8 addresses the need for training and educational programmes. It requires public bodies to undertake, in line with their financial capacity, promotional and training programmes directed at both their staff and civil society organisations, with a view to promoting more and better citizen participation. The National Archives System is to be in charge of training public officials (Transitory Dispositions, Sixth). Article 8 also calls on universities and other educational bodies, including schools, to integrate material on the right to information and habeas data into their curricula. These are progressive provisions, particularly with regard to wider public educational efforts in this area



All public bodies are required to report annually to the Public Defender's Office on their compliance with their obligations under the Law. These reports shall include information on activities undertaken in the last year, detailed information about requests and how they were processed, and an updated report on the indexed list of classified information (Article 12). There is, however, no provision for a central report to the National Congress from the Public Defender's Office on activities undertaken to implement the law and overall progress in this regard, although, as noted, it is required to report semi-annually on the indexed list of classified information. A wider report would provide the Congress with an opportunity to review overall progress in implementation of the Law on a regular basis, to ensure that this receives due attention and that reform efforts are promoted over time.

## Notes



- 1 Law 34 of 2004, published in the Official Gazette on 18 May 2004.
- 2 References in the RTI Law are to the 1998 Political Constitution. Ecuador adopted a new Political Constitution in September 2008.

# Guatemala







## Guatemala

### Introduction

The Political Constitution of the Republic of Guatemala of 1985, as amended, does not specifically guarantee the right to information. Article 35 does provide for a general guarantee of the right to freedom of expression, through any medium, without prior censorship or licence, although any failure to respect private life or morals may be sanctioned in accordance with the law.

The Guatemalan Law of Access to Public Information (RTI Law) was adopted in 2008 to give effect to the right to information.<sup>1</sup> It is a very progressive piece of legislation which, if implemented fulsomely, should provide a very strong base for realisation of the right to information. There are some shortcomings, including the fact that instead of including a comprehensive regime of exceptions in the RTI Law, it defers to secrecy rules in other laws, thereby preserving the pre-existing secrecy regime. Furthermore, it imposes a blanket ban on access to personal information, rather than subjecting this to the harm test and public interest override as assessed at the time of the request, and allows third parties to effectively veto the openness of commercial information they provide. It also fails to provide for an appeal to an independent administrative oversight body or to protect those who disclose information in good faith pursuant to it.

At the same time, it has a number of very positive features. It defines public bodies broadly and provide for strong procedural rules for requests for information, including sanctions for those who delay in providing access, the right to request the form in which an applicant would like to access information requested and an obligation on all public bodies to make a wide range of information available on a proactive basis. Despite the shortcomings with the regime of exceptions, the Law does include a harm test and public interest override for all of the information which it allows to be classified, and puts in place good procedures to guard against excessive classification. It also includes a good package of promotional measures, including placing an obligation on all public bodies to establish Information Units to receive requests and to undertake promotional measures, along with a more general obligation on the Attorney General for Human Rights to promote the right at the national level.

### The Right of Access

Article 5 of the RTI Law clearly states that every “individual or legal person, public or private”, has the right to request and receive public information in accordance with the law. This is supplemented by Article 16, which provides that “all persons” have the right to access public information held by public bodies, as long as they make requests in accordance with the law. Pursuant to Article 38, the right of access under the RTI Law shall not limit or prejudice any other rights of access established by other rules.

Article 1 sets out a number of objectives for the Law, including to guarantee the right of access to public information without discrimination and in accordance with the principle of maximum disclosure, to protect the right to know and update personal data, to ensure limited exceptions to this right, and to foster accountability to citizens so they may audit the performance by public bodies of their functions, with a view to strengthening democracy. Article 3 further stipulates that the Law is based on the principle of maximum disclosure, transparency in the management of public resources, free access to public information and simplicity and speed of access procedures. Article 8 calls for a strict interpretation of the Law to give effect to the principle of maximum disclosure and to protect the right to information.



These constitute a strong statement of the principles underlying access, although they are largely internally focused, in the sense of describing how the law should work, rather than the wider benefits it will produce, such as accountability, participation and a reduction in corruption.

Article 9(6) defines public information as all information “in the power of” public bodies, stored on any medium, regardless of date of creation or who produced it, that “documents the exercise of faculties or the actions of obliged subjects and their public servants”, as long as it is not “confidential or classified as temporarily reserved”. This is a wide definition but subject to two serious and unnecessary constraints. First, qualifying the definition of information by reference to its function adds in an unnecessary decision-making layer for officials considering requests for information, adding to their burden and providing an opportunity for abuse.

Second, and even more importantly, removing confidential and classified (reserved) information from the scope of the definition is highly problematical. It suggests that these categories of information are not, from the start, public information. This is problematical, for example, because the consideration of whether disclosure of the information would cause harm, or whether the public interest override should apply, depends on all of the circumstances at the time of the request. These considerations may warrant overriding a classification label placed on a specific document at a specific time but this will be difficult if the document is not included in the first place in the definition of public information. A better approach is to define information broadly, but subject it to the regime of exceptions for purposes of access.

The RTI Law employs a dual approach to defining public bodies (obliged subjects), providing a generic definition and also, without prejudice to that definition, a list of specific bodies and types of bodies. The generic definition covers all bodies that manage or execute public resources or undertake acts of public administration. The list includes the executive, legislative and judicial branches of government, State corporations and private entities that perform public functions, NGOs and other foundations that receive public funds and even private corporations that have been granted a permit, licence, concession or other benefit to exploit a State resource.

This is an extremely broad and progressive definition. At the same time, consideration might be given to limiting the obligation of openness in relation to private bodies to the extent of their public interface, for example, to the extent of their public funding, so that their private functions remain outside of the scope of the obligation. Otherwise, private bodies may be reluctant to engage with the State since even limited engagement may lead to wide openness obligations.

As noted above, the right of access applies to everyone, including natural and legal persons. There is no reference to the right being limited to citizens, so it presumably applies regardless of citizenship.

### **Procedural Guarantees**

Requests for information may be made orally in person, by telephone, in writing or electronically. Forms may be provided, but these should facilitate access and are not a pre-requisite to lodging a request (Article 38). Systems should be put in place to receive electronic requests (Article 39). Requests should contain the name of the body to which the request is directed, the name of the applicant and a “clear and precise” description of the information sought (Article 41). Requests should be forwarded to the Information Units (see below) and no official from such a Unit may refuse to receive a request by alleging incompetence in the matter. These are progressive provisions on requests which should help facilitate access in practice.

The RTI Law does not provide specifically for assistance to be provided to applicants, but Article 20 places a general obligation on Information Units to orient interested applicants. It would be preferable if more specific obligations were spelt out (for example to assist illiterate or disabled



applicants, or those having difficulty formulating their requests). This is particularly so in light of Article 39, which provides for denial of a request where the applicant has not remedied problems in the request within the timeframe allocated.

Requests should normally be processed within ten days, although this may be extended for another ten days, when the volume of information or complexity of the request so warrant. In this case, the applicant must be notified of the extension two days before the expiry of the original ten-day period, with reasons being provided (Articles 42, 43 y 45). Where a public body fails to meet these timelines, it shall provide the information to the applicant, for free, within ten further days and failure to do so will lead to criminal responsibility. This is a progressive and innovative approach to dealing with delay in the processing of requests.

The RTI Law does not provide for the transfer of requests to other public bodies or for consultation with third parties.

Pursuant to Article 42, applicants shall be notified of the total or partial denial of information. This is supplemented by Article 20, which provides that Information Units have a responsibility to cite reasons when providing notification of a denial of access, and Article 22, which states that the basis for classification will be explained in case of a denial of access or provision of partial access. It would be preferable if this obligation were more clearly spelt out in the law, for example by stipulating that public bodies must notify applicants of the precise legal grounds upon which access has been denied, as well as their right to appeal this decision.

Pursuant to Article 45, applicants have a right to be provided with access in the form they choose, including being provided with the information in writing or obtaining a copy of it, although information will be provided only in the form in which it exists, and further processing of the information is not contemplated. Information Units are obliged to assist in providing opportunities to consult information (Article 20).

Applicants must take care not to harm information placed at their disposal, and to inform public bodies if any harm does result (Article 17). To reduce costs, public bodies are required to give applicants an opportunity to make their own reproductions of information, provided that where materials are not returned, applicants will be charged for this (Article 18).

These are positive provisions, although allowing applicants to remove information from the premises of public bodies so that they may make their own copies is perhaps excessively accommodative and may lead to problems where information is lost, destroyed or simply not returned. It is generally accepted that public bodies should not have to process information further to satisfy requests. At the same time, some basic processing of information, for example to extract it from an electronic database in the form sought by the applicant, may be appropriate.

Article 18 provides that requests for information and consulting information shall be free of charge. Fees may be charged for reproduction of information, but these shall be no greater than market or actual costs. As noted, applicants should be given an opportunity to make their own reproductions in an effort to reduce these costs. Consideration might also be given to providing for fee waivers for impecunious applicants or for requests in the public interest, for example from the media. It might also be useful to establish a central fee schedule so as to avoid a patchwork of fees among different public bodies.

It should be noted that the RTI Law also includes a reasonably detailed regime governing Habeas Data, in Chapter VI, which provides for consultation of personal data by the subject of that data, as well as procedures for correcting and updating it.



### Duty to Publish

The RTI Law includes a very developed regime for proactive or *sua sponte* publication. Article 10 lists 30 categories of information which all public bodies must disclose on a proactive basis. This includes general information about the body (such as its organic structure, functions, addresses, mission and objective and procedures), its employees (including their names, numbers and salaries), financial matters (including the budget, income and spending and an inventory of property held), contracting and the provision of benefits (including a broad range of information relating to tenders, contracts, prequalified companies, works in execution, lease agreements and direct buys), and about its information disclosure systems (including a model application form, an index of information held, including personal files, and information about archives). This article also includes a general category of any other information that is relevant to promote compliance with the goals and objectives of the Law. This is potentially a very wide category of information to be made subject to a proactive disclosure obligation. For private bodies, these obligations are limited to their use of public funds or benefits. Pursuant to Article 7, this information must be updated within 30 days of it being amended or changed.

Article 12 includes special proactive publication obligations governing sentences pronounced by judicial bodies which relate to human rights crimes and crimes against humanity, convictions relating to the management of public funds, and crimes committed by public officials. This is a positive and innovative rule not found in other right to information laws.

Article 13 places special proactive publication obligations on legislative bodies, including in relation to use of the budgets assigned to parties and elected officials, the list of paid advisors to various legislative bodies, agendas of the House and commissions (24 hours in advance), records of sessions, legislative proposals and other significant documents (decrees, agreements, resolutions and so on).

Finally, Article 11 places similar additional obligations on private bodies that manage or receive public funds, including in relation to general information about the body, the ministerial authorisation granting it permission to function, members of the board, and its statutes, objectives and mission and vision.

Article 39 requires all public bodies to establish “electronic communication systems” (websites) to promote access to information.

These are broad and extensive proactive publication obligations. It may be noted, however, that it will be challenging for all public bodies to achieve these impressive results within the 180 days allocated by the Law (Article 68) and that, instead, it might make sense to allow public bodies to lever up their proactive publication efforts over time. Consideration might also be given to the question of ensuring that relevant information is accessible to members of different communities, including those that may not speak Spanish or do not speak it well, for example by requiring a degree of translation and the use of dissemination tools going beyond websites to ensure that relevant information will reach these communities.

### Exceptions

The RTI Law includes a partial regime of exceptions, while also referring to other laws for this purpose. Articles 21-23 describe as confidential, and hence not subject to access, information expressly defined as such in Article 24 of the Constitution (dealing with confidentiality of communications) or in another law (this finds support in Article 20(4), which also recognises confidentiality rules in other laws). Although this sort of provision is not uncommon in other right to information laws, at the same time better practice laws take a different approach, defining all exceptions in the access law and then overriding secrecy provisions in other laws to the extent



of any incompatibility. This has the effect of doing away with overbroad pre-existing secrecy provisions, which are common in most countries.

Article 22 also imposes a blanket ban on access to sensitive personal data (see below for a more detailed definition of what this includes) and information provided by third parties on a confidential basis. Both are unfortunate, although the latter is considerably more so. It is better to subject even sensitive personal data to harm and public interest override tests at the time of a request, which allows all of the circumstances to be taken into account. Providing for a blanket ban on information provided on a confidential basis effectively allows third parties to dictate standards of openness, which could substantially undermine the right of access in practice. Instead, as is the case with many other right to information laws, the legitimate commercial and other interests of third parties should be protected from harm, but this should be determined in accordance with the harm and public interest override standards, as with other information held by public bodies.

Otherwise, the Law establishes a fairly rigorous system for the classification of sensitive information. To classify information, a public body must demonstrate that the information falls within the scope of an exception listed in the Law, that disclosure of the information “may effectively threaten” the protected interest and that the harm from disclosure would be greater than the public interest in receiving the information (Article 26). This is effectively the three-part test for exceptions, which is in conformity with international standards and better comparative practice in this area.

Furthermore, classification of information requires a “resolution” of the head of the public body which must be published in the Official Gazette and contain the following: the source of the information; the basis for classification; the parts of the document that are classified; the term of classification; and the name of the body responsible for safeguarding the information. Classification which fails to meet these standards is “null and void” (Article 25). This is perhaps an onerous system but it should provide important protection against abuse of the power to classify.

Articles 27 and 28 place limits on the duration of classification of seven years, which may be exceptionally extended, once, by the public body concerned, for an additional five years (i.e. to a maximum of 12 years), where the basis for the original classification remains applicable. Otherwise, the period of classification comes to an end when the basis for classification is no longer pertinent or when the competent authority removes it. These are relatively tight time limits on classification.

The Law does not provide directly for severability, so that any part of a document that is not confidential or classified may still be released. However, Article 22 does imply that this will be done, referring to partial access to those parts of a document that are not considered confidential. It would be preferable to include a clear statement in favour of partial release.

Article 23 recognises a number of grounds for classifying information, in addition to recognising confidentiality rules in other laws (with the law on protection of children and youths warranting special mention), as follows:

- Classified information relating to military or diplomatic affairs and which pertains to national security.
- Intellectual property, and patents of brands that are protected by international treaties or other laws.
- Information the disclosure of which may cause serious harm to the investigation, prevention or prosecution of crime, and information related to State intelligence or the administration of justice.
- Legal files which have not yet been the subject of a final judgment.
- Information the disclosure of which prior to the decision for which it has been prepared might damage the State’s economic stability.



- Information relating to oversight of banks.
- Reports provided to the President relating to defence, although information based on these reports may be accessed.

Article 24 contains a progressive rule, stating that information relating to investigations of human rights crimes or crimes against humanity may never be confidential.

Pursuant to Article 31, public bodies may not disclose personal data without the consent of the person to whom it relates, and even then they may not take advantage of this information to the detriment of that person. According to Article 32, consent is not required where the information forms part of a package of statistical data from which it is not possible to identify the person, data exchanged between public bodies that is required for their work, in light of a judicial order or in other cases foreseen by law. Article 9(1) defines personal data as information relating to a natural person who is identified or can be identified from it.

The interests protected by these exceptions are recognised as legitimate under international law and by other right to information laws. They are not all subject to a harm test, but this appears to be provided for indirectly through the rules relating to classification. As noted above, it would be preferable to include personal data within the regime of disclosure and then provide for an exception in favour of it, so that harm and public interest tests could be applied. In better practice laws, personal information relating to the functions of public officials are not included within the scope of personal information.

### Appeals

The RTI Law includes detailed provisions on internal complaints, which it refers to as the “resource of revision”, with the objective of ensuring that guarantees of legality and legal security are met in relation to access to information (Article 54). The head of each public body shall be competent to resolve complaints arising from the performance by public bodies of their obligations under the Law (article 54).

A complaint may be lodged, within 15 days, where an applicant has been denied access to information, told documents do not exist or given incomplete information or information that does not respond to the request, where a public body does not provide personal information or does so in an incomprehensible format, where a public body refuses to amend personal data, where no response to a request has been provided for 20 days, or where the period for providing information has expired (Articles 54-55).

A complaint should indicate the public body to which the original request was directed, the name of those responsible for processing the request, the date on which the request was made, the nature of the complaint and resolution sought, a copy of the decision challenged, where relevant, and any other relevant information (Article 57). The complaint should be resolved as quickly and simply as possible and, in any case, within five days (Articles 57 and 58).

The decision may confirm the decision of the public body (specifically of its Information Unit) or revoke that decision and order the body to provide access to the information. Decisions must be in writing and specify how compliance is to be achieved, and shall themselves be made public. The public body shall comply with a decision within five further days and cases of non-compliance “will be certified before the competent jurisdictional organism”, without prejudice to other measures to promote immediate compliance with the decision (Articles 58, 59 y 60). In practice, the case may either go to the Public Ministry as an instance of the crime of withholding information. One may also appeal this to the Constitutional Court. These procedures are not mutually exclusive.





This is an effective approach to resolving some information disputes, and the head of a public body may well release information which his or her subordinates did not feel confident to. Given the range of bases for a complaint, however, it would be preferable for the law to provide for a wider range of remedies, which might include compensating the applicant or putting in place more robust systems for responding to requests.

An appeal to the courts is useful but experience in other countries clearly demonstrates the importance of the possibility of an appeal to an independent administrative oversight body for a binding decision on access. The courts are too costly and time-consuming to be accessible for most of those seeking information.

## Sanctions and Protections

Article 61 provides generally that anyone who breaches the provisions of the RTI Law will be subject to administrative or criminal sanction in conformity with the RTI Law or other laws. Administrative faults will be sanctioned in accordance with the applicable procedural rules, depending on the severity of the wrong, and without prejudice to civil or criminal liability (Articles 62 and 63).

The RTI Law also establishes a number of crimes. Commercialisation of personal data without the express permission of the 'owner' or altering personal data without authorisation may be sanctioned with five to eight years' imprisonment, and fined between 50,000 and 100,000 Quetzales (approximately US\$6,200-12,400), without prejudice to any civil responsibility (Articles 64 and 65).

Any official who arbitrarily and without justification obstructs access to information may be sanctioned with one to three years' imprisonment, along with "special disqualification" for twice that period and a fine of between 10,000 and 50,000 Quetzales (approximately US\$1,300 to 6500). This is without prejudice to any civil responsibility (Article 66).

Pursuant to Article 67, the disclosure of confidential or classified information by an official who learned of this in the course of his or her work may be sanctioned with five to eight years' imprisonment, along with "special disqualification" for twice that period, and a fine of between 10,000 and 50,000 Quetzales (approximately US\$1,300 to 6500), again without prejudice to any civil responsibility. Article 37 provides that officials who destroy or alter information in administrative archives may be removed from their positions and sanctioned in accordance with Articles 418 and 419 of the Penal Code. If private parties provoke them to do this, they shall be guilty of the crime of "degradation of national patrimony", again contrary to the Penal Code.

Article 15 also provides generally that "interested parties" are directly responsible for the use, management and disclosure of public information to which they have access, in accordance with this Law and other laws.

It is important to provide for sanctions for those who fail to respect the right of information. At the same time, the sanctions provided for in the RTI Law are very severe in nature and do not appear to allow for a conditioning of the sanction to fit the wrong done. It is to be expected that, particularly in the early years, there will be resistance to fulsome implementation of the new law and lesser sanctions, such as fines, may be a more appropriate manner of addressing these problems than firing officials or giving them prison sentences.

Furthermore, it may be noted that the primary goal of a right to information is to foster openness, not to sanction the disclosure of confidential information. In this light, the Law appears to focus unnecessarily on this latter element. It is unnecessary, for example, to refer in the RTI Law to sanctions provided for in the Penal Code. Furthermore, the sanctions for wrongful disclosure of information are greater than those for wrongful nondisclosure, giving the impression that the former is more important. Instead, the opposite message is needed, so that officials can start to move away from established patterns of secrecy towards a culture of transparency.





In addition, the law should protect those who, in good faith, wrongfully disclose information pursuant to the law. Such protection is necessary to give officials the confidence to engage with the new access law, and to overcome the entrenched culture of secrecy. It should also provide protection to those who disclose information on wrongdoing (whistleblowers), in the hope that information of key importance will, as a result, be made publicly available.

### Promotional Measures

All public bodies are required to create Information Units, comprising an official, employee or “internal organism”, with links to all offices and “dependencies” forming part of that body. These Units are responsible for dealing with requests for information, along with a number of other promotional rules (Articles 16 and 17).

The RTI Law does not put in place a full record management system, but it does require Information Units to coordinate and manage the archives of the respective public bodies (Article 20). A better approach would be to give a central body the responsibility and power to set and enforce minimum record management standards across the whole civil service, with a view to ensuring a common approach within government.

The Law provides generally that the General Attorney for Human Rights shall protect the right to information, given its status as a fundamental human right recognised under the Constitution and in international law. In this respect, it shall have the powers set out in its founding legislation to promote the right. Additional resources will be allocated to the General Attorney for Human Rights to undertake these new tasks (Articles 46, 47 and 69).

All public bodies are required to report to the General Attorney for Human Rights annually, providing detailed information on requests for information received and how they have been dealt with. In turn, the General Attorney for Human Rights may report on the number of requests and how they have been dealt with, challenges in implementing the Law, along with analysis and recommendations, and the training and implementation programme for public bodies – in his or her annual report to Congress (Articles 49). It is not clear why this latter is phrased in discretionary terms – ‘may report’ – given that it is clearly important and intended to be followed.

It is very important to have a central body with responsibility for promoting the right to information. At the same time, it might be useful to specify a wider range of activities for the General Attorney for Human Rights in relation to the right to information, such as undertaking broad public education efforts and research, producing a guide on how to use the law, and providing a central locus of expertise on training.

Finally, the Law provides for wide-ranging educational efforts to promote a culture of transparency. The relevant educational authorities are required to include the right to information as a subject in curricula at the primary, secondary and tertiary levels of education. Public bodies, for their part, are required to establish “permanent training programs” for their staff on the right of access and Habeas Data (Articles 50-51).

## Notes

1 Judgment Num. 57-2008 of the Congreso of the Republic of Guatemala, issues 23 September 2008.

# Honduras





## Introduction

The Honduran constitution of 1982, as amended, does not guarantee the right to information. However, Article 182 protects, among other things, the right of *Habeas Data*. Everyone has the right to inspect information held by public or private bodies on him- or herself and, where necessary to correct or amend that information. The right may be claimed without proof of any particular interest, may not be subject to any formalities, either verbally or in writing, and the claim must be satisfied in an expedited fashion and for free.

The Honduran Transparency and Access to Public Information Law (RTI Law) was adopted in November 2006 and published in the Official Gazette on 30 December 2006, coming fully into force on 19 January 2008, at the end of the period of transition.<sup>1</sup> The adoption of the Law was preceded by a long period of civil society advocacy, supported by the international community and a number of key local leaders.<sup>2</sup> Despite local resistance, including from some unexpected quarters, such as the media, the Law that was finally adopted was largely in line with what right to information proponents had been advocating for, and it was amended to remove some of the flaws present at adoption in 17 July 2007.<sup>3</sup> A key implementing body, the Institute for Access to Public Information, was established in September 2007,<sup>4</sup> and regulations were adopted in March 2008, all paving the way for implementation of the law.

