

CHAPTER IV

REPORT ON ACCESS TO INFORMATION IN THE HEMISPHERE¹

A. Introduction

1. The Office of the Special Rapporteur for Freedom of Expression has engaged in continuous efforts to ensure and expand access to information in the Americas, in the understanding that its effective implementation constitutes a touchstone for the consolidation of the right to freedom of expression, and provides a framework for the establishment of policies of transparency necessary to strengthen democracies.

2. In this spirit, and in pursuance of the mandates issued by the Heads of State and Government at the Third Summit of the Americas, held in Quebec City, Canada, in April 2001,² the Special Rapporteur for Freedom of Expression of the IACHR has undertaken to conduct an annual exercise to monitor the adoption of new laws and regulatory systems pertaining to the guaranteeing of the right to freedom of information in the OAS member States.

3. To this end, the Office published in 2001 a "Report on Action with respect to *Habeas Data* and the Right of Access to Information in the Hemisphere."³ This report contains an account of existing legislation and practices within the OAS member States with respect to the right of access to information and the action of *habeas data*. The report was based on the information provided by the member States in response to the official questionnaires issued by the Office of the Special Rapporteur, as well as on information gathered from national and international nongovernmental organizations (NGOs). In the 2001 Report, the Special Rapporteur concluded, in the light of the information obtained, that "practices contributing to a culture of secrecy with respect to state-held information continue to be followed in most countries, because of insufficient awareness of the specific provisions regulating this exercise, or because, given the vague, general language used in the provision, agents in possession of such information opt in favor of denying it, out of fear of punishment," and further stressed that these practices "represent a threat to the constitutional democratic system, permitting a greater incidence of corruption."⁴ In the 2001 report, the Special Rapporteur for Freedom of Expression also recommended that the following measures be taken to guarantee the rights to freedom of information and *habeas data* in accordance with international standards:

¹ This chapter was made possible through the assistance of Kathleen Daffan, a second-year law student at Columbia University, who provided the research and the preliminary drafting of this report, and of Andrea de la Fuente, a recent law graduate from Universidad Torcuato Di Tella, Argentina, who further assisted in the drafting of this report. Both were interns at the Office of the Special Rapporteur for Freedom of Expression during 2003. The Office thanks them for their contributions.

² See Third Summit of the Americas, Declaration and Plan of Action. Québec, Canada, 20-22 April 2001. During the Summit, the Heads of State and Government declared their commitment to support "the work of the inter-American human rights system in the area of freedom of expression through the Special Rapporteur for Freedom of Expression of the IACHR, as well as proceed with the dissemination of comparative jurisprudence, and seek to ensure that national legislation on freedom of expression is consistent with international legal obligations."

³ See IACHR, Annual Report 2001, Volume II, Report of the Office of the Special Rapporteur for Freedom of Expression [hereinafter Annual Report of the IACHR 2001], Chapter III, *Report on Action with Respect to Habeas Data and the Right to Access to Information in the Hemisphere*, OEA/Ser.LV/II.114 Doc. 5, rev. 1, April 16, 2002.

⁴ Annual Report of the IACHR 2001, Chapter III, *Report on Action with Respect to Habeas Data and the Right to Access to Information in the Hemisphere*, para. 164.

1. The promulgation of laws permitting access to state-held information and supplemental provisions regulating the exercise of such access, as well as the promulgation of laws providing for the right of individuals to obtain access to personal data through the action of *habeas data*, taking international standards into account in this regard.

2. The existence of avenues of recourse for independent review to determine whether restrictions established for reasons of national defense are balanced, taking into account the protection of other fundamental rights consistent with international standards in the area of human rights and the right of a society to be informed, *inter alia*, about matters of public interest.

