The Inter-American Legal Framework regarding the Right to Access to Information

Office of the Special Rapporteur for Freedom of Expression
Inter American Commission on Human Rights

IACHR 50 years defending HUMAN RIGHTS

Organization of American States

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THE INTER-AMERICAN LEGAL FRAMEWORK REGARDING THE RIGHT TO ACCESS TO INFORMATION

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Inter American Commission on Human Rights

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[1] The incorporation of this document into the Annual Report of the IACHR was approved in December 2009 in plenary session by the Commission, composed of Luz Patricia Mejia Guerrero, Victor E. Abramovich, Felipe Gonzalez, Sir Clare Kamau Roberts, Paulo Sérgio Pinheiro, Florentín Meléndez and Paolo G. Carozza.

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OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION
INTER AMERICAN COMMISSION ON HUMAN RIGHTS

The Inter-American Legal Framework regarding the Right to Access to Information

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African Commission or ACHPR:	African Commission on Human and Peoples' Rights
American Convention:	American Convention on Human Rights
Declaration of Principles:	Declaration of Principles on Freedom of Expression
IACHR:	Inter-American Commission on Human Rights
ICCPR:	International Covenant on Civil and Political Rights
ILO:	International Labor Organization
Inter-American Court:	Inter-American Court of Human Rights
OAS:	Organization of American States
OSCE:	Organization for Security and Cooperation in Europe
Office of the Special Rapporteur:	Office of the Special Rapporteur for Freedom of Expression of the IACHR
UN:	United Nations
UNESCO:	United Nations Educational, Scientific and Cultural Organization

PROLOGUE

The Inter-American Commission on Human Rights' (IACHR) Office of the Special Rapporteur for Freedom of Expression is pleased to publish this book, which presents the inter-American human rights system's standards on access to information, along with the case law of various OAS member states on the issue. The publication of this book offers an opportune moment to explain why the right of access to information is so relevant for the inter-American human rights system.

Access to information is a basic tool for building citizenship. This task is important for all the hemisphere's democracies, but it is particularly crucial for the many societies in the Americas that have in the last few decades consolidated their ever more well-established and robust democratic systems thanks to the participation of their citizens in matters in the public interest. This citizen activism is precisely one of the ideals underlying the American Convention on Human Rights and the Inter-American Democratic Charter.

Citizens can be defined in contrast to subjects. Citizens question, request, demand. Citizens are loud, they complain, they criticize. In contrast, subjects obey. They accept, and keep quiet. They are comfortable with silence, and do not raise questions. Obviously, democracies require politically active citizens, and access to information is a tool that squares perfectly with what is expected of the members of a democratic society. In society's hands, public information is used to protect rights and prevent abuses by the State. It is a tool that gives power to civil society and that is useful in the fight against ills like corruption and secrecy that have done so much damage to the quality of democracy in our region.

Access to information is also a particularly useful tool for the informed exercise of political as well as other human rights. Access to information allows people to learn what rights they have and how to defend them. The latter is particularly urgent for those sectors of society that are marginalized or excluded and do not have systematic and dependable ways of acquiring information on the scope of their rights and how to exercise them.

The idea of a citizenry that makes demands and asks for information from the state by necessity has a counterpart in the state bodies from which it requests such information. The rule in authoritarian states is to keep state information secret, while making information on individuals public. In democratic societies, the rule is just the opposite. The inter-American system reflects this. The transformation of an authoritarian society into a democratic one is a long road and not without its difficulties, but the inter-American system has shown itself to be a positive influence during these transitions.

When Marcel Claude Reyes asked for information from Chile's Foreign Investments Committee on a deforestation project that could affect the environment and was set to take place in the south of the country, he received only a cursory and inadequate response. A large portion of the information he had requested was not released, and the state did not provide any reasons or grounds for withholding the information from the public. Reyes brought his request before several courts in Chile, without success. Finally, he decided to appeal to the inter-American system, together with a group of Latin American human rights organizations determined to advance the causes of access and transparency. Through the judgment it handed down in *Claude Reyes v. Chile*, the Inter-American Court of Human Rights became the first international tribunal to recognize the right to access to public information as a fundamental human right protected by human rights treaties that require states to respect it. This is no small thing.

Since then, much has changed. With the passage of the Transparency Act and the creation of the Transparency Council in 2009, Chile has become one of the region's leading countries in access to

information policy. Many other countries have also adopted access and transparency policies. A total of 17 countries in the Americas have passed access to public information laws, while others are on their way to doing so.

But neither legal recognition of the right, nor the procedures and bodies established to protect and ensure it, are sufficient. It is necessary to fill this right with "life and meaning," which is why information on its scope and possibilities must be disseminated. In practice, known rights are the only rights that are demanded and protected.

This book lays out the main characteristics of the right of access to information in the inter-American system, as well as the scope that some of the region's courts have given this valuable right. It explores the principles that apply, such as "maximum disclosure," according to which information in the hands of state bodies is public by definition. The exceptions to this rule must be provided for by law, interpreted restrictively, satisfy legitimate purposes, and be necessary for a democratic society. Also relevant is the principle of "good faith," according to which the state must adopt proactive policies that help build a culture of transparency, while also responding to requests for information in a timely, complete, and accessible manner.

We also highlight the obligations that fall to the state, including – for example – the obligation to set aside sufficient resources and make an effective legal resource available to all individuals through which they can question – before independent courts – administrative rulings that deny access to information.

These standards were not arrived at by chance. They are the result of a virtuous circle created through regional and national bodies' mutual recognition of the protection of human rights in response to the demands of civil society. This framework produces a dialogue out of which comes a reciprocal learning process. Happily, this process ultimately favors the inhabitants of the hemisphere, to whom we owe our work.

The dissemination of these international standards will create awareness on the scope and limit of the right to access to information as a tool for democracy in the hands of all. But tools are only as useful as the abilities of the hands that use them. The challenge for the future is to get civil society, vulnerable groups, the media, and journalists into the habit of appealing to this mechanism over and over again when obtaining information related to issues in the public interest, including the struggle against corruption, the enforcement of economic and social rights, and the protection of the environment, to name only a few. In this way, access to information will become a measure that will improve the quality of life of individuals, as well as improve democracy in the hemisphere. Disseminating information on this tool is a fundamental step for its effective fulfillment.

The efforts required are not insignificant. The path is neither short nor easy, but we are following it thanks to the invaluable efforts of the hemisphere's civil society and the fundamental support of the international community. This book seeks to shore up the efforts of the former. As for the latter, we owe our thanks to the Swiss Confederation, since publishing this book would not have been possible without its support. Thanks to this collaboration, we were also able to carry out three training seminars with journalists in Mexico, Argentina, and Colombia. These courses were conceived, according to the Swiss ambassador to Mexico, Urs Breiner, with the intention of endowing the rights of freedom of expression and access to information with "life and meaning." What better way to do this than by training journalists in the use of tools that will allow them to more effectively carry out the important role that they play in our democracies?

In these training courses, the Swiss ambassadors to the aforementioned countries also spoke about the reasons that the right to access to information is so important for democratic societies. Their

warm words of reflection, spoken at the start of each of these seminars, are included at the beginning of this volume.

Finally, we would like to thank the United Kingdom for its invaluable contribution to the work of disseminating and promoting the right of access to information. Its support helped fund part of the research that we present herein and will allow us to continue disseminating and promoting it in the future.

Address by Ambassador Urs Breiter[2]
Embassy of Switzerland in Mexico
Opening of the Seminar on Freedom of Expression and access to information

Mexico City, April 18, 2009

Ms. Catalina Botero, Special Rapporteur for Freedom of Expression
Ms. Ivett Navarro, President of the Ibero-American Network of Journalists
Mr. José Buendía, Executive Director of the Press and Democracy Foundation

Distinguished Participants:

Freedom of expression and access to information are pillars of any democratic system. They are rights that figure not only in various international conventions, but also in the constitutional order of every democratic country. A democracy cannot function if these rights are not respected and guaranteed.

But it is not enough to stipulate these rights from a legal standpoint; they must also be given life and meaning. In today's world, there are many and very diverse threats that weigh on freedom of expression. Unlike the historical circumstances that gave rise to this fundamental right, when the threat was the State itself through its representatives, nowadays the threats come from different actors, among them powerful private interest groups and criminal enterprises.

Freedom of expression and access to information are also essential to ensure respect for other human rights. Without freedom of expression it is impossible to report violations of fundamental rights. Freedom of expression is therefore crucial for the protection of the totality of human rights.

Moreover, freedom of expression is critical for the development of a country in every sphere. It plays a central role not only in the electoral process, but also in the adoption and implementation of political, economic, and social reforms.
All our democracies have the obligation to wage a constant battle to defend freedom of expression. It is a difficult and arduous task, but an important task in the interest of building a more transparent and democratic world.

The work being carried out by the Organization of American States, and particularly its Office of the Special Rapporteur for Freedom of Expression, is part of this effort to defend and promote awareness of the full respect for freedom of expression and information. This is a significant and laudable undertaking.

The OAS does extensive work in different areas. One of these involves reporting violations of freedom of expression and defending this right, as well as making recommendations and providing guidance and training.

As a representative of the Swiss Confederation, I consider it a great pleasure and honor for my country to be able to contribute to this effort. Switzerland has a longstanding interest in the area of freedom of expression and access to information. We understand the importance and scope of this right.

The promotion of human rights is one of the objectives of Switzerland's foreign policy. We try to contribute in this way to the strengthening of democracy in the world. Providing funding for this

[2] Original speech in Spanish, this is an unofficial translation.

seminar falls within this strategy of Swiss foreign policy. Be that as it may, we are aware that our contribution is modest given the herculean nature of the task.

I hope and trust that this seminar will prove useful, and I wish you very productive hours ahead.

Thank you for your kind attention.

Ambassador Urs Breiter
Ambassador of Switzerland to Mexico

Address by Dr. Carla del Ponte[3]
Embassy of Switzerland in Argentina
Opening of the Seminar on Freedom of Expression and access to information

Buenos Aires, Wednesday, September 16, 2009

Speakers:

- Dr. Catalina Botero, Special Rapporteur on Freedom of Expression (Organization of American States, OAS)
- Dr. Carla del Ponte, Ambassador of Switzerland
- Professor Eduardo Bertoni, Director of the Center for Studies on Freedom of Expression and Access to Information (CELE) of the Palermo University Law School, and/or a representative of the Law School

Good morning.

It is an honor for me to welcome you to a discussion on an issue as important as human rights and the right of access to public information.

This subject is not just important, but essential. That is also borne out by the current issues in Argentina.

Freedom of expression is a fundamental right, that is, it has value in and of itself. But freedom of expression also plays a key role in a democratic society. The first principle of the Declaration of Principles on Freedom of Expression puts it this way:
Freedom of expression is "an indispensable requirement for the very existence of a democratic society."

In Latin America, freedom of expression is an integral part of the process of social, constitutional, and political reform. In 2006 alone, 18 countries in the Americas organized presidential or legislative elections at the national level. In this context, freedom of expression is the very premise of democratic elections and ensures citizen control of political institutions.

Respect for and promotion of freedom of expression is very important. It is a task that belongs to all of us, and it is an ongoing task. That is why we have work to do: We all need to protect the respect for freedom of expression: civil society—the media, students, and members of NGOs—but also the State: public officials and judges, everyone. The task belongs to all of us!

Today, a number of dangers persist that threaten this human right around the world—and Latin America is not immune! New populisms appear, television stations critical of governments are shut down, different publications are suppressed. State funds are misappropriated, used to spread the official government line.

In this context, the work of the Special Rapporteur for Freedom of Expression of the OAS (Organization of American States) can have a significant impact on the defense of a democratic society:

- It defends freedom of expression and monitors and reports violations.

[3] Original speech in Spanish, this is an unofficial translation.

- It advises and assists legislators of the member countries to reformulate laws in accordance with the principle of freedom of expression.

Sweden places a high value on this work. Indeed, for my country, freedom of expression is also a critical issue in our cooperation with our partners. Consequently, Sweden supports and contributes to the activities such as this one that advance and defend freedom of expression. Thanks to Switzerland's support and funding, it has been possible to organize three seminars on this topic in Latin America: the first in Mexico, the second here today in Buenos Aires and tomorrow in La Plata, and a third that will be organized in Colombia.

Now, I hope that all of you have an interesting discussion on an issue of such importance, freedom of expression and the right of access to public information.

Thank you so much—or grazie mille!

Dr. Carla del Ponte
Ambassador of Switzerland in Argentina

Words of welcome by Francesco Quattrini, Deputy Chief of Mission[4]
Embassy of Switzerland in Colombia
Opening of the Seminar on freedom of expression and access to information

Bogota and Cali, September[5], 2009

Ms. Catalina Botero, Special Rapporteur for Freedom of Expression
Mr. Alexei Julio, Magistrate of the Constitutional Court
Ms. Nohora Sanín, Director of Andiarios and Representative of the Antonio Nariño Project
Ms. Adriana Blanco, Executive Director of the Foundation for Press Freedom and Representative of the Antonio Nariño Project
Mr. Lelio Fernández Druetta, Dean of the Icesi University Law School
Distinguished Participants

Freedom of expression and free access to information are social conquests that have achieved the status of fundamental rights, enshrined in various international conventions and in the constitutional order of any country that considers itself to be democratic.

It is not enough, however, to formally recognize these rights. Freedom of expression and free access to information face multiple and varied threats, and Latin America unfortunately is no stranger to them. Societies must defend these rights, fill them with life and meaning, and protect and promote them, always in a way that is inclusive, pluralistic, and responsible.

In Colombia, freedom of expression and free access to information take on a particularly important dimension. They are essential pillars in defending human rights, generating conditions conducive to the application of international humanitarian law, ensuring greater protection for victims of violence, exercising oversight of public processes, bringing complaints, and being able to coexist.

They must, above all, provide a fitting space in which the voices of victims can be heard and find resonance, so that they can articulate and report their experiences, their memories, and their hopes.

To that end, journalists and communicators must have all the necessary security guarantees to be able to fulfill their vast responsibilities, and they must receive backing and support from society as a whole.

Thus, despite all the difficulties and pressures, the exercise, defense, and promotion of freedom of expression and free access to information find meaning in the courageous efforts of journalists, judges, social leaders, and students, who overcome often adverse circumstances and make it possible for their voices and those of others to prevail, objectively and in a way that observes the standards and principles that characterize a modern democracy. To them we offer our respectful recognition.

In this context, the efforts of the Organization of American States, and particularly the tasks carried out by the Special Rapporteur for Freedom of Expression, are essential to the defense and promotion of these rights. This task is, without a doubt, as complex as it is necessary.
For the Swiss Confederation, it is an honor to be able to accompany the OAS in this seminar. Conscious of the relevance, applicability, and magnitude of the subjects that will be addressed, we

[4] Original speech in Spanish, this is an unofficial translation.
[5] In Bogota, September 21, 2009 and in Cali, September 23, 2009.

wanted to join in this initiative, modestly but with the firm conviction that freedom of expression and free access to information are non-negotiable values for democratic societies.

May this, then, be another small but determined effort by Switzerland to promote human rights, once again confirming our historical commitment to democracy in Latin America and in Colombia.

Receive our best wishes for this event, which we hope you will find useful and beneficial.

Thank you.

Francesco Quattrini, Deputy Chief of Mission
Embassy of Switzerland in Colombia

THE RIGHT TO ACCESS TO INFORMATION IN THE INTER-AMERICAN LEGAL FRAMEWORK[1]

A. Introduction

1. The right to access to information is a fundamental right protected by Article 13 of the American Convention. It is a right that is particularly important for the strengthening, functioning, and preservation of democratic systems. Therefore, it has received a great amount of attention, both from OAS member States[2] and in international doctrine and jurisprudence.

2. The IACHR's interpretation of Article 13 of the American Convention holds that it includes a positive obligation for the State to allow its citizens access to information under its control.[3] In this sense, the IACHR's Declaration of Principles on Freedom of Expression establishes in Principle 2 that, "Every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights," and that, "All people should be afforded equal opportunities to receive, seek and impart information;" Principle 3 holds that, "Every person has the right to access to 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;" and Principle 4 indicates that, "Access to information [...] is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right."

3. For its part, the Inter-American Court has established that by expressly stipulating the rights to "seek" and "receive" "information," Article 13 of the American Convention protects every person's right to access information under the control of the State, with the exceptions permitted under the strict regime of restrictions established in the Convention.[4]

4. The right of access to information is considered a fundamental tool for citizen control of State affairs and public administration (especially when it comes to controlling corruption);[5] for citizen participation in politics through the informed exercise of political rights; and for the general fulfillment of other human rights, especially for the most vulnerable groups.[6]

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[1] The right of access to information has been one of the recurrent topics of the annual reports and publications of the Office of the Special Rapporteur since its creation. This document is an updated version of the annual reports, especially the Annual Reports of the Office of the Special Rapporteur for Freedom of Expression 2005 (Chapter IV) and 2008 (subsection [f] of Chapter III), and of the Special Study on the Right of Access to Information, produced by the Special Rapporteur for Freedom of Expression in 2007. The content of this publication correspond to the Chapter IV from Annual Report 2009.

[2] The General Assembly of the OAS holds that the right of the access to information is "a requisite for the very functioning of democracy." In this sense, all democratic American States "are obliged to respect and promote respect access to public information for all persons and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application." General Assembly of the Organization of American States. Resolution AG/RES. 1932 (XXXIII-O/03), Access to Public Information: Strengthening Democracy, June 10, 2003. Also see: AG/RES. 1932 (XXXV-O/03), AG/RES. 2057 (XXXIV-O/04), AG/RES. 2121 (XXXV-O/05), AG/RES. 2252 (XXXV-O/06), AG/RES. 2288 (XXXVII-O/07) and AG/RES. 2418 (XXXVIII-O/08).

[3] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 58.a)-b).

[4] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. paras. 76-78. The broad concept of Article 13 protection is also developed in I/A Court H. R., *Case of López-Álvarez v. Honduras. Merits, Reparations and Costs*. Judgment of February 1, 2006. Series C No. 141. para. 77; and I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. para. 108.

[5] "Free access to information is a measure that, in a representative and participative democratic system, the citizens exercise their political rights; effectively, the full exercise of the right of access to information is necessary for

5. Effectively, the right of access to information *is a crucial tool for controlling State affairs and public administration, as well as monitoring corruption.* The right of access to information is a fundamental requirement for guaranteeing transparency and good public administration by the government and other State authorities. Effectively, the full exercise of the right of access to information is a guarantee that is indispensable in preventing abuses by public officials, holding public administration accountable and promoting its transparency, as well as preventing corruption and authoritarianism. In a representative and participatory democratic system, free access to information is also a measure that allows the citizenry to exercise adequately their political rights. Of course, political rights presume the existence of broad and vigorous public discourse. For this discourse, it is indispensable to have access to public information that allows for serious evaluation of the progress made and difficulties faced by the authorities in their achievements. Only through access to information under State control is the citizenry able to know if the State is adequately complying with its public functions.[7] Finally, access to information also has a fundamental instrumental function. Only through adequate implementation of this right can people know what exactly their rights are and what mechanisms exist to protect them. In particular, the adequate implementation of the right of access to information in its full scope is an essential condition for the fulfillment of the social rights of excluded or marginalized sectors of society. Indeed, these sectors do not tend to have systematic and reliable alternatives for learning the scope of the rights that the State has recognized and the mechanisms for demanding them and making them effective.

6. On the functions of the right of access to information, in a 1999 Joint Declaration, the Special Rapporteurs for Freedom of Expression of the UN, OSCE, and the OAS stated that, "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." Likewise, the 2004 Joint Declaration recognized "the fundamental importance of access to information to democratic participation, to holding governments accountable and to controlling corruption, as well as to personal dignity and business efficiency."

7. This book explains the principles that should be followed in designing and implementing a legal framework that guarantees the right of access to information. Likewise, it presents the minimum requirements of the right according to regional doctrine and jurisprudence, and, finally, it presents a series domestic rulings from countries in the region that, in the Office of the Special Rapporteur's opinion, constitute best practices on the subject of access to information and should therefore be distributed and discussed.

B. Guiding Principles of the Right of Access to Information

8. In order to guarantee the full and effective exercise of the right of access to information, State administration must follow the principles of maximum disclosure and good faith.

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preventing abuses by public officials, promoting transparency in government administration, and allowing solid and informed public debate that ensures the guarantee of effective recourses against government abuse and prevents corruption. Only through access to State-controlled information in the public interest can citizens question, investigate, and weigh whether the government is adequately complying with its public functions." *Cf.* I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. paras. 86-87.

[6] IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. para. 147. Available at: http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf

[7] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. paras. 86-87.

1. Principle of maximum disclosure

9. The principle of maximum disclosure has been recognized by the inter-American system as a guiding principle of the right – found in Article 13 of the American Convention – to seek, receive, and impart information. In this sense, the Inter-American Court has explained that, by virtue of Article 13 of the Convention, the right of access to information must be governed by the principle of maximum disclosure.[8] Likewise, the Inter-American Commission has understood that, in keeping with Article 13 of the Convention, the right of access to information must be governed by the principle of maximum disclosure.[9] Similarly, the Inter-American Juridical Committee in Resolution CJI/RES.147 (LXXIII-O/08) on "Principles on the Right of Access to Information," in Principle 1, has established that: "In principle, all information is accessible. Access to information is a fundamental human right which establishes that everyone can access information from public bodies, subject only to a limited regime of exceptions."

10. The principle of maximum disclosure calls for a legal regime in which transparency and the right to access are the general rule and only subject to strict and limited exceptions. The following consequences are derived from this principle: (1) the right of access must be subject to a limited regime of exceptions, and these exceptions must be interpreted restrictively, with all their provisions interpreted to favor right of access; (2) denials of information must be reasoned, and in this sense the burden of proving that the requested information cannot be released falls to the State; and (3) the right of access to information should take precedence in the event of doubts or legal vacuums.

a. The right of access to information is the rule and secrecy the exception

11. The right of access to information is not an absolute right; it can be subject to limitations. However, as will be explored in greater detail below, these limitations must comply strictly with the requirements derived from Article 13.2 of the Convention, namely that limitations are of an exceptional nature, legally enshrined, based on a legitimate aim, and necessary and proportional for pursuing that aim.[10] However, the exceptions should not become the general rule; they must take into account that access to information is the rule and secrecy the exception. Likewise, domestic legislation must make clear that confidential documents remain so only as long as their publication could effectively compromise the interests that their secrecy protects. This means that domestic legislation should mandate that information classified as secret or confidential under the limitations allowed under the American Convention must be published after a reasonable period of time.