The Honduran RTI Law is generally a strong and progressive law, although it does include some shortcomings. A serious problem is that it only applies to information created after it comes into force, a substantial limitation that is not found in other right to information laws. It leaves in place pre-existing secrecy laws, although it does at least provide for a very rigorous procedure for classifying information. It fails to provide protection for good faith disclosures of information and, instead, sanctions wrongful disclosures.

The Law also includes a number of progressive and some innovative provisions. It has a strong statement of objectives and a broad definition of the public bodies it covers. It provides for extensive proactive publication of information, including via electronic means. It provides for a right of appeal to an independent administrative oversight body, something that is relatively rare in Latin America. And it includes a good package of promotional measures, including giving general promotional responsibility to two bodies it creates, the Institute which hears appeals against refusals to provide information and a special right to information law Commission, to receive quarterly reports from public bodies and to formulate recommendations to them.

## The Right of Access

The right of access is set out in Article 4 of the RTI Law, which provides:

[E]very natural or legal person has the right to request and receive complete, truthful, adequate and timely information from the Obligated Institutions, within the limits and conditions established in this Law.

This is supported by the definitions in Article 3, which define the 'Right to Access Public Information' as the right of every citizen to access information generated or managed by public bodies. Article 1, for its part, refers to the goal of the Law as being, among others, the "exercise of every person's right to access Public Information".

The RTI Law includes a number of provisions setting out its objectives and purposes. The Preamble refers to several objectives and bases, including that public officers are legally responsible for



their official conduct and must act effectively, ethically and with social responsibility. It refers to a number of social benefits of transparency, including guaranteeing better performance from public officials and bodies, promoting greater citizen participation, allowing citizens to demand accountability and to fight corruption, and promoting greater trust in government action. It also refers to access to information as a right of citizens.

Article 1, dealing with the nature and finality of the Law, refers to the goals of developing the right to information and strengthening democracy through public participation. Article 2 is expressly devoted to setting out the objectives of the Law. It lists a number of such objectives, including: to guarantee citizens' right to participate in public affairs, to promote the efficient use of State resources, to ensure transparency in public functions and in relations with private parties, to fight corruption and other illegal acts, to promote public accountability, and to ensure the protection of confidential information. Together, these provisions provide quite a comprehensive basis for the Law.

Public information is defined in Article 3(5) of the Law to include any file, record, data or communication contained in any medium (such as a printed document, optical record or electronic file) that "has not been previously classified as reserved". The definition goes on to list a number of different types of information – files, reports, studies, licences, statistics, budgets and so on – regardless of their source or date of elaboration, that "documents the exercise of the faculties, rights and obligations" of public bodies. However, Article 39 clearly states:

Only public information generated after the enforcement of this law will be subject to its norms.

Article 3 also defines 'Reserved Information', 'Confidential Personal Data' and 'Confidential Information', all of which are relevant to the scope of exceptions to the right of access.

Although the definition of information is generally broad, there are some serious limitations inherent in or implied by it. First, it does not include information that has been classified. This is at odds with the approach in progressive right to information laws, which define information very broadly and then list exceptions to the right of access. This is a far better approach, since information might be classified wrongly or even illegitimately. Second, the latter part of the definition is restricted to information relating to the activities, rights and obligations of public bodies. Although the relationship of this with the wider formulation in the earlier part of the definition is not clear, at best it is likely to lead to confusion and it might be understood as a substantive limitation on the scope of access. Finally, there is some confusion between Article 3(5), which suggests that the date of elaboration is irrelevant and Article 39, which suggests that the Law will only apply to information created after it has come into force. The latter is a very significant and unwarranted limitation on the scope of a right to information law.

Article 3(4) defines 'Obligated Institutions' (referred to herein as public bodies) to include all three branches of government (legislative, executive and judicial), autonomous institutions (presumably public in nature), municipalities and all other 'organisms and institutions of the State'. It also includes NGOs, 'Private Development Organizations' and all other natural and legal persons that receive or manage public funds, national or foreign, financial and in other forms, as well as unions that receive various public benefits, such as tax exemptions. This is a broad definition, although it fails to include private bodies which, although not necessarily receiving public funds, undertake public functions.

It is not entirely clear from the RTI Law whether the right of access is to be enjoyed by everyone or just citizens. Some of the key provisions establishing the right, as set out above, refer to citizens, while others refer to all natural and legal persons, or just everyone. It is perhaps significant that Article 15, on form of delivery of information, refers to requests by citizens. Many of the other process provisions refer simply to 'petitioners'. If the Law is indeed restricted to citizens, that is an unfortunate limitation not found in the more progressive right to information laws.



Finally, mention should be made of Article 33, which provides that the right to access information does not limit “the right to be present or observe the acts of public administration, in the manner allowed by Law, or participation in hearings or open sessions to receive information.”

## Procedural Guarantees

Requests for information must be in writing or in electronic format, and indicate clearly the information sought. Where requests are presented by legal entities, they need to prove their legal existence and the person making the request must demonstrate an ability to represent the organisation. No reasons need to be given for a request (Article 20).

There is no provision for assistance to be given to requesters who need help to formulate their requests. However, Article 22 provides that the authorities must support requests by journalists, and not impose any further restrictions on them than are provided for in the law (Article 22). It is not clear why journalists should merit any special attention in this regard.

A response to a request must be provided within ten working days which may, where justified, be extended for another 10-day period (Articles 21 and 37). There is no provision for urgent requests. Where a request is refused, reasons must be given, although the RTI Law fails to specify in any detail what must be included in the reasons (such as the provision relied upon to refuse access or details of any right to appeal against the refusal) (Article 21). There are no provisions addressing the issues of transfer of requests to other bodies, for example because the body with which the request has been lodged does not hold the information, or for consultation with interested third parties.

Article 15 provides for information to be delivered personally, by fax, by mail or through electronic means, as long as this does not undermine the integrity of the information. No other forms of access, such as inspecting the record, are provided for, although these are commonly found in other laws and are a popular means of accessing information.

Article 14 makes it clear that information will only be provided in existing formats, and that analyses or evaluations will not be performed. It is not clear whether this is intended to signal that information will not be extracted in different formats from electronic databases. Article 20, however, provides that requesters do not have the right to copy, in full or in part, databases. This is an unfortunate limitation since extracting information from databases is an increasingly important form of access in the modern world.

Access to information is free, although public bodies may charge for actual costs of reproducing the information (Article 15).

## Duty to Publish

Article 13 is the main provision in the RTI Law placing an obligation on public bodies to disclose information on a proactive basis, even in the absence of a request (which it refers to as *sua sponte*). The list includes a number of general categories of information which every public body must disclose, including about its structure and functions; the services it renders, along with the rates and procedures associated with them; the laws and other rules governing its operation; its general policies and plans; reports, financial statements and quarterly budget liquidations; all real estate it possesses; pay scales and benefits of its employees; quarterly and annual reports on the execution of the budget, including details of all transfers and investments; contracts, concessions, sales and related; means by which citizens can participate in its decision-making activities; statistics and information about the macro-economic and financial status of the part of the State for which it is responsible; information about private companies that provide services under contract to it; and the names and contact details of staff responsible for handling information requests.



The Law also provides for a number of specific proactive publication obligations on different public bodies. The executive branch must disclose executive decrees and agreements; the National Congress must publish resolutions and legislative initiatives within ten days, as well as plenary and committee sessions; the judiciary must disclose judicial sentences involving State execution, without prejudice to personal information; the Superior Court of Accounts must publish final reports on fiscal interventions and final resolutions; the Attorney General must publish a list of cases involving public bodies and their outcome; and municipalities must publish a list of trials involving them and their resolution, along with their resolutions and acts.

Article 4 adds to this that all of the procedures for the selection of contractors and the contracts agreed must be provided to the Normative Office of Hires and Acquisitions, which must, in turn, make this available on its website.

The information listed in Article 13 must be disseminated electronically, and be updated periodically. Pursuant to Article 12, the National Public Information System should serve to integrate access to information into a uniform system designed to facilitate access to information. This is an interesting and effective approach to proactive publication. At the same time it is rather limited by its focus on electronic forms of dissemination. Consideration should also be given to the issue of ensuring that relevant information reaches communities for which it is important.

### Exceptions

The RTI Law includes a comprehensive list of grounds for confidentiality, set out in Article 16, as supplemented by Articles 3, and 17 to 19. This specifically includes information that is rendered confidential by the Constitution, laws or treaties (Articles 16(1) and 17(4)). The Law therefore does not fall into the category of better practice laws that override pre-existing secrecy rules in other laws.

The RTI Law also provides for the classification of information to serve as an exception, but requires such classification to be in accordance with the law and its classification procedures. These set out various grounds for classification of information (listed below) (Article 17). To classify information, the head of a public body must present a petition to the 'highest instance of the institution' for duly motivated and founded approval. The head must then send a copy of the petition to classify to the Institute for Access to Public Information (Institute), which may deny the classification request and any classification issued despite this will be null and void (Article 18). This is certainly a very stringent and procedurally tight classification system. On the other hand, it might prove to be difficult to implement in practice. Among other things, it requires the Institute to review every single classification request from every single public body, of which there may be an extremely large number.

Most of the exceptions in the RTI Law, apart from secrecy provisions found in other laws, are subject to a harm test, either explicit or implicit. One exception which is not entirely clear is that found in Article 16(3), relating to everything that 'corresponds' to a private institution or corporation that is not covered by the obligations of the present law. It is assumed that this simply means that information held by bodies which do not fall within the ambit of a public body as defined in the law is not subject to disclosure, in which case it is uncontroversial (but probably also unnecessary). Article 16(4) establishes an exception to protect confidential journalistic sources within the public sector, information that underpins journalistic investigations and information in the possession of mass media organisations is also excluded from disclosure. It is appropriate to protect confidential sources of information, including information which would identify such sources. It is more controversial, however, to protect all information underpinning journalistic investigations (which may, for example, disclose an abuse of public funds) and it is certainly not legitimate to exclude all information in the possession of mass media organisations (which, if they are public bodies, should be subject to openness obligations).



The RTI Law does not include a public interest override. Indeed, Article 17 provides for the reverse of such an override, providing for the classification of information where the harm that may result from disclosure of the information is greater than the public interest in knowing that information (public interest overrides do the opposite, providing for disclosure of information notwithstanding an exception where the interest in disclosure overrides that of confidentiality). This is most unfortunate as it effectively establishes an extremely open-ended ground for refusing to disclose information, as opposed to a better practice approach which requires exceptions to be clear and narrow.

There is no specific severability clause in the Law. On the other hand, the Law appears to provide for fairly strict overall time limits on the classification of information. Pursuant to Article 19, classification remains legitimate only as long as the reasons for the classification persist. Notwithstanding this, classification shall only last for ten years, unless there is a judicial order to the contrary. Even in this case, continuing classification will be restricted to the specific case and use of the information recognised in the judicial order.

The RTI Law provides for the following specific exceptions:

- Confidential personal data, including in relation such things as ethnic origin, physical or emotional characteristics, personal data (telephone number, address, etc.), beliefs and participation in organisations, property and any data relating to honour or personal image (Article 3(7)).
- Information provided by third parties which the law renders confidential, such as sealed tenders before they are opened (Article 3(9)).
- Information the disclosure of which would pose a risk of harm to the following interests, subject to the data protection law:
  - State security (Article 17(1));
  - life, safety of health of any person or humanitarian aid (Article 17(2));
  - legally guarded interests of children, or Habeas Data interests (Article 17(2));
  - the prevention, investigation or prosecution of crime, or the administration of justice (Article 17(3));
  - the conduct of international negotiations and foreign relations (Article 17(5)); or
  - the economic, financial or monetary stability of the country, or its governability (Article 17(6)).

A better approach to protecting third party information is to protect the underlying interests, such as commercial advantage or privacy, rather than listing categories of information to be protected. It is not clear why the interests of children, humanitarian aid or Habeas Data rules would require protection of confidentiality over and above established interests, such as privacy. These are not exceptions that are commonly found in other right to information laws.

The exception in favour of humanitarian aid is highly problematical in a country like Honduras. This is a major weakness in this law. Humanitarian aid should not be an exception. A serious example of the need for openness in this regard is the large amount of international funding that Honduras received due to the consequences of Hurricane Mitch in 1998, which should, in principle (and subject to other exceptions) be public in nature.

This list also fails to include some interests that are commonly protected by other right to information laws, such as legally privileged information (sometimes referred to as information protected by attorney client privilege), national security and internal deliberative processes. It may be noted that the latter, although often open to serious abuse as a restriction on access to information, is also often deemed to be needed to protect the ability of public bodies to function effectively.





### Appeals

The provisions of the RTI Law relating to appeals are very limited. Article 11 provides generally for the Institute to have several functions, among which to resolve complaints by requesters. Article 26 provides for requesters to appeal decisions which were denied or outside of the time limits established by the law to the Institute. The Institute shall resolve the appeal within ten days and the only appeal against the decision of the Institute shall be an appeal on the basis of the Constitutional Justice Law.

There are a number of shortcomings with this system. The grounds of appeal are very limited. They do not, for example, include a refusal to provide the information in the form sought or against excessive fees. They fail to set out the powers of the Institute when conducting an investigation into an appeal, such as to compel witnesses or to view the information. They also fail to set out what powers the Institute may have in terms of remedies which, in appropriate cases, should go beyond just ordering provision of the information and include more structural remedies, such as ensuring that staff are properly trained or that record management systems are in order. Finally, they fail to establish that, in the context of an appeal, the onus rests on the public body to show that the refusal to provide the information was justified.

Articles 8-10 of the RTI Law provide for the establishment of the Institute and the appointment of commissioners. It is established as a decentralised public body with operational, decision-making and budgetary independence. The Presidency of the Republic is allocated responsibility for supporting the operation of the Institute, with the Secretary of State, through its Office of the Presidency, acting as a link (Article 8). Pursuant to Article 36, the Secretary of State, through its Office of Finances, will include the necessary budget for the Institute to guarantee effective implementation of the Law in its general budget proposals.

The three commissioners of the Institute are elected by a two-thirds vote of the National Congress from among ten candidates proposed by the President (two), the Attorney General (two), the National Commissioner for Human Rights (two), the National Forum for Convergence (two), and the Superior Court of Accounts (two) (Article 9). To be appointed, individuals must be a Honduran citizen, be over 35 years old, have no criminal convictions, be renowned and have a university degree, and have at least ten years of public or academic service (Article 10). Commissioners hold office for five years, and may be removed only due to 'legal or natural impossibility', or where their actions are in conflict with the activities of the Institute. The chair of the Institute has legal personality and is appointed by the President. Finally, Commissioners are supposed to resolve all issues on a collegiate basis (Article 9) and the Institute shall regulate its own internal operations (Article 11(7)).

These rules go some way to ensuring the independence of the Institute, although they have some shortcomings. The process of appointing Commissioners is well-designed to promote their independence, although this could be further improved by providing for some public involvement in the process. Furthermore, depending on how public service is interpreted, the requirement of ten years of such service could unduly limit who might be a Commissioner. Certainly this should not be interpreted as meaning public employment. The grounds for removing Commissioners are unduly vague, and no process is provided for achieving this (for example, is it done by a two-thirds vote of the National Congress, as is the case for appointments, or via some other procedure?) It would be preferable if the chair of the Institute were appointed by agreement of the other Commissioners, rather than the President, given the important role this person can be expected to perform.

The wider institutional arrangements also have their strengths and weaknesses. The Institute is formally independent, and yet it is still linked to the President. Better practice right to information laws do not link their oversight bodies to political positions.



## Sanctions and Protections

Article 27 describes a number of administrative breaches of the law, including by failing to publish information on a proactive basis, by failing to provide information within the timelines specified, by otherwise hindering access to it, by disseminating information falling within the scope of the regime of exceptions, by failing to provide personal information to the owner, by destroying or altering information in breach of the law, by disseminating personal information in breach of the law, by refusing to correct or update personal information, or by failing to provide information on hiring to the Normative Office of Hires and Acquisitions, as required by Article 4.

Pursuant to Article 28, the above breaches, where they do not constitute crimes, may be punishable by a written warning, a fine, suspension, severance or dismissal. Fines ranging from one-half to 50 minimum wage days will be imposed by the Institute, depending on the gravity of the offence, and remitted to the General Treasury. When a breach is criminal in nature, it will be punished as a crime against the public administration, in accordance with the Penal Code (Article 29; see also Article 11(5)).

This is a reasonably comprehensive regime of sanctions for breach of the law, although it does not make it clear that these wrongs require intention. Given that, even for an administrative breach, one might be suspended or dismissed, intention should be required.

The RTI Law does not include protections for those who disclose information pursuant to the Law in good faith, or with a view to exposing wrongdoing. Indeed, it does the opposite, making it an administrative breach to disseminate confidential information. This will exert a chilling effect on the disclosure of information, making it more difficult to overcome the culture of secrecy.

## Promotional Measures

The RTI Law includes a large number of promotional measures. Article 5 provides very generally that public bodies must allocate sufficient human resources to allow for the organisation of information, the provision of services to citizens and for proactive publication of information, where this is warranted, through the print and broadcast media. It also requires every public body to appoint a dedicated Information Officer, in line with good practice in other countries.

The Institute is given a wide mandate to undertake promotional activities. Pursuant to Article 8, it is responsible generally for promoting citizens' right to information, and for regulating the protection and classification of public information. Article 11 provides a long list of functions of the Institute, including, in addition to functions already mentioned, to establish systems and standards for classification, to support the National Archives, to set standards for the operation of the National Public Information System, to undertake promotional activities in relation to the right to information, and to operate its own information system. The Institute is also responsible for ensuring compliance with the Inter-American and UN Conventions Against Corruption in matters of transparency and accountability (Article 38).

Despite these wide general roles, the Law fails to put in place a clear obligation on the Institute to publish and disseminate widely a guide for the public on their right to information and how it may be exercised. It also fails to put in place a clear system for record management, involving the setting and implementation of standards.

The Law also places an obligation on public bodies to undertake regular training of their officers in the culture of access as well as on the specific rules in the Law. Furthermore, the Secretary of State, in its Office of Education, is required to promote broad educational efforts on the right to information, in formal and informal educational institutions and public and private universities (Article 6). This is a progressive provision that goes beyond the training requirements found in most right to information laws.



Pursuant to Article 31, the National Congress is required to create a Special Follow-up of the Transparency and Access to Information Law Commission, which shall receive quarterly reports from public bodies and formulate recommendations to them. This is an innovative approach to promoting proper implementation of the Law. The Institute is also required to report annually on its activities to the President and National Congress. Despite these measures, the Law fails to put in place a clear system for central reporting on progress in its implementation, involving public bodies reporting to a central authority, such as the Institute, and then this authority reporting on global implementation to the Congress and public.

The Law also provides for a system to regulate the destruction of information over time (Article 32). Each public body must keep information for at least five years, or as long as it has operational relevance. After that, information must be submitted to a Documental Depuration Commission, comprised of representatives of the Institute, the Supreme Court of Accounts, the Attorney General, the National Archives and the relevant public body. This Commission will determine what information may be destroyed and what must be kept due to its ongoing historical, legal or administrative value. Furthermore, the July 2007 amendments to the RTI Law<sup>5</sup> added Article 32A, establishing that public information created before the law was passed could not be destroyed or modified.

## Notes



- 1 Decree No. 170-2006.
- 2 See Bellver, A., Mendiburu, M. and Poli, M., *Let the Sunshine In: The Making of the Transparency and Access to Information Law in Honduras*. Accessed on 19 January 2009 at: <http://www1.worldbank.org/prem/PREMNotes/premnote118.pdf>.
- 3 Decree No. 64-2007.
- 4 Decree No. 81-2007.
- 5 Note 3.

Mexico





## Introduction

When the national right to information law was first adopted in Mexico in 2002, Article 6 of the Constitution<sup>1</sup> provided a simple guarantee of the right to information as follows: “Freedom of information will be guaranteed by the State.” However, a comprehensive amendment to Article 6,<sup>2</sup> which was passed unanimously not only by both chambers of the Mexican Congress but also by the legislatures of at least 16 states,<sup>3</sup> significantly extended constitutional protection for the right to information. The new guarantee provides, among other things, that all information shall be public, subject only to temporary restrictions on access for public interest reasons as established by law, although personal information shall be protected. Rapid systems for accessing information shall be put in place and these shall be overseen by independent bodies. After Sweden,<sup>4</sup> this is probably the most detailed and comprehensive constitutional guarantee of the right to information in the world.

The new constitutional guarantee requires access to information systems at all levels and branches of government to be brought into line with its provisions within one year of its coming into force. That date passed in July 2008 and yet, as of the date of writing, few, if any, of the Mexican laws at the federal and state levels have been amended to bring them into line with the new constitution. Reform proposals have been advanced at the federal level – including one put forward by IFAI (see below, IFAI is the federal administrative oversight body for the RTI Law) in February 2008, which attracted a lot of attention from civil society – but none has so far been adopted. Exceptions to this are the Federal Electoral Institute (IFE, an autonomous constitutional body), which issued new regulation on access in 2008, and the Federal District, which passed a new law in 2008.

Mexico was one of the earlier countries in Latin America to pass a right to information law, with the signing into law by President Fox of the Federal Transparency and Access to Public Government Information Law (RTI Law)<sup>5</sup> in June 2002. The law, like the constitutional amendments, was adopted unanimously by both chambers of the Congress, part of the commitment by the new administration to tackle corruption and foster democracy in Mexico. The oversight body has the power under the Law to adopt regulations on various matters including, importantly, on classification. A regulation was adopted by IFAI in June 2003 addressing a range of issues.<sup>6</sup> All 31 Mexican states, as well as the Federal District (Mexico City) have also adopted right to information laws.

The law is among the more progressive right to information laws found anywhere. It includes a number of positive features, including strong procedural guarantees, along with an innovative approach towards ensuring application to all public bodies, regardless of constitutional status, and a prohibition on classifying information needed for the investigation of grave violations of human rights or crimes against humanity. It establishes a very strong and independent oversight mechanism in the form of the Instituto Federal de Acceso a la Información Pública (IFAI; Federal Institute for Access to Public Information).<sup>7</sup> Human Rights Watch has applauded the law as follows:

The transparency law may prove to be the most important step Mexico has taken in its transition to democracy since the 2000 election.<sup>8</sup>

Implementation of the Law has generally been positive. A study by the Open Society Justice Initiative suggests that the rate of ‘mute refusals’ (the failure to provide any answer to a request) was lower in Mexico than any of the other 13 countries surveyed.<sup>9</sup> Mexico was also among the better performers in terms of the percentage of requests met with a positive response. Similarly, a report on IFAI and promoting a culture of transparency in Mexico stated, at its very outset: “In the family of freedom of information laws globally, Mexico is a leader”.<sup>10</sup>



### The Right of Access

The Law provides generally in Article 2 that all information held by government may be accessed by individuals. Article 1 sets out the purpose, which is to guarantee the right of access to information held by government, autonomous constitutional or other legal bodies, or any other federal entity. Article 4 further elaborates six 'aims' of the law, which are to ensure access to information through simple, expeditious procedures, to promote transparent public administration, to protect personal information, to promote public accountability, to improve the management of records, and to contribute to democratisation and the rule of law in Mexico. Finally, Article 6<sup>11</sup> provides that when interpreting the Law, the principle of transparency of public bodies must be favoured. It also provides that the Law must be interpreted in accordance with the constitution, the *Universal Declaration of Human Rights*<sup>12</sup> and a number of international treaties, including the *International Covenant on Civil and Political Rights*,<sup>13</sup> the principal UN human rights treaty guaranteeing freedom of expression. Taken together, these provide a good backdrop to the Law and strong guidance to those tasked with implementing it.