12. As far as its scope, the Inter-American Court has emphasized in its jurisprudence that this principle "establishes the presumption that all information is accessible, subject to a limited

[8] IACHR, Arguments before the Inter-American Court of Human Rights in the *Case Claude-Reyes et al. v. Chile*, cited in I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 58.c)

[9] IACHR, Arguments before the Inter-American Court of Human Rights in the *Case Claude-Reyes et al. v. Chile*, cited in I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 58.c)

[10] In this particular sense, Principle 4 of the Declaration of Principles holds that "Access to information [...] 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."

system of exceptions,"[11] which "must have been established by law,"[12] serve an objective allowed under the American Convention,[13] and be "necessary in a democratic society, which in turn requires that they be intended to satisfy a compelling public interest."[14]

b. Burden of proof on the State when limits on the right of access to information are established

13. The Inter-American Court's jurisprudence has established that the State has the burden of proof of demonstrating that limits to access to information are compatible with inter-American norms on freedom of expression;[15] the Inter-American Judicial Committee affirmed this point in its resolution "Principles on the Right of Access to Information," stating that "The burden of proof in justifying any denial of access to information lies with the body from which the information was requested." This allows for the creation of legal certainty in the exercise of the right of access to information. Since the information is under the control of the State, discretionary and arbitrary acts of the State must be avoided in establishing restrictions of the right.[16]

c. Preeminence of the right of access to information in the event of conflicting statutes or lack of regulation

14. As the Office of the Special Rapporteur has broadly recognized within the rappourteurships of freedom of expression, in cases of discrepancies or conflicting statutes, the law of access to information must prevail over all other legislation.[17] This has been recognized as an

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[11] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 92. In the same sense, the Offices of the Special Rapporteurs on Freedom of Expression of the UN, OAS, and OSCE in the Joint Declaration 2004 explained that this principle "establishes a presumption that all information is accessible subject only to a narrow system of exceptions."

[12] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 89.

[13] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 90.

[14] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 91. Also see, I/A Court H. R., *Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135. para. 85; I/A Court H. R., *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111. para. 96; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107. paras. 121 and 123; and I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 46. Similarly, the Inter-American Juridical Committee in its Resolution CJI/RES.147 (LXXIII-O/08) on "Principles on the Right of Access to Information" in Point 1 establish that, "In principle, all information is accessible. Access to information is a fundamental human right which establishes that everyone can access information from public bodies, subject only to a limited regime of exceptions in keeping with a democratic society and proportionate to the interest that justifies them. States should ensure full respect for the right to access to information through adopting appropriate legislation and putting in place the necessary implementation measures."

[15] IACHR, Arguments before the Inter-American Court of Human Rights in the *Case Claude-Reyes et al. v. Chile*, cited in I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 58.c)

[16] I/A Court H.R., *Case of Claude Reyes et al. v. Chile. Merits, Reparations, and Costs*. Judgment of September 19, 2006. Series C No. 151, para. 98.

[17] UN, OAS, and OSCE Special Rapporteurs on Freedom of Expression, Joint Declaration 2004.

indispensable prerequisite for the proper functioning of democracy.[18] This requirement helps encourage the States to comply effectively with the obligation to establish a law on access to public information and interpret the law favorably toward that right.[19]

2. Principle of Good Faith

15. To guarantee the effective exercise of the right of access to information, it is crucial that those bound to guarantee this right act in good faith; that is, that they ensure the strict application of the right, provide the necessary measures of assistance to petitioners, promote a culture of transparency, contribute to making public administration more transparent, and act with due diligence, professionalism, and institutional loyalty. They must take the actions necessary to serve the general interest and not betray the people's confidence in State administration.

C. Content and scope of the right of access to Information

1. Every person has the right of access to information

16. The right of access to information is a universal human right. Consequently, and as established in Article 13 of the American Convention, all persons have the right to request access to information.

17. The Inter-American Court has specified on this point that it is not necessary to prove a direct interest or a personal stake in order to obtain information in the State's possession, except in cases where there is a legitimate restriction permitted by the Convention, under the terms explained further below.[20]

18. In addition, any person who accesses information under the control of the State has, in turn, the right to disclose that information so that it circulates publicly and the public can know about it, access it and evaluate it. The right of access to information thus shares the individual and social dimensions of freedom of expression, and the State must guarantee both simultaneously.[21]

2. Subjects with obligations under the right of access to information

19. The right of access to information generates obligations at all levels of government, including for public authorities in all branches of government, as well as for autonomous bodies. This right also affects those who carry out public functions, provide public services, or manage public funds in the name of the State. Regarding the latter group, the right to access of information obligates them to turn over information exclusively on the handling of public funds, the provision of services in their care, and the performance of public functions.

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[18] Resolution AG/RES. 1932 (XXXIII-O/03) June 10, 2003 on "Access to Public Information: Strengthening Democracy"; Resolution AG/RES. 2057 (XXXIV-O/04) June 8, 2004 on "Access to Public Information: Strengthening Democracy"; Resolution AG/RES. 2121 (XXXV-O/05) June 7, 2005 on "Access to Public Information: Strengthening Democracy"; and AG/RES. 2252 (XXXVI-O/06) June 6, 2006 on "Access to Public Information: Strengthening Democracy."

[19] *Cf*. IACHR. Arguments before the Inter-American Court of Human Rights in the case *Claude-Reyes et al. v. Chile*, cited in I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 58.d).

[20] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 77.

[21] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 77.

20. As such, reiterating the existing case law, the Resolution of the Inter-American Juridical Committee on "Principles on the Right of Access to Information"[22] states, in Principle 2, that "[t]he right of access to information applies to all public bodies, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory bodies, bodies which are owned or controlled by government, and organizations which operate with public funds or which perform public functions."

3. Object of the right

21. The right of access to information covers information that is in the care of, possession of, or being administered by the State; the information that the State produces, or the information that it is obliged to produce; the information that is under the control of those who administer public services and funds and pertains to those specific services or funds; and the information that the State collects and that it is obligated to collect in the performance of its functions.

22. In that sense, the resolution on the "Principles on the Right to Access to Information" of the Inter-American Juridical Committee states that the right to access to information includes "all significant information, defined broadly to include everything which is held or recorded in any format or medium".

4. State obligations in the right of access to information

23. The right of access to information held by the State generates several obligations under the American Convention for the authorities of the various branches of government, to wit:

a. Obligation to respond in a timely, complete, and accessible manner to requests

24. The State has an obligation to provide a substantive response to requests for information. Indeed, by protecting the right of individuals to access information held by the State, Article 13 of the American Convention establishes a positive obligation for the State to provide the requested information in a timely, complete, and accessible manner. Otherwise, the State must offer, within a reasonable time period, its legitimate reasons for impeding access.[23] In this sense, as will be explored in greater depth in the next section, inter-American doctrine has specified that in the event of exceptions, they "must have been established by law to ensure that they are not at the discretion of public authorities."[24]

25. The State's obligation to supply requested information includes the following:

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[22] Inter-American Juridical Committee. Resolution 147, of the 73rd Ordinary Period of Sessions: Principles on the Right of Access to Information. August 7, 2008, operative paragraph 2.

[23] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 77; IACHR. Arguments before the Inter-American Court of Human Rights in the case *Claude-Reyes et al. v. Chile*, cited in I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 58.a)-b).

[24] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 89.

b. Obligation to offer a legal recourse that satisfies the right of access to information

26. The full satisfaction of the right of access to information requires States to include in their legal systems an effective and adequate legal recourse that can be used by all individuals to request the information they need. In order to guarantee the true universality of the right to access, this recourse must include several characteristics: a) it must be a simple recourse that is easy for everyone to access and only demands basic requirements, like a reasonable method of identifying the requested information or providing the personal details necessary for the administration to turn over the requested information to the petitioner; b) it must be free or have a cost low enough so as not to discourage requests for information; c) it must establish tight but reasonable deadlines for authorities to turn over the requested information; d) it must allow requests to be made orally in the event that they cannot be made in writing – for example, if the petitioner does not know the language or does not know how to write, or in cases of extreme urgency; e) it must establish an obligation for administrators to advise the petitioner on how to formulate the request, including advising the petitioner on the authority competent to reply to the request, up to and including filing the request for the petitioner and keeping the petitioner informed of its progress; and f) it must establish an obligation to the effect that in the event that a request is denied, it must be reasoned and there must be a possibility of appealing the denial before a higher or autonomous body, as well as later challenging the denial in court.

27. With regard to the obligation of creating a special mechanism to make the right to access enforceable, the Inter-American Court has held that the State must "guarantee (…) the effectiveness of an appropriate administrative procedure for processing and deciding requests for information, which establishes time limits for making a decision and providing information, and which is administered by duly trained officials."[25]

28. As stated by the UN, OAS and OSCE Special Rapporteurs on Freedom of Expression in their Joint Declaration of 2004, "[a]ccess to information is a citizens' right. As a result, the procedures for accessing information should be simple, rapid and free or low-cost." In the words of the Inter-American Juridical Committee, in its "Principles on the Right of Access to Information," "[c]lear, fair, non-discriminatory and simple rules should be put in place regarding the processing of requests for information. 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."

c. Obligation to provide an adequate and effective legal remedy for reviewing denials of requests for information

29. States should enshrine the right to administrative review and subsequent judicial review of administrative decisions through a recourse that is simple, effective, quick, and non-onerous, that allows the challenging of decisions of public officials that deny the right of access to specific information or simply neglect to answer the request.[26] Together with that, the remedy should also: a) review the merits of the controversy to determine whether the right of access was

[25] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 163.

[26] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 137.

inhibited, and b) in the affirmative case, order the corresponding government body to turn over the information. In these cases, the recourses should be simple and quick, since the expeditious delivery of the information is indispensable for the fulfillment of the functions this right pressuposes.[27]

30. The Inter-American Court has established that a legal remedy is compatible with the requirements of the Convention as long as it is adequate and effective.[28] That is to say, it must be adequate to protect the right that has been infringed upon[29] and able to produce the sought-after result.[30] The absence of an effective remedy will be considered a transgression of the American Convention.[31]

31. Also, the Court has established that the guarantee of an effective legal remedy for violations of fundamental rights "is one of the basic mainstays, not only of the American Convention, but also of the rule of law in a democratic society in the sense set forth in the Convention."[32]

d. Obligation of active transparency

32. The right of access to information imposes on the State the obligation to provide the public with the maximum quantity of information proactively, at least in terms of a) the structure, function, and operating and investment budget of the state; b) the information needed for the exercise of other rights – for example, those pertaining to the requirements and procedures surrounding pensions, health, basic government services, etc.; c) the availability of services, benefits, subsidies, or contracts of any kind; and d) the procedure for filing complaints or requests, if it exists. This information should be understandable, available in approachable language and up to date. Also, given that significant segments of the population do not have access to new technologies yet many of their rights can depend on obtaining information on how to realize them, in these circumstances the State must find efficient ways to fulfill its obligation of active transparency.

33. In this respect, the UN, OAS and OSCE Special Rapporteurs on Freedom of Expression specified in their Joint Declaration of 2004 that "[p]ublic authorities should be required to publish pro-actively, even in the absence of a request, a range of information of public interest;"

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[27] I I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. paras. 116-139.

[28] I/A Court H. R., *Case of the Serrano-Cruz Sisters v. El Salvador. Preliminary Objections*. Judgment of November 23, 2004. Series C No. 118. para. 134.

[29] I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4. para. 64.

[30] I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4. para. 66.

[31] I/A Court H.R., *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9. Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 23.

[32] I/A Court H. R., *Case of the Serrano-Cruz Sisters v. El Salvador. Preliminary Objections*. Judgment of November 23, 2004. Series C No. 118. para. 75; I/A Court H. R., *Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 7, 2004. Series C No. 114. para. 131; and I/A Court H.R., *Case of the 19 Tradesmen v. Colombia*. *Preliminary Objection*. Judgment of June 12, 2002. Series C No. 93. para. 193.

and that "[s]ystems should be put in place to increase, over time, the amount of information subject to such routine disclosure."

34. The scope of this obligation is also defined in the resolution of the Inter-American Juridical Committee on "Principles on the Right of Access to Information," which establishes that "[p]ublic bodies should disseminate information about their functions and activities – including, but not limited to, their policies, opportunities for consultation, activities which affect members of the public, their budget, subsidies, benefits and contracts – on a routine and proactive basis, even in the absence of a specific request, and in a manner which ensures that the information is accessible and understandable." In the same sense mentioned above, this obligation includes the duty to refrain from interfering with the right of access to information of all kinds, which extends to the circulation of information that may or may not have the personal approval of those persons who represent State authority at a given time.

e. Obligation to produce or gather information

35. The State has the obligation to produce or gather the information it needs to fulfill is duties, pursuant to international, constitutional, or legal norms.

36. To this effect, in its report on Guidelines for Preparation of Progress Indicators in the Area of Economic, Social, and Cultural Rights,[33] the IACHR noted that "[t]he obligation of the State to adopt positive means to protect the exercise of social rights has important effects, for example, in regards to the type of statistical information that the State must produce. The production of information that is properly categorized so as to determine what sectors are disadvantaged or relegated in the exercise of their rights, from this perspective, is not only a way to guarantee the effectiveness of a public policy, but is also an indispensable obligation that allows the State to fulfill its duty to provide such sectors with special and prioritized attention. As an example, the desegregation of data by sex, race, or ethnicity is an indispensable tool for illustrating problems of inequality."[34]

37. In this same report, the IACHR reiterates that "the Committee on Economic, Social, and Cultural Rights has determined that it is an obligation of the State to produce information databases from which it would be possible to validate indicators [of progress] and, in general, the access to many of the guarantees covered by each social right. This obligation is, thus, fundamental for the enforceability of these rights."[35] Finally, the IACHR[36] pointed out that in international legislation, clear and explicit obligations exist regarding the production of information related to the exercise of the rights of sectors that are excluded or historically discriminated against.[37]

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[33] OAS/Ser.L/V/II.132, Doc. 14, July 19, 2008.

[34] IACHR, Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights. OEA/Ser.L/V/II.132. Doc. 14 rev. 1. 19 July 2008. para. 58

[35] IACHR, Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights. OEA/Ser.L/V/II.132. Doc. 14 rev. 1. 19 July 2008. para. 78.

[36] IACHR, Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights. OEA/Ser.L/V/II.132. Doc. 14 rev. 1. 19 July 2008. para. 81. Available at: https://www.cidh.oas.org/countryrep/IndicadoresDESC08eng/Indicadoresindice.eng.htm

[37] The *Inter-American Convention in the Prevention, Punishment, and Eradication of Violence Against Women* (Belém do Pará) establishes the State's obligation "to ensure research and the gathering of statistics and other relevant information relating to the causes, consequences and frequency of violence against women, in order to assess the

f. Obligation to create a culture of transparency

38. The State has an obligation to promote within a reasonable time period a true culture of transparency. This means systematic campaigns to inform the general public of the existence of the right of access to information and ways of exercising that right. In this respect, the Inter-American Juridical Committee finds in its resolution on "Principles on the Right of Access to Information" that, "Measures should be taken to promote, to implement and to enforce the right to access to information, including (...) implementing public awareness-raising programmes."[38]

g. Obligation of adequate implementation

39. The State has a duty to adequately implement access laws. This implies at least three actions:

40. First, the State has a duty to design a plan that allows for the real and effective satisfaction of the right of access to information within a reasonable time period. This obligation implies a duty to budget the necessary funds to meet, progressively, the demand that the right of access to information will generate.

41. Second, the State must adopt laws, policies, and practices to preserve and administer information adequately. The Offices of the Special Rapporteurs for Freedom of Expression of the UN, OAS, and the OSCE declared in their Joint Statement in 2004 that "[p]ublic authorities should be required to meet minimum record management standards" and "[s]ystems should be put in place to promote higher standards over time."

42. Third, States must adopt a systematic policy for training public officials who will work in satisfying the right of access to information in all of its facets, as well as "training [of] public entities, authorities and agents responsible for responding to requests for access to State-held information on the laws and regulations governing this right."[39] This obligation also means the training of public officials on the laws and policies on the creation and maintenance of information archives that the State is obligated to safeguard, administer, and produce or gather. In this sense, the Inter-American Court has referred to the States' obligation to "train (...) public entities, authorities and agents responsible for responding to requests for access to State-held information on the laws and regulations governing this right."[40]

h. Obligation to adjust domestic legislation to the demands of the right of access to information

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effectiveness of measures to prevent, punish and eradicate violence against women and to formulate and implement the necessary changes".

[38] Inter-American Juridical Committee. Resolution 147 of the 73rd Ordinary Period of Sessions: Principles on the right to access to information. August 7, 2008. Principle 10.

[39] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 165.

[40] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 165.

43. Finally, and in conjunction with the preceding, the State has an obligation to adjust its domestic legal code to international standards on access to information, including by: a) implementing an adequate legal framework; b) removing legal or administrative obstacles that impede access to information; c) promoting the right of access within all of the State's entities and authorities, through the adoption and enforcement of rules and procedures and through the training of public officials on the custody, administration, filing and provision of information; and (d) in general terms, adopting public policy that is favorable to the full exercise of this right.

44. As the Inter-American Court has explained, the State must adopt the measures necessary to guarantee the rights protected under the Convention. This includes both repealing laws and practices that violate these rights and issuing laws and practices that effectively protect these guarantees.[41] Likewise, the Court has established that States should have a legal framework that adequately protects the right to information. They should guarantee the effectiveness of an adequate administrative procedure for processing and resolving requests for information, with clear deadlines for turning over information. The procedure should be under the supervision of appropriately trained officials.[42]

5. Limitations to the right of access to information

a. Admissibility and conditions of limitations

45. As an element of freedom of expression protected by the American Convention, the right of access to information is not an absolute right. Rather, it may be subject to limitations that remove certain types of information from public access. Nevertheless, such limitations must be in strict accordance with the requirements derived from Article 13.2 of the Convention—that is, the conditions of exceptional nature, legal establishment, legitimate objectives, and necessity and proportionality. In this precise sense, Principle 4 of the IACHR Statement of Principles on Freedom of Expression states that "[a]ccess to information (...) 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."

46. It is incumbent upon the State to demonstrate, when it restricts access to information under its control, that it has complied with the requirements set forth in the Convention. The Inter-American Juridical Committee addressed this point in its Resolution on the "Principles on the Right of Access to Information," stating that "[t]he burden of proof in justifying any denial of access to information lies with the body from which the information was requested."

47. The Inter-American Court has held that the establishment of restrictions to the right of access to information held by the State through the practice of the authorities and without meeting the requirements of the American Convention (a) creates fertile ground for the discretionary and arbitrary action of the State in the classification of information as secret, reserved or confidential; (b) gives rise to legal uncertainty with respect to the exercise of such right; and (c) gives rise to legal uncertainty as to the scope of the State's powers to restrict the right.[43]

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[41] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 163.

[42] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 163.

[43] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 98.

b. Exceptional nature of limitations

48. Bearing in mind the principle of maximum disclosure, the law must guarantee the effective and broadest possible access to public information, and any exceptions must not become the general rule in practice. Also, the exceptions regime should be interpreted restrictively and all doubts should be resolved in favor of transparency and access.

c. Legal establishment of exceptions

49. First, limitations to the right to seek, receive and impart information must be prescribed by law expressly and in advance, to ensure that they are not set at the government's discretion. Their establishment must be sufficiently clear and specific so as to not grant an excessive degree of discretion to the public officials who decide whether or not to disclose the information.[44]

50. In the opinion of the Inter-American Court, such laws must have been enacted "for reasons of general interest" in accordance with the common good as an element of public order in a democratic State. The definition of the Inter-American Court in Advisory Opinion 6/86 is applicable in this respect, according to which the term "laws" does not just refer to any legal norm, but rather to general normative acts that are enacted by the democratically elected legislative body provided for in the constitution, according to the procedures established in the constitution, and tied to the general welfare.[45]

51. Also relevant here is Principle 6 of the Resolution of the Inter-American Juridical Committee regarding the "Principles on the Right of Access to Information," which states that "[e]xceptions to the right to access should be established by law, be clear and narrow."

d. Legitimate aim under the American Convention

52. The laws that set limitations on the right of access to information under the State's control must correspond expressly to an objective that is permissible under Article 13.2 of the American Convention, that is: to ensure respect for the rights or reputations of others, and to protect national security, public order, or public health or morals.[46] The scope of these concepts must be clearly and precisely defined and coincide with their meaning in a democratic society.

e. Necessity and proportionality of limitations

53. The limitations imposed upon the right of access to information– like any limitation imposed on any aspect of the right to freedom of thought and expression – must be necessary in a democratic society to satisfy a compelling public interest. Among several options for accomplishing

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[44] IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Claude-Reyes et al. v. Chile*, cited in I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 58.f).

[45] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 89.

[46] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 90.

this objective, the one least restrictive to the right must be chosen, and the restriction must: (i) be conducive to the attainment of the objective; (ii) be proportionate to the interest that justifies it; and (iii) interfere to the least extent possible with the effective exercise of the right. With specific regard to the requirement of proportionality, the Inter-American Commission has asserted that any restriction to access to information held by the State, in order to be compatible with the Convention, must overcome a three-part proportionality test: (a) it must be related to a legitimate aim that justifies it; (b) it must be demonstrated that the disclosure of the information effectively threatens to cause substantial harm to this legitimate aim; and (c) it must be demonstrated that the harm to the objective is greater than the public's interest in having the information.

54. Finally, the exceptions regime should set forth a reasonable time period. Once that time period expires, the information must be made available to the public. In this sense, material can only be kept confidential while there is a certain and objective risk that, were the information revealed, one of the interests that Article 13.2 of the Convention orders protected would be disproportionately affected.

f. Duty to justify clearly the denial of petitions for access to information under the control of the State

55. When there is in fact a reason allowed by the Convention for the State to limit access to information in its possession, the person who requests the access must receive a reasoned response that provides the specific reasons for which access is denied.[47] According to the Inter-American Commission, if the State denies access to information, it must provide sufficient explanation of the legal standards and the reasons supporting such decision, demonstrating that the decision was not discretionary or arbitrary, so that individuals may determine whether the denial meets the requirements set forth in the Convention.[48] Similarly, the Inter-American Court has specified that the unfounded failure to provide access to information, without a clear explanation of the reasons and rules on which the denial is based, also constitutes a violation of the right to due process protected by Article 8.1 of the Convention, in that decisions adopted by the authorities that may affect human rights must be duly justified; otherwise, they would be arbitrary decisions.[49]

g. Confidential or secret information

56. In their Joint Declaration of 2004, the UN, OAS and OSCE Special Rapporteurs summarized the requirements that limits to the right to access to information must meet, and addressed in greater depth some issues concerning "restricted" or "secret" information and the laws establishing those classifications, as well as the public officials legally required to maintain its confidentiality. The Special Rapporteurs established, in general terms: (i) that "[t]he right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy," that "[e]xceptions 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

[47] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 77.

[48] IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Claude Reyes et al. v. Chile*, cited in I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 58.c)-d).

[49] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 120.

interest in having access to the information," and that "[t]he 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;" (ii) that "those requesting information should have the possibility to appeal any refusals to disclose to an independent body with full powers to investigate and resolve such complaints;" and (iii) that "[n]ational authorities should take active steps to address the culture of secrecy that still prevails in many countries within the public sector," which "should include provision for sanctions for those who willfully obstruct access to information," and that "[s]teps should also be taken to promote broad public awareness of the access to information law."

57. In this same Joint Declaration of 2004, the Special Rapporteurs examined in greater detail the issue of confidential or restricted information and laws regulating secrecy, declaring: (i) that "[u]rgent steps should be taken to review and, as necessary, repeal or amend, legislation restricting access to information to bring it into line with international standards in this area, including as reflected in this Joint Declaration;" (ii) that "[p]ublic authorities and their staff bear sole responsibility for protecting the confidentiality of legitimately secret information under their control," that "[o]ther individuals, including journalists and civil society representatives, should never be subject to liability for publishing or further disseminating this information, regardless of whether or not it has been leaked to them, unless they committed fraud or another crime to obtain the information," and that "[c]riminal law provisions that do not restrict liability for the dissemination of State secrets to those who are officially entitled to handle those secrets should be repealed or amended;" (iii) that "[c]ertain information may legitimately be secret on grounds of national security or protection of other overriding interests," but that "secrecy laws should define national security precisely and indicate clearly the criteria which should be used in determining whether or not information can be declared secret, so as to prevent abuse of the label 'secret' for purposes of preventing disclosure of information which is in the public interest," for which "[s]ecrecy laws should set out clearly which officials are entitled to classify documents as secret and should also set overall limits on the length of time documents may remain secret," and likewise that "[s]uch laws should be subject to public debate;" and (iv) finally, that "[w]histleblowers are individuals releasing confidential or secret information although they are under an official or other obligation to maintain confidentiality or secrecy," with regard to whom it was declared that "[w]histleblowers releasing information on violations of the law, on wrongdoing by public bodies, on a serious threat to health, safety or the environment, or on a breach of human rights or humanitarian law should be protected against legal, administrative or employment-related sanctions if they act in 'good faith.'"

58. In this same fashion, in the Joint Declaration of 2006, the Special Rapporteurs affirm that "[j]ournalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold."

59. The Inter-American Court of Human Rights ruled specifically on the issue of "secret" or "confidential" information in another area concerning public access to information, namely, the provision of information on serious human rights violations to the judicial and administrative authorities in charge of investigating such cases and administering justice on behalf of the victims. In the *Case of Myrna Mack Chang v. Guatemala*,[50] it was proven before the Court that the Ministry of National Defense had refused to provide certain documents relating to the operation and the structure of the Presidential General Staff after repeated requests from the Attorney General's Office and federal judges in the investigations of an extrajudicial execution. The refusal invoked state secrecy pursuant to article 30 of the Guatemalan Constitution. In the opinion of the Inter-American Court, "in cases of human rights violations, the State authorities cannot resort to

[50] I/A Court H. R., *Case of Myrna Mack-Chang v. Guatemala. Merits, Reparations and Costs*. Judgment of November 25, 2003. Series C No. 101. paras. 180-182.

mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding." In this respect, the Court adopted the considerations of the Inter-American Commission on Human Rights, which had argued before the Court that "[i]n the framework of a criminal proceeding, especially when it involves the investigation and prosecution of illegal actions attributable to the security forces of the State, there is a possible conflict of interests between the need to protect official secret, on the one hand, and the obligations of the State to protect individual persons from the illegal acts committed by their public agents and to investigate, try, and punish those responsible for said acts, on the other hand. (…) [P]ublic authorities cannot shield themselves behind the protective cloak of official secret to avoid or obstruct the investigation of illegal acts ascribed to the members of its own bodies. In cases of human rights violations, when the judicial bodies are attempting to elucidate the facts and to try and to punish those responsible for said violations, resorting to official secret with respect to submission of the information required by the judiciary may be considered an attempt to privilege the 'clandestinity of the Executive branch' and to perpetuate impunity. Likewise, when a punishable fact is being investigated, the decision to define the information as secret and to refuse to submit it can never depend exclusively on a State body whose members are deemed responsible for committing the illegal act. (…) Thus, what is incompatible with the rule of law and effective judicial protection 'is not that there are secrets, but rather that these secrets are outside legal control, that is to say, that the authority has areas in which it is not responsible because they are not juridically regulated and are therefore outside any control system.'" In this context, the Inter-American Court considered that the refusal of the Ministry of National Defense to provide the documents requested by the judges and the Attorney General's Office, alleging state secrecy, amounted to the obstruction of justice.

h. Personal information and the right of access to information

60. One of the limits on the right of access to information is the protection of personal data, which belongs only to the person it concerns and whose disclosure could affect a legitimate right of this person, like the right to privacy. As a consequence, in principle only the person whom it concerns may have access to information of a personal nature. Effectively, and in keeping with the IACHR's Declaration of Principles on Freedom of Expression, "Every person has the right to access to 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."

61. Access to personal information comes from *habeas data* and not the right of access to information. However, as long as there is no law on personal information, the person whom the data concerns may, in the absence of any other recourse, access the information through the mechanisms set forth in the access law. Consequently, in the hypothetical situation mentioned, the administrators of databases and registries would be obliged to turn over said information, but only to those with legal standing to request it.

62. Regarding personal information – or *habeas data* – in its Report on Terrorism and Human Rights,[51] the IACHR stated that, in addition to the general right to access information held by the State, "Every person has the right to access to information about himself or herself, whether this is in the possession of a government or private entity." The report continues that "this right includes the right to modify, remove, or correct such information due to its sensitive, erroneous,

[51] IACHR. Report on Terrorism and Human Rights. OAS/Ser.L/V/II.116. October 22, 2002. Chapter III, Section E. Available at: http://www.cidh.oas.org/Terrorism/Eng/toc.htm

biased, or discriminatory nature."[52] Later in the same report, the IACHR indicated that "The right to access to and control over personal information is essential in many areas of life, since the lack of legal mechanisms for the correction, updating or removal of information can have a direct impact on the right to privacy, honor, personal identity, property, and accountability in information gathering."[53]

D. Specific Applications of the Right of Access to Information

63. The satisfaction of the right of access to information is, in many instances, a necessary precondition for guaranteeing the exercise of other rights. In this sense, this section explores the specific applications of this right in subjects addressed by the Commission and the Inter-American Court, specifically: (1) restriction of access to official sources of information in the form of public acts or events; (2) creation and preservation of police archives; (3) the right to "informed" consultation of indigenous peoples; and (4) access to information and creation of historic archives on gross violations of human rights.

1. Restriction of access to official sources of information in the form of public events or acts

64. The alleged violation of the right of access to information through disproportionate restrictions placed on journalists or communicators to hinder their access to public acts or events was the object of specific statements by the Inter-American Court in the *Ríos et al.* and *Perozo et al.* cases.

65. In these cases, the Court indicated that, "With respect to the accreditations or authorizations necessary for the media to participate in official events, which imply a possible restriction to the exercise of the freedom to seek, receive and impart information and any kind of ideas, it is essential to prove that their application is legal and legitimate and necessary and proportionate to the goal in question in a democratic society. The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent. It corresponds to the State to show that it has complied with the above requirements when establishing restrictions to the access to the information it holds."[54]

2. Access to information and indigenous peoples' right to consultation

66. As explained previously, according to the Inter-American Commission on Human Rights, the right of access to information "comprises the positive obligation of the State to provide its citizens with access to the information in its possession, and the corresponding right of individuals to access the information held by the State."[55]

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[52] IACHR. Report on Terrorism and Human Rights. OAS/Ser.L/V/II.116. October 22, 2002. Chapter III, Section E para. 289. Available at: http://www.cidh.oas.org/Terrorism/Eng/toc.htm

[53] IACHR. Report on Terrorism and Human Rights. OAS/Ser.L/V/II.116. October 22, 2002. Chapter III, Section E para. 289. Available at: http://www.cidh.oas.org/Terrorism/Eng/toc.htm

[54] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 93; I/A Court H. R., *Case of Ríos et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 194. para. 375; I/A Court H. R., *Case of Perozo et al. Vs. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of January 28, 2009. Series C No. 195. para. 346.

[55] IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. Available at: http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf Likewise,

67. The right of access to information cannot be reduced to the duty of turning over information requested by a particular person. The right also includes the obligation to make public administration transparent[56] and to provide, *ex officio*, the information needed by the public (the general citizenry or a particular group) for the exercise of other rights. Effectively, when the exercise of the fundamental rights of people depend on those people having relevant public knowledge, the State must provide it in a manner that is *timely*, *accessible*, and *complete*. In this sense, the Commission has established that the right of access to information is a key instrument for the exercise of other human rights, "particularly by the most vulnerable individuals."[57]

68. The timely, sufficient, and clear provision of information to Indigenous Peoples on outside interventions that can affect their territory is an indispensable condition for adequately guaranteeing the exercise of their right to collective property over their territories. Likewise, the close relationship that indigenous peoples have with their territory means that the right of access to information about possible exogenous interventions on indigenous territory that could have a serious impact on the community's habitat can become a mechanism that is necessary for ensuring other rights like the right to the health of group members and even their right to exist as a community. Finally, the right of access to information on exogenous interference on indigenous land is an indispensable condition for guaranteeing control over political decisions that can compromise the collective rights of a People, as well as fundament rights that would also be affected.[58]

Article 4 of the IACHR's Declaration of Principles on Freedom of Expression (2000) establishes that "Access to information […] is a fundamental right of every individual," and also that "States have the obligation to guarantee the full exercise of this right." See also IACHR, Office of the Special Rapporteur for Freedom of Expression. Estudio Especial sobre el Derecho de Acceso a la Información. August, 2007. Available at: http://www.cidh.oas.org/relatoria/section/Estudio%20Especial%20sobre%20el%20derecho%20de%20Acceso%20a%20la%20Informacion.pdf ; IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2005. OEA/Ser.L/V/II.124. Doc. 7. 27 February 2006. Chapter IV. Available at: http://www.cidh.oas.org/relatoria/showarticle.asp?artID=662&IID=1; IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2003. OEA/Ser.L/V/II.118. Doc. 70 rev. 2. 29 December 2003. Chapter IV. Available at: http://www.cidh.org/relatoria/showarticle.asp?artID=139&IID=1; IACHR, Report on Terrorism and Human Rights. OEA/Ser.L/V/II.116. Doc. 5 rev. 1 corr. 22 October 2002. paras. 281-288. Available at: http://www.cidh.oas.org/Terrorism/Eng/toc.htm; IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2001. OEA/Ser.L/V/II.114. Doc. 5 rev. 1. 16 April 2002. Chapter III. Available at: http://www.cidh.org/relatoria/showarticle.asp?artID=137&IID=1

[56] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 77. In this respect, the UN, OSCE and OAS Special Rapporteurs on Freedom of Expression, in their Joint Declaration, established that "Public authorities should be required to publish pro-actively, even in the absence of a request, a range of information of public interest" (Joint Declaration on Access of Information and Secrecy Legislation, December 6, 2004, available at: http://www.cidh.oas.org/relatoria/showarticle.asp?artID=319&IID=1), which is particularly relevant when the information is necessary for the exercise of other fundamental rights. The scope of this obligation is also spelled out by the Inter-American Juridical Committee in its Resolution CJI/RES.147 (LXXIII-O/08) on "Principles on the Right of Access to Information," Rio de Janeiro, Brazil, August 7, 2008, available at: http://www.oas.org/cji/eng/CJI-RES_147_LXXIII-O-08_eng.pdf, in which it is established that "Public bodies should disseminate information about their functions and activities – including, but not limited to, their policies, opportunities for consultation, activities which affect members of the public, their budget, and subsidies, benefits and contracts – on a routine and proactive basis, even in the absence of a specific request, and in a manner which ensures that the information is accessible and understandable" (id., Principle 4).

[57] IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. para. 147. Available at: http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf Likewise, Article 9 of the Inter-American Democratic Charter provides that "the promotion and protection of human rights of indigenous peoples […] contribute to strengthening democracy and citizen participation."

[58] IACHR. Report No. 40/04. Case 12.053. Merits. Maya Indigenous Communities of the Toledo District. Belize. October 12, 2004. para. 142.

69. On this topic, the Commission has indicated that one of the central elements for the protection of indigenous property rights is that States establish effective and previously-informed consultations on actions and decisions that could affect their traditional territories. Member States have the obligation to guarantee that every decision is based on a process of previously-informed consent of the Indigenous People as a whole.[59]

70. The Inter-American Court has indicated that Indigenous Peoples' exercise of the right to collective property requires "the State to both accept and disseminate information, and entails constant communication between the parties. [...] [that] must be in good faith, through culturally appropriate procedures and [have] the objective of reaching an agreement."[60]

71. According to a systematic interpretation of the jurisprudence and instruments of the inter-American system for the protection of human rights, the right of access to information as a condition for the exercise of the rights derived from the collective property of Indigenous Peoples and as a condition for an adequate prior consultation in those cases in which that right is enforceable includes Indigenous Peoples' right to have the State provide *accessible*, *sufficient*, and *timely* information on two aspects: (1) the nature and the impact of the outside intervention on goods or resources that are the People's property; and (2) the consultation process to be carried out and the reasons justifying it. Only in this way can it be ensured that the information submitted by the State will allow the communities to form a genuinely free and informed opinion in the decision-making process on the exploration and exploitation of natural resources in their territories.[61]

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[59] IACHR. Report No. 40/04. Case 12.053. Merits. Maya Indigenous Communities of the Toledo District. Belize. October 12, 2004. para. 142.

[60] I/A Court H. R., *Case of the Saramaka People v. Suriname. Preliminary Objection, Merits, Reparations, and Costs*. Judgment of November 28, 2007 Series C No. 172. paras. 133-134. Emphasis added.

[61] I/A Court H. R., *Case of the Saramaka People v. Suriname. Preliminary Objection, Merits, Reparations, and Costs.* Judgment of November 28, 2007 Series C No. 172. paras. 133-137; I/A Court H. R., *Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs.* Judgment of June 23, 2005. Series C No. 127. para. 225; IACHR. Report No. 75/02. Case 11.140. Mary and Carrie Dann. United States. December 27, 2002. para. 140; IACHR. Report No. 40/04. Case 12.053. Merits. Maya Indigenous Communities of the Toledo District. Belize. October 12, 2004. para. 142; IACHR, Access to Justice and Social Inclusion: the road towards strengthening Democracy in Bolivia. OEA/Ser.L/V/II. Doc. 34. 28 June 2007. paras. 246 and 248. Available at: http://cidh.org/countryrep/Bolivia2007eng/Bolivia07indice.eng.htm; IACHR. Draft American Declaration on the Rights of Indigenous Peoples. Article XVIII 5-6. In this sense, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people has indicated: "Any development projects or long-term strategy affecting indigenous areas must involve the indigenous communities as stakeholders, beneficiaries and full participants, whenever possible, in the design, execution and evaluation stages. The free, informed and prior consent, as well as the right to self-determination of indigenous communities and peoples, must be considered as a necessary recondition for such strategies and projects. Governments should be prepared to work closely with indigenous peoples and organizations to seek consensus on development strategies and projects, and set up adequate institutional mechanisms to handle these issues". *United Nations Economic and Social Council.* Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*,* Rodolfo Stavenhagen, *submitted according Resolution 2002/65 of the Human Rights Commission, E/CN.4/2003/90, paras. 66, 68-69 and 73-77. See also, International Labor Organization.* Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989)*, Articles 6, 7 and 15; Committee on the Elimination of Racial Discrimination.* Consideration of Reports submitted by States Parties Under Article 9 of the Convention. Concluding Observations concerning Ecuador*, CERD/C/62/CO/2 (2003), para. 16; International Labor Organization.* Convention No 169 concerning Indigenous and Tribal Peoples: A Manual (2003), *pp. 15-20; United Nations Economic and Social Council.* Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples *(2005). E/C.19/2005/3, pp. 13-14; United Nations General Assembly. 61/295,* United Nations Declaration of the Rights of Indigenous Peoples*. A/RES/61/295, September 13, 2007, Article 27; International Labor Organization.* United Nations Development Group. Guidelines on Indigenous Peoples' Issues. *February, 2008, p. 18; Colombian Constitutional Court.* Sentencia SU 039/97 (February 3, 1997), Sentencia C-169/01 (February 14, 2001), Sentencia C-891/02 (October 22, 2002), Sentencia SU-383/03 (May 13, 2005), Sentencia C-030/08 (January 23, 2008); *and* Sentencia C-175 de 2009 (March 18, 2009)*; and Resolution 2002/65 of the Human Rights Commission, E/CN.4/2003/90.,* op. cit*. paras. 66-69 and 74-77.*

72. The information provided by the State in the prior consultation process should be clear and accessible. This means that the information must be truly understandable, which includes the condition (among others) that its dissemination be carried out in clear language and, where necessary, distributed with the help of a translator or in a language or dialect that allows the members of the indigenous communities involved to understand it fully.[62] The provided information also must be sufficient. That is to say, it must be suitable and complete enough that those who receive it can form non-manipulated consent to the proposed project or activity.[63] The condition of timeliness means that information must be presented sufficiently in advance of any authorization or beginning of negotiations, taking into account the consultation process and the time periods required for the indigenous community in question to make decisions.[64]

73. Also, the consultation framework should provide for a moment in which communities have access to the reasons for which their arguments were rejected (if that were the case). The framework should also include the State's duty to provide clear, sufficient, and timely information on the compensation proposals to be adopted in the event of a need to repay damage suffered. It is the duty of the State – and not the indigenous peoples – to demonstrate effectively that both dimensions of the right to prior consultation were effectively guaranteed.

3. Access to information and the creation and preservation of police archives

[62] The ILO has indicated in this context that the "process of consultation must be specific to the circumstances and the special characteristics of the given group or community. Thus, a meeting with village elders conducted in a language they are not familiar with, e.g. the national language, English, Spanish etc, and with no interpretation, would not be a true consultation." See International Labor Organization. *Convention No 169 concerning Indigenous and Tribal Peoples: A Manual (2003),* p. 16. The United Nations has indicated that the "information should be accurate and in a form that is accessible and understandable, including in a language that the indigenous peoples will fully understand," and that "consent to any agreement should be interpreted as indigenous peoples have reasonably understood it." United Nations Economic and Social Council. *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples* (2005). E/C.19/2005/3, pp. 12-13. See also, I/A Court H.R., *Case of the Saramaka People. v. Suriname.* paras 133-37; and IACHR, Access to Justice and Social Inclusion: the road towards strengthening Democracy in Bolivia. OEA/Ser.L/V/II. Doc. 34. 28 June 2007. paras. 246 and 248. Available at: http://cidh.org/countryrep/Bolivia2007eng/Bolivia07indice.eng.htm

[63] The *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, convened by the United Nations, held that the there should not be "coercion, intimidation or manipulation" in the release of information. United Nations Economic and Social Council. *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples* (2005). E/C.19/2005/3, p. 12. Also, Article 6.2 of ILO's Convention 169 provides that "the consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures." Likewise, the Constitutional Court of Colombia has indicated that the right to prior consultation mandates that, "The people have full knowledge on projects designed to explore for or exploit natural resources in the territory they occupy or that belongs to them, as well as the mechanisms, procedures, and activities necessary to carry out the exploration or exploitation." Colombia Constitutional Court. *Sentencia SU 039/97 February 3, 1997).* See also I/A Court H.R., *Case of the Saramaka People. v. Suriname.* paras 133-37; and IACHR, Access to Justice and Social Inclusion: the road towards strengthening Democracy in Bolivia. OEA/Ser.L/V/II. Doc. 34. 28 June 2007. paras. 246 and 248. Available at: http://cidh.org/countryrep/Bolivia2007eng/Bolivia07indice.eng.htm

[64] The ILO has indicated that FPIC should be sought sufficiently in advance of commencement or authorization of activities, taking into account indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project." International Labor Organization. Convention No 169 concerning Indigenous and Tribal Peoples: A Manual (2003), p. 14. See also I/A Court H.R., Case of the Saramaka People. v. Suriname. paras 133-37; IACHR, Access to Justice and Social Inclusion: the road towards strengthening Democracy in Bolivia. OEA/Ser.L/V/II. Doc. 34. 28 June 2007. paras. 246 and 248. Available at: http://cidh.org/countryrep/Bolivia2007eng/Bolivia07indice.eng.htm; and United Nations Economic and Social Council. Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (2005). E/C.19/2005/3, p. 13. Likewise in Sentencia C-175 de 2009 (March 18, 2009), the Colombian Constitutional Court held that regarding the condition of timeliness, "what is at stake is that the participation of African-American communities include the ability to materially influence the content of the measure."

74. As mentioned in previous paragraphs, the right of access to information entails an obligation for the State to produce and preserve certain information. On this point, the IACHR has understood that the State has the obligation to produce and preserve archives or registries of police detentions. Effectively, the duty to produce and preserve archives on police detentions is essential for fulfilling the right of access to information of detained individuals and their families. Indeed, as pertains to detentions, it is crucial for the State to keep records of all detained individuals, with complete personal details of the person arrested, the circumstances of the arrest – including time, manner, and place of detention – and other legal formalities. This information must be registered, guarded, and not manipulated since it is a mechanism of exceptional importance for controlling the administration of matters as sensitive as the imprisonment of a person and possible subsequent violations of human rights. Altering or destroying this kind of information is usually accompanied by State silence on the whereabouts of a person arrested by its agents. It generates fertile ground for impunity and for the propagation of the worst kind of crimes.

75. In this respect, the non-existence, manipulation, or destruction of archives or police records can constitute not only a hindrance to the adequate fulfillment of justice in many cases, but also cause a violation of the right to access public information.

4. Access to information and the creation of historic archives on gross violations of human rights

76. The Inter-American Court has established that, "every individual, including family members of the victims of serious violations of human rights, has the right to know the truth. Therefore, the relatives of the victims [,the victims] and society as a whole must be informed of everything that happened regarding the violations."[65]

77. In this sense, the right of access to information imposes on States the duty to preserve and facilitate access to State archives when they exist; and to create them and preserve them when they have not been compiled or organized as such. In the event of gross violations of human rights, the information these archives can bring together has an undeniable value and is indispensable not only for pushing investigations forward but also for preventing these deviant actions from being repeated.[66]

78. This practice is already reflected in some countries in the region that have created "memory archives" charged with compiling, analyzing, classifying, and distributing documents, testimonials, and other kinds of information linked to violations of human rights in the recent past.[67]

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[65] I/A Court H. R., *Case of Gómez-Palomino v. Peru. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 136, para. 78.