The Law defines information as everything contained in documents that public bodies generate, obtain, acquire, transform or preserve. Documents, in turn, are defined as any records, regardless of form, that relate to the exercise of the functions or activities of public bodies and public servants, regardless of their source, date of creation or form. This is a relatively broad definition, but it is unfortunately limited by the substantive restriction to documents about functions or activities of public bodies (Article 3).

The Law defines separately the obligations of two sets of public bodies. All public bodies, defined as "subjects compelled by the Law" are defined and then a sub-set of these, termed "agencies and entities" is carved out from this. The Law provides for a more stringent set of obligations for 'agencies and entities' (basically the executive branch of government), and less detailed obligations for 'other' public bodies.

All "subjects compelled by the Law" (public bodies) includes:

- the federal executive branch and the federal public administration;
- the federal legislative branch, including the House of Deputies, the Senate, the Permanent Commission and other bodies;
- the federal judicial branch and the Council of the Federal Judicature;
- autonomous constitutional bodies;
- federal administrative tribunals; and
- any other federal body.

Autonomous constitutional bodies is further defined to include bodies like the Federal Electoral Institute, the National Commission for Human Rights, the Bank of Mexico, universities and any others provided for in the Constitution.

"Agencies and entities", effectively the first bullet point above, is defined as including bodies indicated in the Constitutional Federal Public Administration Law, including the President and decentralised administrative institutions, such as the Office of the Attorney General.

The definition of public bodies overall is broad inasmuch as it encompasses all branches and levels of government. At the same time, it does not necessarily include private bodies which are funded by government, or private bodies which undertake public functions.

The First Section of the Law applies to all public bodies. However, the Second Section, which contains most procedural provisions, as well as the oversight system, including IFAI, applies only to agencies and entities, effectively the executive branch of government. The Third Section, which applies to other public bodies, mainly the legislative and judicial branches of government, as



well as the five autonomous bodies is quite brief, containing only two Articles, but it does seek to incorporate many of the obligations and oversight functions provided for in Section Two. This is an innovative approach to including all three branches of government under the Law while respecting constitutional divisions of power. At the same time, this has led to differential application of the Law, with the executive branch (agencies and entities) being subject to more rigorous oversight, and by more independent bodies.

This chapter will, like the Law, focus on the duties of agencies and entities.

## Procedural Guarantees

Any person may submit a request for access to information to the liaison section which all public bodies are required to establish (see below, under Promotional Measures) either in a letter (including electronically) or on the approved form. A request must include the applicant's name and address, a clear description of the information sought, any other relevant facts and the form in which the applicant would like the information to be disclosed. The Law specifically states that the motive for the request shall not be relevant to the decision whether or not to disclose the information sought. If the information is not described sufficiently clearly, or if the individual has difficulty making a request, including because of illiteracy, the liaison section must provide assistance (Articles 40-41 and Transitory Eighth).

Notification of a decision on a request must be provided as soon as possible but in any event within 20 working days and the information must then be provided within another 10 working days, once the applicant has paid any fees (Article 44). An unusual provision stipulates that failure to provide a decision within the time limit will be understood as an acceptance of the request, and the agency will then be under an obligation to provide the information within the next 10 days, and for free, unless IFAI determines that it is confidential (Article 53).

Where the information is deemed to be classified or confidential, the Committee – a supervisory unit within all agencies and entities (see below) – must be notified of this fact immediately, along with the reasons for classification, so that it may decide whether to ratify the classification or to revoke it and grant access to the information. Similarly, when documents are not found, the Committee must be notified and, after having taken “appropriate measures” to find the information without success, confirm that the agency or entity does not hold the information (Articles 44-46).

Agencies are only required to provide access to information they hold (Article 42). However, where an agency receives a request for information it does not hold, it must ‘duly orient’ the applicant to the agency which does hold the information (Article 40). The Law does not include many provisions on third party notice, but it does require the document lodging an appeal to indicate any interested third parties (Article 54) and Article 55, on the hearing of appeals, is generally understood to give certain rights to third parties. The Law also provides generally that ‘internal procedures’ for processing requests will be established by regulation (Article 44).<sup>14</sup>

Where a request is satisfied, the applicant must be notified of the cost and form of access (Article 44). Where a request is refused and this has been confirmed by the Committee, the applicant must be notified of this fact within the time limit, along with the reasons for the rejection and the manner in which the decision may be appealed (Article 45). Confirmation must also be provided to the applicant where the agency does not hold the information sought (Article 46).

Disclosure must be in the form requested, if the document will permit that (Article 42). Otherwise, the various forms of access shall be established by regulation (Article 44).

The provisions of the Law relating to fees are progressive. The fees for obtaining access to information, which must be set out in the Federal Duties Law,<sup>15</sup> may not exceed the cost of the materials used to reproduce the information, along with the cost of sending it. The cost of





searching for the information and preparing it is thus excluded (Article 27). Access to personal data is free, although charges may be levied to cover the costs of delivery of this information (Article 24). Currently, allowable charges are 1 peso (USD.09) for a simple photocopy and 20 pesos for a certified copy.<sup>16</sup>

The process described above applies only to agencies and entities, not other public bodies. A general attempt is made in Article 61 to require other public bodies to process requests in an analogous fashion by requiring them to “establish in their respective domains the institutions, criteria and institutional procedures for granting private persons access to information according to regulations or agreements of a general nature that comply with the principles and deadlines established in this Law.” They are specifically required, within a year, to set up a number of systems and bodies for this purpose, including a liaison section and procedures for access to information. They are also required to submit an annual report on the activities undertaken to ensure access to information (Articles 62 and Transitory Fourth).

In an interesting innovation, the Law provides that requests for information and the responses to them must themselves be published (Article 47). In practice, the whole request process can be conducted electronically through the System for Information Requests (SISI), which has a separate website dedicated to it.<sup>17</sup> This includes a facility for posting questions, as well as the answers. It also makes available all electronic documents to which access has been provided since 2003.

### **Duty to Publish**

Article 7 of the Law provides for a broad duty to publish, subject to the regime of exceptions. It provides that public bodies must, in accordance with the regulations promulgated by IFAI (for agencies and entities) or other relevant oversight bodies (for other public bodies, which must establish or designate their own institutes), publish 17 categories of information in a manner that is accessible and comprehensible.<sup>18</sup> The categories include information about the general operations of the body, the services they offer, procedures and forms, subsidy programmes, contracts entered into, reports made and opportunities for participation. Importantly, Article 12 stipulates that public bodies must publish information regarding the amounts and recipients of any public resources they are responsible for, reflecting the preoccupation with corruption which was an important motivation for the Law.

The Law includes precise stipulations about how this information must be made available, including via electronic means accessible in remote locations and via local systems. An important rule is that every agency must, for purposes of facilitating access to information subject to proactive disclosure, make available a computer for use by members of the public which includes printing facilities, and support must be provided to users where needed (Article 9).

The Law also includes a number of specific directions regarding proactive publication of information. Pursuant to Article 8, the judicial branch must make public all rulings, although individuals may object to the disclosure of their personal information. Agencies and entities must publish all rules and formal administrative arrangements 20 days prior to adopting them, unless this could frustrate their success. Reports by political parties and groups to the Federal Electoral Institute, as well as any formal audits of these bodies, must be published as soon as they are finalised (Articles 10-11). Agencies are also required to produce, on a semi-annual basis, an index of the files they have classified, indicating which unit produced the document, and the date and length of classification, and this index may not under any circumstances itself be considered classified (Article 17).

### **Exceptions**

The Law includes a reasonably clear regime of exceptions, operated largely through a system of classification, although there are a number of potential loopholes in the system. Pursuant



to Article 14, information expressly required by another law to be confidential is one of the exceptions – commercial, industrial, tax, bank and fiduciary secrets established by law are specifically mentioned – so that the existing secrecy regime is left in place.

Only some of the exceptions are subject to a harm test and the requisite standard of harm varies. Article 13 provides generally for an exception where disclosure of information ‘could’ lead to a negative result, but the standard of harm varies considerably, ranging from ‘compromise’, ‘harm’ or ‘impair’ to ‘severely prejudice’. The exceptions under Article 14 – which for the most part involve other laws, investigations prior to a decision and internal deliberations (see below) – do not have a harm test. However, pursuant to regulations adopted by IFAI in 2003, when considering whether to classify documents under Articles 13, 14 or 18 of the RTI Law, the heads of public bodies must take into account the harm that disclosure of these documents might cause.

IFAI (or the relevant oversight body for public bodies falling outside of its ambit) is tasked with establishing criteria for classification and declassification of information,<sup>19</sup> as well as for oversight of the system, while the heads of administrative units, defined as the parts of public bodies that hold information, are responsible for actual classification. IFAI may, at any time, have access to classified information to ascertain whether it has been properly classified (Articles 15-17).

There is no public interest override. However, Article 14 does contain an exceptional and extremely positive provision prohibiting the classification of information “when the investigation of grave violations of human rights or crimes against humanity is at stake.” This should facilitate human rights and humanitarian work.

Article 43 provides for partial disclosure of information (severability), “as long as the documents in which the information is found permit the withholding of the classified parts or sections.”

There is a strict system of time limits to classification under Articles 13 and 14, of 12 years. Information shall be declassified when the grounds for its classification no longer exist or when the period of classification is over, albeit without prejudice to other laws. The time limit may, exceptionally, be extended by IFAI or the relevant oversight body where the grounds for the original classification still pertain (Article 15). In practice, this happens relatively rarely.

Article 48 contains a general exception to the effect that requests which are offensive or which have already been dealt with previously from the same person do not have to be processed. It is unclear what offensive refers to in this context; some other right to information laws refer to vexatious requests. Another general exception is that information already published does not need to be provided to applicants but, in this case, the liaison section must assist the applicant to locate the published information (Article 42).

Article 13 provides for specific exceptions for information the disclosure of which could:

- compromise national or public security, or defence;
- impair ongoing negotiations or international relations, including by divulging information provided on a confidential basis by other States or international organisations;
- harm the country’s financial or economic stability;
- pose a risk to the life, security or health of an individual; or
- severely prejudice law enforcement, including the prevention or prosecution of crime, the administration of justice, the collection of taxes or immigration controls.

These are legitimate grounds for refusing to disclose information, which are found in many right to information laws.

Article 14 adds to these exceptions provided by other laws (as detailed above), prior investigations,<sup>20</sup> files relating to trials prior to a ruling, proceedings against civil servants prior to a ruling, and



opinions, recommendations or points of view provided by officials as part of a deliberative process prior to the adoption of a final decision. These exceptions are problematical mainly because they lack harm tests but also because of their breadth.

Articles 18 and 19 also provide protection for private information. When private individuals provide information to public bodies, the latter must indicate what shall remain confidential (which they may do only where they have a legal right to classify it) and then this information may only be released with the consent of the individual who provided it. This is bolstered by Chapter IV of Section I, which is devoted to the protection of personal information, defined in Article 3(II) as information from which a physical person may be identified and concerning his or her "ethnic or racial origin, or referring to his physical, moral or emotional characteristics, his sentimental and family life, domicile, telephone number, patrimony, ideology and political opinions, religious or philosophical beliefs or convictions, his physical or mental state of health, his sexual preferences, or any similar information that might affect his privacy". Such information may not be disclosed without the consent of the individual concerned, although there are exceptions to this, for example for medical treatment or for purposes of exchanging the information between public bodies pursuant to the proper exercise of their powers. Chapter IV also gives a right to correct personal data (Articles 21 and 25).

### Appeals

For agencies, complaints lie in the first instance to IFAI and from there to the courts. The complaint must be lodged within 15 days of the notice of refusal of access, where information has otherwise not been provided, either in full or in part, where correction of personal information has been refused or to review timeliness, cost or form of access (Article 50). This is an extremely short timeline which may prevent some applicants from lodging appeals. The complaint must contain the names of the agency or entity, the person making the complaint and any third parties, the date the cause of the complaint arose, the subject matter of the complaint, the arguments and a copy of any formal documents relating to the case (such as a notice of refusal of access) (Article 54). Complaints may be lodged with the liaison section of the agency, which must forward it to IFAI the next day (Article 49). Complaints can also be lodged directly with IFAI or made via SISI, which automatically sends a notice to the public body and triggers the process inside IFAI.

A commissioner must investigate the claim and report to all commissioners within 30 working days, and a decision must be made within another 20 days, although these time limits may be doubled for justifiable cause (Article 55). Where an agency has failed to respond within the timelines, IFAI shall process the complaint on an expedited basis (Article 54). A complaint may be rejected where it has been lodged outside of the time limits, where IFAI has already definitively ruled on it, where it does not relate to a decision made by a committee, or where an appeal is being heard by the courts (Article 57).

IFAI may accept or reject a complaint, or modify it, and their ruling shall include time limits for compliance (Article 56). The ruling is final for agencies but applicants may appeal them to the federal courts (Article 59).

Once a year has passed since a decision by IFAI confirming an original decision by a public body, the applicant may request IFAI to review its decision, and a second decision must be issued within 60 days of such a request (Article 60).

Article 33 provides for the establishment of IFAI as an independent public body charged with promoting the right to information, acting as a complaints body for refusals to disclose information and protecting personal information. The Law includes a number of provisions designed to promote the independence of IFAI. The five commissioners are nominated by the executive branch, but nominations may be vetoed by a majority vote of either the Senate or the Permanent Commission, as long as they act within 30 days. Individuals may not be appointed as commissioners unless they are citizens, have not been convicted of a crime of fraud, are at least 35 years old, do not have strong political connections and have "performed outstandingly in the professional activities" (Articles 34 and 35).



Commissioners hold office for seven years, but may be removed for serious or repeated violations of the Constitution or the RTI Law, where their actions or failure to act undermine the work of IFAI or if they have been convicted of a crime subject to imprisonment (Article 34). Two of the five original Commissioners were appointed for four years, with possibility of renewal for another seven years (Transitory Fifth).

Other public bodies are also obliged to provide for complaints' procedures in line with those available through IFAI for agencies and entities (Article 61).

## Sanctions and Protections

Civil servants who fail to comply with the law in a number of ways – including by destroying information, by denying access negligently, fraudulently or in bad faith, by intentionally denying access to non-confidential information, or by refusing to disclose information as ordered by a committee or IFAI – are administratively liable. These wrongs, as well as any other failure to respect the provisions of the Law, will be punished in accordance with the Federal Law of Administrative Responsibilities of Public Servants. Repeated failures will be considered 'serious' for purposes of sanction (Article 63)

The RTI Law also provides for liability on the same basis if officials disclose classified or confidential information, one of the few provisions in the Law that is likely to impede the development of a culture of openness, prompting officials to err in favour of secrecy (Article 63). Instead, protection should be provided to officials who disclose information pursuant to the law in good faith, in line with the practice of many right to information laws. Protection should ideally also be provided to those who disclose information about wrongdoing (whistleblowers).

## Promotional Measures

The Mexican RTI Law provides for a number of interesting procedural mechanisms to promote effective implementation of the right of access. All public bodies must establish a "liaison section", the analogy of an information officer in some other laws, with a number of duties including to ensure that proactive publication obligations are respected, to receive and process requests for access and to assist applicants, to ensure procedures are respected, to propose internal procedures to ensure efficient handling of requests, to undertake training, and to keep a record of requests for information and their outcome. These sections must be established within six months of the law coming into force and they must become operational within a further six months (Articles 28 and 62, and Transitory Third and Fourth).

The Law also provides for an Information Committee in each agency and entity, with a few exceptions, composed of a civil servant, the head of the liaison section and the head of the internal oversight body. The Committee is responsible for coordinating and supervising information activities, establishing information procedures, overseeing classification, ensuring, along with the liaison section, that documents containing requested information are found, establishing document maintenance criteria and overseeing their implementation, and ensuring the provision to IFAI of the information it needs to produce its annual report (see below) (Articles 29-31).

IFAI has a long list of functions including, in addition to those already noted, interpreting the Law as an administrative regulation, monitoring implementation of the Law and making recommendations in case of non-compliance, providing advice to individuals, developing forms for information requests, promoting training and preparing a simple guide on how to use the Law (Articles 37 and 38).

Article 9 includes a very general rule on record management, providing that agencies and entities must handle their information, including putting it online, in accordance with regulations promulgated by IFAI. Article 32 provides that IFAI must cooperate with the General Archive of the



Nation to develop “criteria for cataloguing, categorizing and preserving administrative documents, as well as organizing the archives”.

IFAI is responsible for providing an annual report to Congress, which shall include, at a minimum, “the number of requests for access to information presented to each agency and entity and their results; agency response time; the number and outcome of matters attended to by the Institute; the status of denunciations brought before the internal oversight bodies; and any difficulties encountered in carrying out the Law.” For this purpose, it shall issue guidelines to the committees of the different agencies on the information which they must, pursuant to Article 29(VII), provide to it (Article 39). Other public bodies must prepare their own reports, along the same lines as is required of IFAI, a copy of which must be provided to IFAI (Article 62).

## Notes

- 1 A version of the Constitution as it was in 2002 is available at: <http://historicaltextarchive.com/sections.php?op=viewarticle&artid=93#T1C1>.
- 2 Published in the *Diario Oficial de la Federación* on 20 July 2007.
- 3 A constitutional amendment requires the support of 16 States to pass.
- 4 Where the entirety of the right to information law is considered to be of constitutional status.
- 5 Available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/laweng.pdf>. Available in Spanish, as amended, at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/244.pdf>.
- 6 Reglamento de la Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental, adopted 11 June 2003. Available (in Spanish) at: [http://www.sre.gob.mx/transparencia/docs/reglamento\\_lftaipg.htm](http://www.sre.gob.mx/transparencia/docs/reglamento_lftaipg.htm).
- 7 In relation to IFAI, Former World Bank President, Paul Wolfowitz, stated: “I was particularly impressed by IFAI, the autonomous agency which gives ordinary citizens access to public information.” Press conference in Monterrey, Mexico, 26 April 2006. Available at: <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/LACEXT/MEXICOEXT/0,,contentMDK:20903722~pagePK:1497618~piPK:217854~theSitePK:338397,00.html>.
- 8 *Lost in Transition: Bold Ambitions, Limited Results for Human Rights Under Fox* (Human Rights Watch, 2006), p. 4. Available at: <http://hrw.org/reports/2006/mexico0506/mexico0506web.pdf>.
- 9 See *Transparency and Silence: A Survey of Access to Information Laws and Practices in Fourteen Countries* (Open Society Justice Initiative, 2006), p. 43. Available at: [http://www.soros.org/resources/articles\\_publications/publications/transparency\\_20060928](http://www.soros.org/resources/articles_publications/publications/transparency_20060928).
- 10 Sobel, D. and Bogado, B., *The Federal Institute for Access to Public Information in Mexico and a Culture of Transparency*, February 2005, Executive Summary. Available at: <http://www.global.asc.upenn.edu/index.php?page=32>.
- 11 Article 6 was amended on 6 June 2006.
- 12 UN General Assembly Resolution 217A(III), 10 December 1948.
- 13 UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.
- 14 A regulation was adopted in June 2003 which does, among other things, address the issue of processing of requests. See note 6.
- 15 Which came into force on 31 December 1981. Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/107.pdf>.
- 16 It would appear that different public bodies interpret this differently, some charging by page and others for entire documents.
- 17 See [www.sisi.org.mx](http://www.sisi.org.mx).
- 18 This is further elaborated in Articles 8-25 of the 2003 Regulation, note 6.
- 19 The 2003 Regulation includes extensive rules on classification.
- 20 It is unclear what this means.

Nicaragua





## Nicaragua

### Introduction

The Political Constitution of the Republic of Nicaragua, adopted in February 1987, as amended, does not provide for a general guarantee of the right to information. Article 26(4) protects the right of Habeas Data, whereby everyone has the right to know about information held by public bodies about them. Article 66 stipulates that all Nicaraguans have the right to truthful information which comprises the freedom to seek, receive and impart information and ideas, whether oral or in writing, graphically or by any other means. Law No. 621 on Access to Public Information (RTI Law) was adopted on 22 June 2007 to give effect to the right to information.

The Nicaraguan RTI Law is a very progressive one and if implementation is successful, it should go a long way to ensuring access to information in practice. Generally, the Law includes broad definitions, clear procedural rules, wide proactive publication obligations, a fairly narrow regime of exceptions and extensive promotional measures, including very extensive rules on public educational efforts. The Law adopts a rather unique approach to appeals providing for a central system of 'internal' appeals, rather than for a truly independent level of administrative appeal. It remains to be seen how successful this will be in practice. The Law also fails to provide protection for those who release information in good faith pursuant to it, instead providing for sanctions for those who release classified information.

### The Right of Access

Article 2 provides that public information held by public bodies must be provided to anyone who requests it, in accordance with the RTI Law (see also Article 4(a)). The right of everyone to access information held by public bodies relating to them, and to know why and for what ends the information is held (Habeas Data), is also guaranteed (Article 4(b)).

Article 1 of the RTI Law defines its objects generally as being to guarantee and promote the right to information. Article 3 sets out a number of principles governing the right to information, an interesting approach to this right, found mostly in other right to information laws only in Latin America. Article 3 contains the following principles:

- The Principle of Access: anyone has the right, without discrimination, to request and receive complete, adequate and timely public information, subject to the regime of exceptions.
- Principle of Publicity: Public bodies are subject to this principle in their activities, so that all information they hold is shall be publicly accessible, again subject to the regime of exceptions.
- Principle of Multi-ethnicity: Nicaragua is multi-ethnic in nature and so public information must be provided in all local languages.
- Principle of Citizen Participation: Public bodies should promote citizen participation, including by providing information to this end.
- Principle of Transparency: Public bodies should disclose, with a view to fostering citizen scrutiny over them, information about their activities and the public resources they manage.
- Principle of Responsibility: This principle promotes the responsible use of public information, including complete, integral and truthful management of information.





- Principle of Proof of Harm: This principle provides that exceptions should be harm based (see below, under Exceptions).

Information is not defined in the RTI Law but a document is defined as any form of stored information, including in electronic form (Article 4). The Law also defines files, books and databases, all specific forms of recording and storing information. Public information is defined as information produced, obtained, classified and stored by public bodies, as well as information in the possession of private bodies that relates to public resources, benefits, concessions or advantages. Private information is defined as personal data referring to private life, such as information about health, race, political or religious preferences, honour and reputation, etc. This is supported by the definition of Habeas Data, which refers to similar characteristics in relation to the notion of sensitive personal data. According to Article 1, private information held by public bodies is not included in the right of access. This is a significant and problematical blanket exclusion from the Law, not found in other right to information laws (although these do include an exception to protect privacy or personal information).