[66] On completing his recent visit to Guatemala, Commissioner Victor Abramovich commented on the importance of archives on violations of human rights. Specifically, he noted "the hard work that went into the systemization, preservation and opening of the archives" and highlighted the "great importance of these archives, especially because they contributed to the reopening of some criminal trials for crimes against humanity that were found (to date) to be inactive." After mentioning that the topic of official documents had been brought up in an interview with Guatemala's defense minister, he commented, "The IACHR hopes that the State's distinct instances grant full and total access to all of the archives and documents about human rights violations related to the internal armed conflict." Press Release 37/09 ("IACHR Conducted Visit to Guatemala"), June 12, 2009. Available at: http://www.cidh.oas.org/Comunicados/English/2009/37-09eng.htm.

[67] See, among others, Decree (*Decreto*) 1259/2003 of the executive power of Argentina, which created the "National Memory Archive" (published in the official State newspaper on December 17, 2003). Article 1 of the provision establishes that the archive's function is to "collect, analyze, categorize, copy, digitize, and archive information, testimony, and documents on the violation of human rights and fundamental freedoms in which the responsibility of the Argentine State is implicated, as well as on the social and institutional response to these violations." The reasoning of the decree indicates that, "The duties of the State to promote, respect and guarantee human rights should be represented, including as pertains to the rights to truth and justice, as well as the paying of reparations, rehabilitation of victims, and assurance of the benefits of a democratic State for current and future generations."

a. Duty to allow access to files containing information related to violations of human rights

79. For the reasons explained in the first part of this publication, access is the rule and only in exceptional circumstances can certain limits be put in place—limits which, in turn, must comply with the requirements derived from Article 13.2 of the Convention.[68] All limitations should be prescribed expressly by law, have a legitimate aim, and be necessary and proportionate in a democratic society.

80. In this sense, it is clear that in accordance with the scope of the right of access to information recognized by the inter-American system, States have the obligation to guarantee individuals the right of access to State archives that hold information on gross violations of human rights.[69]

81. It is important to take into account that the right of access to information allows access to *processed data* (in the form of statistics, an indicator, or any other data) as well as to *raw data*, which is data collected by the administration but not yet processed or categorized.[70] This right also implies the possibility of accessing physical places where the information is held, which makes it possible to learn the categorization criteria of the office in question. In such a way, the right to information as a tool for guaranteeing the right to justice in cases of gross violations of human rights includes the right to access statistics on these facts or the raw data used to compile these official statistics, or the duty to produce statistics if they have not yet been produced.

82. The State's obligation to provide information on these matters also includes the duty to collect information that is essential for public administration and to organize the information it receives, creating archiving systems and registries that allow the past to be known.[71] This subject will be addressed in the next section.

b. Duty to create and preserve archives on gross violations of human rights

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[68] In this sense, Principle 4 of IACHR's Declaration of Principles on Freedom of Expression provides that "access to information [...] is a fundamental right of every individual. States have the obligation 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." See Also I I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. paras. 77, 89-90, 98, 120 and 137. In its 2008 Annual Report the Office of the Special Rapporteur for Freedom of Expression expanded on this point. *cf*. IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. paras. 166-176. Available at: http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf

[69] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 77.

[70] Newer cases have challenged the impracticality of the administration processing data according to the needs of petitioners. Access to raw data allows others (researchers, private individuals or special public commissions, judicial officials, etc.) to process the data, removing the responsibility from the relevant agency. This method replaces the State's requirement to produce or process non-obligatory information.

[71] IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. paras. 162-165. Available at: http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf

83. As a part of the right to information and its character as a tool necessary for guaranteeing knowledge of serious violations of human rights, the States also have the duty to create and preserve public archives designed to collect and organize information on gross violations of human rights that took place in their countries. The collection of this information, the creation of archives and their preservation are precisely State obligations derived from the right of access to information as an instrument to guarantee the rights of victims of gross violations of human rights.

84. As established in Principle 3 of the United Nations' Updated Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, the State has the duty to preserve archives and other evidence related to violations of human rights and humanitarian law in order to foster knowledge of the violations. These measures are intended to preserve the collective memory of what happened.[72] For its part, Resolution AG/RES. 2267 (XXXVII-O/07) of the OAS General Assembly established that "States, within the framework of their own internal legal systems, should preserve records and other evidence concerning gross violations of human rights and serious violations of international humanitarian law, in order to facilitate knowledge of such violations, investigate allegations, and provide victims with access to an effective remedy in accordance with international law, in order to prevent these violations from occurring again in the future, among other reasons."[73]

85. Also, the States have "the duty to gather information relative to violations of human rights from the following sources: (a) national governmental agencies, particularly those that played significant roles in relation to human rights violations; (b) local agencies, such as police stations, that were involved in human rights violations; (c) State agencies, including the office of the prosecutor and the judiciary, that are involved in the protection of human rights; and (d) materials collected by truth commissions and other investigative bodies."[74]

86. These State archives also play a fundamental role in the framework of judicial investigations. The use of these archives will depend on, among other factors, the establishment of an obligation for public bodies (including the military, security, and intelligence bodies, among other departments and divisions) to attend to urgent and special judicial requests and facilitate access to all variety of documentation, reports, or files requested.

87. In particular, it is essential to guarantee that departments that have been more involved in gross violations of human rights establish databases and independent units – with unrestricted access to the documentation – for releasing information. These units should be in charge of searching for, certifying, and analyzing of all the documentation found therein and linked with violations of human rights; carrying out the corresponding investigations; and submiting the results to the relevant authorities, both those in charge of the criminal trial and those in charge of the memory archive.

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[72] United Nations, Commission on Human Rights, Updated Principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, adopted on February 8, 2005. Principle 3 ("The duty to preserve memory"). See also Principle 5 ("Guarantees to give effect to the right to know"), and Principle 4 ("The victims' right to know").

[73] Commission on Human Rights of the United Nations. Principles for the protection and promotion of human rights through action to combat impunity. E/CN.4/2005/102/Add.1, adopted on February 8, 2005, Principle 3 ("The duty to preserve memory").

[74] AG/RES. 2267 (XXXVII-O/07), "Right to the Truth", adopted at the fourth plenary session, held on June 5, 2007.

c. Duty to turn over information linked to gross violations of human rights

88. The obligation to investigate and inform, imposed on the States by Article 1.1 of the American Convention, is not fulfilled by the mere fact of facilitating family members' access to documentation under State control. The State has an obligation to launch an investigation to corroborate the facts, whether or not they are found in official documents, with the goal of clearing up the truth of what happened and informing families of the victims as well as the public in general. This is a positive and proactive obligation that depends on obtaining and processing information that allows for full understanding of the facts that are not today duly documented.

89. For this reason, the Commission has at various times established the States' duty to create investigative commissions dedicated to finding and categorizing information on violations of human rights as an obligation under the American Convention. The IACHR has specified that the forming of these commissions should be determined by the domestic legislation of each country; they must be provided with the necessary resources; and they must actively collaborate with justice.[75]

E. National jurisprudence and access to information best practices in domestic law

90. The fundamental right of access to information has had a higher regional profile in recent years. Effectively, despite the fact that the majority of State constitutions in the region expressly or implicitly recognize the right to access, at the beginning of the 21st century only five had passed laws on transparency and access. However, during this past decade, 11 other countries also passed these kinds of laws.[76]

91. The Office of the Special Rapporteur is preparing a study on the various legal frameworks that exist today. However, independently of the different statutory frameworks, there have been some legal rulings that have also notably advanced the standards applied in each of the States. The study of this jurisprudence is of particular interest because it reports on how the various judges and courts have been able to apply the principle of maximum disclosure. The following paragraphs are a review of some of the most important rulings on the subject.

92. For some countries, it is enough to simply point out that there have autonomous bodies in charge of ensuring due respect for the right of access to information. These include Mexico's Federal Institute for Access to Public Information (*Instituto Federal de Acceso a la Información Pública*) and Chile's recently created Council for Transparency (*Consejo para la Transparencia*). These entities have made a large number of very valuable decisions that in themselves could provide enough material for an independent study. However, this chapter

[75] IACHR, Annual Report 1985-1986. OEA/Ser.L/V/II.68. Doc. 8 rev. 1. 26 September 1986. para. 193.

[76] The countries in the region that have access to information legislation are: Antigua and Barbuda, Belize, Canada, Colombia, Chile, Ecuador, the United States, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, the Dominican Republic, Trinidad and Tobago, and Uruguay. Argentina has a law on the right of access to public environmental information and a decree that applies to the federal Executive Power. Also, Bolivia has a decree in place on access to information in the area of executive branch administration. *Cf.* Ackerman, John M.; Sandoval E. Irma. *Leyes de Acceso a la Información en el Mundo.* Instituto Federal de Acceso a la Información Pública. Fourth edition. México, D.F. July, 2008. Available at: http://www.ifai.org.mx/Publicaciones/publicaciones; Mendel, Toby. *El Derecho a la Información en América Latina. Comparación jurídica.* United Nations Educational, Scientific and Cultural Organization. Quito, Ecuador. 2009. Available at: http://unesdoc.unesco.org/images/0018/001832/183273s.pdf; Open Society Justice Initiative. *Amicus Curiae Submission in the Case of Defensoria del Pueblo v. Municipalidad de San Lorenzo. A Submission from the Open Society Justice Initiative to the Supreme Court of Paraguay.* December, 2009; Argentina. Law 25.831 Régimen de Libre Acceso a la Información Pública Ambiental. Available at: http://www.icaa.gov.ar/Documentos/Ges_Ambiental/LEY_25831.pdf; Bolivia. *Decreto Supremo* N° 28168. Available at: http://www.abi.bo/#.

emphasizes court rulings given that in the majority of the region's States, judges are directly responsible for resolving conflicts on the right to access. In this sense, learning what their colleagues are ruling can be an important instrument for a better interpretation of the law.

93. Finally, it is relevant to note that the Office of the Special Rapporteur finds the study of comparative law to be enormously important. Through this study, it is possible to enrich regional doctrine and jurisprudence. Although it is true that one of the main objectives of regional human rights protection bodies is to achieve the domestic application of inter-American standards, another objective is to see those standards elevated through local development in each of the States. Favorable interpretations of guarantees by civil society and State bodies have allowed the regional system to improve and strengthen its doctrine and jurisprudence. In this sense, and as this report addresses in a different chapter, mutual recognition among regional and national human rights protection bodies allows for a virtuous circle in which the beneficiaries are the people living in our territory and to whom we owe our work.

94. The following paragraphs review some of the most important decisions on access to information that the Office of the Special Rapporteur had available. The decisions were ordered according to the central issue addressed. However, it is important to note that most of the rulings cited refer to more than one issue, and therefore it is worth examining them in detail.

1. Jurisprudence on the right of access to information as a fundamental autonomous right

95. Several of the region's courts have concluded that the right of access to information is a fundamental autonomous right, deserving of the highest constitutional protection.

96. In this sense, Argentina's Supreme Court of Justice (*Corte Suprema de Justicia*) in a February 11, 2004[77] decision held that, "The principle of publicity of government action is inherent in the republican system established by the National Constitution, for which reason compliance with that principle is for public authorities an unavoidable requirement. [...] This allows citizens their right to access State information in order to exercise control over the authorities [...] and foster administrative transparency."[78]

97. The same court found -in a decision dated April 3, 2001[79]- that "the American Convention on Human Rights offers standards that are inexcusably worth considering for judging cases on the exercise of freedom of expression, [a right that] includes the freedom to seek, receive, and distribute information and ideas of all kinds."[80] The right of access to information contained in the American Convention is recognized as a fundamental right due to the fact that "Article 75, Subparagraph 22 [...] granted treaties the same authority as the Constitution [....] [Treaties] must be understood to be complementary to the rights and guarantees [...] recognized [in the

[77] Supreme Court of Justice of Argentina, *Expediente*. 315/2004-Adm.Gral, Buenos Aires, Argentina, February 11, 2004. Available at: http://www.villaverde.com.ar/archivos/File/investigacion/Amicus%20Curiae/ac-1-2004-csjn.pdf

[78] Supreme Court of Justice of Argentina, *Expediente*. 315/2004-Adm.Gral, Buenos Aires, Argentina, February 11, 2004, para. 1 Available at: http://www.villaverde.com.ar/archivos/File/investigacion/Amicus%20Curiae/ac-1-2004-csjn.pdf

[79] Supreme Court of Justice of Argentina. S. 622. XXXIII. S., V. c/ M., D. A. s/ medidas. April 3, 2001. Available at : http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp

[80] Supreme Court of Justice of Argentina. S. 622. XXXIII. S., V. c/ M., D. A. s/ medidas. April 3, 2001. p. 3. Available at: http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp

Constitution]"[81] and "must be interpreted in harmony, to find an environment of reciprocal communication in which individual rights and guarantees can reach their greatest depth."[82]

98. Following that same idea, Mexico's Eighth Associate Administrative Court of the First Associate Circuit held that the right of access to information is a fundamental and universal human right that must be subject to a restricted system of exceptions and whose process must be simple, fast, and free or low cost.[83]

99. Also, the Constitutional Chamber of the Supreme Court of Costa Rica (*Sala Constitucional de la Corte Suprema de Costa Rica*) held in a ruling dated April 2, 2002 that "The right to information [...] is an inalienable and indispensable human right [...]. This right [...] has precedency, as it guarantees a constitutional concern: the formation and existence of free public opinion, a guarantee which, because it is a prior and necessary condition for the exercise of other rights inherent for the functioning of a democratic system, becomes [...] one of the pillars of a free and democratic society." [84]

100. Likewise, the Constitutional Court (*Tribunal Constitucional*) of Chile held in its August 9, 2007[85] ruling that the right to public information is recognized at the constitutional level "because the right to access information in the power of State bodies is part of freedom of expression [...] [which is] enshrined in Article 19 No. 12 of the Constitution,"[86] as well as because "Article 8 of the Political Constitution[87] [...] enshrined the principles of the probity, publicity and transparency of State conduct." In this way, "the right of access to public information is recognized in the Constitution – although not explicitly – as an essential mechanism for full validity of the democratic regime" and "the publicity of the actions of [State] bodies guaranteed [...] by the right of access to public information gives basic support to the appropriate exercise and defense of the fundamental rights of those who [...] could be harmed as a result of actions or omissions of said

[81] National Supreme Court of Justice. S. 622. XXXIII. S., V. c/ M., D. A. s/ medidas. April 3, 2001. p. 17. Available at: http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp

[82] Supreme Court of Justice of Argentina. S. 622. XXXIII. S., V. c/ M., D. A. s/ medidas. April 3, 2001. p. 5. Available at: http://www.csjn.gov.ar/cfal/fallos/cfal3/ver_fallos.jsp

[83] Mexico's Eighth Associate Administrative Court of the First Circuit, *Amparo en revisión* 133/2007. Aeropuerto de Guadalajara, S.A. de C.V., May 31, 2007. *Novena Época, Semanario Judicial de la Federación y su Gaceta XXVI*. *Tesis*: I.8o.A.131 A. Available at: http://www.scjn.gob.mx/ActividadJur/Jurisprudencia/Paginas/IndexJurisprudencia.aspx

[84] Supreme Court of Justice of Costa Rica. Archive 02-000808-0007-CO. Ruling 2002-03074. San José, Costa Rica, April 2, 2002. *Considerando* III and IV. Available at: http://www.iidh.ed.cr/comunidades/libertadexpresion/docs/le_otroscr/3074-02%20sala%20constitucional.htm

[85] Constitutional Tribunal of Chile. Rol 634-2006. Ruling August 9, 2007, pp. 28-31. Available at: http://www.tribunalconstitucional.cl/index.php/sentencias/download/pdf/86

[86] Political Constitution of Chile. "Article 19.- The Constitution ensures to all individuals: 12) The freedom to issue opinions and to offer information, without prior censorship, in any way and by any method, notwithstanding the responsibility for crimes and abuses committed in the exercise of these freedoms in keeping with the law, which must be passed with an absolute majority (*ley de quórum calificado*)." Available at: http://www.leychile.cl/Navegar?idNorma=242302 ; Constitutional Tribunal of Chile. Rol 634-2006. Ruling August 9, 2007. Ninth *Considerando*. 9. p. 28. Available at: http://www.tribunalconstitucional.cl/index.php/sentencias/download/pdf/86 .

[87] Political Constitution of Chile. "Article 8.- The exercise of public functions obligates public officials to comply with the principle of probity in all their actions. The actions and resolutions of State bodies are public, as are reasons and procedures it adopts. However, only a law passed by absolute majority can qualify as these as confidential or classified, and only when their publicity would affect the due completion of said body's functions, the rights of individuals, national security, or national interest." Available at: http://www.leychile.cl/Navegar?idNorma=242302. New language introduced by the August 26 constitutional reform by Law Nº 20.050.

bodies."[88] In this way, "the right of access to public information is recognized in the Constitution – although not explicitly – as an essential mechanism for the full maturation of a democratic regime" and "the publicity of actions of [State] bodies, guaranteed [...] by the right of access to public information, constitutes basic support for the adequate exercise and defense of the fundamental rights of people that [...] can be injured by the action or inaction of those bodies."

101. The Full Chamber of the Constitutional Court (*Sala Plena de la Corte Constitutional*) of Colombia, in a ruling dated June 27, 2007, held that the right to access of information[89] is a "fundamental right [...] [with] clear and rigorous requirements for its limitation [...] to be constitutionally admissible." [90]

2. Jurisprudence on the universal nature of access to information

102. The Constitutional Court of Colombia has reiterated that, "all persons [have] the right to inform and receive information that is true and impartial, [...] a precaution that constituent assembly introduced in order to guarantee the adecuate development of the individual in the context of a democratic State."[91]

103. For its part, the Eighth Collegiate Tribunal of administrative competence of the First Circuit of Mexico has also addressed the universal reach of this right by observing that, "[t]he joint declaration adopted on December 6, 2004 by the United Nations special rapporteur for freedom of opinion and expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Cooperation in Europe Representative on Freedom of the Media and the Organization of American States Special Rapporteur on Freedom of Expression—applicable by virtue of article 6 of the Federal Transparency and Access to Public Governmental Information Law—establishes [...] as a basic principle [...] regarding [...] access to information [...] 1. The right to access to information is a fundamental human right; meanwhile, a systematic analysis of the Federal Transparency and Access to Public Governmental Information Law yields the conclusion that the right to access to information is universal."[92]

104. Meanwhile, the Constitutional Chamber of the Supreme Court of Justice of Costa Rica has indicated that, "the active subject of [this] right [...] is any person [...], which reveals that the aim of the constituent assembly was to reduce administrative secrecy to its minimum expression and expand administrative publicity and transparency.[93]

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[88] Constitutional Tribunal of Chile. Rol 634-2006. Judgment of August 9, 2007. Ninth *Considerando*. 9. p. 30. Available at: http://www.tribunalconstitucional.cl/index.php/sentencias/download/pdf/86.

[89] Political Constitution of Colombia. "Article 74.- All individuals have the right to access public documents, except for in those cases established by law. Professional secrecy is inviolable." Available at: http://web.presidencia.gov.co/constitucion/index.pdf.

[90] Full Chamber of the Constitutional Court of Colombia. *Sentencia* C-491/07. Bogotá, Colombia. June 27, 2007. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/C-491-07.htm

[91] Appeals Chamber of the Constitutional Court of Colombia. Judgment T-437/04. File T-832492. May 6, 2004. Legal argument 6. Available at: http://www.corteconstitucional.gov.co/relatoria/2004/T-437-04.htm.

[92] Octavo Tribunal Colegiado en Materia Administrativa del Primer Circuito. Amparo en Revisión 133/2007. Aeropuerto de Guadalajara, S.A. de C.V. May 31, 2007. Available at:

http://www.scjn.gob.mx/ActividadJur/Jurisprudencia/Paginas/IndexJurisprudencia.aspx.

[93] Consitutional Chamber of the Supreme Court of Justice of Costa Rica. Exp. 05-001007-0007-CO, Res. 2005-04005, San José, Costa Rica. April 15, 2005. Considering IV. Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=1&nValor1=1&nValor2=307334&strTipM=T&lResultado=2&strLib=LIB.

3. Jurisprudence on the principle of maximum disclosure

a. Jurisprudence on the principle of maximum disclosure as the central tenet of access to information

105. The Full Chamber of the Constitutional Court of Colombia highlighted in its ruling *Sentencia* C-491/07 (dated June 27, 2007) the close relationship between the principle of maximum disclosure and the function of the right of access to information in a democratic society.

106. In this sense, the Colombian Court established that, "According to the Constitution, the most important guarantee of an appropriately functioning constitutional regime is the full publicity and transparency of public administration. Decisions or actions of public servants that they do not want exposed are usually ones that cannot be justified. And the secret and unjustifiable use of State power is repulsive to the rule of law and appropriate functioning of a democratic society. Effectively, the transparency and publicity of public information are two conditions that are necessary for obligating the agencies of the State to publicly explain the decisions they make, as well as their use of power and public resources; they are the most significant guarantee in the struggle against corruption and in subjecting public servants to the purposes and procedures they are bound to by law; they are the foundation on which true citizen control of public administration and the satisfaction of related political rights is based. In this sense, [...] access to information and official documents constitutes a condition that allows for the existence and exercise of mechanisms of criticism and oversight of government actions that, under the framework of the Constitution and the law, the political opposition can legitimately exercise. Finally [...] the right of access to public information is tool that is crucial for the satisfaction of victims of arbitrary actions' right to truth, as well as society's right to historic memory."[94]

107. For this reason, according to the tribunal, as a general rule, "in keeping with the provisions of Article 74 of the Constitution, Article 13 of the [Inter-American] Convention on Human Rights, and Article 19 of the International Covenant on Civil and Political Rights, individuals have a fundamental right to access State information. In this sense, wherever there is no express legal exception, the fundamental right of access to information prevails. In this respect, the [Inter-American] Court has indicated that, 'In sum, in a democratic society, the general rule is to permit citizen access to all public documents. Public authorities have a constitutional duty to turn over clear, complete, timely, true, and up to date information on any State activity to anyone who requests it.'"[95]

108. Following the jurisprudence of the Inter-American Court, the Colombian Court held that the principle "of maximum disclosure" must imply at least two consequences: "The provisions that limit the right of access to information must be interpreted restrictively and all limits must be adequately reasoned."[96] Likewise, the Constitutional Court of Colombia has indicated that, "The public servant has a clear obligation to justify a decision to deny access to a public document, and

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[94] Full Chamber of the Constitutional Court of Colombia. *Sentencia* C-491/07. Bogotá, Colombia. June 27, 2007. p. 1 Available at: http://www.corteconstitucional.gov.co/relatoria/2007/C-491-07.htm

[95] Full Chamber of the Constitutional Court of Colombia. *Sentencia* C-491/07. Bogotá, Colombia. June 27, 2007. *Fundamento jurídico* 11. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/C-491-07.htm

[96] Cf. *Sentencia* T-074, 1997. "The demand for justification is also found in the legal norms on the topic." Full Chamber of the Constitutional Court of Colombia. *Sentencia* C-491, 2007. Bogotá, Colombia. June 27, 2007. *Fundamento jurídico* 11. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/C-491-07.htm

the justification must meet the requirements established in the Constitution and by law [...]. In particular, it should expressly cite the provision on which the denial was based. This way, the matter can be submitted to disciplinary, administrative, or even judicial controls."[97]

109. Likewise, the Constitutional Chamber of the Supreme Court of Justice of Costa Rica has used the principle of maximum disclosure as a basis for rulings indicating that, "In the framework of a State governed by the rule of law and social rights, every public body and entity that forms part of the administration must be subject to the constitutional principles implicit in transparency and publicity, which should be the rule in every administrative action or function. Organizations under Public Law – public entities – are called upon to be true glass houses in whose interior all administrators can be scrutinized and supervised under the light of day. [...]. Under this regime, secrecy or the classifying of administrative information as confidential are the exception and only justifiable under qualifying circumstances when protecting constitutionally relevant values or interests."[98]

110. The Dominican Republic courts also highlighted the significance of this principle in several rulings. It has indicated that, "It is necessary to specify that democratic States must follow the principles of publicity and transparency in their public administration. In this way, individuals can exercise democratic control, which legitimizes the actions of those making a living from the *res publica*."[99]

111. Finally, the First Chamber of the Constitutional Court of Peru made statements on August 18, 2009, on the "culture of transparency," indicating that it is "inherent to our State governed by the rule law and social rights. This obligates the Administration to turn over requested information without requiring justification for the solicitation thereof."[100]

112. According to this court, "This paradigmatic turn is based on the already mentioned principle of publicity, according to which it is understood that all information under the control of the State or the control of legal entities that provide public services or administrative functions through a concession, delegation, or authorization, is in principle public."[101]

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[97] Cf. *Sentencia* T-074, 1997. "The demand for justification is also found in the legal norms on the topic." Full Chamber of the Constitutional Court of Colombia. *Sentencia* C-491, 2007. In its *Claude Reyes* ruling, the Inter-American Court established the obligation to justify in the following language: "In this case, the State's administrative authority responsible for making a decision on the request for information did not adopt a duly justified written decision, which would have provided information regarding the reasons and norms on which he based his decision not to disclose part of the information in this specific case and established whether this restriction was compatible with the parameters embodied in the Convention. Hence, this decision was arbitrary and did not comply with the guarantee that it should be duly justified protected by Article 8(1) of the Convention." Cf. I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 122.

[98] Constitutional Chamber of the Supreme Court of Justice, writ of amparo, exp. 04-012878-CO, Res. 2005-03673, Costa Rica, April 6, 2005. *Considerando* III.- I Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=1&nValor1=1&nValor2=302552&strTipM=T&lResultado=3&strLib=LIB

[99] Administrative and Tax Tribunal, Exp. No.030-07-00078, *Sentencia* No. 024-2007, Santo Domingo, Dominican Republic, April 27, 2007. p. 21. Available at: http://www.suprema.gov.do/novedades/sentencias/2007/luis_lora.pdf

[100] First Chamber of the Constitutional Court, Exp. N.º 04912-2008-PHD/TC. Lima, Peru, August 18, 2009. *Fundamento* 5. Available at: http://www.tc.gob.pe/jurisprudencia/2009/04912-2008-HD.html.

[101] First Chamber of the Constitutional Court, Exp. N.º 04912-2008-PHD/TC. Lima, Peru, August 18, 2009. *Fundamento* 5. Available at: http://www.tc.gob.pe/jurisprudencia/2009/04912-2008-HD.html.

113. On a different topic, to promote the effectiveness of the right of access to information, the court pointed to a necessary element in "the punishment of public officials and servants who in any way obstruct the fulfillment of the right of access to public information. These sanctions are not only necessary but inherent to the defense and protection of fundamental rights, as they help achieve the objective of the effective fulfillment of these rights. Sanctions for conduct contrary to fundamental rights also seek to discourage that conduct, as well as encourage the rest of society to view the sanctions as normal, and socially and legally accepted."[102]

114. After analyzing the merits of the matter and due to the authority's lack of response to the petitioner on the matter, in keeping with the principle of maximum disclosure, the court found that the right of access to information had been affected and ruled, among other things, to start the procedure for administrative sanctions against the officials who failed in their duty to adequately reply to the request for information.

b. Jurisprudence on the application of the principle of maximum disclosure in ordering access to information on public advertising

115. In its September 11, 2009 ruling on a Motion of Habeas Data,[103] the Governmental Justice of the Peace of Uruguay, after recalling the principle of maximum disclosure and the importance of publicity in public administration and its impact on citizen participation, held that funds outlaid by a public body on official advertising were not excepted from the right of access to information. For the judge, information on public advertising is public by nature, since it forms part of the information produced by the public entity and whose distribution benefits public service and the democratic control of government.

116. The case resulting in this ruling was on a request for information made by a journalist of the Departmental Council (*Junta Departamental*) of Soriano, Uruguay, on the distribution of official advertising during different periods.[104] On August 11, 2009, the president of the council denied the request for access to the information, arguing that the petitioner was a representative of a press organization, which in keeping with Section b), Paragraph 1) of Article 10 of Law 18.381, constitutes an exception to the right of access. According to this provision, information that can be useful to a competitor is not distributed to press organizations. The petitioner reiterated in his arguments before the judge that the information requested included the amount of funds outlaid by a public entity, and that revealing the amount spent on public advertising would not give any advantage to a competitor.

117. In his ruling, the Uruguayan judge held that the "right of access to public information is related to certain principles. To wit: The principle of transparent administrative management allows for a clear view of the actions of the Administration in its use of public funds, [and the] principle of the publicity of administrative action is a consequence of the republican manner of

[102] First Chamber of the Constitutional Court, Exp. N.º 04912-2008-PHD/TC. Lima, Peru, August 18, 2009. *Fundamento* 10. Available at: http://www.tc.gob.pe/jurisprudencia/2009/04912-2008-HD.html.

[103] Uruguay Judiciary. Judgment No. 48. Writ of *habeas data*. 381-545/2009. Mercedes, Uruguay. September 11, 2009. Available at: http://www.poderjudicial.gub.uy/servlet/page?_pageid=56&_dad=portal30&_schema=PORTAL30&_type=site&_fsiteid=34&_fid=1&_fnavbarid=1&_fnavbarsiteid=34&_fedit=0&_fmode=2&_fdisplaymode=1&_fcalledfrom=1&_fdisplayurl=.

[104] On August 5, 2009, the petitioner, as a natural person, requested from the Departmental Council of Soriano access to information of the names and amounts in Uruguayan pesos paid to media outlets, programs or journalists during specified periods in which the Council had hired publicity. Also, the petitioner requested to be informed if the publication of the Council´s press releases in each period had been paid and, if so, he asked for detailed information of the monthly amount in Uruguayan pesos and to which media outlet had it been paid or continued to be paid.

governing and living under the rule of law."[105] According to the judge, "a restriction of the publicity of administrative management should be reasoned well enough to supercede the generic reasoning that advises publicity. [...] That is, in a system such as ours, the principle solution is always publicity, while restriction is the exception."[106]

118. Finally, the judge indicated that "the right to access public information is also related with the principle of participation, meaning that the inhabitants should be informed and consulted on matters that concern them."[107]

119. Taking into account the principles he mentioned, the judge found that "spending on official advertising is not information submitted to the Council but rather produced by the Council and is therefore public information from the moment in which it is placed in the body's five-year budget."[108] Also, in keeping with Article 5 of Law 18381, information on the budget, the budget's execution, the results of any corresponding audits, as well as concessions, tenders, permits, or authorizations granted with specification of the recipients, as well as all public body statistical information of general interest "is not only non-confidential but public by nature."[109]

120. In keeping with the fact that the information requested was produced and held by a public body, and in guaranteeing the "principle of maximum publicity" as well as complying with the parallel obligations of publicity and transparency, the judge ruled that the Departmental Council of Soriano, Uruguay must turn over to the petitioner the requested information within a period of 10 days from the notification of the judgment.

c. Jurisprudence on the definition of a public document

121. In carrying out an analysis of the "right of access to public documents" in its Judgment (*Sentencia*) T-473/92, the Colombian Constitutional Court indicated that the expressions "public document" and "public information" should not be exclusively limited to what the State has produced or generated, but rather should include all documentation that the State administers or archives, excepting those withheld in keeping with explicit provisions of the law. According to the

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[105] Uruguay Judiciary. Judgment No. 48. Writ of *habeas data*. 381-545/2009. Mercedes, Uruguay. September 11, 2009. *Considerando* 3. Available at: http://www.poderjudicial.gub.uy/servlet/page?_pageid=56&_dad=portal30&_schema=PORTAL30&_type=site&_fsiteid=34&_fid=1&_fnavbarid=1&_fnavbarsiteid=34&_fedit=0&_fmode=2&_fdisplaymode=1&_fcalledfrom=1&_fdisplayurl=.

[106] Uruguay Judiciary. Judgment No. 48. Writ of *habeas data*. 381-545/2009. Mercedes, Uruguay. September 11, 2009. *Considerando* 3. Available at: http://www.poderjudicial.gub.uy/servlet/page?_pageid=56&_dad=portal30&_schema=PORTAL30&_type=site&_fsiteid=34&_fid=1&_fnavbarid=1&_fnavbarsiteid=34&_fedit=0&_fmode=2&_fdisplaymode=1&_fcalledfrom=1&_fdisplayurl=.

[107] Uruguay Judiciary. Judgment No. 48. Writ of *habeas data*. 381-545/2009. Mercedes, Uruguay. September 11, 2009. *Considerando* 3. Available at: http://www.poderjudicial.gub.uy/servlet/page?_pageid=56&_dad=portal30&_schema=PORTAL30&_type=site&_fsiteid=34&_fid=1&_fnavbarid=1&_fnavbarsiteid=34&_fedit=0&_fmode=2&_fdisplaymode=1&_fcalledfrom=1&_fdisplayurl=.

[108] Uruguay Judiciary. Judgment No. 48. Writ of *habeas data*. 381-545/2009. Mercedes, Uruguay. September 11, 2009. *Considerando* 7. Available at: http://www.poderjudicial.gub.uy/servlet/page?_pageid=56&_dad=portal30&_schema=PORTAL30&_type=site&_fsiteid=34&_fid=1&_fnavbarid=1&_fnavbarsiteid=34&_fedit=0&_fmode=2&_fdisplaymode=1&_fcalledfrom=1&_fdisplayurl=.

[109] Uruguay Judiciary. Judgment No. 48. Writ of *habeas data*. 381-545/2009. Mercedes, Uruguay. September 11, 2009. *Fundamento* 7. Available at: http://www.poderjudicial.gub.uy/servlet/page?_pageid=56&_dad=portal30&_schema=PORTAL30&_type=site&_fsiteid=34&_fid=1&_fnavbarid=1&_fnavbarsiteid=34&_fedit=0&_fmode=2&_fdisplaymode=1&_fcalledfrom=1&_fdisplayurl=.

court, under the right of access to information, "the nature of the subject or entity that produced the document[s] and the way in which they were produced are not as important as the objective fact of whether [they] contain information that should be withheld in keeping with an explicit provision of the law"[110] in determining whether a document should be made public. For the Colombian court, "this right of mankind to inform and be informed [...] is a guarantee of the conscious exercise of the political right to participate in the *res publica*."[111]

122. Taking the aforementioned reasoning as a foundation, the tribunal ruled that the requested document was of a public nature. Consequently, the relevant authority was obligated to turn over the requested information within 48 hours of the notification of the decision.

d. Jurisprudence on the obligation to narrowly construe the exceptions to the general principle of maximum disclosure

123. In the case of *Department of the Air Force v. Rose*, on April 21, 1976, the Supreme Court of the United States heard the claim of a group of law students against U.S. military academies. The students sought access to archives of hearings on possible violations of the United States Air Force Academy's Honor Code by cadets.

124. The Air Force denied the request, citing two exemptions found in the 1996 Freedom of Information Act (FOIA); Section 522(b)(2) establishes that requests for access to information on issues "related solely to the internal personnel rules and practices of an agency"[112] are not viable, while Section 522(b)(6) establishes that requests for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"[113] can be denied.

125. The U.S. District Court for the Southern District of New York, which initially heard the case, found in a summary judgment that the documents requested by the students were covered by the exemption set forth in Section 522(b)(2), though not the one in Section 522(b)(6), given that making these documents public with the names blacked out or without sensitive information would not subject any cadent to public identification, for which reason no one's privacy would be violated.

126. The Second Circuit Court of Appeals overturned the ruling of the lower court on two grounds. The court found that Section 522(b)(2) did not protect the requested documents, but also found that the district judge had erred in finding that the publication of the documents with information partially eliminated could in itself satisfy the legitimate privacy interests of the cadets involved in the hearings. The court held that it was necessary to analyze the case in more detail, and it ordered an inspection of the documents in chambers.

127. The Supreme Court upheld the ruling, highlighting the necessity of strictly interpreting the FOIA exemptions to the principle of maximum disclosure through "a general philosophy of full agency disclosure (...) unless information is exempted under clearly delineated

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[110] First Chamber of Review of the Constitutional Court of Colombia, T-473/92, Bogotá, Colombia, July 14, 1992. *Consideración* A). Available at: http://www.corteconstitucional.gov.co/

[111] First Chamber of Review of the Constitutional Court of Colombia, T-473/92, Bogotá, Colombia, July 14, 1992. *Consideración* A). Available at: http://www.corteconstitucional.gov.co/

[112] FOIA Act 1966, Section 522(b)(2).

[113] FOIA Act 1966, Section 522(b)(6).

statutory language."[114] The court emphasized that the law's objective is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[115] According to the court, no content of the law should be read to "authorize withholding of information or limit the availability of records to the public, except as specifically stated."[116]

128. Regarding the exemption provided for in Section 522(b)(2) on internal institutional proceedings, the court found it inapplicable to matters "subject to such a genuine and significant public interest."[117] According to the court, the exemption is not intended to force government entities to keep records of matters in which the public could not reasonably have an interest. But if there is a genuine public interest, government agencies cannot deny access to information by citing the "internal" nature of the information.

129. Regarding the exemption provided for in Section 522(b)(6), the court understood that the mere fact that the information was located in "personnel" archives did not allow the agency to deny non-confidential information. The court found that Congress' intent in creating exemptions was to strike a balance of "the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act."

130. The court therefore upheld the decision of the lower court and ordered that the information be released for inspection in the trial judge's chambers.

4. Jurisprudence on the obligation to respond in a timely, thorough and accessible manner

a. Jurisprudence on the obligation to provide a simple, quick and free administrative procedure for access to information

131. With regard to the obligation to have an administrative procedure for access to information, the Associate Courts of Mexico have held that in keeping with "the December 6, 2004, joint declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the representative of the Organization for Security and Co-operation in Europe on Freedom of the Media, and the Organization of American States' Special Rapporteur for Freedom of Expression [...] it is announced that as a basic principle of access to information, the process for accessing public information must be simple, quick, and free or of low cost."[118]

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[114] Department of the Air Force v. Rose, 425 U.S. 352, 360-361 (1976), "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." The court's Web page is: http://www.supremecourtus.gov/. The full decision can be found at: http://supreme.justia.com/us/425/352.

[115] Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

[116] Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

[117] Department of the Air Force v. Rose, 425 U.S. 352, 369 (1976).

[118] Fifteenth Associate Administrative Court of the First Circuit, *Amparo en revisión* (denial) 85/2009. Jaime Alvarado López. March 11, 2009. Unanimous vote. Reporting: Armando Cortés Galván. Secretary: Gabriel Regis López. *Novena Época, Semanario Judicial de la Federación y su Gaceta XXIX*, *Tesis* I.15o.A.118 A, *Tesis Aislada*, Abril de 2009. Available at: http://www.scjn.gob.mx/ActividadJur/Jurisprudencia/Paginas/IndexJurisprudencia.aspx

b. Jurisprudence on the obligation to provide an adequate and effective judicial recourse

132. In addition to incorporating international standards on the right to an adequate and effective recourse for the protection of the right of access to information, the April 27, 2007 *amparo* ruling of the Tax and Administrative Court of the Dominican Republic has characterized this right as pertaining to a autonomous recourse. According to the tribunal, the exercise of a recourse designed to guarantee the right of access cannot depend on the exhaustion of other legal remedies. For this recourse to work, it must be enough that the matter at hand involves the infringement of or certain threat to the right of access to information.

133. The case concerns a request for access to information made by a journalist to the State Secretariat for Public Works. The request sought copies of the plans approved for the construction of several projects in the Santo Domingo subway, as well as several geophysical and geotechnical surveys related to the projects. The request was denied on the grounds that the requested information was covered by a legal exemption – provided for in Subparagraph e), Article 17 of Law No. 200-04 – given that the public knowledge of the project could endanger the safety of its users, and as a consequence be detrimental to the national interest.

134. In its defense brief, the authority responsible for supplying the information made a request (among several) that the Tax and Administrative Court be declared not competent to hear the writ of amparo intended to protect the right of access to information in view of the fact that the appellant did not exhaust all administrative remedies before filing the writ.

135. The petitioner replied to these objections during the hearing, indicating that when the law on free access to public information provides for a writ of amparo, it is referring to a recourse that prevents the defenselessness of citizens against the power of the State and provides for this basic right – which protects other fundamental rights - within the Dominican legal system.

136. To resolve the procedural question at hand, the court applied the criteria established by the jurisprudence of the inter-American system for examining the State's obligation to provide an adequate and effective recourse that protects the right of access to information provided for in Article 13 of the American Convention.

137. The tribunal examined the Inter-American Court of Human Rights' interpretation of Article 25 of the American Convention, which states, "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."[119]

138. The judges argued that Article 25 of the American Convention was applicable to the right of access to information contained in Article 8, Subparagraph 10 of the National Constitution and Article 13 of the Convention. The tribunal ruled that the recourse was enshrined in Law No. 437-06 as "an autonomous recourse that does not require the exhaustion of administrative remedies nor any other for admissibility; rather, it is sufficient that a fundamental right has been infringed up or that there is a possibility that such an infringement is imminent."[120]

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[119] Tax and Administrative Tribunal of the Dominican Republic, *Sentencia* No. _024-2007. Exp. No.030-07-00078, Santo Domingo, Dominican Republic. p. 21. Available at: http://www.suprema.gov.do/novedades/sentencias/2007/luis_lora.pdf.

[120] Tax and Administrative Tribunal of the Dominican Republic, *Sentencia* No. _024-2007. Exp. No.030-07-00078, Santo Domingo, Dominican Republic. p. 22. Available at: http://www.suprema.gov.do/novedades/sentencias/2007/luis_lora.pdf.

139. Considering that this recourse does not require the exhaustion of other remedies, the tribunal called it "an action autonomous of all other procedures." According to the tribunal, "for an amparo judge to admit the recourse, a fundamental right must have been violated, or there must be a possibility of that happening." In the instant case, the court found that there was "a violation of a fundamental right, that right being the right of access to public information enshrined in the Constitution of the Dominican Republic, international treaties and law."[121]

140. In light of the obligations contained in Article 8 of the Constitution of the Republic, Article 13 of the American Convention, and Article 19 of the Universal Declaration on Human Rights, as well as the Law on Free Access to State Public Information, the court ruled that the recourse filed by the petitioner was admissible. Once the merits of the controversy were analyzed, the recourse would have the effect of protecting the petitioner's right of access to information.

c. Jurisprudence on the obligation to inform petitioners on the source, location, and format in which previously publicized information can be accessed

141. A ruling handed down on April 3, 2007,[122] by the Supreme Court of Justice of Panama reiterated that, in the event that requested information has already been publicized, the authority who receives the request for information has the obligation to indicate the source, location and format in which the requested information can be accessed.

142. The facts of the case that resulted in this ruling involved a private individual's request for information from the director of Panama's Social Security Administration (*Caja del Seguro Social*). The request sought information on whether Panamanian law allowed or prohibited a woman from registering her husband so that he can receive social security hospital and medical services.[123] The legal and constitutional deadlines expired, and the request was not answered by the relevant authority.

143. When the case was brought before the court, the relevant authority filed in its defense a performance report that confined its comments to arguing that the requested information was "of a general character, and therefore found in Article 138 of Law 51 of 2005 (Institution Act)" and also "in the public knowledge," for which reason no specific response was offered to the petitioner.

144. The Tribunal held that the relevant authority had not acted in keeping with the rules that regulate access to public information, considering that at no time did it provide the petitioner with the requested information and that at trial it had only justified its failure to provide information through the aforementioned report.

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[121] Tax and Administrative Tribunal of the Dominican Republic, *Sentencia* No. _024-2007. Exp. No.030-07-00078, Santo Domingo, Dominican Republic. p. 26. Available at: http://www.suprema.gov.do/novedades/sentencias/2007/luis_lora.pdf.

[122] Supreme Court of Justice of Panama, *Expediente* 1154-06 Panama City, Panama, April 3, 2007. Available at: http://bd.organojudicial.gob.pa/registro.html.

[123] On October 30, 2006, the appellant in the *habeas data* filing requested that the aforementioned public entity indicate whether there was any provision prohibiting or limiting a woman from registering her husband as a dependent to receive the corresponding hospital and medical services. In the event that there was a provision addressing the situation, the appellant requested the date of the provision; otherwise, the appellant wished to be informed of the proper administrative process to follow in registering her husband.

145. The tribunal held that "in the event that the information is already available to the public in printed forms such as books, public archives, and electronic formats accessible through the Internet, among others, it will inform the petitioner of the source, the location, and the format in which the previously published information can be accessed."[124] Likewise, the court indicated that even when the requested information appeared in law and was public and of general knowledge, the relevant authority had the duty to give a precise response within the legal time limit.

146. The Supreme Court of Justice of Panama granted the motion and ordered the public entity being sued to submit the requested information to the petitioner within 10 days.

d. Jurisprudence on due diligence and administrative assistance with regard to the right of access to information

147. In a ruling dated January 28, 2005,[125] the Constitutional Chamber of the Supreme Court of Costa Rica made an important connection between the "principle of informality to the benefit of the person administered" and the right of access to public information. In its ruling, the court held that any request for information from a entity that does not have the information but belongs to the same public body as the one that does have the information has the obligation to immediately transfer the request to the relevant entity for its resolution.

148. The incident that resulted in this ruling was a request for access to information, filed with two different branches of the same entity on two different occasions during the same month. In both cases, officials explained to the appellant that it was impossible to fully answer every point of the request[126] because part of the requested information was not in their power. They explained that the appellant must request it from other offices of the same public entity.