Meetings of public bodies in which public decisions are discussed are required to be minuted and these minutes preserved in official archives (Article 24). This is an innovative and extremely positive approach which should promote far greater openness in relation to meetings.

Article 4 defines public bodies and private bodies subject to the law separately (and the Law often treats them differently, for example in relation to proactive publication). The former includes the legislative, executive, judicial and electoral branches of the State, along with related dependent and independent bodies, autonomous government bodies, including corporations, and municipal and autonomous regional governments (specifically of the Atlantic Coast), along with their dependent and independent bodies and corporations. Private bodies subject to the Law are defined as bodies that have public service concessions, as well as other private bodies when they act to support these concessions or when they receive public funds.

This is a broad definition, although it is not absolutely clear that it covers all bodies established by law. Furthermore, it may not include private bodies undertaking public functions other than pursuant to a concession or with public funds.

Everyone has the right to request and receive public information. Article 4 specifically defines this to include natural and legal persons, as well as nationals and foreigners.

### **Procedural Guarantees**

Requests for information may be made in verbal or written form, specifically including electronically where the relevant body has an electronic form available. Requests must be registered and the applicant must be provided with a copy of the registration form (Article 26). Requests must contain the name of the body from which the information is being requested, the name, address and "standard legal questions" of the applicant, an identification card, a clear and precise description of the information sought, and the address or email to which the information should be sent (Article 27). The Law specifically rules out reasons being asked as a condition for the satisfaction of a request for information (Article 28). These are progressive provisions on lodging requests but it would be preferable for electronic requests to be accepted even if the body has not developed the requisite form. Furthermore, it is not clear why applicants should provide their full name, address, answers to standard legal questions and an identification card. These formalities were added on the basis that they might be necessary to facilitate the filing of appeals. However, this is not required in other countries and may be abused to obstruct access.

Where a request is not clear or the requisite information is incomplete, the applicant must be informed of this within three working days (Article 27(2)). Assistance must be provided to



applicants who are disabled or who have special language needs (Article 6(3)). More generally, those responsible for processing information requests must do their best to assist applicants (Article 11). Officials must also provide assistance to applicants to orient them on the right to information, to assist them to fill out forms and to indicate which bodies are able to receive complaints about the right of access (Article 33).

Requests must be answered immediately or within 15 working days (Article 28). It might be preferable to provide for requests to be answered as soon as possible or within the established time limit (i.e. in addition to immediately). The 15 days may exceptionally be extended by ten more working days where information must be collected from other bodies or from a location which is far away, where the request necessitates consultation with other public bodies, where the request involves a lot of information which will take time to collect or where analysis is required to determine whether or not the information falls within the scope of the regime of exceptions. In this case, the body must communicate the fact of the extension, along with the reasons for it, to the applicant before the expiry of the original 15 working days (Article 29). Where bodies fail to comply with these timelines, they will be considered to have granted the request, unless the information is confidential (Article 35). Although clearly designed to create pressure on officials to respond in a timely manner to information requests, the exception in favour of confidential information largely robs this provision of its relevance, since all requests are supposed to be granted unless the information is confidential.

Where the body to which a request has been presented does not hold the information or is not competent to deliver the information, the applicant must be informed of this and 'duly advised' within three working days of the petition having been presented (Article 27). In this case, the applicant must be given precise instructions as to the location and person responsible for providing the information, and any failure in this regard is expressly listed as a violation of the law (Article 30(2)). It is not clear why a body which holds the requested information would not be competent to deliver it. Public bodies should be required to process requests for all information they hold; where necessary, they are of course free to consult with other public bodies as to the disclosure of this information. The Law does not appear to provide for consultation with third parties about the provision of information.

In terms of form of access, applicants may print documents for immediate consultation, or copy or photocopy them, or purchase items for sale (Article 11). Pursuant to Article 30, applicants may consult information on site during office hours and in the presence of an official, whose role shall be simply to ensure the safety of the information.

Denials of access to information must be motivated or they will be considered to be null and void (Article 35). The denial must be provided to the applicant within three days of being adopted and it must include a full description of the denial, along with the legal grounds underpinning it (Article 36). It is not clear why such denial should not be communicated to the applicant immediately. Otherwise, however, this is a unique and positive attempt to ensure public bodies provide appropriate reasons when denying access to information.

Lodging requests and consulting documents shall be free of charge. A reasonable recovery fee may be charged for the duplication of information which shall not, however, exceed the cost of materials used in the reproduction and the cost of delivery, where required (Article 31). It is not clear what this would cover – for example whether the cost of equipment used to photocopy documents would be considered to be a 'material' cost – but it would appear to be very limited in scope. Where items are sold at fixed prices, that price may not exceed the cost of publication (Article 11). These are progressive fee rules. Consideration should, however, be given to providing for centrally set fee structures, so as to avoid a patchwork of different fees across different public bodies.



### Duty to Publish

The main provisions of the RTI Law dealing with the duty to provide information on a proactive basis are Articles 20 and 21 addressing, respectively, the obligations of public bodies and obliged private bodies. Article 40 additionally provides, very generally, that public bodies must create a database to host the information it creates, administers and possesses, and to make this database publicly available, including in electronic form (presumably via a website), in accordance with the rules set out in the Law.

Public bodies are required to publish the following categories of information: their organic structure, the services they provide, the legal norms that govern them and the policies that provide their vision and mission; the names of the officials that make up the Superior Direction and the Information Office (see below); the monthly pay for all personnel, including temporary employees and consultants; calls for tenders, contests, purchases, the provision of services, concessions, permits and authorisations, and hiring opportunities; studies and other information that justify the grant of permits, concessions, licences and hiring of personnel, information relating to compliance with the rules for conducting the above, as well as the results of tenders, contracts and purchase competitions; the results of internal audits; the beneficiaries and authorised use of all public grants; services and programmes offered, along with the procedures for accessing them; the upcoming programme of work; balance sheets and financial statements; an annual report on activities, including a summary of results of right to information requests; the results of evaluations, audits and investigations undertaken by supervisory bodies; and the resources that have been allocated to achieve administrative acts, along with the resolutions adopted to this end. Public bodies must periodically update this information (Article 22).

Pursuant to Article 21, private bodies covered by the obligation to provide access to information are required to disclose on a proactive basis a smaller range of information, as follows: concessions, contracts, donations and other public benefits they have received, along with the basis for these and their content; the work and investments they are required to do and make to fulfil commitments associated with the above; the kinds of services they render, their basic rates, how they are calculated and any other fees they are authorised to collect; procedures for making complaints; annual information on their activities, including a summary of complaints received and how they were resolved; and all information necessary to allow citizens to monitor the degree to which they have complied with their public obligations, as well as their use of State funds and benefits.

These are broad proactive publication obligations. The idea of imposing separate obligations on public and private bodies is an innovative one that may make sense given the cost implications of proactive publication obligations, which may affect commercial competitiveness. At the same time, consideration should be given to whether it might be more realistic to allow obliged bodies more time than the 180 days currently provided for in the RTI Law to build up to these impressive proactive disclosure obligations over time, by allowing them to establish a programme for their progressive realisation over time.

Both public bodies and obliged private bodies must make “all information, diagnoses, studies, research and/or public information of a different nature available” to indigenous peoples and communities of “African descent” with a view to contributing to their development and socio-economic wellbeing (Article 25). This is a welcome and indeed innovative provision but it is also rather vague in nature. It might be preferable to set out clear obligations in this regard, including as to the scope of information covered, translation and mode of dissemination, so as to be sure that obliged bodies really do meet it.

The Information Offices that both public bodies and obliged private bodies are required to establish must also create an index of the information they hold, as well as of administrative acts, regulations and files, and this index must be made publicly available, subject to the regime



of exceptions. Charges may be levied for reproduction of these indexes (Articles 10 and 12). This is a very progressive rule which should significantly facilitate access to information. At the same time, it might impose a burden on these bodies and so should perhaps be revisited in due course to assess how well it is working in practice.

Finally, public bodies are required to put in place systems to enable access to information and for proactive publication of information, including over the Internet (Article 23).

## Exceptions

The RTI Law includes a comprehensive list of exceptions, at Article 15. Significantly, Article 50 provides that the Law is of “public order” and so shall prevail over other laws to the extent of any inconsistency. This is supported by Article 3(7), setting out the Principle of Proof of Harm, which provides that the classification of information shall only be in accordance with the exceptions set out in “the present Law”. If this interpretation is correct, this is a very positive provision which should ensure that the regime of exceptions in the RTI Law is not extended by other laws.

The exceptions listed in Article 15 vary in terms of whether they incorporate a harm test and, for those that do, the nature of this test. Blanket exceptions include commercial secrets of both third parties and the State, and internal advice. For other exceptions, the harm test is formulated as “may pose a risk” or “may hinder or frustrate”, which is a low standard of risk. Article 3(7), however, provides that information may be classified only where disclosure of that information “may effectively threaten public interests”, suggesting a more robust form of harm test. The relationship between these provisions, as well as how they are applied in practice, is not clear.

Article 3(7) also provides for a public interest override, stating that information may only be classified where the damage caused by disclosure of the information is greater than the public interest in knowing the information. This is not repeated in Article 15, which specifically provides for exceptions, although presumably it still applies.

Pursuant to Article 15, information may only be classified through an agreement with the head of the body which holds it. Article 16 places a number of conditions on such agreements, including that they indicate the source of the document, the reasons for its classification, the parts of the document that are classified, the term of classification and the body responsible for keeping it.

The RTI Law does not include a severability provision, providing for partial release of a document where only some of it falls within the scope of the regime of exceptions. This is unfortunate as such provisions are important to foster the release of information in practice. At the same time, Article 16(2) provides that any document, or part thereof, which has not been classified must be made public, which is an implied severability provision.

Article 17 provides that classified information remains classified for up to ten years, although it loses this status once the reasons that justified it have disappeared. The period of classification may be extended, once, for an additional five years. When the period of classification expires, the document attains an historical status if this is mandated by the Nicaraguan Institute of Culture and the National Institute for Information and Development, in which case it becomes accessible in accordance with the provisions of the Law.

The specific exceptions provided for in Article 15 are as follows:

- Information the disclosure of which may pose a risk to territorial integrity or national security and “specifically and exclusively” a list of seven categories of information, such as military plans, strategies and communications, intelligence plans, inventories and locations of weapons, the acquisition and destruction of armaments, military exercises, and military information rendered secret by regional treaties signed by Nicaragua.



- Information the disclosure of which may hinder or frustrate the prevention or prosecution of crime by the Attorney General, the police and other bodies legally entrusted with these tasks.
- Bank, commercial, industrial, scientific or technical secrets or intellectual property belonging to third parties or to the State, without prejudice to the disclosure of the Registry of Intellectual Property.
- Information the disclosure of which poses a risk to international relations, litigation before international courts or the negotiation of commercial agreements or integration pacts, without prejudice to the right of citizens to participate in these negotiations, as well as information which relates to collective defence and security which Nicaragua is required by international law to keep confidential.
- Advice, recommendations and opinions that form part of the deliberative process, as long as a decision has not yet been reached, provided that once an act has been decided or resolution taken, it shall be made public. Furthermore, any information referred to in the process of formulating and adopting laws and public policies, as well as advance reports of the Comptroller General, are excluded from this exception.

As noted above, personal information is fully excluded from the scope of the RTI Law. This is highly problematical for a number of reasons, including that not all of what is defined by the Law as personal information is legitimately confidential. For example, the list of personal information includes information that would affect the reputation of the individual but, to the extent that such information is true, it should still be disclosed (and, if it is not true, one may question why it is being held by a public body). Furthermore, this exclusion has the effect of avoiding the application of the public interest override to personal information. In better practice right to information laws, personal information is *prima facie* covered but subject to an exception to prevent access in practice, to the extent that its disclosure would cause harm and subject to the public interest override.

Article 19 also exempts asset declarations made by civil servants in accordance with Law Number 438, Law of Probity of Public Servants, from the entire regime of exceptions in the RTI Law.

Article 32 provides that where a request relates to information that has already been published, the applicant will be notified of this and be directed to the place where it was previously published, instead of being given the information directly.

For the most part, the exceptions in Article 15 are recognised as legitimate under international law and better practice national right to information laws. At the same time, several may be criticised as being overbroad. While it is likely that the list of categories of exempted security information are intended to narrow the scope of this exception, at the same time they are seriously overbroad. For example, in many countries, information about military exercises or the destruction of weapons is regularly made available. The exception in favour of internal deliberations and advice is similarly overbroad. Instead of a class exception, it should identify the particular harm sought to be avoided – such as undermining the free and frank provision of advice.

The list of exceptions is also too limited, inasmuch as it fails to include some exceptions found in most right to information laws, such as in favour of legally privileged information and to protect the ability of the government to manage the economy.

## Appeals

The RTI Law adopts a unique approach to appeals, providing for an enhanced form of internal appeal, but no appeal to an independent administrative supervisory or oversight body.

Pursuant to Article 13, Coordination of Access to Public Information units are to be created at the national, municipal and Autonomous Regional government levels with the main purpose



of overseeing compliance with the RTI Law, including by constituting a sort of internal appeal mechanism for applicants whose requests for information have been denied. The Law stipulates that municipalities shall elect three delegates to these bodies but is silent as to how they should be constituted at the other levels of government. Pursuant to Article 37, an appeal may be entered before these bodies within six days of notification of a refusal of access, and such an appeal will be resolved within 30 days. An appeal may also be lodged with this body in case of administrative silence (i.e. a mute refusal of access).

An internal appeal of this sort can serve as a useful means to help resolve access problems that lower ranking civil servants do not have the confidence or authority to deal with. At the same time, this mechanism could be improved by widening the grounds of appeal to include such things as undue delays, excessive fees and a refusal to provide information in the form sought. Furthermore, six days is too short a period for lodging an appeal and fails to take into account situations where the applicant needs to consider whether or not to take this step, is otherwise too busy to do so within that timeframe, or is simply away, for example on holiday.

Applicants may also appeal to the Jurisdiction of Administrative Litigation of the Supreme Court of Justice, either after pursuing an internal appeal or directly, in accordance with the rules governing that venue. In this case, the applicant may request damages, expenses and court costs (Article 38). A failure of an official to comply with a decision of this body constitutes contempt of court (Article 39).

The possibility of an appeal to the courts is useful. At the same time, experience in other jurisdictions has demonstrated that an appeal to an independence administrative body is an invaluable means to resolve access to information disputes rapidly and at low cost to applicants. Put differently, courts are simply too expensive and time consuming a venue for most people to pursue access to information disputes.

## Sanctions and Protections

Pursuant to Article 18, officials are responsible for violating the confidentiality of classified information. Any officer who denies, without just cause, a request for information, who completely or partially destroys or alters public information, who makes available classified information or who classifies public information shall be sanctioned with a fine of between one and six months of his or her monthly salary. When the head of a body wrongly classifies public information, the fine shall be between one third of one to six months of his or her monthly salary (Article 47 and 49). These sanctions are without prejudice to any crimes and penalties in the Penal Code (Article 48).

Sanctions for wilfully obstructing access to information are welcome. At the same time, there are problems with these sanctions. First, they do not appear to require wrongdoing in all cases. For example, it is normal for officials to alter public information, indeed this is part of their daily responsibilities. Similarly, some public information needs to be classified, as provided for in the RTI Law. Second, while the wrongful provision of classified information does deserve to be sanctioned, the main role of a right to information law is to try to counter deep-seated secretive practices. As a result, it is inappropriate, and likely unnecessary, to impose sanctions on those who breach the secrecy rules (since these are supported in other laws). Finally, it is not clear why the head of a body should be treated more favourably than ordinary employees both by potentially receiving a lower fine and by being held responsible for a smaller range of wrongs.

The RTI Law fails to provide protection to those who, in good faith, disclose information pursuant to the Law. Such protection is essential to give civil servants, long accustomed to operating in secret, the confidence to release information in accordance with the new law. It also fails to provide protection to those who, again in good faith, release information on wrongdoing (whistleblowers). This is important to ensure a flow of information of key importance to the





public. Its importance in the Nicaraguan context is highlighted by the criminal provisions for wrongful disclosure of information which can lead to imprisonment, as well as the not infrequent attempts by the authorities to sanction public officials for disclosing information.

### **Promotional Measures**

All public bodies and obliged private bodies are required to establish an Office of Access to Public Information (Information Office), incorporating the existing Centers for Documentation and Central Files, to report directly to the “maximum authority” of that body and to receive sufficient resources for its work from the Superior Direction of the body (Articles 6, 7 and 8). Article 53 provides more generally that the Ministry of Finance and Public Credit shall make provision in the budget for bodies to be able to implement their information obligations. Bodies falling outside the scope of such public funding, which would include obligated private bodies, must fund their information activities from existing resources. These Information Offices are responsible for creating a system for record management and indexes of information held by the body, for keeping a record of requests for information and the responses provided, which shall themselves be public, for establishing an accessible place where applicants may review information and for putting in place procedural manuals (Articles 6 and 9). This is an impressive list of positive implementation measures for such bodies.

The RTI Law also provides for the establishment of a National Commission of Access to Public Information, made up of officers that coordinate access to information at the State, municipal and Autonomous Regional Government levels, and with the responsibility of making public policy proposals, promoting training for officials and public awareness of the new law, and fostering technical cooperation with similar bodies in other countries (Article 14). This is also an innovative and interesting approach, rarely found in other right to information laws.

The Law provides for extensive training and educational activities. All public bodies are separately required to train their officials on the right to information and the culture of openness (Article 43). The Ministry of Education is required to introduce content on the right to information into school curriculums, while universities are required to introduce courses on this at their respective institutions and the National Commission for Education is tasked with establishing, in coordination with institutions of higher learning, a national centre for research and teaching on the right to information (Articles 43-45). These are impressive obligations; indeed, the training and educational provisions are among the most extensive of those found in any right to information law in the world.

Although these are all very positive provisions, they could be further improved by bolstering the reporting obligations of public bodies. While Article 20 requires each body to report annually on its information activities, there is no requirement for any central report summarising all information activities across the public sector, or for such a report to be laid annually before the legislature, with a view to ensuring regular consideration of this important social activity by that body. A natural candidate for this task would be the National Commission of Access to Public Information.



Panama





## Introduction

The Political Constitution of the Republic of Panama of 1972, as amended, does not specifically guarantee the right to information. Article 37 does provide for a general guarantee of the right to freedom of expression, including through words, in writing or through any other medium, without prior censorship, which may be subject to certain restrictions to protect the reputation or honour of others, security or public order.

The Panamanian Law Which Dictates Norms for Transparency in Public Administration, Establishes Habeas Data and Dictates Other Dispositions of 2002 (RTI Law), sets out the right to information in that country.<sup>1</sup> The Law is a reasonably progressive one, although it falls short of international standards in some areas. Its rules on proactive publication are less extensive than in some laws, although it does include an innovative requirement to publish information to facilitate participation, linked to its relatively unique right to participate in different ways. It has a substantially overbroad regime of exceptions, which probably defers to secrecy laws, although this is not entirely clear, and which includes unnecessary exceptions and does not include a harm test or public interest override. It also fails to provide for any sort of appeal against refusals to provide access, whether internal, to an independent administrative oversight body or to the courts. It does not protect those who release information in good faith and its package of promotional measures is, taken as a whole, rather modest.

At the same time, the Law does include a number of positive features, in addition to the right to participate, noted above. It defines information very broadly to include information held in a chemical, physical or biological form, and within the power or knowledge of a public body. It has a broad definition of a public body and it extends the right of access to everyone, including non-citizens. It also has a forward-looking rule requiring public bodies to establish “consultation offices” for purposes of promoting electronic access to information.

## The Right of Access

Article 2 of the RTI Law sets out the main guarantee of the right to information, providing that anyone has the right to request public information in the “power or knowledge” of public bodies. This is supported by Article 1(2), which defines the Right to Freedom of Information as the right of anyone to obtain information about issues being handled by public bodies, or information of any nature held by them. Article 8 stipulates that public bodies must provide information concerning their functions and activities to any person who requests it, subject only to established exceptions.

There is a tension running through these provisions between guaranteeing the right to *all information* held by public bodies and only guaranteeing access to *information relating to their functions*. The latter is an unduly restrictive form of the right, since it allows public bodies, at least potentially, to refuse access to some information they hold on the basis that it does not relate to their functions. The principles underlying the right to information – namely that public bodies hold information on behalf of the public – do not warrant such a limitation.

Article 3 also provides for a right of access to personal information, as well as the right to correct or have removed, where appropriate, such information. Articles 17-19 elaborate on the right of Habeas Data, and provide for anyone to enter such an action where a public body has refused to provide personal information, or has done so in a manner which is insufficient. Such



actions are dealt with by the Supreme Court and shall be processed in a summary judgment without formalities.

Chapter VII establishes a rather unique right to participate in public decision-making. Article 24 requires public bodies to allow citizens to participate in all acts of public administration that might affect their interests and rights, including, among others, the construction of infrastructure, zoning and the fixing of fees and rates for services. Article 25 lists a number of modalities for citizen participation, including the following:

- “Public Query”: Where a public body makes information available and requests feedback in the form of comments or suggestions.
- “Public Hearing”: As in the above, but where the feedback is provided in person.
- “Forums or workshops”: Meetings with relevant actors or affected parties to garner their input, including with a view to promoting consensus or resolving conflicts.
- “Direct Participation in Institutional Entities”: Where citizens are directly represented in public bodies, for example on boards or advisory bodies, for purposes of providing input or decision-making.

Taken together, this is an impressive list of aspects of the right to information which goes beyond what is found in most such laws. The right to Habeas Data is presumably defined in more detail elsewhere in Panamanian law. While it is both innovative and useful to establish a right to participate, and this is widely recognised as a key rationale behind the right to information, it is unclear how effective these provisions will be in practice, as they fail to stipulate or set standards regarding the extent of participation that might be required.

The RTI Law does not really set out its objectives as such. But Article 1 does define a number of principles. In addition to Article 1(2), defining generally the right to information, Article 1(10) defines the Public Access Principle, which refers to the right of anyone to request and receive “truthful and timely” information in the power of public bodies. Article 1(11) defines the Publicity Principle, which states that all information generated by public bodies is public and that, as a result, the State must ensure proper organisation of such information to provide access to it and to disseminate it proactively. Finally, Article 1(13) defines Transparency as the duty of public bodies to submit to citizen scrutiny any information relating to public administration, the management of public resources or the conduct of public officials, or which serves as a basis for decision-making.

These really define the scope of the right rather than set out the underlying goals or purposes for which the right is guaranteed. At the same time, they could well be used as a guide for interpreting the scope of the Law.

The Law defines information as any “kind of data contained in any optical, electronic, chemical physical or biological medium, document or record” (Article 1(4)). Although simple, this definition is also broad and should cover all types of recorded information. Indeed, the reference to chemical, physical or biological forms of information goes beyond the scope of information covered by most right to information laws. Furthermore, at least as defined in Article 2, the right of access applies broadly to all information in the power of, or even knowledge of, public bodies. This is once again wider than the scope of access in many right to information laws, although, as noted above, the Law also suggests that access may be restricted to information relating to the functions of public bodies.

Public bodies (“institutions”) are defined in Article 1(8) as any agency of the State, including at the executive, legislative and judicial branches of government, the Attorney General, “decentralized, autonomous and semi-autonomous” bodies, the Panama Canal Authority, municipalities, local governments and community boards, mixed capital companies, and other bodies (“cooperatives, foundations, trusts and non-government organizations”) that receive or have received State funding or support.



This is a broad definition. It probably covers all statutory bodies, but it might still be worth making this quite explicit. It is not clear whether the reference to “mixed capital companies” would cover any corporation with some State ownership or just those with substantial public ownership. This would be worth clarifying. It might also be worth specifying, if this is the intention, that bodies that receive State funding are covered by the obligation of openness only to the extent of that funding. Finally, bodies which carry out public functions but without public funding (for example on a for-profit basis) are not covered.

The Law defines a ‘person’ as any person, natural or legal, acting in his or her own name or on behalf of someone else (Article 1(9)). The right of access, as defined in Articles 2 and 8, applies to any person. There do not appear to be any limitations on the definition of a person, so this may be assumed to apply to non-citizens as well as citizens.

## Procedural Guarantees

Article 5 of the RTI Law provides for the submission of requests in writing either on “regular paper” or by email, where the public body has the capacity to receive requests in this manner. No formalities are required – such as the need for a power of attorney – and requests should contain a name, personal identity number, home or office address and telephone number of the applicant, as well as a detailed description of the information sought. For applicants that are legal persons, information on their “inscription” (presumably registration or incorporation) and the personal data of their legal representative must also be included (Article 6). No reasons are required to be provided for a request (Article 2).

It would be preferable if requests might also be lodged orally, particularly in case of illiterate applicants. Furthermore, many right to information laws provide for assistance to be provided to applicants, particularly for illiterate or disabled applicants, but also for anyone else who is having difficulty formulating his or her request. It is not clear why such a lot of personal information and, in particular, information like the personal identity number, needs to be provided to make a request for information. It should be sufficient if the applicant has provided adequate contact information.

Requests must be answered within 30 calendar days, which may be extended for another 30 days for “complicated or extensive” requests, but not beyond this. In the case of an extension, the applicant must be informed of this within the original 30 days (Article 7). These are relatively long timelines, although it may be noted that 30 calendar days is about 20-22 working days. There is no provision for shorter timelines for urgent information, for example relating to human rights abuse or life or liberty. The reference to “complicated or extensive” requests is a bit vague and better practice would be to define more precisely the grounds upon which an extension might be sought.

There is no provision for consultation with third parties who provided the information sought to a public body or to whom the information relates. Article 7 does provide that where the information is not held by the public body receiving the request, the applicant should be informed of this, as well as which other public body might hold it, if this is known.

Where access to information is to be refused, the applicant must be informed of this and provided with a reasoned refusal, including by referring to the provisions in the Law upon which that refusal is based (Article 16). Such notice must presumably be in writing, although this is not specified in the Law.

Article 7 provides generally that there should be “a clear and simple mechanism” for providing the information to the applicant, including through email where this is available and the request was made by email. Article 4 elaborates on this, providing that information may be provided in



simple copy form, or “in digital, audio, photographic, cinematographic or video reproduction”, depending on how the request is made and what is technically feasible. It would be preferable to allow applicants to specify the form in which they would like to receive the information (i.e. instead of linking this to the manner in which the request is made).

Article 4 provides that requests shall be free, as long as no reproduction of the information is sought. Where a reproduction is asked for, the applicant must pay for this, but no other charges (although applicants may also be charged for the cost of certifying information, where this is requested). Better practice right to information laws set certain conditions on reproduction charges, for example that they should not exceed commercial rates or actual costs. Ideally, these rates should be set by a central body to ensure consistency across all public bodies. Consideration should also be given to the idea of lower fees, or fee waivers, for certain requests, for example from poorer applicants or where the request is in the public interest.

### **Duty to Publish**

Article 9 is the main provision in the RTI Law dealing with proactive or routine publication. It calls on public bodies to make available the following categories of information: updated internal regulations and procedures; general policies and strategic plans; the location of documents by category and the officer responsible for them; and a description of the forms and procedures for obtaining information, and where these can be found. Such information should be made available in printed publications, as well as on their websites, where the body has one, and be updated periodically.

Both the Comptroller General and the Ministry of Economy and Finance must also publish a report on the execution of the budget, within 30 days (Article 9). These bodies must both also present quarterly reports on the execution of the budget containing, at a minimum, the development of the gross national product and the most relevant activities by sector (Article 10). Furthermore, the General Budget must contain information about the non-financial public sector, including current revenues, operating expenses and savings; interest; capital expenditures and donations; and depreciations (Article 12).

Articles 10 and 11 are included in the same chapter as the above provisions, on “The State’s Obligation to Inform”, although they refer only to the obligation to provide information upon request. Article 10 requires the “State” to provide anyone who requests it with information on the functions of public bodies, decisions made and information relative to all projects handled; the budget structure and execution, as well as statistics and other budget information; programmes developed by the body; and public hiring. Pursuant to Article 11, the following shall also be public information, to be made available to anyone interested: information on hiring and the designation of all officials, along with information about any expenses or emoluments they have received.

For purposes of public participation, public bodies must publish information about how citizens can engage with the body, prior to any particular participatory activity. Public bodies must also, within six months of the Law coming into force, publish, in the Official Gazette, their Codes of Ethics for public officials. These shall contain, among others, a declaration of values, rules on addressing conflicts of interest, rules on appropriate use of public resources and the obligation to inform superiors about acts of corruption, along with an effective mechanism for implementing these rules (Article 27). The People’s Defence will compile these Code of Ethics after approval by the different public bodies.

As noted above, Article 1(11) establishes the publicity principle, which calls on public bodies to maintain their records in good condition so as to promote proactive publication.

These are positive rules on proactive disclosure, although at the same time they are rather more limited and general those found in many right to information laws, particularly within Latin



America. For example, they do not require publication of the salaries or even the salary scales for officials, and the references to budget information are very general and could be interpreted in a variety of different ways. The rules also fail to build in a mechanism for increasing the amount of information subject to proactive publication over time. At the same time, the obligation for public bodies to publish codes of ethics and to make available information on participation are positive and innovative.

## Exceptions

The RTI Law includes a reasonably comprehensive list of exceptions to the right of access, and Article 28 provides that it shall override any other legal rules that are inconsistent with its provisions. At the same time, it is not quite clear whether or not it overrides secrecy rules in existing legislation. The right of access as spelt out in Article 8 applies only insofar as the information sought is not “confidential” or “restricted access”. Article 1(7) defines “Restricted Access Information” as information held by public bodies where access is restricted to officials that have a need to access it to undertake their functions. Neither of these provisions refers exclusively to the RTI Law as a basis for confidentiality. Indeed, they would appear to broadly preserve secrecy rules and perhaps even all information which has been classified by an official.

Article 15 explicitly defers to the “applicable norms” relating to minors, judicial arbitration, documents held by the Attorney General, banking and the prevention and combating of tax evasion for official documents relating to these subjects. Thus access to information about these significant areas are taken outside of the system established by the RTI Law.

Better practice right to information laws specifically override exceptions in other laws to the extent that these other laws are not consistent with the standards set out in the right to information law. This is to avoid perpetuating the pre-existing regime of secrecy which, in most cases, did not accord with international standards on openness. Leaving in place classification rules is particularly problematical, as it effectively allows civil servants to dictate whether or not a document shall be disclosed.

The regime of exceptions in the RTI Law itself falls far short of international standards in this area. It fails to establish any form of harm test, instead listing categories of information which are confidential (such as information relating to national security or information on the existence of mineral and oil beds). Flowing from the almost complete absence of any harm tests is the absence, too, of a public interest override, so that information may not be disclosed, even where this is in the overall public interest.

The Law does include a severability clause, so that where only part of a document is confidential, the rest shall be provided upon request (Article 14).

Pursuant to Article 14, information declared confidential shall not be released for ten years, unless the grounds for restricting it lapse before that time. This may be extended for an additional ten years, where this is necessary but in no case shall information be rendered confidential for longer than 20 years. This is a positive provision, which establishes clear and relatively short timelines for the release of information. At the same time, consideration might be given to establishing different levels of confidentiality, with shorter timelines for less sensitive information.

Article 14 sets out the following categories of exceptions, pursuant to which information may be declared to be confidential by the relevant official, and in accordance with the RTI Law:

- Information relating to national security which is handled by security professionals.
- Confidential commercial information, including trade secrets, obtained by the State through commercial regulation.



- Information relating to legal processes or jurisdictional issues produced by the Attorney General or the courts which is only available to parties to the relevant proceedings, until those have been executed (see also Article 13).
- Information relating to investigative processes being undertaken by a range of justice officials (police and related) and other regulators (such as the Free Market and Consumer Affairs Commission).
- Information on the existence of mineral and oil beds.
- Reports and other information relating to diplomatic, commercial or international negotiations.
- Documents relating to police or related criminal investigations provided by other countries.
- Documents relating to discussions or activities of the Cabinet's Council, and the Presidents and Vice-Presidents of the Republic, except those relating to the approval of contracts.
- Transcripts of meetings of and documents considered by Commissions of the Legislative Assembly relating to their fiscal duties, that may be included in the previous points.

Article 1(5) further defines as confidential information held by public bodies which relates to a range of privacy interests, including medical or psychological files, family affairs, marital status or sexual orientation, private telephone or other communications, information on minors, and information in employment or human resources records.

Pursuant to Article 7, where information has already been published, public bodies need only inform applicants of "the source, place and manner of access to the information".

In some cases, the exceptions refer to interests that are not protected by other right to information laws. This is the case, for example, for information on the existence of mineral and oil beds. It is not clear what particular purpose this exception serves.

Many of the exceptions refer not to specific interests which it is legitimate to protect – such as commercial competitiveness, privacy or negotiating position – but to categories of information – such as confidential commercial information, documents relating to negotiations and so on. The result is that instead of protecting only legitimate interests, the Law protects whole categories of information. For example, the price of pens purchased by the army might well be considered to relate to national security and be handled by security professionals, but it has nothing to do with national security as an interest. Much information relating to investigative processes is not sensitive – as shown by the regular police briefings that are given even in sensitive investigations – and yet the RTI Law excludes all of this information.

To be brought into line with international standards, these exceptions would need to be substantially redrafted to refer to legitimate interests, and then subjected to a harm test and public interest override.

### **Appeals**

The RTI Law simply does not provide for appeals, whether internal, to an independent administrative oversight body or to the courts. Article 21 provides briefly that anyone whose right to access information has been denied may enter a civil suit against the responsible official to recover damages and losses. It may well be that rules of general application also mean that an administrative appeal to the courts to obtain the information even absent a specific loss is available. At the same time, it is well established that applicants should be able to appeal failures to respect their right to information to an independent administrative oversight body, as the courts are simply too expensive and time-consuming for the vast majority of those seeking access





to information. The absence of any system of appeals is a major shortcoming of the Law, which would need to be addressed to bring it into line with international standards.

## Sanctions and Protections

Article 1(12) provides generally that every civil servant is individually responsible for his or her actions, including in relation to openness. Article 13 provides specifically that information defined by the RTI Law as confidential must not be disclosed by officials under any circumstances.

The main rules on sanctions are found at Articles 20 and 22-23 of the RTI Law. Article 20 provides that knowingly refusing to provide personal information in breach of Habeas Data rules will be treated as a contempt of court and result in a fine of at least double the offending officer's monthly salary. Article 22 provides that any official who obstructs access to information or who destroys or alters a document will, without prejudice to any administrative or civil sanctions, be fined twice his or her monthly salary. These fines will be remitted to a special account for the Defence of the People, to be used for citizen participation programmes.

These are welcome provisions which should help prevent officials from obstructing access to information. Consideration might be given to widening their scope, for example so that it is not only denial of access to personal information, but also refusing to correct or delete personal information, where appropriate, which might lead to sanction. Consideration might also be given to more severe penalties for repeated and egregious breaches.

The Law also fails to provide protection for good faith disclosures, whether pursuant to the Law or for purposes of exposing wrongdoing (whistleblowing). These protections are important to reverse long-standing practices of secrecy and, in particular, to give officials the confidence to release information, knowing that they will not be sanctioned should this information be confidential.

## Promotional Measures

The RTI Law does not exactly provide for the appointment of an information officer to act as a central locus of responsibility for implementing public bodies' obligations under the Law, but it does refer, in Article 5, to the "office assigned by each institution for the reception of correspondence", which may effectively amount to the same thing. Article 4 also refers to the obligation of public bodies to establish a "consultation office" to promote electronic access to information (or to establish "information booths" for the same purpose).

Similarly, the Law does not provide for a system for record management, but Article 1(11) does at least refer to the obligation of public bodies to ensure appropriate internal organisation of information to give effect to the right of access. Better practice right to information laws go much further than this, putting in place a central system for setting and implementing record management standards, for example by assigning this responsibility and power to a central oversight body of ministry.

Article 26 of the Law places an obligation on all public bodies to include, in their annual reports to the legislature, a section containing information on the number of requests they have received, how those requests have been processed, and a list of all opportunities for public consultation, as well as the observations provided and decisions finally adopted. This is helpful but it would also be useful to require some central body to provide a report compiling information from all public bodies so as to create an overview of overall implementation, as well as a perspective on successes and problems.



The Law fails to require public bodies, or a central body, to conduct public outreach and awareness raising efforts, including by publishing and widely disseminating a guide on how to use the Law. This is essential to the longer-term success of right to information legislation. The Law also fails to require public bodies to conduct training programmes for their officials, again something that is crucial to the overall success of the system.

### Notes



- 1 Law N° 6, signed 22 January 2002, published in Official Gazette N° 24,476 of 23 January 2002.

Peru





## Introduction

The 1993 Peruvian Constitution guarantees the right to access information held by public bodies.<sup>1</sup> The guarantee stipulates that no reasons need to be given for requesting information but it is limited to 'required' information. The Constitution also gives broad protection to "banking secrecy and confidentiality concerning taxes", as well as private and family information.<sup>2</sup> The Law of Transparency and Access to Public Information, adopted in August 2002, which gives legislative effect to this constitutional guarantee, is not limited to required information.<sup>3</sup> It was, however, criticised, in particular for its very broad regime of exceptions, and was also subjected to a legal challenge by the Ombudsman Office.<sup>4</sup> As a result, amendments to the Law were promulgated in February 2003, just after it had come into force, to help address these concerns.

The Peruvian RTI Law is a progressive one, which includes all of the key characteristics required to give effect to the right to information in accordance with the principle of maximum disclosure. In some areas, its provisions, while appropriate, are rather brief, leaving out some details which are found other laws. On the other hand, its provisions on the proactive disclosure of information are perhaps the most detailed to be found in any RTI law, particularly in relation to financial information.

## The Right of Access

The Peruvian RTI Law clearly establishes a right of access to information held by public bodies. Article 1 describes the purpose of the law as being to "promote transparency of acts of State" and to regulate the right to information as provided for in the Constitution. Article 7 provides that every individual has the right to request and receive information from public bodies. Article 3 supports this, providing that all information held by the State, other than that covered by the exceptions, is presumed to be public and that the State is obliged to provide information upon request, in accordance with the "Principle of Public Disclosure". The Law does not elaborate in specific detail on its purpose, over and above these general, albeit strong, statements in favour of openness.

Article 10 is the main provision elaborating on the scope of information covered by the RTI Law. It notes that public bodies are obliged to release information whether held in "written documents, photographs, recordings, magnetic or digital devices or any other format", but only if the information was created or obtained by the entity and is under its possession or control. Furthermore, any documentation financed by the public budget, based on decisions of an administrative nature, is public information, including records of official meetings. Article 3 elaborates on this by providing that all activities and regulations of public bodies are subject to the Principle of Public Disclosure.

This is a broad definition, although it is not entirely clear what effect the limitations it contains might have. 'Created or obtained' by the entity would appear to cover most information which might be considered to be public. The requirement that the information must be under the possession or control of a public body is also reasonable, as long as even information archived with a private body is considered to be under the control of the public body which so archived it, as long as it remains accessible to the public body.

Article 2 of the RTI Law defines public bodies as those included in Article 1 of Preliminary Law No. 27.444, the Law of General Administrative Procedures. This Law defines public bodies as all three branches of government – the executive, including ministries and decentralised public bodies, the legislature and the judiciary – as well as regional and local governments, any bodies



upon which the constitution or another law confer autonomy, other “bodies, organs, projects and programmes of the State whose activities are carried out by virtue of administrative power” and private legal bodies which provide public services or serve in an administrative capacity “by virtue of concession, delegation or authorisation of the State”.

Article 8 further provides that State owned enterprises are also “subject to the procedures established in this Law”, while Article 9 provides that private legal entities, “as described in Article 1, clause 8 of the Preliminary Title of Law 27.444,” (see above) “are obliged to inform about the characteristics, costs and administrative functions of the public services they perform.” This is a more limited set of obligations than applies to other public bodies.

As noted, the right of access extends to everyone (see Article 7). In case this was not sufficiently clear, Article 13 specifically provides that a request for information cannot be denied based on the ‘identity’ of the applicant.

### Procedural Guarantees

Requests for information should normally be directed to the official designated by the public body for this purpose, provided that where no individual has been so designated, the request shall be directed to the official who holds the information or to his or her immediate superior (Article 11(a)). No reasons are required to be provided for a request for information (Article 7). The requirement to direct a request to the official who holds the information may prove problematical, since applicants will often not know who this is.

Requests shall normally be responded to within seven working days, although this may be extended for another five working days when it is unusually difficult to gather the information. In this case, the public body must inform the applicant in writing before the expiry of the original seven days (Article 11(b)). These are very short timelines in comparison to most other RTI laws; indeed they might be criticised for being unduly short and therefore difficult to comply with. Where either deadline is breached, the request is deemed to have been refused (Article 11(b), (d) and (e)). This is also the case where the response of the public body is so ambiguous that a request may be considered not to have been fulfilled (Article 13). Where a public body does not hold the information but knows where it may be obtained, it shall inform the applicant of this (Article 11(b)).

Article 13 provides that any denial of access to information must be based on the exceptions contained in Articles 15-17 and that the reasons for any denial, along with the time during which the information will remain confidential, must be communicated to the applicant. These are positive, particularly the requirement of specifying the time the information will remain confidential. At the same time, like some other procedural provisions in the Peruvian RTI Law, they could be more detailed, for example by specifying in more detail what must be included in any notice refusing access to information. Furthermore, in practice they are often honoured as much in the breach as many requests are simply met with mute refusals.

Article 20 of the Law sets out the rules relating to fees. Applicants must bear the cost of reproducing the information requested, but any additional costs shall be considered to be a restriction on the right of access, subject to sanctions (see below). Every public body must elaborate on the amount of fees allowed to be charged in its “Rules of Administrative Procedures (Texto Unico de Procedimientos Administrativos—TUPA)”. These are very progressive rules on fees inasmuch as charges are limited to the cost of reproducing the information. At the same time, a central schedule of fees would prevent different fees being charged by different public bodies and fee waivers could have been considered, for example for the poor.



The Peruvian RTI Law makes explicit what many RTI laws leave unclear, namely that public bodies are not required to create or produce information they do not have or are not obliged to have, although in this case they must inform the applicant of this fact. Public bodies are also not required to provide an evaluation or analysis of information (Article 13). This is not unreasonable, but it might be relied upon as a basis for refusing to perform even quite mechanical operations, such as extracting information in a particular form automatically from a database, which would otherwise normally be understood as included under the right to information.

The Peruvian RTI Law does not contain provisions on a number of procedural matters commonly addressed in such laws. It does not require public bodies to provide assistance to applicants who need it – for example because they are illiterate or disabled, or have difficulty describing the information they seek in sufficient detail – or to acknowledge requests upon receipt. It does not require third parties to be consulted where a request relates to information which concerns them. The Law also does not contain any provisions allowing applicants to specify the form in which they would like the information to be communicated to them – for example electronically, in photocopy format and so on – although it does provide that applicants should be given “direct and immediate access” to information during business hours, a progressive and practical rule.

## Duty to Publish

The Peruvian RTI Law is remarkable for its extremely extensive pro-active publication provisions. In addition to a few provisions found throughout the text, the Law devotes all of Title IV: Transparency for the Management of Public Finances, running to some 14 articles, to this topic.

Article 5 provides for the progressive provision by government departments, depending on budget, of various types of information through the Internet, including general information about the department, budget information, including the wages of all staff, detailed information about the acquisition of goods and services, and information about official activities involving high-ranking officials. Public bodies must, furthermore, publicly identify the official responsible for the development of their website. Article 6 sets deadlines for the establishment of websites (for example, 1 July 2003 for central government departments) and requires budget authorities to take this into account when assigning resources.

As noted, Title IV contains extremely detailed and extensive proactive publication obligations, which are among the most onerous of any RTI law in the world, particularly in the area of public finances, upon which it focuses. It includes its own purpose and definition section (Article 23), as well as a provision on mechanisms for publishing information (Article 24). The latter refers to publishing on websites or through major newspapers, depending on resources, as well as to regulations regarding publication where the number of inhabitants is low. It requires the methodology used to collect the information to be provided and the terms used in documents to be elaborated, so as to allow appropriate analysis of the information. And it requires information published on a quarterly basis to be published within 30 days of the end of each quarter, along with information from the previous two quarters, for comparative purposes.

Specific obligations are set out for certain bodies, such as the Ministry of Economy and Public Finance, the National Fund for the Financing of State Entrepreneurial Activities and the High Council for State Contracts and Acquisitions. It is beyond the scope of this work to elaborate in detail on the specific obligations provided for in Title IV. Suffice it to say that they are extensive and cover budget information, information about employees, projects, contracts and acquisitions, macro-economic information and even economic predictions (such as the probably impact of tax changes to the public budget and on the social-economic situation). The rules even require certain information to be published at least three months before general elections, such as a review of what was accomplished during the tenure of the incumbent administration and fiscal predictions for the next five years.



### Exceptions

The exceptions to the right of access are set out in Articles 15-17 of the RTI Law. Article 15 deals with 'secret information', mostly military and intelligence information; Article 16 deals with 'reserved information', mostly relating to the police and justice system; Article 17 deals with 'confidential information', which includes a range of other types of exceptions; and Article 18 places conditions on these exceptions.

According to Article 18, Articles 15-17 provide the only grounds upon which a refusal of access may be based, they may not be overridden by a "norm of a lesser scale" and they should be interpreted in a restrictive manner. These are progressive general rules. Article 17(6), however, provides for an exception for all information which is protected by legislation approved by Congress or the Constitution. Article 17(2) goes even further, rendering confidential information protected by legal rules in various areas such as banking, tax and so on.<sup>5</sup> As a result, the RTI Law fails to override secrecy provisions contained not only in other laws passed by Congress but also lower order legal rules.