149. The court carried out an extensive analysis of the principles that must be observed for the guarantee of the right of access to information. In doing so, and in broad agreement with the standards established in inter-American human rights instruments and jurisprudence, the court expounded on the principles of transparency and administrative publicity, the provisions of the right of access to administrative information, and the bearers of the right and those responsible to respond, as well as matters deserving of protection and the limitations derived.

150. In ruling on the case, the tribunal's judgment explained the provisions of the "principle of informality to the benefit of the person administered" and its connection to public

[124] Supreme Court of Justice of Panama, *Expediente* 1154-06 Panama City, Panama, April 3, 2007. Decision of the full court. Available at: http://bd.organojudicial.gob.pa/registro.html.

[125] Constitutional Chamber of the Supreme Court of Costa Rica, Exp: 04-010480-0007-CO Res: 2005-00774 San José, Costa Rica, January 28, 2005. Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&nValor1=1&nValor2=365503&strTipM=T&strDirSel=directo

[126] The information requested by the appellant included the following: a) the resolution reached by the Board of Directors in the case of the investigation of an individual, with the names of the directors who were present and those who voted in favor and against the recommendation of the entity directing the proceedings; b) the date of tender for the contracting of an attorney to carry out the investigation; c) in the event that the attorney had been contracted directly, the name of the other attorneys who were invited to participate in the tender and their bids; d) the bid of the attorney who was contracted; e) whether this attorney currently worked or had worked for JAPDEVA as an external advisor; f) whether this attorney has or had any relationship or professional connection with the head of JAPDEVA's legal department.

administration's obligation to comply with its obligations derived from the right of access to information.

151. According to the court, "The principle of informality to the benefit of the person administered with regard to administrative procedures is deeply rooted in the Constitution, based both on the *indubio pro actione* doctrine and in the right to access public administration's own self-regulatory mechanisms [...]. Moreover, [...] inter-administrative coordination mandates that, given the person administered's lack of knowledge of the complex and recondite structure of the administrative organization, any request or petition filed with a branch of the same entity or public body be immediately forwarded by that entity or body to the one competent to hear and resolve the request. In this way, the constitutional principles of efficacy, efficiency, simplicity and celerity in the compliance of administrative functions are fulfilled."[127]

152. Consequently, the court found that there was an obligation to forward the request to the relevant branch within the same public entity in "the cases [in which] the issue is simple non-competence (within the same entity or public body), which must not be placed on the shoulders of the person administered, who does not know the internal distribution of the competencies among the different offices that make up an entity or body and does not have the duty to find that out."[128]

153. The tribunal concluded that "according to the principle of informality in public administration previously cited, the appellant's arguments are correct [...], considering that [the authority from which information was requested] was obligated to attend the request for information filed by the appellant and forward it to the correct departments."[129]

154. With regard to the issue raised on this point, the Constitutional Chamber ruled to "therefore grant the writ of amparo on this matter, for having infringed upon the constitutional principle of administrative coordination with respect to the fundamental right of access to administrative information in detriment to the appellant,"[130] thereby obligating the authority in question to immediately turn over the requested information.

e. Jurisprudence on assent by default (*afirmativa ficta*)

155. According to a decision made by the Federal Institute of Access to Information (*Instituto Federal de Acceso a la Información Pública*), dated August 19, 2009,[131] when a person

[127] Constitutional Chamber of the Supreme Court of Costa Rica, Exp: 04-010480-0007-CO Res: 2005-00774 San José, Costa Rica, January 28, 2005. Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&nValor1=1&nValor2=365503&strTipM=T&strDirSel=directo.

[128] Constitutional Chamber of the Supreme Court of Costa Rica, Exp: 04-010480-0007-CO Res: 2005-00774. *Considerando* IV. San José, Costa Rica, January 28, 2005. Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&nValor1=1&nValor2=365503&strTipM=T&strDirSel=directo.

[129] Constitutional Chamber of the Supreme Court of Costa Rica, Exp: 04-010480-0007-CO Res: 2005-00774 *Considerando* V. San José, Costa Rica, January 28, 2005. Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&nValor1=1&nValor2=365503&strTipM=T&strDirSel=directo.

[130] Constitutional Chamber of the Supreme Court of Costa Rica, Exp: 04-010480-0007-CO Res: 2005-00774. *Considerando V*. San José, Costa Rica, January 28, 2005. Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&nValor1=1&nValor2=365503&strTipM=T&strDirSel=directo.

[131] Federal Institute for Access to Public Information. *Expediente*: 279/09, Mexico, Distrito Federal, August 19, 2009. Available at: http://www.ifai.org.mx/resoluciones/2009/3279.pdf.

files a request for access to information and does not receive a reply by the deadline set forth by domestic law, the authority responsible is obligated (in principle) to turn over the requested information.

156. This case involves a private individual who filed a request for access to information with an entity known as "FONATUR" Operadora Portuaria, S.A. de CV., seeking a variety of information on the buildings on FONATUR property that had emergency stairways on the exterior. The petitioner did not receive an answer from FONATUR.

157. Upon receiving the request for verification for lack of response, the Federal Institute of Access to Information ordered FONATUR to report whether it had responded to the request in the appropriate time and fashion. However, as of the date of judgment in the case, the Institute had not received a written response.

158. The Institute found that the failure to respond to a request for access by the deadline established by law "will be understood as assent" and ruled that the State entity was obligated to turn over the requested information in a period of no more than 10 working days, "paying all the costs generated by the preproduction of the informative material, unless this institute determines that the documents in question are classified or confidential."[132]

5. Jurisprudence on the right of access to information and personal information

a. Jurisprudence on access to information and personal rights

159. In a case in which U.S. federal judges had refused to turn over information on their personal assets, the Fifth Circuit Court of Appeals found that the public interest in a government subject to ethical limitations took substantial precedence over any private interest potentially affected by the revelation of that information.[133] In this sense, the Court restrictively construed the exemption for privacy and found that, because judges have taken on public responsibilities, their expectations of privacy are less than that of other people.[134]

160. For its part, the Superior Federal Court of Brazil ruled on the same issue in a case that involved a lawsuit brought by a state employees union against the decision of the mayor of Sao Paulo to publish on the Internet the names, positions, and salaries of the 147,000 employees of that mayoralty and the 15,000 city contract workers. After weighing the rights involved, the court found that the principle of maximum disclosure of public information should prevail over the private interests involved. The court noted the importance of the Internet for controlling public funds and found that hindering the release of information on the monthly compensation of public servants would have "negative effects for the consistent exercise of official and citizen control over public funds."[135]

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[132] Federal Institute for Access to Public Information. *Expediente*: 279/09, Mexico, Distrito Federal, August 19, 2009. Available at: http://www.ifai.org.mx/resoluciones/2009/3279.pdf.

[133] Duplantier v. United States, Fifth District Court of Appeals, 606 F.2d 654, paragraph 54 (1979). The Web page of the court is http://www.ca5.uscourts.gov. An analysis of this ruling in the context of the right of access to information can be found in the *amicus curiae* brief filed by the Open Society Justice Initiative in the case of *Defensoría del Pueblo c. Municipalidad de San Lorenzo*, heard by the Supreme Court of Paraguay.

[134] Duplantier v. United States, Fifth District Court of Appeals, 606 F.2d 654, paragraph 54 (1979).

[135] Superior Federal Tribunal, Ruling dated July 8, 2009. The Web page of the court is: http://www.stf.jus.br. The full ruling is available at: http://right2info.org/resources/publications/Brazil%20S.Ct%20salarios%20SP%20Jul%202009.pdf An analysis of this ruling in the context of the right of access to information can be found in the *amicus curiae* brief filed by

b. Jurisprudence on the right to access information regarding persons who are or have been public officials

161. On October 29, 2003, the Supreme Court of Canada handed down a ruling in the case *Information Commissioner v. Canada*. The case was on a request for information on the positions and postings of five Royal Canadian Mounted Police (RCMP), made by a citizen under the Canadian Access to Information Act.[136]

162. The RCMP submitted partial information, limiting itself to reporting the current posting of its four active members and the last posting of the retired police officer involved in the request for access. The RCMP argued that the information on previous postings was "personal" information that was outside the reach of the access law in keeping with that established in the 1985 Privacy Act.[137]

163. The Information Commissioner of Canada (an independent ombudsman appointed by Parliament) found that the information was not covered by the exemption of personal information and recommended it be turned over. However, the RCMP rejected the recommendation, for which reason the Information Commissioner of Canada requested the case be reviewed in court.

164. The Trial Division of the Federal Court of Canada ruled in favor of the RCMP, finding that it was only necessary to turn over information on current police employees, and on the last posting in the case of the retired officer. The Appeals Court rejected this interpretation and found that the law does not contain a temporal limitation on the access to information on State employees. However, the judges ruled that a request for information of this kind should be specific in relation to time, scope, and location, and cannot be used to "fish for" information with general requests.

165. The Supreme Court, meanwhile, rejected both restrictions on the right to access. First, the Court adopted a broad standard of revision according to which a decision of the government to turn over or deny access to information must be reviewed by independent government bodies. In this respect, the court found that it was important to take into account the general purpose of the law, which is to "provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public."[138]

166. In applying this broad standard of review, the court found that the requested information was personal information, a concept that in the court's opinion included individuals' work history. However, the requested information was not protected by exemption, since Section 3(j) of the Privacy Act provided that it would be possible to access "information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual."[139]

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the Open Society Justice Initiative in the case of *Defensoría del Pueblo c. Municipalidad de San Lorenzo*, heard by the Supreme Court of Paraguay.

[136] Access to Information Act 1985, R.S.C. 1985, c. A-1.

[137] Privacy Act 1985, R.S.C. 1985, c P-21.

[138] *Information Commissioner of Canada v. Commissioner of the Royal Canadian Mounted Police*, 1 S.C.R. 66 (2003), para. 17. Available at: http://scc.lexum.umontreal.ca/en/2003/2003scc8/2003scc8.html.

[139] Privacy Act 1985, R.S.C. 1985, c P-21., Section 3 (j) (which holds that) "for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, exception 3 does not include (…) (*j*) information about an individual who is or was an officer or employee of a government institution related to the position or functions of the individual…."

167. The court struck down the restrictive interpretations of the lower court judge and the Court of Appeals.

168. According to the Supreme Court, the Access Act "makes this information equally available to each member of the public because it is thought that the availability of such information, as a general matter, is necessary to ensure the accountability of the state and to promote the capacity of the citizenry to participate in decision-making processes."[140]

c. Jurisprudence on the right to know the salaries or incomes of public resources

169. On June 22, 1984, the U.S. District Court for the District of Columbia heard a lawsuit on access to information, filed by a union against the Department of Housing and Urban Development (HUD). The union was seeking the names, salaries, and positions of eight employees of the company Knorz Inc., a subcontractor on a construction project financed with HUD funds.

170. The union requested the information to protect its members' salaries and benefits from the possibility of unfair competition: the union suspected that Knorz Inc., which was a company that had not been unionized, paid salaries below the amount established by law for work on contracts financed by the government.

171. HUD answered the request with a list of employees with the names, social security numbers, and salaries blacked out, since it considered that revealing that information would violate the exemption provided for in Section 522(b)(6) of the Freedom of Information Act (hereinafter "FOIA"). That section establishes that requests for information can be denied when the information requested includes "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[141] According to HUD general counsel, the union had no legitimate interest in the information.

172. In a preliminary hearing, it became clear that the union wanted to know the names of the employees. During that hearing, the HUD attorneys argued that revealing that information would embarrass and be detrimental to the employees in two ways. First, it would expose them to possible hostility, since their identities as non-union laborers would be revealed in a community with strong pro-union feelings. Second, the revelation of the names would allow the union to learn their salaries, information which is covered under workers' privacy.

173. The district judge rejected both arguments through a broad interpretation of the goals of FOIA. Following the Supreme Court's resolution in the *Department of the Air Force v. Rose* case, the court found that "the dominant objective of FOIA is disclosure, and FOIA exemptions are accordingly constructed narrowly."[142] Applying the *Rose case* standard, the judge examined a) whether the requested information came from personnel files or medical records and b) whether the revelation of the information would imply a clear and unjustified invasion of personal privacy.

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[140] *Information Commissioner of Canada v. Commissioner of the Royal Canadian Mounted Police*, 1 S.C.R. 66 (2003), para. 32.

[141] FOIA Act 1966, Section 522(b)(6).

[142] *International Brotherhood of Electrical Workers, Local 41 v. United States Department of Housing and Urban Development*, 593 F.Supp. 542, 544 (1984).

174. As point a) had already been determined in the sense that the information would come from personnel files, the question to analyze was whether the second condition of the Rose standard was met. According to the district judge, HUD had not been able to demonstrate that the revelation of this information would clearly violate the employees' privacy.

175. First, the judge found that revealing the salaries of federal employees was not comparable to the kind of "embarrassing" information protected by Exemption 6 of the FOIA. As for the revelation of the names of the employees, the judge found that the alleged harassment to which they could be subject was only speculation that did not nullify the clear public interest involved. The Court added that "[t]he strong public interest in assuring compliance with the law tilts the balance in favor of disclosure."[143]

176. In this sense, the judge emphasized the union's interest in independently learning the unfair practices of the companies that pay salaries beneath that provided for by law. The judge held that investigations by authorities supervising the labor market do not affect the union's right to try to satisfy on its own the public interest in labor law compliance.

177. The ruling was appealed to the District of Columbia Court of Appeals, but on April 26, 1985, that court upheld the ruling of the lower court. The appeals court highlighted that one of the main objectives of FOIA was to allow citizens to exercise control over the workings of the government. In this sense, it found that, "it is a prime function of the Freedom of Information Act to enable the public to survey the operations of its government."[144]

178. For its part, the Constitutional Tribunal of Peru coincided with the standards mentioned in the previous paragraph when it held in a September 30, 2008[145] judgment that the obligation to provide information of general interest bound not only bodies of the State but also legal entities that, governed mainly by private law, provide public services.

179. The case that resulted in this decision began on January 4, 2008, when a private individual requested information from an aviation company on the varieties of complaints it had received on the public services it offers. The request sought details on which had complaints had been resolved and which had not over the last two years.

180. The company decided to declare that the *habeas data* motion was inadmissible, arguing that although the company was a legal entity offering a public service, "it does not carry out an administrative function, and therefore is only obligated to turn information over to third parties when it relates to: i) the characteristics of its public services, meaning (among others) the routes, frequency, and timetable of its flights; and ii) its fees, all of which are found fully described and detailed on its Web page."[146]

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[143] *International Brotherhood of Electrical Workers, Local 41 v. United States Department of Housing and Urban Development*, 593 F.Supp. 542, 545 (1984).

[144] *International Brotherhood of Electrical Workers, Local 41 v. United States Department of Housing and Urban Development,* 763 F.2d 435, 436 (1985).

[145] First Chamber of Constitutional Tribunal, Case 4339-2008-PHD-TC, Lima Peru, September 30, 2008. Available at: http://www.tc.gob.pe/jurisprudencia/2009/04339-2008-HD.html.

[146] First Chamber of Constitutional Tribunal, Case 4339-2008-PHD-TC, Lima Peru, September 30, 2008. Antecedente 2. Available at: http://www.tc.gob.pe/jurisprudencia/2009/04339-2008-HD.html.

181. Once lower court recourses had been exhausted, the Constitutional Court made a noteworthy use of the standards of the Inter-American system by using the primary inter-American jurisprudence on the scope of the right of access to information – recognized in Article 13 of the American Convention – in its reasoning.

182. In applying this jurisprudence, the court found that "air transport, due to its regular nature and purpose of satisfying particular social needs, has an impact on the general interest and must therefore be considered a public service. Because of this, information closely linked to this service must be turned over to any citizen who requests it. Actions to the contrary will be considered detrimental to the fundamental right of access to information."[147]

183. In addition to the general interest in the public service, the court indicated that the requested information was preexisting, being information "that is in the possession of the solicitee, contained in its written documents, digital files, or any other format." For the tribunal, these reasons were enough to find that the entity was obliged to turn over the requested information, even though the company was a legal entity regulated principally under private law.

184. Effectively, the tribunal found that, "In general terms, this right comes from the authority held by all individuals to request and access information that is held mainly by State entities. As far as access to information held by non-state entities – that is, legal entities governed under private law – not all the information they hold is exempt. According to the kind of work they do, it is possible that they might hold some information that is of a public nature and therefore may be demanded and attained by the general public. In this context, legal entities that can be asked for this kind of information are those that offer public services or carry out administrative functions despite being under a private legal regime."

185. As a consequence, the Constitutional Tribunal of Peru found that the petitioner had had his or her right to access to public information infringed upon and that the company must provide the requested information pending payment of fees for its release.

186. The criteria that makes obligations derived from the right of access apply not only to the State but also to those who carry out public functions or manage public resources has also been reiterated by the Supreme Court of Justice of Costa Rica, which held that, "[M]otions of amparo filed against private subjects [...] are admissible when filed against actions or omissions of entities governed under Private Law when those entities act or should act to fulfill public functions or charges, or they find themselves by law or by fact, holding power over which the common judicial remedies are clearly insufficient or too slow to guarantee fundamental rights or liberties."[148]

d. Jurisprudence on access to information on "uncollectable" tax debts

187. The Office of the Special Rapporteur has held that the right of access to information contained in Article 13 of the American Convention is not an absolute right, but rather is subject to limits that must adhere strictly to the requirements derived from Article 13.2 of the Convention –

[147] First Chamber of Constitutional Tribunal, Case 4339-2008-PHD-TC, Lima Peru, September 30, 2008. Merits 11. Available at: http://www.tc.gob.pe/jurisprudencia/2009/04339-2008-HD.html.

[148] Constitutional Chamber of the Supreme Court of Justice, Exp. 03-010830-0007-CO. Res: 2004,09705, San José, Costa Rica, August 31, 2004. Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=RST&param2=1&param3=FECHA&param4=DESC&tem1=Mauricio%20Herrera%20Ulloa%20Banex

that is, conditions that are of an exceptional nature, legally enshrined, based on a legitimate aim, and necessary and proportional for pursuing that aim.

188. These rules for the establishment of limits to the right of access to information under Article 13.2 must be followed by domestic courts in order to guarantee the exercise of this right in accordance with inter-American law. On this point, the October 21, 2005 ruling of the Constitutional Chamber of the Supreme Court of Justice of Costa Rica on the right of access to tax information is relevant.[149]

189. On June 1, 2005, the appellant requested – from the General Director of Taxation (*Director General de Tributación*) – information on the individuals and companies declared by the Tax Administration as owning "uncollectible" debts in the years 2002, 2003, and 2004. The appellant requested information on the date of the declaration, the amount of money declared uncollectible, the reasoning for the declaration, the kind of taxes declared uncollectible, the justification for the declaration, the legal basis for the declaration, and the name and national identification number of those whose debts were declared uncollectible. In a June 14, 2003, response to the request, the director informed the appellant that there was a legal obstacle that blocked him from turning over the information – specifically, the information was of a confidential nature. This decision was repeated in the ruling on the writ of reconsideration that the appellant filed. Consequently, the appellant filed a writ of amparo before the Supreme Court of Justice for the violation of his access to public information.

190. In his arguments, the appellant claimed that, "despite requesting information on the companies and individuals declared uncollectible by the General Direction of Direct Taxation, this authority declined to supply the information, considering it confidential. This is a violation of the provisions in Subparagraph 30 of the Political Constitution. In reality, this is information related to the activity of this institution."[150]

191. For his part, the General Director of Direct Taxation indicated that, "The tax administration does not have the authority to turn over information to third parties that contains economic content that would allow one to determine the financial situation of taxpayers."[151]

192. The court used tools of interpretation that closely coincide with the jurisprudential standards of the inter-American system to determine which of the parties was in the right. In this sense, the Court studied whether the exception was prescribed previously by law, corresponded to an objective allowed by the American Convention, and was necessary in a democratic society.

193. Regarding the legal establishment of the supposed confidentiality limit (contained in Article 117 of the Code of Tax Rules and Procedures) cited by the director, the court found that in any case, the director "is making an erroneous interpretation of the confidentiality declared in this

[149] Constitutional Chamber of the Supreme Court of Costa Rica, *Sentencia*: 14519, *Expediente*:05-011831-0007-CO, October 21, 2005. Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=17%20&nValor1=1&nValor2=327472&strTipM=T&lResultado=163&strTem=ReTem.

[150] Constitutional Chamber of the Supreme Court of Costa Rica, Sentencia: 14519, *Expediente*:05-011831-0007-CO, October 21, 2005. *Considerando* III. Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=17%20&nValor1=1&nValor2=327472&strTipM=T&lResultado=163&strTem=ReTem.

[151] Constitutional Chamber of the Supreme Court of Costa Rica, *Sentencia*: 14519, *Expediente*:05-011831-0007-CO, October 21, 2005. *Resultando* 2. Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=17%20&nValor1=1&nValor2=327472&strTipM=T&lResultado=163&strTem=ReTem.

subparagraph. Although it is clear that the statements presented by private personages cannot be divulged because of the kind of information they contain, the same is not true when a debt has already been declared uncollectible, since there is evidence of a public interest in determining the way in which the administration managed a case like this."[152]

194. According to the court, the aim presumptively pursued through the use of confidentiality "does not justify [...] declining to turn over information on accounts declared uncollectible, because only through this information are private individuals able to exercise adequate oversight of public finances, determining whether the Tax Administration took the necessary measures to confront the problems of defaults."[153] As pertains to the general interest surrounding knowledge of the activities of public authorities in the area of taxation, "It is clear that the lack of compliance with taxation responsibilities is a detriment to the Public Treasury, for which reason it is in the public interest of everyone to learn about unpaid debts, as long as this is the only way to determine if the administration has acted with due diligence in collecting public resources."[154] Finally, the court indicated that, "As for the obligation of transparency that should characterize public administration [...] the administration cannot deny access to information that is in the public interest when that information may reveal an improper use of funds that belong to all Costa Ricans, as is the case here."[155]

195. As a consequence, since there was in reality no limit on the right to access, the tribunal ruled "that in the instant case there was an evident violation of the provisions of Article 30 of the Political Constitution, considering that the information requested by the appellant is evidently in the public interest"[156] and not subject to any recognized exception under the laws or constitution of the State. The Court therefore ordered that the requested information be turned over to the appellant within a non-extendable deadline of eight days from the date of the notification of the ruling.

e. Jurisprudence on access to personal information of uninformed third parties and the scope of the State's obligations in the face of an especially onerous request for information

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[152] Constitutional Chamber of the Supreme Court of Costa Rica, Sentencia: 14519, Expediente:05-011831-0007-CO, October 21, 2005. *Considerando* V. Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=17%20&nValor1=1&nValor2=327472&strTipM=T&lResultado=163&strTem=ReTem.