The Peruvian RTI Law establishes a complex relationship with classification systems. It states that only heads of departments, or officials nominated by them, may classify information. It then goes on to list the cases in which information might be classified, which constitute the bulk of the exceptions. Presumably information classified in breach of these rules would still be subject to disclosure.

Many of the exceptions in the RTI Law do include a specific harm requirement. However, the intelligence and counter-intelligence activities of the National Intelligence Council (Consejo Nacional de Inteligencia, CNI) appear to be excluded entirely from the ambit of the law, without regard to specific harm (Article 15). Furthermore, most of the exceptions relating to national defence, described as military classification in the Law, do not include a harm test, although some do. This category, for example, includes defence plans for military bases, technical developments relating to national security, and so on, regardless of whether or not the disclosure of this information would cause any harm. In comparison, exceptions relating to intelligence (with the exception of the CNI, as noted above), as well as the categories of reserved and confidential information, mostly refer to some sort of harm, although in some cases the standard is low, as in 'could endanger' or 'could put at risk'.

Significantly, the exception in favour of internal deliberations does not include a harm test, so that all information that contains advice, recommendations or opinions as part of the deliberative process is confidential. This exception is 'terminated' once the decision is made, but only if the public body makes reference to the advice, recommendation or opinion. As a result, background documents may remain confidential even once the matter to which they relate has been completed.

The RTI Law does not include a general public interest override. Article 18 does, however, include two specific overrides of a public interest nature. First, it provides that any information relating to violations of human rights or the Geneva Conventions of 1949 cannot be considered confidential. Furthermore, the exceptions may not be used to undermine provisions in the Peruvian Constitution.

Second, various actors – the Congress, the judiciary, the General Controller (Contralor), and the Human Rights Ombudsman (Defensor del Pueblo) – have a right to access even exempt information under various circumstances, mainly relating to the proper exercise of their functions. Judges, for example, may access confidential information when exercising jurisdiction in a particular case and where it is required to get to the truth and the Ombudsman can access information where pertinent to the defence of human rights.





Article 19 of the RTI Law establishes a rule of severability, whereby that part of a document which is not exempt must be disclosed even if part of the document is confidential.

Article 15 establishes a rule of historical disclosure, but apparently only for exempt information falling within its ambit, namely defence and intelligence information. The system provides that a request for information which has been classified for five years or more may be satisfied if the head of the relevant department declares that disclosure will not harm security, territorial integrity or democracy. If a request for such information is denied, the head must provide reasons for this in writing, which must be forwarded to the Council of Ministers, who may declassify the information.

The specific exceptions established by the Peruvian RTI Law are as follows:

- information classified for military reasons, with several sub-categories elaborated (Article 15(1));
- information classified on grounds of intelligence, also with several sub-categories listed (Article 15(2));
- information relating to preventing and combating crime, once again with several sub-categories (Article 16(1));
- information relating to international negotiations whose disclosure would damage the negotiation process or information whose disclosure would negatively affect foreign relations (Article 16(2));
- internal deliberative material, as described above (Article 17(1));
- information protected by banking, tax, commercial, industrial, technological and stock-exchange rules (Article 17(2));
- information relating to ongoing investigations on the use of power sanctioned by the administration, but only until the matter is resolved or six months have elapsed since the investigation began (Article 17(3));
- information prepared or obtained by public legal advisors whose publication could reveal a legal strategy, or information covered by legal privilege, but only as long as the legal process to which the information relates is ongoing (Article 17(4));
- personal information whose disclosure would constitute an invasion of privacy (Article 17(5)); and
- information rendered secret by any other law (Article 17(6)).

## Appeals

There are fairly rudimentary appeals provisions in the Peruvian RTI Law. Pursuant to Article 11(e), where a request for information has been denied, or is deemed to have been denied due to the expiry of the deadline for a response, an applicant may, if the public body is "subject to a higher department", lodge an appeal against the decision, presumably with that higher department. Article 11(f) provides that if the appeal is denied, or if no response is forthcoming within ten working days, all administrative procedures are considered to have been exhausted, paving the way for a legal appeal. It would be preferable if the law required a response to be provided within ten days, but it may amount to more-or-less the same thing.

Apart from the above, which is a form of internal appeal, the RTI Law does not provide for an appeal to an independent administrative body, such as an information commissioner or ombudsman.

Article 11(g) provides for a legal appeal, either pursuant to administrative law procedures or the constitutional process of Habeas Data,<sup>6</sup> protected by Article 200(3) of the Constitution and also provided for by statute.



### Sanctions and Protections

Pursuant to Article 4 of the RTI Law, public bodies are required to respect the provisions of the law. Officials or public servants – that is, employees of public bodies but not private bodies covered by the law – who do not follow the law will be sanctioned for “committing a major offense, possibly being criminally denounced” in accordance with Article 377 of the Penal Code, providing for abuse of authority. This is reinforced by Article 14, which provides that any responsible official who ‘arbitrarily obstructs’ access to information, responds incompletely to a request or hinders implementation of the law will be held liable in accordance with Article 4.

Article 4 also provides that compliance with the Law should not lead to ‘reprisals’ against officials responsible for releasing requested information. On the other hand, Article 18 provides that officials must keep information covered by the exceptions in Articles 15-17 confidential and that they shall be responsible for any leaks. It is not clear how compatibility between these two provisions is achieved. It seems likely that Article 4 applies subject to Article 18. In other words, officials may not be subject to sanction for releasing information pursuant to a request, unless the information falls within the scope of an exception, in which case they may be sanctioned. In better practice RTI laws, officials are protected against any sanction for releasing information as long as they act in good faith, which helps promote a culture of openness.

The Peruvian RTI Law does not provide for protection for whistleblowers.

### Promotional Measures

The Peruvian RTI Law contains only very basic promotional measures. Pursuant to Article 3, public bodies must designate an official responsible for responding to requests for information. This is backed up by Article 8, which reiterates this obligation, and also provides that, where an official has not been identified, responsibility will lie with the ‘secretary general’ or whomever is in charge of the body.

Article 3 also establishes two general positive obligations, namely that the responsible official shall plan an ‘adequate infrastructure’ for the “organisation, systematisation, and publishing of information” and that the body should “adopt basic measures that guarantee and promote transparency”. It is unclear how far these obligations extend and how they might be applied in practice.

Article 21 places an obligation on the State to create and maintain its records in a professional manner to ensure proper exercise of the right to information. It forbids public bodies to destroy information ‘under any circumstance’ and instead provides for the transfer of all information to the National Archive, in accordance with deadlines established by law. The National Archive may destroy information that lacks relevance, in accordance with its internal regulations, but only if the information has not been requested for a reasonable period of time. These are positive obligations but they could be strengthened by establishing more specific systems for ensuring the proper management of records. Furthermore, the idea that public bodies may not destroy any information but must, instead, transfer all information to the archives appears to be based in an unduly narrow conception of ‘information’ which should include, for example, things like emails and even cookies on computers.

Article 22 of the Law places an obligation on the Council of Ministers to report annually to Congress on information requests, and to indicate which were granted and which denied. The Council of Ministers must furthermore gather information from public bodies so that it may prepare this report. Although positive, it would be helpful if the Law set out in more detail the categories of information required to be included in such a report.



## Notes

- 1 See Article 2(5). Available at: <http://www.idlo.int/texts/leg6577.pdf>.
- 2 See Articles 2(5) and (6).
- 3 Law No. 27.806. Available in amended form at:  
[http://www.justiceinitiative.org/db/resource2/fs/?file\\_id=15210](http://www.justiceinitiative.org/db/resource2/fs/?file_id=15210).
- 4 See Committee to Protect Journalists, Attacks on the Press 2002,  
<http://www.cpj.org/attacks02/americas02/peru.html>.
- 5 This is consistent with Article 2(5) of the Constitution which, as noted above, provides broad protection to these types of information.
- 6 This is the right to access one's own personal data.

Uruguay





## Introduction

The 1967 Constitution of Uruguay, as amended, does not guarantee the right to access information held by public bodies. Article 29, however, does guarantee the right to freedom of expression, through any means and free of prior censorship, although it may be subject to restrictions established by law.

Law No. 18.381 on the Right to Access Public Information (RTI Law) was adopted on 17 October 2008 to give effect to the right to information. The Law is a reasonably progressive one, although it also includes some weaknesses. As with some other right to information laws in Latin America, confidential information is excluded from the scope of the law, rather than defining this broadly and addressing confidentiality through the regime of exceptions. The Law also lacks any definition of what constitutes a public body. The duty to publish information proactively is somewhat limited compared to many other right to information laws, and there is no mechanism for increasing the scope of information subject to this duty over time. Exceptions in other (secrecy laws) are left in place and there is no provision for an appeal to an independent administrative body.

At the same time, the Law includes a number of positive provisions, including a very progressive rule on what fees may be charged and a requirement to publish a list of confidential information. The Law also provides for the establishment of an independent body with wide responsibilities to promote the right to information, including by assisting those seeking to make requests for information, to train officials, to conduct publicity campaigns and to report on overall implementation of the right.

## The Right of Access

Article 3 sets out the right of access, providing that every person shall have the right to access public information. The RTI Law does not really include a statement of purpose, but Article 1 provides that its object is to promote transparency in the functioning of public bodies and to guarantee the right of access to information. A more complete statement of purposes, including reference to underlying objectives – such as to promote accountability and participation – would be useful as an interpretive tool.

Article 2 provides that all information “issued by or in the possession of” any public body is considered to be public information, although this does not extend to the exceptions or secrets established by the RTI Law or another law. Article 4 makes it clear that this applies regardless “of the format” of the information. This is a simple definition, but one that would appear to embrace all information held by public bodies. However, it is unfortunate that confidential information is excluded at this definitional phase, rather than including it within the scope of the law and then providing for its non-disclosure pursuant to the regime of exceptions, thereby allowing for the potential application of the harm test and public interest override at the time of any request for access.

Surprisingly, the Law does not include any definition of public bodies, although it does refer to “any public organism, be it State run or otherwise” and the “subjects mandated by the present Law” (Articles 1, 2 and 4). This is an important omission in the Law, not found in other right to information laws. It is very problematical since, without such a provision, it is not at all clear what bodies are covered by the obligations set out in the Law.

Article 3 explicitly provides that this right shall be exercised without discrimination, including as to the nationality or character of the person, making it quite clear that everyone falls within the ambit of the right. This is supported by Article 15, which refers to the right of any “physical or legal” person to make a request for information.



### Procedural Guarantees

Anyone may make a request for information in writing. Such a request shall contain the identification, address and contact details of the applicant, a clear description of the information sought, along with any other information that might facilitate its identification, and, optionally, the format in which the applicant would prefer to receive the information (Article 13). The RTI Law is silent as to how a request may be lodged. It would be better if this were stipulated so as to avoid any risk of public bodies refusing requests which were lodged electronically. Reasons may not be required as a condition of access to information (Article 3).

The right to request information does not place an obligation on public bodies to create or produce information they do not already hold, as long as they are not under an obligation to hold that information at the time the application is made. Where information is not held, public bodies shall notify applicants of this fact in writing. It would be useful if the Law required public bodies to indicate to applicants where they might find the information (i.e. which public body might hold it), where it is not in their possession. The right of access also does not require public bodies to evaluate or analyse the information they hold, again subject to separate obligations to do this (Article 14). It is not clear whether this would require public bodies to extract information from databases in ways not originally contemplated when the database was created, an emerging right to information issue.

Article 15 provides that public bodies should try to answer requests immediately, where possible, or otherwise within 20 working days, which may be extended for another 20 days where there are “exceptional circumstances”. It would be preferable if the Law were to provide, in addition to immediate provision of the information, for provision of it as soon as possible but not later than the 20 day deadline. It would appear that public bodies are required to notify applicants, prior to the expiry of the original 20 days, in writing, of any extension of the time limits (Article 18). It would be helpful if the Law were to stipulate the possible reasons for an extension, rather than relying on a vague reference to exceptional circumstances, which might be applied in inappropriate cases.

Article 18 provides that where the 20-day time limit has expired without the information being provided or notification having been provided that the period for response has been extended, the applicant may access the information sought, and that any refusal to provide it will be considered to be a serious offence. There do not appear to be any exceptions for this, regardless of the sensitivity of the information. This provides a very innovative and powerful motivation for officials to comply with the time limits set out in the Law.

The Law does not include provisions for transfer of requests or for notification to third parties of requests that might affect them. These are both useful provisions and consideration might usefully be given to including them.

The Law does not specifically refer to notice being provided to applicants. However, it requires the decision as to whether to grant access to be made by the “highest hierarchy” of the public body, or those to whom such responsibilities have been delegated, and for such decisions to be made on a “founded basis” (Article 16). Furthermore, denial of information must be made by a “resolution” of the highest authority in the body indicating the confidential nature of the information and the legal basis upon which it is founded (Article 18).

Pursuant to Article 17, where a decision has been made to allow access, the public body shall authorise consultation with the documents or provide an authenticated copy to the applicant. These are rather limited options in terms of the form of access; they do not, for example, include the idea of simply emailing the information to the applicant or other forms of access, such as a transcript. They also appear to run counter to the option applicants have of specifying the form of access they would prefer.

There is no charge for access to information, although applicants may be charged for reproducing information, in any format, but only for the cost of the material used for such reproduction



(Article 17). This is a very progressive fee rule, which would appear to allow only for paper and ink costs for photocopies, rather than the wider costs which may be involved. At the same time, consideration might be given to the need for a centrally set schedule of fees to ensure consistency across all public bodies, as well as the need for fee waivers in certain cases, for example where the request is in the public interest or where the applicant is indigent.

## Duty to Publish

Article 5 sets out the categories of information that all public bodies must disseminate on a proactive basis, through websites or other media of their choice. This list includes information about: their organic structure and facilities; the pay structure by category and function, along with other forms of compensation; information on the budget and how it has been spent, including the results of all audits; all concessions, tenders, permits and authorisations granted, including as to the recipients or beneficiaries; all general interest statistical information; and mechanisms for citizen participation, including the contact details of the person responsible for receiving requests for information.

Pursuant to Article 32, all public bodies must establish websites within one year of the Law coming into force. Regulations shall govern this, to ensure uniformity, interactivity and ease of location of information.

These are positive provisions and they include a wide scope of information subject to proactive publication. At the same time, they are more limited than is provided for in many modern right to information laws, and particularly many other laws in Latin America. Consideration should be given to putting in place a system for extending the scope of proactive publication over time, as public bodies gain capacity and experience in this area. Consideration should also be given to requiring more targeted dissemination of this information, in addition to via websites, so that it will reach individuals particularly affected by decisions where relevant.

## Exceptions

The RTI Law includes a reasonably comprehensive list of exceptions. At the same time, it leaves in place secrecy provisions in other laws (Article 8). This is unfortunate and not consistent with better practice in this area, whereby the right to information law overrides other laws to the extent of any inconsistency. This avoids a situation whereby existing secrecy provisions, most of which do not conform to the openness approach reflected in the right to information law, are left in place, limiting the potential change impact of the RTI Law.

Most of the specific exceptions established in the RTI Law do include a harm test, although the nature of the requisite harm varies considerably from provision to provision – examples include ‘compromise’, ‘damage’, ‘harm’ and ‘undermine’ – and, overall, the level of harm required appears to be rather low. At the same time, the Law does require exceptions, both in the RTI Law and in other laws, to be interpreted strictly (Article 8), which may lead to a more stringent application of the harm test in practice.

The Law does not include a public interest override, whereby information should still be disclosed, even if this would pose a risk of harm to a protected interest, where disclosure is in the overall public interest (i.e. where the public benefits of disclosure outweigh the expected harm from releasing the information).

Article 11 provides that information shall only be classified for a total of 15 years, and that it shall be declassified when the reasons which justify classification disappear. At the same time, classification may be extended, apparently without limit, where the reasons for classification remain. It may be noted that a blanket period of 15 years is relatively long and that less sensitive





information, which is presumably classified at lower levels of confidentiality, should probably be declassified in a shorter period of time.

The Law does put in place a system to try to control the extent of classification of information, whereby all public bodies are required to produce an updated semi-annual report containing a list of all classified information (Article 7). Article 33 requires all public bodies to do this within one year of the Law coming into force. Only properly classified information may be included and all other information should be declassified, "within a peremptory term of six months". Similarly, all information that has been classified for more than 15 years must be declassified. These are useful procedural mechanisms, although they do not replace the need to put in place more stringent substantive rules relating to classification.

The specific exceptions are set out in Articles 9 and 10. The former, which essentially focuses on public harms from disclosure, provides for classification of information where to disclose it would:

- Compromise public security or national defence.
- Harm international relations or negotiations, including by revealing information that other States or international bodies provided on the understanding that it would remain confidential.
- Damage the financial, economic or monetary stability of the country.
- Pose a risk to the life, human dignity, security or health of any person.
- Undermine the competitive advantage of the public body, or endanger a production process.
- Leave a scientific, technological or cultural discovery "without protection".

Article 10 adds to these the following information, largely relating to third party information:

- Information provided on a confidential basis which:
  - is related to a person's assets;
  - includes facts or actions of an economic, accounting, legal or administrative nature that could be useful for competitors; or
  - is protected by a contractual confidentiality clause.
- Personal information that requires prior informed consent to disclose.

Pursuant to Article 12, information relating to human rights violations, or the investigation, prevention or avoidance of such violations, may never be withheld. This is a very positive and innovative provision which should help ensure greater exposure of human rights problems.

For the most part, these are all exceptions which are recognised as legitimate under international law and in other right to information laws. Some, however, go beyond what is necessary to protect legitimate interests. The exception in favour of the economic stability of the country could be interpreted over broadly, for example to include economic success defined generally, which could cover almost anything, rather than instances where confidentiality is justified by reference to the need to manage the economy. Better practice right to information laws do not protect information which might harm the dignity or reputation of individuals. Given that these rules are applicable only to information held by public bodies, it is not clear why this might be engaged (i.e. why public bodies would hold false information which would negatively affect others' reputation) or how it might be justified. Similarly, very few laws provide blanket protection, without linking it to the competitive advantage of a public body or enterprise, for "scientific, technological or cultural" discoveries held by public bodies. Indeed, it is hard to imagine why a cultural discovery should be kept secret.

The exclusion of all information relating to a person's assets is too broad. This should be covered only where disclosure of the information could cause commercial harm to the person or the



information falls within the scope of private information. The exclusion of information that “could be useful for competitors” is also overbroad; it is only where disclosure of the information would unfairly prejudice the competitive position of the party that provided it that it may be withheld. On the other hand, where this is the case, the rule should apply generally, not only to “economic, accounting, legal or administrative” information. Allowing information to be rendered confidential through a confidentiality clause effectively gives private bodies control over this important matter, rather than defining it by reference to objective criteria. Finally, it is not clear which information would require prior informed consent to disclose. The Law should either define this or refer instead to the notion of a legitimate privacy interest.

## Appeals

The RTI Law provides for neither an internal appeal nor a right of appeal to an independent administrative oversight body. These are significant shortcomings. The former is important to give public bodies a chance to reconsider the non-release of information. Often an appeal to a more senior officer can lead to release of the information, due to the fact that higher-ranking officers often have more confidence to release information than their subordinates.

Experience in other countries has demonstrated that a right of appeal to an independent administrative body is crucial to overall success in implementing a right to information law. Such bodies can provide rapid and low cost reviews of refusals by public bodies to disclose. While the courts are normally also available for such reviews, they are prohibitively costly and time-consuming for most of those who have made a request for information. The Information Unit (see below) would appear to be an ideal candidate for the role of an independent administrative complaints body.

Article 22 provides for an appeal to the courts to guarantee “full access to the information of their interest”. Such an action may be brought when any public body refuses to disclose information or fails to do so within the timeframe required by the law. These are rather narrow grounds for appeal; it would be preferable if other breaches of the Law, for example charging excessive fees or refusing to provide the information in the form sought, were also subject to appeal. The Law provides for clear timelines for processing such appeals, including that a hearing shall normally be held within three days and a decision provided either during the hearing or within another 20 days. The courts are given special powers to address situations where urgent action is needed. A further appeal lies to a superior court (Articles 23-30). Applicants may be provided with public legal counsel in these cases, further enhancing its accessibility.

## Sanctions and Protections

Article 6 provides generally that the individuals who administer information shall, along with the public body, be responsible for their actions and omissions, including any hiding, alteration, loss or destruction of public information. As noted above, pursuant to Article 18, breach of the timelines will result in the public body having an obligation to disclose the information and any failure to do so will be considered a serious offence. The main sanction provision is Article 31, which provides that the following shall be considered to be serious offences, without prejudice to any civil or criminal liability: denying access to non-classified information; failing to provide information, in whole or in part, in bad faith or negligently; allowing unjustified access to classified information; and unapproved use, removal, hiding or alteration of information.

These are sound provisions, although it is not clear what sanction they will lead to. However, it is probably unnecessary to provide for sanctions for unjustifiably disclosing classified information, as presumably this is already catered to in another law. Including such a provision in the right to information law sends an unfortunate signal to officials, who will normally already have a strong tendency to be overly secretive. Instead, officials should benefit from protection where they wrongly, but in good faith, disclose information pursuant to the right to information law.



Furthermore, the Law should ideally provide protection for whistleblowers, individuals who disclose information on wrongdoing in good faith.

### **Promotional Measures**

The Law does not require public bodies to appoint information officers to serve as a central locus of responsibility for implementing the law, as well as a clear point of contact for those requesting information.

It does, however, create the Unit of Access to Public Information (Information Unit) as a decentralised body of the Agency for the Development of the Government of Electronic Management and the Society of Information and Knowledge (AGESIC) with the highest degree of “technical autonomy”. The Information Unit will be run by an Executive Board, comprised of three members, the chief officer of AGESIC and two others chosen from among individuals who, as a result of their background, will safeguard its independence, efficiency, objectivity and impartiality. These two individuals will hold tenure for four years and may be reappointed. They may be removed from office only for “ineptitude, omission or crime”, and in accordance with due process guarantees. The presidency will rotate on an annual basis between these two members (Article 19).

The Information Unit also has an Advisory Board of five people, which the Executive Board may consult on any matter and must consult on regulatory matters. The five members of the Advisory Board represent the judiciary, the public attorney, academics, someone from the private sector and a human rights expert designated by the legislature. It will be presided over by the President of the Executive Board (Article 20).

The Information Unit is given a wide mandate to promote compliance with the Law, including to provide advice to the executive and more generally on compliance with relevant norms, to “control” implementation by public bodies, to promote and coordinate implementation policies, to advise private parties about the right to information, to train public officials, to promote publicity campaigns, to issue an annual report to the executive on the state of the right to information and to denounce those who violate the Law before the appropriate authorities.

This is a broad package of promotional activities. It would perhaps be useful to include as a specific educational activity for the Information Unit the obligation to publish and widely disseminate a guide for the public on how to use the Law. Similarly, it might be useful for the Law to set out in greater detail what the annual report should contain, including information on the processing of requests. Article 7 does already place an obligation on all public bodies to present annual reports on their compliance with the Law to the Information Unit. Such reports shall contain information on compliance with obligations under the law, as well as details of all requests and how they were processed.