[153] Constitutional Chamber of the Supreme Court of Costa Rica, *Sentencia*: 14519, Expediente:05-011831-0007-CO, October 21, 2005. *Considerando* V. Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=17%20&nValor1=1&nValor2=327472&strTipM=T&lResultado=163&strTem=ReTem.

[154] Constitutional Chamber of the Supreme Court of Costa Rica, *Sentencia*: 14519, *Expediente*:05-011831-0007-CO, October 21, 2005. *Considerando* V. Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=17%20&nValor1=1&nValor2=327472&strTipM=T&lResultado=163&strTem=ReTem.

[155] Constitutional Chamber of the Supreme Court of Costa Rica, *Sentencia*: 14519, *Expediente*:05-011831-0007-CO, October 21, 2005. *Considerando* V. Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=17%20&nValor1=1&nValor2=327472&strTipM=T&lResultado=163&strTem=ReTem.

[156] Constitutional Chamber of the Supreme Court of Costa Rica, *Sentencia*: 14519, *Expediente*:05-011831-0007-CO, October 21, 2005. *Considerando* V. Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=17%20&nValor1=1&nValor2=327472&strTipM=T&lResultado=163&strTem=ReTem.

196. On August 14, 2009, Chile's Council for Transparency handed down a decision that is particularly relevant in its reiteration and incorporation of several criteria that, in keeping with domestic legislation, must be observed in the exercise of the right of access to information.[157]

197. According to the Council: (1) All information under the control of the State is public; (2) Strict scrutiny must be applied in the instant case to determine if turning over the "full names of private individuals" in response to a request for access could affect their rights to privacy, honor, and image; and (3) given the principles of facilitation and divisibility, if the fulfillment of a request is excessively burdensome to the operation of the entity in question, a review should be done to examine how to submit as much information as possible.

198. On April 30, 2009, a private individual requested all the claims and complaints on police activities received from citizens during 2008. The request sought the inclusion in each claim of – among other things – "the complete name of the person who filed the claim or complaint."[158]

199. On May 26, 2009, the Undersecretariat of the *Carabineros* police turned over the complaints requested without including complete names.

200. Three arguments were made to justify the denial of the full names of the claimants: (1) In the opinion of the Undersecretariat, the claims and complaints filed by private individuals could not in any way be considered "administrative acts, resolutions, proceedings, and documents" governed by the principles of transparency and publicity because those principles only obligate the authorities to turn over the content of acts, resolutions, records, files, contracts, and agreements, as well as all information prepared with public money; (2) the submission of the full names of the persons who filed the complaints could affect their private lives; and (3) on the possibility of verifying whether the people who filed the complaints would allow their names to be released, providing them with notification would have affected the functions of the Undersecretariat and unduly distracted its officials from the normal completion of their regular work.

201. Each of the aforementioned arguments was challenged by the petitioner, who maintained that he had the right of access. For this reason, he filed an amparo against the Undersecretariat of the *Carabineros* police with the Transparency Council on June 12, 2009.

202. In resolving the case, the Council first examined whether the complaints were public and open to the light of the transparency law; second, it determined whether the full names of the people who had filed their complaints during 2008 should also be made public; third, it ruled on the duty – contained in the transparency law – of informing each individual who filed a complaint of their right to deny permission for making their name public, allowing the authority to prepare a list of the names of those who give permission to make their names public. As previously mentioned in this chapter, in applying the principle of relevance, the Council found that the complaints or claims in question were public information and subject to the transparency law.

203. In relation to the question of whether the full names of those who filed the complaints were also public, the Council found that, "The name of a private individual is personal

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[157] Transparency Council, *Amparo* A91-09, ruling of August 14, 2009. Available at: http://www.consejotransparencia.cl/prontus_consejo/site/artic/20090706/asocfile/20090706202514/a91_09_decision_fondo.pdf.

[158] The request sought information on the complaints filed with the Undersecretariat of the *Carabineros* [police], including the following details: a) The full name of the person who filed the claim or complaint; b) The reason for filing the claim or complaint; c) Whether the complaint was filed by letter, telephone, e-mail, or other method; d) Whether the complaint was forwarded to the General Direction of *Carabineros* and by which method – letter, e-mail, or telephone; and e) The recommendations for each complaint filed with the General Directorate of *Carabineros*.

information that is owned by each individual and a part of their personalities. As this is private information, it is protected [...] and can only be turned over or made public with consent, unless it has been obtained from a source accessible to the public. In this case, and as the examples of complaints submitted by the Undersecretariat of *Carbineros* in its briefs indicate (such as one from an official who was denied reinstatement because of his sexual orientation), connecting the name of the individual filing the complaint with the complaint or claim could certainly affect the rights of those whose names are released, including the right to a private life or privacy and the right to honor or image. Therefore, this Council recognizes that the release or submission of the names of all the individuals who filed complaints or claims – names requested by the petitioner – could inhibit the future filing of complaints or claims with the Undersecretariat of the *Carbineros*, especially on sensitive issues like the ones indicated [...]."[159]

204. Given the request's relevance to public control of this State entity, the Council ruled on the obligation to notify those who filed complaints about the request and to learn their wishes regarding the publicity of their names, a task that, in the opinion of the Undersecretariat, would unduly distract its officials from the standard completion of their regular work.

205. Effectively, according to the Council, the relevant authority had a duty to the effect "that when documents or records that contain information that can affect the rights of third parties are requested, the relevant body must inform the aforementioned third parties (in this case, those who filed the complaints) of this fact so that they can exercise their right to challenge the revelation of the requested information. Only when challenges are produced will the information be retained. The petitioner can then file an amparo with this Council to appeal the petition."[160]

206. Regarding the ability of the Undersecretariat to expedite the notification of all the individuals who filed complaints, the Council found that applying the procedure for informing those who filed complaints of their right to oppose the release of their names "presumes an excessive use of the time of the officials who work for the Undersecretariat of the *Carabineros*, causing undue distraction and, in doing so, affecting the due completion of institutional functions."[161]

207. However, in the Council's opinion, and in a reiteration of the public interest involved in the request for access, it was necessary "to know who has access to complaints filed before a public authority and what the effects of those complaints are" in order that "society can control the exercise of public administration." This justified "on the basis of the principles of facilitation and divisibility [...] a revision of whether there is a way to turn over at least part of the information."[162]

208. The Council found that under these principles, the public authority must strictly scrutinize the claims and complaints in order to: 1) determine which claims and complaints refer to alleged police procedures that were carried out poorly and which refer to other administrative

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[159] Transparency Council, Amparo A91-09, ruling of August 14, 2009. *Considerando* 6. Available at: http://www.consejotransparencia.cl/prontus_consejo/site/artic/20090706/asocfile/20090706202514/a91_09_decision_fondo.pdf.

[160] Transparency Council, Amparo A91-09, ruling of August 14, 2009. *Considerando* 7. Available at: http://www.consejotransparencia.cl/prontus_consejo/site/artic/20090706/asocfile/20090706202514/a91_09_decision_fondo.pdf.

[161] Transparency Council, Amparo A91-09, ruling of August 14, 2009. *Considerando* 9. Available at: http://www.consejotransparencia.cl/prontus_consejo/site/artic/20090706/asocfile/20090706202514/a91_09_decision_fondo.pdf.

[162] Transparency Council, Amparo A91-09, ruling of August 14, 2009. *Considerando* 10. Available at: http://www.consejotransparencia.cl/prontus_consejo/site/artic/20090706/asocfile/20090706202514/a91_09_decision_fondo.pdf.

questions not related to police actions or inquiries, only taking into account those that fit into the former category; 2) distinguish whether the complaint or claim comes from a public entity or a private individual, revealing the names in the case of the former but not in the case of the latter, maintaining the obligation to notify private individuals of their right to challenge the release of their names in the response to the request for access to information.

f. Jurisprudence on the right of access to archives and public records containing information on the petitioner

209. A ruling on a writ of amparo by the Constitutional Chamber of the Supreme Court of Justice of Venezuela dated August 7, 2007[163] established that the right of access to the content of public records or archives containing information on the petitioner must not be limited to requests filed within the framework of an administrative procedure, since the guarantee of this right requires that information be turned over when the individual affected requires it.

210. The case refers to the challenge of a ruling by the Second Administrative Court, which had denied a student access to his academic records, located in the archives of the Universidad Central de Venezuela.

211. The *a quo* judge ruled that there had been no violation of the right to access under Article 143 of the National Constitution,[164] considering that "for a violation of the right to access to a file with information on the petitioner to have taken place, the denial must have been given in the framework of an administrative procedure in which the plaintiff has an interest with respect to the final Administrative ruling. This was not demonstrated in the instant case."[165]

212. In its ruling, the Venezuelan Constitutional Chamber found "that the *a quo* court incorrectly interpreted the provision and reached conclusions that cannot be derived from Article 143 of the Constitution" because "it is not evident [...] that for a violation there *must* be *an administrative procedure established*."[166] For the Tribunal, the existence of an administrative procedure is subordinate to the violation of a right to information, and would be equivalent to the imposition of an unfounded limitation on the constitutional right.

213. In the opinion of the Constitutional Chamber, "Constitutional provisions should not be interpreted restrictively, but rather broadly, especially when constitutional rights like the right to information are at stake. This right, as indicated in the provision's heading, belongs to all citizens,

[163] Constitutional Chamber of the Supreme Court of Venezuela, Exp. 00-2672, Caracas, Venezuela, August 7, 2007. Available at: Available at: http://www.tsj.gov.ve/decisiones/scon/Agosto/1710-070807-07-0334.htm.

[164] The article in question reads as follows: "Article 143. All citizens have the right to be informed in a timely and truthful fashion by the Public Administration of the status of legal proceedings in which they have a direct interest, as well as to know the final rulings adopted. Likewise, they have access to administrative archives and records, notwithstanding the acceptable limits allowed in a democratic society on topics related to domestic and foreign security, criminal investigations, and privacy. This is in keeping with the law that regulates the classification of documents containing confidential or secret material. Censorship of public officials who give information on matters under their responsibility is not allowed."

[165] Constitutional Chamber of the Supreme Court of Justice of Venezuela, Exp. 00-2672, Caracas, Venezuela, August 7, 2007. *Apartado* IV. Available at: http://www.tsj.gov.ve/decisiones/scon/Agosto/1710-070807-07-0334.htm.

[166] Constitutional Chamber of the Supreme Court of Justice of Venezuela, Exp. 00-2672, Caracas, Venezuela, August 7, 2007. *Apartado* VI. Available at: http://www.tsj.gov.ve/decisiones/scon/Agosto/1710-070807-07-0334.htm.

without distinction of the legal relationship that might exist between the petitioner and the Administration."[167]

214. The Tribunal therefore overruled the decision of the *a quo* judge, considering that the student who requested access to his academic records "has a right according to which the Office of Academic Control (*Oficina de Control de Estudios*) should turn over information on his academic development during the time that he was associated with the university. It should allow him to review his file and even take notes on its content, as well as copy it if he needs to."[168]

6. Jurisprudence regarding restrictions on the right of access to information

a. Jurisprudence on the general regime of limits to the right of access to information

215. As has been previously explained in this book, limits to the right of access to information must have a legitimate purpose that is in keeping with the provisions of Article 13.2 of the Convention. Also, they must be prescribed clearly and precisely by law, interpreted restrictively, and subject to broad and strict judicial control, just to name a few of the characteristics that make restrictions on this right acceptable in the eyes of the inter-American system. In light of this, it would be useful to examine the region's jurisprudence on this topic.

216. For example, the Constitutional Court of Colombia has developed and incorporated into its jurisprudence several criteria on limitations of the right of access to information. These limitations are highly compatible with the standards that the Office of the Special Rapporteur has promoted to the regions' States.

217. In a case on the supposed unconstitutionality of a law that regulates hidden spending, the Colombian court stated the principles used to determine the limits of the right of access. Effectively, this court found that, "A restriction of the right of access to public information – or the establishment of a legal exemption that holds back certain information – is only legitimate when: i) the restriction is authorized by law or the Constitution; ii) the provision that establishes the limit is clear and precise enough in its terminology that it does not provide opportunity for arbitrary or disproportionate actions of public officials; iii) public officials who chose to take refuge in the exemption give written justification of their decision, including citation of the legal or constitutional provision that authorizes it; iv) the law establishes a temporal limit on the exemption; v) adequate systems for watching over the information are in place; vi) administrative and judicial controls of the exempted actions or decisions are in place; vii) the exemption applies to the content of public documents but not to their existence; viii) the exemption applies to public servants, but does not block journalists who access the information from publishing it; ix) the exemption is strictly subject to principles of reasonability and proportionality; and x) judicial action or recourses are in place to challenge the decision to exempt particular information."[169]

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[167] Constitutional Chamber of the Supreme Court of Justice of Venezuela, Exp. 00-2672, Caracas, Venezuela, August 7, 2007. *Apartado* VI. Available at: http://www.tsj.gov.ve/decisiones/scon/Agosto/1710-070807-07-0334.htm.

[168] Constitutional Chamber of the Supreme Court of Justice of Venezuela, Exp. 00-2672, Caracas, Venezuela, August 7, 2007. *Apartado* VI. Available at: http://www.tsj.gov.ve/decisiones/scon/Agosto/1710-070807-07-0334.htm.

[169] Full Chamber of the Constitutional Court, *Sentencia* C-491/07, *Expediente* D-6583, Bogotá, Colombia, July 27, 2007. *Fundamento jurídico* 12. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/C-491-07.htm.

b. Jurisprudence on the necessity of setting limits by law

218. Regarding the obligation to enact exemptions to the right of access through an act of the legislature, the Colombian court has said that, "No other branch of government has the authority to impose limits on this fundamental right. Doing so would be stepping outside its authority and contradicting the provisions of the Constitution."[170]

219. The court ratified this principle in a case in which Air Force authorities denied a citizen access to certain information because the information was confidential in accordance with Air Force rules contained in an administrative edict. The court found that it "is evident that the confidentiality of the administrative investigations into aerial accidents that the [Air Force] cites as grounds for the denial of documents to the petitioners does not originate in the law but rather in an edict from the Administration, handed down in the exercise of its regulatory function, as is the Aeronautics Regulations Manual (*Manual de Reglamentos Aeronáuticos*), passed by resolution [...] of the head of the Administrative Department of Civil Aeronautics (*Departamento Administrativo de la Aeronáutica Civil*). By the same token, being as it is that this case does not concern an exemption in the strict sense, such a regulation can hardly be relied upon to dismiss the plaintiff's claims."[171]

c. Jurisprudence on the need for laws that establish limitations that are clear and precise, not vague or generic

220. Likewise, the Colombian court established clear rules on the need for laws that place limits on the right to access to be written in clear and precise language. In this sense, the Court found that a law of this kind "must be precise and clear in defining what kind of information can be made confidential and what authorities can do so."[172] According to the court, the Constitution rejects "generic or vague provisions that can end up being a kind of general authorization for authorities to keep secret any information they feel is adequate at their discretion. So that this does not happen and the general rule of publicity is not inverted, the law must clearly and precisely establish the kind of information that can be made confidential, the conditions under which it can be made confidential, the authorities that can make it confidential, and the systems of control that supervise the actions that for this reason remain confidential."[173]

d. Jurisprudence on the need for limited and reasonable time limits to be established on confidential information

221. Based on the rule of time limits for confidential material, the Colombian court found that a law that did not place a time limit on the confidentiality of disciplinary investigations was "a

[170] Third Review Chamber of the Constitutional Court, *Sentencia* T-705, see files T-1613624, T-1613625 T.1613626, T-1613627 joined, Bogotá, Colombia September 7, 2007. *Fundamento jurídico* 9. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/T-705-07.htm.

[171] Invocation of judgment T-1268/91, issued by the Full Chamber of the Constitutional Court, *Sentencia* C-491/07, *Expediente* D-6583, Bogotá, Colombia, June 27, 2007. *Fundamento jurídico* 11. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/C-491-07.htm.

[172] Full Chamber of the Constitutional Court, *Sentencia* C-491/07, *Expediente* D-6583, Bogotá, Colombia, June 27, 2007. *Fundamento jurídico* 11. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/C-491-07.htm.

[173] Full Chamber of the Constitutional Court, *Sentencia* C-491/07, *Expediente* D-6583, Bogotá, Colombia, June 27, 2007. *Fundamento jurídico* 11. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/C-491-07.htm.

disproportionate restriction on the exercise of [...] fundamental rights."[174] The court ruled that the law was constitutional, but with the caveat that once the evidence had been gathered in the disciplinary process, the file should be made public. The court stated that, "Under these conditions, the public can be freely informed of the charges, the removal of charges, and the supporting evidence. The public can then access the file, even before any ruling is issued, ensuring that if new evidence emerges from the public scrutiny, it can be assessed before the final decision is made."[175] Extending the classification of information beyond this would be disproportionate and a violation of the right of access to public information.

e. Jurisprudence on the need for strict proportionality when the confidential nature of information is invoked

222. On December 3, 2007, the Second Review Chamber of the Constitutional Court of Colombia ruled on a writ of amparo (*tutela*) filed for the denial of information by the National Defense Ministry. In the case, a group of individuals had requested the names of the commanders of a checkpoint in an area where there had been a massacre. The information was needed to begin legal proceedings for failure in the duty to protect.[176]

223. The ministry denied the request for information, arguing that providing the names of these individuals affected their judicial guarantees, "among them the most elemental, the presumption of innocence, expressly recognized in [...] many international human rights treaties [because] [n]ot recognizing this right implies that the military and law enforcement personnel whose names are sought [...] are presumed guilty."[177]

224. The Constitutional Court found: (1) that in the right of access to information, a test of strict constitutionality must be applied—that is, at the moment of restricting the right, the State must give sufficiently clear and compelling reasons demonstrating that confidentiality is useful, absolutely necessary, and strictly proportional to achieve a legitimate aim; and (2) that in some cases, keeping names confidential could meet both requirements – for example when it could violate the right to life and personal integrity. In this case, the court found that confidentiality was neither proportionate nor necessary. In its opinion, on analyzing the details of the case, the tribunal indicated that "the decision does not meet the standards of necessity and strict proportionality required by strict scrutiny of the [...] measure [because] the decision of the Defense Ministry nullifies the right of citizens to access information held by State institutions. In reality, the protection of due process and the presumption of innocence of the Police Force members whose names the appellant requests could be achieved through measures that are less damaging to the right of access to information."[178]

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[174] Full Chamber of the Constitutional Court, *Sentencia* C-491/07, *Expediente* D-6583, Bogotá, Colombia, June 27, 2007. *Fundamento jurídico* 11. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/C-491-07.htm.

[175] Full Chamber of the Constitutional Court, *Sentencia* C-491/07, *Expediente* D-6583, Bogotá, Colombia, June 27, 2007. *Fundamento jurídico* 11. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/C-491-07.htm.

[176] Second Revision Chamber of the Constitutional Court, *Sentencia* T-1025/07, Bogotá, December 3, 2007. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/T-1025-07.htm.

[177] Second Revision Chamber of the Constitutional Court, *Sentencia* T-1025/07, Bogotá, December 3, 2007. Fundamento jurídico 8. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/T-1025-07.htm.

[178] Second Revision Chamber of the Constitutional Court, *Sentencia* T-1025/07, Bogotá, December 3, 2007. Fundamento jurídico 12. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/T-1025-07.htm.

225. The Court incorporated several international law standards on human rights to reiterate the precedency of freedom of expression over measures that would restrict it. The Court invoked Inter-American Court of Human Rights' Advisory Opinion 5/85 and its judgment in the case of *Claude Reyes et al. v Chile*.

226. However, the court found that in some exceptional cases, the measure could be proportional and necessary. This exception, which was not put forward during the legal proceeding, obligates an assessment of the details of who requested the names, the situation of those who live with their families or with family members outside the barracks, and whether the release of the information could violate their rights to life and personal integrity. Taking these details into consideration, it would be possible to deny a request for the names of the police officers, as long as the General Commissioner of the National Police certifies the conditions under which they live and justifies their names not being made public by citing the need to protect their lives and the lives of their families in the face of clear and present risk that is not avoidable in a way that is less restrictive to rights.

227. However, considering that this hypothetical was not the case, the Court concluded that maintaining the confidentiality of the names of the soldiers who participated in the massacre would not meet the standards of a strict test of constitutionality, and therefore the Police Force could take other measures less damaging to the right of access to information.

228. Therefore, the court ordered that the information requested by the petitioner be turned over, and that it include the names of the members of the Police Force, indicating their dates of service and their postings. However, the court found that the an inclusion of a name on the list should in no way be understood as a suspicion, indication, or recognition of responsibility.

229. In this way, the court incorporated into its jurisprudence the international and Inter-American framework of human rights protection through Article 13 of the American Convention on Human Rights, looking to interpretations of that article by the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, and several statements and principles prepared by the Office of the Special Rapporteur for Freedom of Expression.

230. The Colombian court recalled that, "In Article 13.1, the American Convention on Human Rights holds that 'Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.'" It also recalled that the Inter-American Court of Human Rights reasoned that, "Article 13 indicates that freedom of thought and expression 'comprise the liberty to seek, receive, and disburse information and ideas of all kind….' This language establishes literally that those who are under the protection of the Convention have not only 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. Therefore, when an individual's freedom of expression is illegally restricted, it is not only this individual's right that is being violated, but also the rights of everyone to 'receive' information and ideas. It is here that the right protected by Article 13 takes on special scope and character. Here the two dimensions of freedom of expression are clear. Effectively, this freedom demands on one hand that no one be arbitrarily blocked or prevented from expressing their own thoughts, and therefore represents an individual right; but it also implies, on the other hand, the collective right to receive any information and learn the thoughts of others."[179]

[179] I I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 69.

231. The Court also recalled that in its 2001 report, the Office of the Special Rapporteur for Freedom of Expression established that, "The absence of participation by society in terms of access to information that directly affects its members prevents the full development of democratic societies, increasing the potential for corrupt conduct in the administration of government and spawning policies of intolerance and discrimination. The inclusion of all segments of society in the processes of communication, decision-making, and development is fundamental to ensuring that the needs, opinions, and interests of individual citizens are taken into account in the processes of policy design and decision-making."[180]

f. Jurisprudence on the obligation to prepare a public version of a document when the requested information is partially confidential

232. In an April 22, 2009 ruling on a writ of review, Mexico's Federal Institution of Access to Public Information reaffirmed – upon finding that part of the requested information was of a confidential nature and part of a public nature – the obligation of preparing a public version of requested documents to guarantee the right of access to information.

233. In this case, the appellant requested that the National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores*) turn over information on a banking institution to carry out the sale of loans of its credit portfolio to another legal entity.

234. The National Banking and Securities Commission denied the request for information, arguing that it was "confidential" both because it contained personal information and because it was protected by banking secrecy.

235. In order to resolve the dispute on its merits, the Institute did an analysis of Mexican legislation on sale of loans and banking secrecy and concluded that "information on assets of a legal entity that include facts and actions of an economic, accounting, legal, or administrative nature and that could be useful to a competitor, [...]. is [only] confidential when it is designated as such by those – either legal entities or individuals – it concerns; that is to say, information that refers to the private affairs, in this case, of a legal entity, and that is not excepted by a legal provision determining its publicity, must be considered confidential."

236. In the instant case, the Institute found that the requested documents "contain information on the assets of several of the legal entities that make up the credit portfolio that is the object of the sale of loan. In this sense, because it involves economic and legal actions on the assets of a legal entity, the information is of a confidential nature, considering that were it to be publicized, it would reveal economic facts or actions of a legal entity that could be useful to a competitor or affect business negotiations."

237. However, the Institute also noted that the requested documents contained information "relevant to the public performance of the National Banking and Securities Commission as the authority responsible for statements that the subject made regarding the request for authorization, as well as the names of the public servants who endorsed the communication in carrying out their duties."

[180] IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2001. OEA/Ser.L/V/II.114. Doc. 5 rev. 1. 16 April 2002. Chapter III. para. 14. Available at: http://www.cidh.org/relatoria/showarticle.asp?artID=137&IID=1

238. For this reason, although part of the information contained in the requested communication was information on the assets of a legal entity, as well as other sensitive information, another part of the same document referred to the National Banking and Securities Commission's failure of supervision and control, information which is by nature public.

239. Consequently, the Institute ordered "the National Banking and Securities Commission [...] to prepare a public version of the requested information" that only leaves out information that according to the classification criteria is protected by confidentiality.

g. Jurisprudence on the State's duty to demonstrate causality and proof of damage in order to invoke the confidentiality of an administrative procedure

240. On August 18, 2009, Chile's Transparency Council (*Consejo para la Transparencia*) made an important contribution to determining when records or deliberation produced prior to the execution of a resolution, measure or public policy should be confidential. The Council determined that if authorities wish to invoke confidentiality on the grounds that information refers to a deliberation or records produced prior to the execution of a resolution, measure, or policy, they are obligated to demonstrate that it complies with two requirements: (1) causality between the records or prior deliberation and the final resolution, measure, or policy; and (2) proof of damage to its work due to the distribution of the requested information.[181]

241. The incident that gave rise to this decision was a denial by the Chilean Undersecretary of Transportation of a request for information. The individual who made the request sought information on a 2008-2009 road tolls study carried out by a consultant. The Undersecretary maintained that the requested information was of a confidential nature.[182]

242. In the instant case, the Council determined that the grounds for confidentiality found in Chilean legislation demand "two copulative requirements that must be applied and satisfied: (...) a. That the information required involves records or deliberation prior to the adoption of a resolution, measure, or policy. b. That the publicity, knowledge, or distribution of the information would affect the body's proper completion of its functions."[183]

243. According to the Council, the authority failed to demonstrate "that the distribution of the information would cause damage to the proper compliance of its functions."[184] The court added

[181] Transparency Council, Amparo Ruling A79-09, August 18, 2009, Available at: http://www.consejotransparencia.cl/prontus_consejo/site/artic/20090706/asocfile/20090706202325/a79_09_decision_fondo.pdf.

[182] The Undersecretary of Transportation denied the request for information on the grounds of secrecy or confidentiality, grounds, which are valid "when the publicity, communication, or knowledge of the information (when that information includes records or deliberations produced prior to adopting a resolution, measure, or policy) would effect the body's due compliance with its functions, notwithstanding the publication of those documents after the decision is made." In this sense, in his opinion, "the requested roadway toll study is a record that anticipates the eventual adoption of a public policy that allows for the confrontation of the traffic problems in the city of Santiago," for which reason, according to the grounds cited, it should be confidential.

[183] Transparency Council, *Amparo* Ruling A79-09, August 18, 2009, *Considerando* 3) Available at: http://www.consejotransparencia.cl/prontus_consejo/site/artic/20090706/asocfile/20090706202325/a79_09_decision_fondo.pdf.

[184] Transparency Council, *Amparo* Ruling A79-09, August 18, 2009, *Considerando* 5) Available at: http://www.consejotransparencia.cl/prontus_consejo/site/artic/20090706/asocfile/20090706202325/a79_09_decision_fondo.pdf.

that, "The information required in this case covers a subject of great public relevance, both for its social importance regarding urban transportation and because the funds involved are part of the United Nations Development Program, for which reason the public interest demands the fostering of social control over this information. Indeed, rather than negatively affecting the functions of a government agency, knowledge and distribution of this information could prove a benefit, making government action on the adoption of necessary measures to solve the urgent problem of the urban transportation of passengers in the city of Santiago more transparent."[185]

244. As a consequence, the Council ordered the Undersecretary of Transportation to turn over a copy of the 2008-2009 roadway toll study within 15 working days of the of the adoption of the decision, with the Council itself giving notice and verifying compliance.

7. Jurisprudence on the obligation to submit a denial of documents for reasons of national security to judicial review in chambers and at the discretion of the magistrate

245. On August 24, 1978, the District of Columbia Court of Appeals ruled in a *per curiam* opinion on a request that two American citizens made of the Central Intelligence Agency (CIA) for "a copy of any file you may have on me."[186] The CIA rejected the request and argued that the documents fell into several categories of exemption under the 1966 Freedom of Information Act (FOIA), Section 5 U.S.C. § 552 (b), for which reason it requested a dismissal.

246. The district court granted the motion and declined to inspect the documents in the judge's chambers. According to the court, the sworn statement of a CIA operations director was enough reason to reject the request for review made by the plaintiffs. Specifically, the court declined to conduct an in camera inspection of the documents and adduced that in regards to documents and reports specifically excluded from public access by statute, in-chamber reviews rarely happened and are almost never "necessary or appropriate." The District of Columbia Court of Appeals rejected this interpretation.

247. First, the Appeals Court began by noting that the purpose of FOIA was "to increase the American people's access to information." Second, the Court reviewed FOIA's legislative evolution, which has amplified access under the act rather than restricted it.

248. Specifically, the court highlighted a 1974 modification that held that denials of requests for access should be reviewed by a court *in novo*, which would review the relevant documents in judges' chambers.[187] The court found that because of this modification, the inspection of documents in chambers is necessary and appropriate under many circumstances. In addition, it held that although the government's sworn statements indicated that the documents clearly fell under legal exemption, the burden to prove this statement fell to the government.

249. In this sense, Congress' intention to provide for an objective and independent judicial review on matters of national security is clear. Congress trusted in the magistrates' ability to analyze these matters in chambers and without risking the country's security. In matters of this kind, judges must pay close attention to the government's arguments; however the inspection of

[185] Transparency Council, *Amparo* Ruling A79-09, August 18, 2009, *Considerando* 6) Available at: http://www.consejotransparencia.cl/prontus_consejo/site/artic/20090706/asocfile/20090706202325/a79_09_decision_fondo.pdf.

[186] Ray v. Turner, 585 F.2d 1187, 190 U.S. App. D.C. 290, 292 (1978), "a copy of any file you may have on me." The court's Web page is: http://www.cadc.uscourts.gov/internet/home.nsf. The full decision is available at: http://openjurist.org/587/f2d/1187/ray-v-turner.

[187] According to Section 5 U.S.C. § 552(a)(4)(B).

the documents in chambers is subject "to the discretion of the court, both in matters of national security as well as in any other kind."

250. According to the court, "A judge has discretion to order in camera inspection on the basis of an uneasiness, on a doubt he wants satisfied before he takes responsibility for a de novo determination. Government officials who would not stoop to misrepresentation may reflect an inherent tendency to resist disclosure, and judges may take this natural inclination into account."

251. In this case, the judges ruled that the arguments made by the CIA to deny the requested documents did not clearly demonstrate that the documents were covered by exemptions to FOIA's principle of maximum disclosure. As a result of this and of the broad interpretation of in camera inspections procedure, the Appeals Court ordered that the case be returned to the lower court for a new ruling in accordance with the aforementioned criteria.

8. Jurisprudence on the obligation to not censor confidential information that has been made public, nor persecute journalists or editors for their good-faith publication of the information

252. The Constitutional Court of Colombia also reiterated that it is illegitimate to censor the publication of government information obtained by journalists, even if that information is confidential. In this sense, the Court indicated that "law [...] that prohibits the publication of extracts or summaries of the content of confidential investigations until after a ruling is handed down is inexecutable as it is clearly and unequivocally a form of censorship, violating as it does the freedom and independence of journalism activities."[188] The obligation to maintain the confidentiality of the information should be understood to be binding essentially on public officials but not on journalists who have obtained the information in good faith and can only be subject to subsequent liability under the terms of Article 13.2 of the American Convention.

[188] Full Chamber of the Constitutional Court, *Sentencia* C-038/96, Bogotá, Colombia, February 5, 1996. *Fundamento jurídico* 16. Available at: http://www.corteconstitucional.gov.co/relatoria/1996/C-038-96.htm.

APPENDIX

A. AMERICAN CONVENTION ON HUMAN RIGHTS

(Signed at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969)

Article 13. Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
    a) respect for the rights or reputations of others; or
    b) the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

B. INTER-AMERICAN DECLARATION OF PRINCIPLES ON FREEDOM OF EXPRESSION

PREAMBLE

REAFFIRMING the need to ensure respect for and full enjoyment of individual freedoms and fundamental rights of human beings under the rule of law;

AWARE that consolidation and development of democracy depends upon the existence of freedom of expression;

PERSUADED that the right to freedom of expression is essential for the development of knowledge and understanding among peoples, that will lead to a true tolerance and cooperation among the nations of the hemisphere;

CONVINCED that any obstacle to the free discussion of ideas and opinions limits freedom of expression and the effective development of a democratic process;

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

RECALLING that freedom of expression is a fundamental right recognized in the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights, the Universal Declaration of Human Rights, Resolution 59 (1) of the United Nations General Assembly, Resolution 104 adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Covenant on Civil and Political Rights, as well as in other international documents and national constitutions;

RECOGNIZING that the member states of the Organization of American States are subject to the legal framework established by the principles of Article 13 of the American Convention on Human Rights;

REAFFIRMING Article 13 of the American Convention on Human Rights, which establishes that the right to freedom of expression comprises the freedom to seek, receive and impart information and ideas, regardless of borders and by any means of communication;

CONSIDERING the importance of freedom of expression for the development and protection of human rights, the important role assigned to it by the Inter-American Commission on Human Rights and the full support given to the establishment of the Office of the Special Rapporteur for Freedom of Expression as a fundamental instrument for the protection of this right in the hemisphere at the Summit of the Americas in Santiago, Chile;

RECOGNIZING that freedom of the press is essential for the full and effective exercise of freedom of expression and an indispensable instrument for the functioning of representative democracy, through which individuals exercise their right to receive, impart and seek information;

REAFFIRMING that the principles of the Declaration of Chapultepec constitute a basic document that contemplates the protection and defense of freedom of expression, freedom and independence of the press and the right to information;

CONSIDERING that the right to freedom of expression is not a concession by the States but a fundamental right;

RECOGNIZING the need to protect freedom of expression effectively in the Americas, the Inter-American Commission on Human Rights, in support of the Special Rapporteur for Freedom of Expression, adopts the following Declaration of Principles:

PRINCIPLES

1. Freedom of expression in all its forms and manifestations is a fundamental and inalienable right of all individuals. Additionally, it is an indispensable requirement for the very existence of a democratic society.

2. Every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights. All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.

3. Every person has the right to access to 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 the obligation 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.

5. Prior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression.

6. Every person has the right to communicate his/her views by any means and in any form. Compulsory membership or the requirements of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression. Journalistic activities must be guided by ethical conduct, which should in no case be imposed by the State.

7. Prior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments.

8. Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.

9. The murder, kidnapping, intimidation of and/or threats to social communicators, as well as the material destruction of communications media violate the fundamental rights of individuals and strongly restrict freedom of expression. It is the duty of the state to prevent and investigate such occurrences, to punish their perpetrators and to ensure that victims receive due compensation.

10. Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public

person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.

11. Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as "*desacato laws,*" restrict freedom of expression and the right to information.

12. Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of people's right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.

13. The exercise of power and the use of public funds by the state, the granting of customs duty privileges, the arbitrary and discriminatory placement of official advertising and government loans; the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law. The means of communication have the right to carry out their role in an independent manner. Direct or indirect pressures exerted upon journalists or other social communicators to stifle the dissemination of information are incompatible with freedom of expression.

C. RESOLUTION OF THE GENERAL ASSEMBLY OF THE ORGANIZATION OF AMERICAN STATES 2009

AG/RES. 2514 (XXXIX-O/09)

ACCESS TO PUBLIC INFORMATION: STRENGTHENING DEMOCRACY[189]

(Adopted at the fourth plenary session, held on June 4, 2009)

THE GENERAL ASSEMBLY,

RECALLING resolutions AG/RES. 1932 (XXXIII-O/03), AG/RES. 2057 (XXXIV-O/04), AG/RES. 2121 (XXXV-O/05), AG/RES. 2252 (XXXVI-O/06), AG/RES. 2288 (XXXVII-O/07), and AG/RES. 2418 (XXXVIII-O/08), "Access to Public Information: Strengthening Democracy";

HAVING SEEN the Annual Report of the Permanent Council to the General Assembly as it pertains to the status of implementation of resolution AG/RES. 2418 (XXXVIII-O/08), "Access to Public Information: Strengthening Democracy" (AG/doc.4992/09 add. 1) ;

CONSIDERING that Article 13 of the American Convention on Human Rights provides that "[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice";

CONSIDERING ALSO that Article 19 of the Universal Declaration of Human Rights includes the right "to seek, receive and impart information and ideas through any media and regardless of frontiers";

RECALLING that the Plan of Action of the Third Summit of the Americas, held in Quebec City in 2001, indicates that governments will ensure that national legislation is applied equitably to all, respecting freedom of expression and access to public information by all citizens;

EMPHASIZING that Article 4 of the Inter-American Democratic Charter states that transparency in government activities, probity, responsible public administration on the part of

[189] The Bolivarian Republic of Venezuela reaffirms the statement made in the footnote to resolution AG/RES. 2288 (XXXVII-O/07) as we consider that access to public information in the hands of the state must be consonant with Article 13 of the American Convention on Human Rights, which establishes that: "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice." Venezuela maintains that a democratic system must guarantee access to public information and must allow all citizens, without exception, to seek, receive, and impart information. When a citizen seeks information, he or she exercises, consciously and fully, the right to access information and the state must foster the adoption of legislative provisions that guarantee that right. Furthermore, the state must guarantee that same right for the poor, the underprivileged, and the socially excluded, based on the principle of equality before the law. Accordingly, it is necessary "to instruct the IACHR to conduct a study on how the state can guarantee to all citizens the right to receive public information in the framework of the principle of transparency and objectivity, in full exercise of the right to freedom of expression and as an effective mechanism of participation." Along those lines, we underscore the conclusions and reflections of the special meeting on the right to public information, held on April 28, 2006, within the framework of the OAS, in which it was recognized that the media are responsible for ensuring that citizens receive, without distortions of any type, information provided by the state. Venezuela laments the fact that the message transmitted by the poor is again falling on deaf ears and it shares the views of those who denounce that denying access to information to the poor perpetuates their social and economic ostracism. For that reason, Venezuela again urges the Inter-American Commission on Human Rights to take the initiative and, under the powers vested in it by the American Convention on Human Rights, conduct the aforementioned study and report its findings to the General Assembly of the Organization of American States at its next regular session.

governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy;

REAFFIRMING the public nature of the acts and decisions of government organs and of the reasons for them, the documents supporting them or constituting a direct and essential complement to them, and the procedures used to promulgate them, without prejudice to exceptions that may be established in accordance with domestic law;

NOTING that, in the Declaration of Nuevo León, the Heads of State and Government affirmed that 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, and that, in that connection, they are committed to providing the legal and regulatory framework and the structures and conditions required to guarantee the right of access to public information;

CONSIDERING that the General Secretariat has been providing support to member state governments in dealing with the topic of access to public information;

NOTING the work accomplished by the Inter-American Juridical Committee on this issue, in particular resolution CJI/RES. 123 (LXX-O/07), "Right to Information," attached to which is the report entitled "Right to Information: Access to and Protection of Information and Personal Data in Electronic Form" (CJI/doc.25/00 rev. 2), and resolution CJI/RES. 147 (LXXIII/08), "Principles on the Right of Access to Information";

RECOGNIZING that the goal of achieving an informed citizenry must be rendered compatible with other societal aims, such as safeguarding national security, public order, and protection of personal privacy, pursuant to laws passed to that effect;

RECOGNIZING ALSO that democracy is strengthened through full respect for freedom of expression, access to public information, and the free dissemination of ideas, and that all sectors of society, including the media, through the public information they disseminate to citizens, may contribute to a climate of tolerance of all views, foster a culture of peace and non-violence, and strengthen democratic governance;

TAKING INTO ACCOUNT the important role civil society can play in promoting broad access to public information;

TAKING NOTE of the Declaration of Principles on Freedom of Expression of the Inter-American Commission on Human Rights (IACHR); and of the Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE (Organization for Security and Co-operation in Europe) Representative on Freedom of the Media, the Special Rapporteurship on Freedom of Expression of the Inter-American Commission on Human Rights, and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression, adopted in 2006;[190]

[190]. Reservation by Nicaragua: The Government of Nicaragua wishes to place on record its commitment to the promotion and protection of human rights, as enshrined in the Political Constitution of our country. At the same time, it considers it necessary for the Inter-American Commission on Human Rights not to apply a double standard in its analysis of the situation of human rights in the region. The elements of transparency, veracity of sources of information, and the impartiality and universality thereof would contribute to greater objectivity in the work of the Commission; therefore, its recommendations should not be used as an instrument to pressure some states.

TAKING NOTE ALSO of the reports of the IACHR Special Rapporteurship on Freedom of Expression on the situation of access to information in the Hemisphere for 2003, 2004, 2005, 2006, 2007, and 2008;

TAKING NOTE FURTHER of the report of the special meeting of the Committee on Juridical and Political Affairs (CAJP), held at the headquarters of the Organization of American States on December 15, 2008, with the participation of the member states, the General Secretariat, and civil society representatives, to examine the possibility of preparing an inter-American program on access to public information (CP/CAJP-2707/09);

RECALLING initiatives taken by civil society regarding access to public information, in particular, the Declaration of Chapultepec, the Johannesburg Principles, the Lima Principles, and the Declaration of the SOCIUS Peru 2003: Access to Information, as well as the outcomes of the Regional Forum on Access to Public Information, of January 2004; the Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information, sponsored by the Carter Center, which addresses ways of advancing the implementation and exercise of the right of access to information; and the results of the International Seminar on Press, Litigation, and the Right to Public Information, held in Lima, Peru, on November 28, 2007;

BEARING IN MIND therefore the Americas Regional Conference on the Right of Access to Information, organized by the Carter Center and held in Lima, Peru, from April 28 to 30, 2009;

RECALLING that the media, the private sector, and political parties can likewise play an important role in facilitating access by citizens to information held by the state;

TAKING INTO ACCOUNT the Report on the Questionnaire regarding Legislation and Best Practices on Access to Public Information (CP/CAJP-2608/08), which is a contribution to the study of best practices concerning access to public information in the Hemisphere; and

WELCOMING WITH INTEREST the study "Recommendations on Access to Information," submitted to the CAJP on April 24, 2008 (CP/CAJP-2599/08), a study organized by the Department of International Law pursuant to resolution AG/RES. 2288 (XXXVII-O/07), "Access to Public Information: Strengthening Democracy,"

RESOLVES:

1. To reaffirm that everyone has the right to seek, receive, access, and impart information and that access to public information is a requisite for the very exercise of democracy.

2. To urge member states to respect and promote respect for everyone's access to public information and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application.

3. To encourage member states, in keeping with the commitment made in the Declaration of Nuevo León and with due respect for constitutional and legal provisions, to prepare and/or adjust their respective legal and regulatory frameworks, as appropriate, so as to provide the citizenry with broad access to public information.

4. Also to encourage member states, when preparing or adjusting their respective legal and regulatory frameworks, as appropriate, to provide civil society with the opportunity to participate in that process; and to urge them, when drafting or adjusting their national legislation, to take into account clear and transparent exception criteria.

5. To encourage member states to take the necessary measures, through their national legislation and other appropriate means, to make public information available electronically or by any other means that will allow ready access to it.

6. To encourage civil society organizations to make information related to their work available to the public.

7. To encourage states to consider, when they are designing, executing, and evaluating their regulations and policies on access to public information, where applicable, with the support of the appropriate organs, agencies, and entities of the Organization, implementing the recommendations on access to public information contained in the study organized by the Department of International Law of the Secretariat for Legal Affairs and submitted to the Committee on Juridical and Political Affairs (CAJP) on April 24, 2008.

8. To instruct the Permanent Council, in the framework of the CAJP, to:

a. Convene in the second half of 2010 a special meeting with the participation of the member states, the General Secretariat, and representatives of civil society to examine the possibility of preparing an inter-American program on access to public information, bearing in mind the recommendations contained in the aforementioned study;

b. Update the Report on the Questionnaire regarding Legislation and Best Practices on Access to Public Information (CP/CAJP-2608/08), requesting to that end contributions from member states, the Special Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR), the Inter-American Juridical Committee (CJI), the Department of International Law, the Department of State Modernization and Good Governance of the Secretariat for Political Affairs, interested entities and organizations, and civil society representatives; and

c. Include in the study mentioned in the preceding subparagraph the right of all citizens to seek, receive, and disseminate public information.

9. To instruct the Department of International Law to draft, in cooperation with the CJI, the Special Rapporteurship for Freedom of Expression of the IACHR, and the Department of State Modernization and Good Governance, and with the cooperation of the member states and civil society, a model law on access to public information and a guide for its implementation, in keeping with international standards in this field.

10. To instruct the Department of State Modernization and Good Governance, and to invite the Special Rapporteurship for Freedom of Expression of the IACHR, to support the efforts of member states that request such support in the design, execution, and evaluation of their regulations and policies with respect to access by citizens to public information.

11. To instruct the Department of International Law to update and consolidate the studies and recommendations on access to public information and the protection of personal data, using as a basis the contributions of member states, the organs of the inter-American system, and civil society.

12. To instruct the Special Rapporteurship for Freedom of Expression of the IACHR to continue to include in the Commission's Annual Report a report on the situation regarding access to public information in the region.

13. To instruct the General Secretariat to identify new resources to support member states' efforts to facilitate access to public information; and to encourage other donors to contribute to this work.

14. To request the Permanent Council to report to the General Assembly at its fortieth regular session on the implementation of this resolution, the execution of which shall be subject to the availability of financial resources in the program-budget of the Organization and other resources.