A number of provisions in the Law relate to record management. Article 5 provides generally that public bodies should plan for the “adequate” organisation of their records so as to facilitate access to information. Article 6 supports this, placing an obligation on public bodies to create and keep records “professionally”, again to facilitate the right to information. Pursuant to Article 34, public bodies have two years to render their records “suitable”, during which time they will not be liable for failures to provide information based on their inability to locate requested information. These are positive rules but it would be preferable to put in place a central system for setting and implementing minimum standards on record management. The Information Unit could be given responsibility for this (or it could be allocated to another public body).



# Comparative Analysis



## Comparative Analysis

**A**s the survey above demonstrates, countries all over Latin America have recognised that individuals have a right to access information held by public bodies and that legislation is needed to give practical effect to this right. The survey indicates that there are significant areas where national legislation is reasonably consistent, but that there are also areas of divergence. This chapter looks at the various issues dealt with in right to information laws, pointing out common approaches, as well as areas of difference. It also highlights some of the more imaginative or innovative approaches adopted in different countries.

### The Right of Access

Establishing a right to access information held by public bodies is the fundamental reason for adopting a right to information law, and most laws in Latin American set out the right with reasonable clarity. In some cases, such as the laws of Mexico and Honduras, this is set out as a free-standing right, subject to the regime of exceptions. In other cases, the right is cast in more procedural terms, providing that anyone may make a request for information and, subject to certain conditions – procedural and substantive – have access to the information. It is not clear whether this makes much difference in practice, although a more rights-based approach may prove important over time.

A particular feature in Latin America is that many countries include a set of rules on Habeas Data within their right to information laws. Typically, these provide for a right to access, correct and question the use of personal information held by public bodies. The Panamanian right to information law goes even further, establishing a right to participate and the principle that access to information should serve this right.

In many countries, the law sets out its purposes or functions and/or includes principles governing access. These can be classified into two main categories. The first is the external benefits which the right to information will help deliver. These can be useful to clarify the underpinnings of the law and as an interpretive tool, helping to clarify ambiguity or the conflicts between openness and other public interests that are bound to arise. Principles in this category found in different laws include promoting transparent, accountable and effective government, controlling corruption, fostering public participation, enhancing the ability of the public to scrutinise the exercise of public power, promoting a democratic and human rights culture and the rule of law, improving public record management, and building public understanding and an informed citizenry. The Honduran law contains perhaps the most comprehensive list of ‘purposes’ in Latin America.

The Mexican law refers to many of these objectives, and also calls for the law to be interpreted in accordance with international and constitutional standards, and in a manner that best gives effect to the right to information.

Several laws in Latin America also include a number of more pragmatic ‘instructions’ among their principles, such as that public bodies should establish practical mechanisms to ensure access to information, and ensure that access is rapid, inexpensive and not unduly burdensome. A good example of this is Nicaragua, which has a long list of principles governing the application of the law, including that it is a multi-ethnic State so information must be provided in different languages and that information must be provided to underpin participation. The Ecuadorian law includes an impressive list of both of these categories of principles.



In some countries, such as Colombia, the law fails to include much of a statement of principles. This is unfortunate, since these laws fail to provide guidance to those who are tasked with interpreting them. In Mexico, by contrast, the key standards governing right to information laws are set out in the constitution.

In a few countries, such as the Dominican Republic, the principles refer to the quality of the information to be provided, in particular that it be accurate or truthful. This seems inconsistent with the main thrust of a right to information law, which is to provide access to information actually held by public bodies, whether or not that information happens to be correct.

There is some discrepancy in the way different laws define information and/or documents. The key definition is normally the one found in the clause defining the basic right, whether this be 'information' or 'records' or something else (such as 'official information' or 'public information'). Some laws include multiple definitions – examples include 'information', 'private information' and 'documented information' – some of which do not strictly appear to be relevant to the question of the scope of the right of access. This is problematical inasmuch as it may cause confusion.

The Colombian law, uniquely among right to information laws, fails to provide any definition of information, which is a serious shortcoming. In Honduras, the law only applies to information created after its adoption. This is a very unfortunate limitation, which runs against the idea of access as a right. The basis for the right, which is that public bodies do not hold information for themselves, but on behalf of the public, should not be restricted on the basis of the date of creation of the information in question.

Most laws define information and/or records broadly to include all forms of recorded content, whether written, electronic or some other storage system. Some laws go beyond the common forms of recording information. The Panamanian law specifically lists chemical, physical or biological forms of storage of information. Nicaragua requires meetings to be minuted and these minutes kept in the archives, while the Dominican Republic also provides for openness of the records of meetings.

A number of countries in Latin America, including Uruguay and Guatemala, employ a notion of 'public information' when defining the scope of the right to information law, with the result that they exclude from the beginning information which is confidential. The Dominican Republic also totally excludes drafts from the scope of the law. These are serious shortcomings since excluding information at the definitional stage means that various safeguards, such as the requirements of harm to a legitimate interest and the public interest override, will not apply. Put differently, the question of whether information is legitimately confidential should depend on a consideration of the context at the time a request is made. It is, as a result, illogical to exclude confidential information at the definitional level from the scope of the obligation of openness.

In most cases, the right applies to all information regardless of the purpose for which it is held. Some laws, however – such as those of Mexico, the Dominican Republic and Guatemala – apply only to information held for official purposes or in connection with the functions of the public body. In the Dominican Republic, the law does not apply where another law regulates access. These restrictions unnecessarily limit the right to information. Access to information should not depend on the deemed usefulness or role of the information held. Furthermore, these restrictions require officials to make threshold decisions which may be very important in terms of access to information, which is both an unwanted obligation for them and could create an opportunity for abuse. A progressive rule in Guatemala is that the right of access to information shall not prejudice rights of access established by other laws.

All Latin American right to information laws apply to information actually held by a public body. An approach which is quite developed in Latin America is for laws to cover information that is 'in the power of' a public body, which is probably a broader notion than the idea of information simply being held. Other laws even extend to information that may be accessed by a public body.



The Ecuadorian law, for example, applies to information held by or on behalf of a public body. The Peruvian law extends to information financed by the public budget, while the Panamanian law extends to information 'in the knowledge' of a public body.

There are two main approaches when it comes to defining which bodies are covered by a right to information law. The first, and most common, is simply to define the bodies covered and then let any borderline issues be dealt with on a case-by-case basis. Second, some laws provide a list of bodies covered. This has the virtue of being clear, but it may also be excessively limited and rigid, which could be a problem over time. None of the laws of Latin America adopt this approach but it has been used in the United Kingdom, which has a list but also provides that the Secretary of State may designate additional public bodies. In Guatemala, the law includes a list of categories of public bodies. This helps mitigate the rigidity of a list of specific bodies. Perhaps an ideal solution would be to combine both systems, providing a generic definition, but also a list of bodies which are specifically covered.

Surprisingly, Uruguay does not include any definition of public bodies at all, in what can only be described as a very serious shortcoming. It is perhaps the only country in the world, and certainly the only one in Latin America, whose right to information law does not include such a definition.

Most countries in Latin America include all three branches of government – administrative, legislative and judicial – within the scope of the right to information law, making this one area where the region is generally progressive. In some countries, such as Colombia, only the executive is covered. In principle, the legislative and judicial branches should be covered, as long as the regime of exceptions protects legitimate secrecy interests, and experience in those countries that do cover all three branches of government demonstrates that this is not in any way problematical. Limiting the scope of the law to certain branches of government runs contrary to the idea of access to information as a human right, which should, as a result, apply to all public bodies.

Mexico and Chile have adopted a novel approach to the question of coverage, providing for a very detailed set of obligations for administrative bodies, and then placing the legislative and judicial branches of government under a generic obligation effectively to do their best to meet the same standards, without actually describing in detail how this should be done. If this proves to be successful, which remains to be seen, it could prove a good model for other countries. In a somewhat analogous approach, Nicaragua distinguishes between true public bodies and private bodies covered by the legislation, placing the former under more onerous proactive publication obligations. This may be a good way to accommodate the need for some private bodies to be open and yet not place undue obligations on them.

The scope of national legislation may be affected by constitutional limitations. The Mexican and Chilean approach, for example, seeks to accommodate the limited power of the legislature to impose rules on other branches of government or on constitutionally independent bodies. In other countries, this does not appear to be a problem; the Peruvian law, for example, specifically applies to independent constitutional bodies. Federal States like Mexico also face political division of powers issues so that the national laws apply only to federal public bodies. This problem may be addressed through the adoption, by the individual states or provinces that make up the country, of their own, sub-national, right to information laws; all Mexican states have done this, for example.

Another area of divergent practice is with respect to public corporations. In most countries, the law does extend to public corporations, although this is not always the case. In Peru, all State owned corporations are covered. In some countries, like Chile and Colombia, only corporations with 50% public ownership are covered. State control over a corporation – which is ensured by 50% ownership but is often present with a much lower percentage of share ownership – should certainly engage the principle of openness. But even where the State does not control a





corporation, a large block of State involvement should engage the principle of openness, since significant involvement of the State in a corporation should normally signal a public interest in its operations.

The scope of many Latin American laws, but not all of them, extends beyond public corporations and includes private bodies which receive funding through public contracts. In Peru, coverage is even extended to all bodies exercising a public power or performing a public function.

In most countries everyone, regardless of citizenship, can claim the right. The Uruguayan law specifically prohibits discrimination on the basis of nationality in relation to access to information. The Peruvian law specifically provides that a request for information may not be denied based on the identity of the requester which presumably includes citizenship. In contrast, in a few countries, like Honduras, it would appear that the right is restricted to citizens or residents. There are fairly obvious reasons for extending the right to everyone, and it has not proved to be a significant additional cost or burden in those countries where the right extends to foreigners.

### **Procedural Guarantees**

There are some variations among the different laws surveyed in terms of the rules for processing requests for information but this is an area where, on balance, the laws demonstrate a relatively high degree of consistency. Virtually all laws provide for requests to be made in writing, including electronically, and to include the name and contact details of the applicant, along with a sufficiently detailed description of the information sought to enable it to be identified. The Colombian law, uniquely, is silent as to the manner in which requests may be made. In some countries – such as Guatemala – requesters can also make requests orally. Guatemala also allows public bodies to develop forms for making requests, but these should not obstruct access and requests must be accepted regardless of whether or not they are submitted on the form.

In most countries, no reasons need to be given for a request. An unfortunate exception is the Dominican Republic, where reasons may be required. Nicaragua requires applicants to provide detailed information when making a request, including official identity card information. It is unclear why this is deemed to be necessary.

A few laws in Latin America, including those of Honduras and Colombia, specifically provide that journalists shall not be discriminated against in relation to requests for information. It is not clear why this is necessary since it should be implicit in the very nature of the law. On the other hand, journalists in some countries have experienced problems of discrimination in relation to access to information and this rules provides a clear basis for challenging this.

Many laws specify that requests must be submitted to particular officials, such as appointed information officers, while others simply provide that a request may be lodged with the public body which holds the information. In Nicaragua, all requests must formally be registered, and applicants provided with a copy of the registration. This can help to track the processing of requests and provide a clear basis for an appeal, particularly on the basis of a failure to respect the timelines.

Better practice laws provide specifically for assistance to be provided to applicants, for example where they are having problems describing the information sought in sufficient detail or where they cannot make a written request either because they are illiterate or due to disability. This approach is less prevalent in Latin American than in other regions but some laws, for example that of Mexico, do require public bodies to provide assistance to applicants.

Many laws in Latin American provide for clear and short time limits for responses to requests for information. Most laws require the information to be provided as soon as possible, with the time



limit set as a maximum, although this is not clear in some laws and the time limits may be seen as the normal response time.

In Honduras and Guatemala, responses must be provided within 10 days, which may be extended for another 10 days. In Ecuador, the limit is also 10 days, but extendable only by five further days. Peru has the shortest timelines, of 7 days which may exceptionally be extended by another five days for a total of 12 days. While commendable, this may also be unrealistically short. It is important that timelines be as short as possible, but not so short that public bodies will experience persistent difficulties meeting them. Reasons for allowing an extension of the time limit include that the request is complex, that it requires a search through records not located at the main office or that it requires consultations with others. In the Dominican Republic, an interesting innovation is that shorter timelines apply in the contexts of denials of access.

In many countries, a failure to respond within the time limits constitutes a deemed refusal of the request. In Peru, an unacceptably ambiguous response also constitutes a deemed refusal, prompting officials to be clear. In Mexico, breach of the time limits places an obligation on the public body to provide the information, and for free, unless the oversight body gives permission for the information to be withheld. The same is true in Uruguay. In Guatemala, as well, the information must be provided for free if the timelines are breached, and a failure to provide it will result in criminal responsibility. Similarly, in Colombia, a failure to provide information within the established timelines leads to a requirement to provide the information, failing which the official risks losing his or her job. These are some of the more rigorous mechanisms to ensure timely provision of information found anywhere in the world.

The practice of providing for shorter time limits in special cases is not established in Latin America. In both India and Azerbaijan, however, a 48-hour time limit applies where the information is needed to protect life or liberty, and Azerbaijan further provides for a 24-hour time limit where the information is needed urgently. In the United States, special time limits apply to cases of compelling need – including a threat to life or safety, or where there is an urgent need to inform the public about government activity – in which case the information must be provided within ten days.

Some countries, such as Peru, provide for the transfer of requests – or for the applicant to be notified – where information is held by another public body while others, such as Honduras, fail to address this issue. In some cases, the original body itself effects the transfer while in others – such as Mexico – the applicant is simply informed. The Chilean law introduces the idea of ‘ownership’ of information, whereby the request should be processed by the public body which is most closely connected with the information. This runs counter to the principles underlying the right of access, pursuant to which any body which holds information should be responsible for providing access to it.

Few laws in Latin America provide for notice to be given to affected third parties of requests for information the disclosure of which would affect them, although this practice is relatively established in other parts of the world. The Mexican law does include brief provisions on this. In the Dominican Republic, third parties are effectively given a veto over the disclosure of information concerning them. This goes too far in balancing the rights of third parties against the right to information.

Most laws require public bodies to give written notice of their responses to requests. For requests which are being granted, the notice should include any fees and the form in which the request is to be granted, along with the right to appeal against these; where the request is refused, the notice should be required to include the reasons for such refusal, preferably referring to a specific legal provision, along with information about the right to appeal against the refusal. This allows the requester to determine whether or not to pursue any appeal options and also provides a basis for the appeal, should one be lodged.

The Honduran law provides for notice to be given, but does not specify what it should contain. In Nicaragua, a failure to provide reasons for a refusal render that refusal void, presumably leading to



a requirement to provide the information. This should go some way to helping enforce the notice rule. Various countries have more specific rules. In Peru, a refusal notice must note the time the information is expected to remain confidential. In Mexico, an internal oversight committee must be informed if access is denied, or if the applicant is notified that the information is not held. Many countries allow applicants to select from among a number of forms of access, such as inspection of the document, a transcript, an electronic copy, a photocopy or an official copy, although a number of other laws, including those of Honduras and Peru, fail to specify this, the former referring instead to modes of *delivering* the information. In most countries, the form specified may be refused in certain cases, for example where this would harm the record, unreasonably divert the resources of the public body or infringe copyright. In Colombia, applicants have the option of consulting documents, but in the presence of an official, 'if necessary'.

The issue of how much effort public bodies are required to make to adapt information so as to present it in a form which is accessible to the applicant, or to extract information from databases or electronic systems of storage, is a complex one. A number of laws in Latin America, including the Honduran, Guatemalan, Ecuadorian and Peruvian laws, stipulate that the right of access does not extend to the processing of information or to analysing it.

Various systems apply to fees. There are four main types of cost potentially involved in the provision of information, namely the cost of searching for the information, any costs associated with preparing or reviewing the information, the cost of reproducing or providing access to the information and the cost of sending the information to the requester. Most countries in Latin America, including Mexico, Honduras, Panama and Peru, restrict fees to the cost of reproducing the information; in Peru, charging other costs is considered to be an obstruction of access and can attract sanctions. In Uruguay, only the cost of materials used for reproduction may be charged, while in Nicaragua, the cost of materials for reproduction and delivery of the information may be charged. On the other hand, the law of the Dominican Republic refers to the idea of charging for searching for information. The Colombian law includes language suggesting that smaller requests should be provided for free, in line with better international practice in this area. In Guatemala, fees may not exceed market rates and applicants may even be given the document to take away and copy for themselves so as to save costs.

Very few Latin American laws follow better international practice by providing for a central body to set the schedule of fees, although this is stipulated in the Mexican law. This avoids a patchwork of fee structures at different public bodies and tends to limit inflationary fee pressures. Few Latin American laws provide for fee waivers, for example for the poor or for public interest requests.

Regardless of the system used, it is important to keep fee levels low so they do not exert a chilling effect on the willingness of individuals to lodge requests for information. How best to address this will vary from country-to-country, depending on factors such as wealth, engagement with the public sector and so on.

### **Duty to Publish**

All of the laws of Latin America impose a duty on public bodies to publish certain key information on a proactive or routine basis, even in the absence of a request. Indeed, this is generally an area where the Latin American laws have very progressive rules. The law of Peru is among the most expansive in this regard as compared to any law in the world. Proactive publication rules represent a recognition of the fact that effective promotion of access to information held by public bodies requires more than passive provision of information in response to requests. Such rules are increasingly being recognised as one of the most important systems for promoting access to information held by public bodies.



Most laws provide a list of the categories of documents that must be published, such as information about their general operations, about the services they provide and about how to request information, although the specific list varies considerably from country to country. The detail on this may be found in the country chapters and will not be repeated here. In most cases, the documents subject to proactive publication are still subject to the regime of exceptions. In other words, documents subject to proactive publication may still have confidential information redacted from them before they are published. In Colombia, public bodies must publish all information required to ensure that the public can exercise control over them. In the Dominican Republic and Panama, public bodies must publish a range of information necessary to foster public participation, while in Guatemala, information necessary to promote compliance with the goals and objectives of the Law must be proactively disclosed. Panama has a special provision which requires public bodies to develop and disclose proactively codes of conduct for their performance.

Many laws, including those of Ecuador and Peru, also include special lists of information subject to proactive publication for specific public bodies, such as the legislature, the central bank and so on. In Ecuador, as well as in Guatemala, all funds spent by political parties must be disseminated on a proactive basis. In Guatemala, sentences pronounced by judicial bodies which relate to human rights crimes and crimes against humanity, convictions relating to the management of public funds, and crimes committed by public officials must be proactively published.

Many laws in Latin America place a particular emphasis on information of a commercial or financial nature. The Peruvian law, noted above, includes a whole chapter on public financial information which not only requires proactive publication of a very wide range of financial information, but also calls for dissemination of the methodology used to collect the information, as well as the terms used. A number of laws, including the laws of Chile, Peru and Panama, require such information as salaries of staff and all public contracts and procurement to be made public. The Nicaraguan law provides for different proactive publication obligations for public and private bodies, so as to reduce the cost of openness for the later.

An interesting approach has been adopted in the United Kingdom, where the law requires public bodies to come up with publication schemes, which then need to be approved by the independent Information Commissioner. Alternatively, public bodies can simply adopt the appropriate model publication scheme provided by the Commissioner. The approval of the Commissioner may be time limited, or may be withdrawn, allowing for progressive increases in proactive disclosure over time. At the same time, this approach requires active oversight by an independent body, in this case the Information Commissioner, and it may lead to differences in the scope of information published by different public bodies. Mexico provides for a list of information to be published, but also provides for oversight of the system by an independent body, which shall develop regulations on this issue.

Many laws – including those of Chile, Panama and Peru – provide for regular updating of the information published, often annually. In Peru, certain financial information needs to be published on a quarterly basis, within 30 days of the end of the quarter, along with information from the previous two quarters for comparative purposes. In Colombia, public bodies must publish gazettes containing certain categories of information on a monthly basis and these must be disseminated for free to public offices, universities, the media, professional bodies and associations. In the Dominican Republic, the information made available over the website must be easily accessible, and also clear and understandable for ordinary people.

A number of laws address the issue of making information subject to proactive publication widely accessible. In Nicaragua, special efforts must be made to ensure access by indigenous peoples and communities of 'African descent', and systems must be developed in relation to dissemination. In Panama and Peru, information must be made available on websites as well as in printed publications. In Peru, special rules must be developed to ensure that information reaches areas with low population density.



In Uruguay, Ecuador and Peru, all public bodies must develop website capacity within a year of the law coming into force, while in the Dominican Republic, the law includes a number of principles governing dissemination over the Internet. The Mexican law goes further than most, requiring public bodies to make a computer available to the public for the purpose of accessing information, along with a printer and technical support where needed. The Peruvian law contains specific instructions to public bodies to use appropriate methods of dissemination, including in rural or low-population density areas, and adequate funds must be allocated for this task.

In Mexico, all information provided in response to a request is made available electronically via a sophisticated electronic requesting system. In Nicaragua, all public bodies are required to make available an index of all of the information they hold, while in Mexico a list of classified information must be made available. In Ecuador, the information subject to proactive publication must be organised so as to facilitate access.

The dominant trend in all countries is to make more and more information available on a proactive basis, particularly online, whether or not this is required under a right to information law. This can promote a number of efficiencies for the public sector, as well as better service provision, both as reflected in tendencies to move to ever more significant forms of e-government. Given the relative ease and low cost of proactive publication over the Internet, it only makes sense that this should be promoted, among other things because it serves as a means to reduce the number of (relatively costly) requests for information. It is likely the case that the request load in countries which upload actively is far less than it would be if they did not do this. The Indian law expressly recognises the role of proactive publication in reducing the number of requests for information, specifically requiring public bodies to endeavour to increase proactive publication to this end.

### Exceptions

Most laws in Latin America and around the world include a comprehensive list of exceptions, or grounds for refusing to disclose information. A few, however, such as Colombia, do not contain any list of exceptions, deferring instead to secrecy laws for this purpose.

The relationship of right to information laws with secrecy laws is a difficult issue. In principle, it does not matter which law provides for an exception, as long as that exception is appropriate in scope, taking into account the need for openness. In practice, however, many secrecy laws do not provide for an appropriate balance, in part because they were drafted before the need for openness was recognised. Put differently, leaving in place the pre-existing regime of secrecy at the time a right to information law is adopted is likely to lead to undue secrecy.

Notwithstanding this, right to information laws in most countries, including in Latin America, leave in place secrecy laws. In Honduras, the right to information law is overridden not only by other laws but also by international treaties. In Nicaragua, the right to information law appears to prevail over secrecy laws and in some countries in the region – such as the Dominican Republic and Panama – the relationship between the right to information and secrecy laws remains unclear. In the latter, other laws prevail at least in certain areas, such as banking and tax evasion. In some countries in other regions – including South Africa and India – the right to information law provides explicitly that it has overriding force in case of conflict with a secrecy law. The Indian law specifically mentions that it takes precedence over the Official Secrets Act, 1923, presumably because it was recognised as being particularly problematical from a secrecy point of view.

Another issue is the role of classification in relation to the release of information under a right to information law. In some countries, classification is irrelevant and the exceptions in the right to information law, or possibly in a secrecy law, serve as the basis for decisions about disclosure. This has obvious merit, since mere administrative classification should not be able, in effect, to override legal provisions requiring disclosure.



On the other hand, a trend in Latin America is to impose limits on classification, along with rules requiring openness in relation to the list of documents that are classified, as a way of limiting the scope of exceptions to the right of access. This is useful, among other things because classification often has a very important bearing on disclosure in practice. A number of right to information laws in Latin America – including Chile, Ecuador and Uruguay– require public bodies to keep an up-to-date list or index of the documents they have classified or which are deemed to be confidential. In Ecuador, this list is itself required to be a public document and all documents must be declassified within three months if their classification is not supported by law. In Uruguay, similarly, information which is not on this list must be made available.

Under the Mexican law, classification is subject to different levels of review, including by the independent oversight body, which also sets standards for classification in the first place. In Nicaragua, classification requires agreement of the head of the body. The agreement must indicate the source of the document, the reasons for its classification, the parts of the document that are classified, the term of classification and the body responsible for keeping it. A document may not be classified after a request for access to it has been lodged, and parliament may declassify most information, apart from information relating to national security. In Guatemala, classification requires a resolution of the head of the relevant public body, which must be published in the Official Gazette and which must specify the basis for classification. Presumably such resolutions are relatively rare. In Honduras, any decision to classify information must be made by the senior official at the public body and must be sent to the oversight body, which may reject it.

The three-part test for exceptions to the right to information requires information to be disclosed unless the public body can show a) that the information falls within the scope of an exception listed in the law; b) that disclosure would pose a risk of harm to the protected interest; and c) that this harm outweighs the overall public interest in the disclosure of the information. Few of the laws surveyed in this book strictly conform to all three parts of this test, but many do at least broadly reflect parts of it.

An overall majority of the exceptions in the various laws from Latin America are subject to a harm test of one sort or another, or have built-in harm tests, although an unfortunate number of laws, including those of Ecuador and Panama, lack such a test, or have too many exceptions that are not subject to a harm test. Certain exceptions, for example in favour of legally privileged information, effectively contain an internal harm test, since the definition of legally privileged information was developed specifically to protect overriding interests.

The standard of harm required varies considerably both between laws and among exceptions. This has an important bearing on disclosure of information since the higher the standard of harm, the narrower the exception will be in practice. A few examples of harm found in different laws are: 'would be likely to prejudice', 'could lead to a negative result', 'adequate reason to believe harm would result' and 'harm could reasonably be expected'. In Uruguay, although the harm test is often rather weak, the law requires exceptions to be interpreted strictly, which may effectively be the same as a more stringent test.

Most of the right to information laws in Latin America do not include a general public interest override, although some, including Nicaragua and Guatemala, do. A number of laws have particular public interest overrides for certain exceptions. Mexico, Uruguay, Guatemala and Peru, for example, provide for an override in relation to human rights breaches or crimes against humanity. The Peruvian law also protects the right of certain bodies – such as the Congress, the judiciary, the General Controller (Contralor), and the Human Rights Ombudsman (Defensor del Pueblo) – to access information. In other cases, in countries outside of the region, the public interest override may apply in the context of other interests, such as a breach of the law or a serious risk to public safety or the environment.

This approach of using specific public interest overrides has the advantage of being clear, whereas a general reference to the public interest may lead to difficult interpretation issues. At the same





time, indeed by the same token, it is also narrow in scope, excluding a wide range of potential public interests.

In Honduras, the law provides for a reverse public interest override, whereby information may be kept confidential when this is in the overall public interest. This is an unfortunate approach, given the strong historical tendency of public officials to interpret the public interest in a manner that renders far too much information confidential.

A number of laws completely exclude certain bodies from the ambit of the law which is a radical way of avoiding the harm test and public interest override, or any consideration at all of whether the information should be disclosed. Security and/or intelligence bodies, for example, are excluded in Peru, while information provided on a confidential basis by third parties is excluded in Guatemala.

A number of countries also exclude certain types of requests. In many countries in Latin America, including Nicaragua and Mexico, requests which relate to information which has already been published are excluded, while Mexico additionally provides that offensive requests do not need to be responded to. Both exclusions are in principle legitimate. There is nothing wrong with leaving in place existing publication systems as an alternative to request-driven access, as long as the standards that apply – for example in terms of timeliness or cost of access – are similar. Where this is not the case, however, public bodies could use publication of information to avoid the procedures in place for requests. In Colombia, to help mitigate some of the potential problems, published information still has to be provided if the publication is no longer available. Similarly, vexatious, offensive or repetitive requests can impose costly burdens on public bodies and yet not advance the right to information. Again, however, where these are applied too broadly, or are subject to unduly wide discretionary interpretation, they can be problematical.

Some countries in Latin America, including Nicaragua, Ecuador and Guatemala, completely exclude personal information from the ambit of the law. This is problematical since it means that decision-making on disclosure is not subject to a harm test at the time of the request, or to the public interest override. In Mexico, public bodies must indicate to those providing personal information what information may be confidential and what is subject to disclosure.

Another shortcoming of a number of laws in Latin America is that they do not explicitly provide for the partial release of information (severability) where only some of a document is confidential. This simply makes obvious sense since the fact that some information in a document is confidential should not, of itself, prevent disclosure of the rest of the document. Exceptions to this include Panama, Peru and Mexico, where severability is provided for.

Many right to information laws in Latin American provide for historical disclosure. In Nicaragua, for example, information remains classified for up to ten years, which may be extended once for another five years. In Guatemala, classification lasts for seven years and may only be extended once, for a maximum of an additional five years. Similarly, in Honduras, classification lasts only for ten years and may only be extended by court order. In Mexico, only the oversight body may extend the initial period of classification, which is 12 years. In most of these countries, classification lapses as soon as the reasons which underpin it have disappeared. In other countries, however, classification may remain in place as long as the underlying reasons remain relevant, without any time limits.

It is not proposed to list specific exceptions here; this detail is contained in the country chapters. However, a few countries include 'unique' exceptions, which raises an issue as to why these exceptions have been deemed necessary when other countries have not included them, given that modern States have very similar (legitimate) confidentiality needs. In Nicaragua, for example, the law specifically lists litigation before international courts and information relating to collective defence agreements as exceptions. In Uruguay, "scientific, technological or cultural" discoveries by public bodies are protected, along with information which might harm





the dignity of an individual. In the Dominican Republic, all aspects of the banking and financial systems are protected, along with all strategic and scientific interests and vague interests such as 'public measures', 'national interests' and the 'public interest in general'. Panama protects information on the existence of mineral and oil beds. Honduras has a special exception for information relating to humanitarian aid, an unfortunate rule in a country which receives substantial amounts of such aid.

A few exceptions, while common and in principle legitimate, are also problematical. For example, most laws have an exception relating to internal decision-making or deliberative processes. This is legitimate as government needs to be able to run its internal operations effectively and to have 'time to think'. In particular, the following harms may need to be prevented:

- prejudice to the effective formulation or development of public policy;
- frustration of the success of a policy, by premature disclosure of that policy;
- undermining of the deliberative process in a public body by inhibiting the free and frank provision of advice or exchange of views; and
- undermining of the effectiveness of testing or auditing procedures.

At the same time, if this exception is phrased in excessively broad terms, it can seriously undermine the principle of maximum disclosure and lead to a wide range of internal documents being withheld. It is, as a result, particularly important that this exception be clearly and narrowly drawn, that it be limited to protecting the specific interests noted above and that it be subject to a public interest override.

Another problematical exception is protection of good relations with other States and intergovernmental organisations. In principle, this is legitimate. At the same time, it can be problematical, particularly when used by intergovernmental organisations, since it embraces much of the information they hold. A problem is that both parties may easily claim they need to deny access to the information on the basis that disclosure would harm relations with the other party, a clearly unacceptable situation. It can also lead to a lowest common denominator situation, whereby the least open country within the information sharing 'circle' sets the standards. It can be difficult for those not involved in the specific relationship, such as judges or information commissioners who are supposed to exercise oversight over secrecy claims, to assess whether or not a disclosure really would harm a relationship.

National security is another problematical exception, which led ARTICLE 19 to produce a set of principles on this subject, *The Johannesburg Principles: National Security, Freedom of Expression and Access to Information*.<sup>1</sup> States have historically demonstrated a serious tendency to over-classify information on grounds of national security. Furthermore, as with inter-governmental relations, it is difficult for outside actors to assess the extent to which the disclosure of information might really affect national security. This leads to a situation where security claims may be accepted, even though they are completely unwarranted. As Smolla has pointed out:

History is replete with examples of government efforts to suppress speech on the grounds that emergency measures are necessary for survival that in retrospect appear panicky, disingenuous, or silly.<sup>2</sup>

Unfortunately, the reaction of many States to the problem of terrorism has been to increase secrecy rather than to bolster democracy through openness.

## Appeals

It is widely recognised that individuals should have the right to lodge complaints or appeals where they feel that their requests for information have not been dealt with properly, in particular where they have been refused access to the information they seek. Different laws provide for different



complaint options. Globally, an internal complaint is a common option, as is a complaint to an independent oversight body and/or the courts. Some sort of independent oversight is clearly needed, since otherwise decisions on whether or not to disclose information ultimately depends on the discretion of public officials.

Many laws – including those of the Dominican Republic, Guatemala and Peru – provide specifically for an internal appeal, normally to a higher authority within the same body which originally refused the request. The Guatemalan law includes detailed provisions on internal complaints, which go to the head of the public body. These include clear timelines for processing requests, wide grounds for lodging complaints, and powers to order the disclosure of information.

A unique approach in Nicaragua is the system of Coordination of Access to Public Information units, which must be created at the national, municipal and Autonomous Regional government levels, with overall responsibility for overseeing compliance with the Law, including by constituting a sort of internal appeal mechanism for applicants. This is not an independent body, but represents a sort of compromise measure as it is also not internal to a specific public body.

In Latin America, only three countries – Chile, Honduras and Mexico – provide for an independent administrative oversight body to review refusals to provide access to information. This is unfortunate, as independent oversight bodies have proven central to the effective functioning of right to information regimes in other countries. Appeals to the courts are too time-consuming and expensive for all but a small minority of applicants, and yet it is essential that an external level of appeal be available. The importance of administrative oversight is reflected in attempts in countries which do or did not have oversight bodies to introduce them. Recent amendments in the United States have finally established an oversight body with a mandate to help resolve complaints, while in South Africa the establishment of such a body is a key civil society demand.

All three countries in Latin America with administrative oversight bodies establish specific bodies for this purpose, although some countries in other regions, such as Kyrgyzstan, allocate the task to an existing body, in that case the ombudsman. This has a number of disadvantages, including that the powers of the body are unlikely to be tailored to the specific needs of information appeals and that the body is unlikely to develop the specialised expertise required to deal properly with information appeals. At the same time, this can be an attractive option for less wealthy or smaller countries. In some countries – such as the United Kingdom and Thailand – the law provides for both an independent oversight body and a specialised tribunal with the power to hear further appeals.

Given that, at least in their complaints role, oversight bodies have to mediate between the public and officials, it is important that they be protected against interference, particularly of a political nature. Different laws take different approaches to guaranteeing the independence of these bodies. The appointments process is clearly central to this guarantee. In Mexico, appointments are made by the executive branch, but are subject to veto by the Senate or Permanent Commission. In Chile, the members of the Council for Transparency are proposed as a group by the President to the Senate, which must either accept or reject them, *en bloc*. In Honduras, the three commissioners of the Institute are elected by a two-thirds vote of the National Congress from among ten candidates – the Attorney General, the National Commissioner for Human Rights, the National Forum for Convergence, and the Superior Court of Accounts propose two candidates each. As a general rule, involving more different sectors of society in the appointments process is an important way of enhancing the independence of the body.

A number of other rules can enhance independence, including prerequisites for being appointed as a member – such as having expertise and having a strong moral record – conditions on membership – for example against individuals with strong political connections from being appointed – protection of tenure – for example through establishing limited grounds for removal – and funding mechanisms – including by linking salaries of members to pre-existing civil service grades, such as those of the judicial service.



The grounds for complaint should be broad, so that all failures to apply the law may be remedied. Specific grounds in different laws include an inability to lodge a request, failure to respond to a request within the set time frame, a refusal to disclose information, in whole or in part, charging excessive fees and not providing information in the form sought. A catch-all for other failures is found in some laws. It is also important that the body be able to investigate breaches of its own motion, so that general failures about which complaints are unlikely to be lodged by individuals – such as a failure to respect proactive publication rules – may also be addressed. Not all laws in Latin America provide for such wide grounds for complaints.

Oversight bodies should be given the necessary powers to conduct full investigations into information complaints, including to summon witnesses and, importantly, to request any information from public bodies, including the information to which access has been refused, which they may consider *in camera* if necessary to protect its confidentiality until a decision has been reached. Powers of enforcement should also be provided for, which is sometimes achieved by registering decisions with the courts. Once again, this is an area where not all of the laws in Latin America are as progressive as they should be, although the Mexican law is more detailed than some as regards the powers of the oversight body.

In some countries, the law specifically provides that the onus in case of a complaint is on the public body to justify any refusal to provide information. This is consistent with the idea of a right to information, which establishes a presumption that all information is subject to disclosure, from which derogations must be justified.

Oversight bodies may be given the power to impose a range of remedial measures, such as to require public bodies to disclose the information, perhaps in a particular form, to lower the fee or even to compensate the applicant, to appoint information officers, to enhance the provision of training to their officials, to publish certain information on a proactive basis, to make changes to their record management systems and so on.

Most, but not all, right to information laws provide for an ultimate appeal to the courts. Significantly, in Mexico, only requesters, and not public bodies, may lodge an appeal with the courts. This prevents public bodies from using their often considerable power to delay or prevent information disclosure.

A particular feature of a number of laws in Latin America – including those of Uruguay, Colombia and Ecuador – is special provision for expedited appeals to the courts, as a way of making them more accessible and appropriate for information appeals. All three laws provide for clear and quite short timelines for the processing of information appeals by the courts. The Uruguayan law also gives courts powers to resolve appeals on an urgent basis where necessary and public legal counsel is made available, helping to address the problem of costs normally associated with court appeals. The Ecuadorian law, along with the Uruguayan law, provides for the courts to take urgent action to protect the integrity of any information which appears to be under threat.

## Sanctions and Protections

Most laws in Latin America, as well as globally, include a regime of sanctions for individuals who obstruct access to information, and some also provide for the direct responsibility of public bodies. In some countries – like the Dominica Republic and Peru – it is a criminal offence to obstruct wilfully access, and conviction may lead to criminal penalties, often including imprisonment. In other countries – like Chile, Honduras and Mexico – the law instead provides for administrative liability.

Some laws define the scope of behaviour that attracts a sanction broadly, while others – including the laws of Ecuador and Nicaragua – define it more narrowly as including only cases in which



requested information is denied. Various particular forms of conduct are specified in different laws, such as destroying, damaging, altering, concealing or falsifying records. Other laws, such as those of the Dominican Republic, Panama and Honduras, refer generically to any manner of obstruction of access. The Guatemalan law specifically prohibits the commercialisation of personal information.

Very few laws in Latin America provide for protection for good faith disclosures under the law, although this is not uncommon in other countries. Instead, most countries in the region – including Mexico, Honduras, Guatemala, Ecuador and Uruguay – actually provide for liability for disclosing confidential information. This obviously inhibits the disclosure of information and is likely to perpetuate a culture of secrecy. The Peruvian law does at least provide some protection for good faith disclosures, indicating that compliance with the law by providing information should not lead to ‘reprisals’. However, it also provides for sanctions for wrongful disclosures.

None of the right to information laws in Latin America provide for protection for whistleblowers. On the other hand, in some countries, such as Chile, other laws provide for whistleblower protection. Protecting whistleblowers is an important safety valve which can help ensure that key public interest information is disclosed.

### **Promotional Measures**

The range of promotional measures provided for varies considerably from law to law. Some laws – such as those of Chile, Peru and the Dominican Republic – contain very few measures while other laws – such as those of Mexico, Honduras and Nicaragua – contain more extensive measures. Colombia, exceptionally, does not include any promotional measures at all.

Many laws provide for the appointment of dedicated officials – information officers – to assist in the implementation of the law. These officials undertake a range of functions, processing requests for information, ensuring that proactive publication takes place, providing assistance to applicants, proposing internal procedures to implement the law, promoting training, undertaking reporting and so on.

In Mexico, Liaison Sections carry out most ‘information officer’ functions, while Information Committees are required, among other things, to oversee classification and to establish document management criteria. In Ecuador, these functions fall to the Public Defender’s Office. In Nicaragua, public bodies are required to establish Offices of Access to Public Information to undertake a range of information functions.

A number of laws provide for the production of a guide to explain to the public their access to information rights and how to lodge requests, while in other countries these are produced as a matter of practice. These guides contain information on the purpose of the law, the rights of individuals to request information, the contact details of information officers, how to make a request for information, how such a request should be processed, what assistance is available, applicable fees and remedies for failures to apply the law, including available appeals.

A particular feature of many Latin American laws is their strong commitment to public education at all levels on the right to information. The Nicaraguan law, for example, provides for both training of officials as well as for the incorporation of the right to information into school curriculums at all levels. It even provides for the establishment of a national centre for research and teaching on the right to information. Other countries which promote wide training and public education activities include Ecuador, Guatemala and Honduras.

Quite a few countries provide for minimum standards for record management. Some countries – like Mexico – give a mandate to a central body – the Federal Institute of Access to Information – to set standards regarding record management, and establish a system for ensuring that public bodies respect these standards. This is a good approach as it can ensure strong, uniform standards



across the civil service. In other countries, like Nicaragua, Panama and Guatemala, the obligations are placed on individual public bodies to improve record management. In Ecuador, the obligation is on individual public bodies but with an oversight role for the national archival body. Peru has a unique system whereby only the National Archive may destroy information, on the basis that it lacks ongoing relevance.

Some countries provide for reporting on implementation of the law, although these obligations are less developed in Latin American than in other parts of the world. In some countries in the region, such as Ecuador, public bodies are required to report on their activities but there is no provision for a central report to be tabled before parliament. In Guatemala, public bodies must report to the General Attorney for Human Rights which may, in turn, report to parliament. In Panama, public bodies must include a section in their annual reports to parliament on access to information. In Mexico, the oversight body must report annually to parliament on the right to information, while all public bodies must provide such information as the oversight body may specify to this end. In Peru, the Council of Ministers is responsible for reporting annually to Congress on the right to information.

The reporting requirements vary but certain information is commonly required to be provided such as the number of requests received, granted and refused, the provisions of the law relied upon to refuse requests and how frequently, appeals, whether internal or to the oversight body, their outcome, the time taken to process requests, fees charged, measures taken to implement the law and recommendations for reform.

In a number of countries – including Chile, Honduras and Mexico – the oversight body has a general responsibility to promote implementation of the law which may include monitoring implementation, providing training, interpreting the law, developing forms and other implementation tools, giving advice to applicants and/or public bodies, and making recommendations for reform. In some other countries, such as Uruguay and Nicaragua, a special body (which does not have oversight functions) is created with a wide mandate to conduct promotional activities. In Honduras, a Special Follow-up of the Transparency and Access to Information Law Commission is established to receive quarterly reports from public bodies and formulate recommendations to them.

## Notes

- 1 ARTICLE 19 (London: 1996).
- 2 Smolla, Rodney, *Free Speech in an Open Society* (New York: Knopf, 1992), p. 319.

The image features a minimalist design with a light grey background. A vertical white line runs down the left side. Two white curved lines intersect: one starts from the bottom left and curves upwards and to the right, while the other starts from the top right and curves downwards and to the left. The word "Conclusion" is centered in the lower half of the image.

Conclusion



## Conclusion

**A**t its best, the right to information can deliver important social benefits. It can provide an important underpinning of democracy, fuelling peoples' ability to participate effectively and to hold governments to account. Examples of the right to information being used to expose corruption are legion and powerful, ranging from grassroots cases linked to basic livelihoods to major corruption scandals which have brought down governments. The right to information has also been used less dramatically, but no less importantly, to ensure an efficient flow of information between government and business.

These utilitarian benefits of the right to information have been recognised since at least 1776, when the idea first found legislative recognition in Sweden. Of far more recent vintage, however, is recognition of the right to information as a fundamental human right, an aspect of the right to freedom of expression which, under international law, guarantees not only the right to impart, but also to seek and receive information and ideas.

Fifteen years ago, almost no one claimed that access to information held by public bodies was a fundamental human right. By the time the first edition of the companion publication to this book was published in 2003, the idea had become more established but was still largely the preserve of right to information activists, supported by a few academics and others. As this book goes to print, the idea has matured significantly, to the point where it is constantly recognised not only by activists but also by inter-governmental bodies, development workers and even government officials. The author has, over the years, spent considerable energy promoting the idea of the right to information as a human right, including through the first and second editions of the companion to this book, and now through this regionally-focused version. Its growing recognition as such is, therefore, a source of some satisfaction.

The first edition of the companion publication to this book brought together for the first time all of the key international standards supporting the idea of access to information as a human right, along with supporting national developments, and marshalled the arguments in favour of such recognition. The second edition and then this version updated the evidence and extended the arguments, and they are presented in this version as highly persuasive.

It is important to recognise the proper status of the right to information but, as with other complex human rights, the devil is in the detail. This book seeks to elaborate in some detail on specific principles derived from international standards on the right to information, namely: a strong presumption in favour of access; good procedural means by which the right may be exercised, including through proactive publication obligations; a clear and narrow regime of exceptions; and the right to appeal breaches of the rules to independent oversight bodies.

Beyond these (still quite general) principles, the now considerable practice of different States in giving effect to the right to information in law serves as an important body of knowledge both for those promoting the adoption of a law for the first time and for those reviewing their existing law and practice with a view to reforming it. This book provides a wealth of comparative information on the practice of the 11 States in Latin America that have adopted right to information laws.





It has often been noted that the adoption of a progressive right to information law is only the first, and in some ways the easiest, step in realising the right to information in practice. The author fully endorses this view, which is also clearly borne out in practice. Effective implementation requires political will, an active civil society and at least some other key democratic features, such as respect for the rule of law. While a good law is not sufficient to deliver the right to information, it is at the same time a necessary precondition. It is the platform upon which these other required features build. It is hoped that this book will assist those promoting the right to information to build a strong legal platform in support of this key human right.

Those tasked with drafting or promoting legislation guaranteeing the right to information face a number of challenges. How should the regime of exceptions be crafted so as to strike an appropriate balance between the right to know and the need for secrecy to protect certain key public and private interests? How extensive should the obligation to publish and disseminate information be and how can the law ensure that this obligation grows in line with technological developments which significantly reduce publication costs? What procedures for requesting information can balance the need for timely, inexpensive access against the pressures and resource constraints facing civil servants? What right of appeal should individuals have when their requests for information have been refused? Which positive measures need to be taken to change the culture of secrecy that pervades the public administration in so many countries, and to inform the public about this right?



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