3. The introduction of legislation on civil society participation and consensus-building.

4. Policies promoting and disseminating information on these individual and collective rights as legal tools for achieving transparency in government, protecting personal privacy against the arbitrary or illegitimate handling of personal data, and promoting accountability to and participation by society.⁵

4. On December 11 and 12, 2002, the Office of the Special Rapporteur for Freedom of Expression of the IACHR cooperated with the Inter-American Dialogue⁶ in a conference on access to information held in Buenos Aires, Argentina, with the aim of collaborating in the Inter-American Dialogue's efforts to further democracy in Latin America. Local co-organizers were the Association for Civil Rights (*Asociación por los Derechos Civiles*) and the Center for Legal and Social Studies (*Centro de Estudios Legales y Sociales*, CELS). In attendance were leading decision makers and members of institutions working on access to information issues throughout Latin America, the United States, and the United Kingdom. The conference brought together academics, civil society organizations, journalists, lawmakers, and members of public and private entities with expertise in the areas of enacting, enforcing, or interpreting access to information laws throughout the region.⁷

5. In June 2003, the General Assembly of the OAS recognized the importance of access to information with the adoption of Resolution AG/Res. 1932 (XXXIII-O/03).⁸ In this Resolution, the General Assembly reaffirmed the statement of Article 13 of the American Convention in that everyone has the freedom to seek, receive, and impart information and held that access to public information is a requisite for the very exercise of democracy.⁹ Further, the General Assembly reiterated that states are obliged 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.¹⁰ Paragraph 6 of the Resolution resolved to "instruct the Inter-American Commission on Human Rights, through the Special Rapporteur for Freedom of Expression, to continue including in its annual report a report on access to public information in the region." As a consequence, this

⁵ Annual Report of the IACHR 2001, Chapter III, *Report on Action with Respect to Habeas Data and the Right to Access to Information in the Hemisphere*, para. 166.

⁶ The Inter-American Dialogue is a center for policy analysis, exchange, and communication on issues in Western Hemisphere affairs. Information on the Inter American Dialogue is available at <http://www.thedialogue.org>.

⁷ See Inter-American Dialogue, *supra*, note 6, *Access to Information in the Americas: A Conference Report*, 9.

⁸ This resolution is included in the Annex section of this report.

⁹ OAS, Resolution AG/RES. 1932 (XXXIII-O/03), para. 1.

¹⁰ *Id.*, para 2.

chapter will summarize the current situation of the member States in relation to the right to freedom of information, in an effort to record the development of the States in this area.

6. In August 2003, the President of the Permanent Council of the OAS requested the collaboration of the Office of the Special Rapporteur for Freedom of Expression in the presentation of a document containing proposals for the Council's compliance with paragraph 5 of Resolution AG/Res. 1932 (XXXIII-O/03), which instructed the Permanent Council to "promote seminars and forums designated to foster, disseminate, and exchange experiences and knowledge about access to public information so as to contribute, through efforts by the member states, to fully implementing such access." The Special Rapporteur for Freedom of Expression of the IACHR presented this document, included in the Annex Section of this report, during the session of the Permanent Council held on September 10, 2003.¹¹ Many of the proposals suggested here reiterate the considerations made before the Permanent Council.

7. Public discussion and debate about access to state-held information can only improve the strength of American democracies. And yet, the Office of the Special Rapporteur for Freedom of Expression would like to take this opportunity to emphasize to each member State that more focused attention is necessary to achieve compliance with the American Convention. In fact, a recent study found that 84% of the journalists interviewed, from 18 OAS member States, felt that it was difficult or very difficult to obtain information or documents from public officials in their countries.¹² In order to correct this situation and adequately guarantee citizens' right to state-held information, States must make concentrated, simultaneous advances on at least three different levels.

8. First, the theoretical background of the right of access to information should be widely understood as both deep and broad. Guaranteeing public access to state-held information is not only a pragmatic tool that strengthens democratic and human rights norms and promotes socioeconomic justice; it is also a human right protected under international law.

9. Secondly, this conceptual foundation must be accompanied by an access to information regime that is well-conceived and based on a balanced confluence of procedural coordination, civic activism, and political will. Only a legislative and regulatory structure that relies on such principles can achieve the degree of openness fostered by Article 13 of the American Convention.

10. Finally, the adequate provision of the right of access to state-held information requires a specific, clear and transparent system of exceptions. It is inevitable that states will occasionally encounter a tension between the guarantee of the right of access to information and other valid state interests, such as the protection of individual privacy and the maintenance of national security. Defining and weighing these various interests presents a challenge of enormous delicacy and importance.

11. Given the practical complexity of providing the right of access to state-held information as guaranteed by Article 13 of the American Convention on Human Rights, the

¹¹ OEA/Ser.G CP/doc. 3780/03, August 29, 2003 Original: Spanish.

¹² Study by the International Center for Journalists, July 7, 2003. For more information, see <http://www.libertad-prensa.org/foetemplate.html>.

Office of the Special Rapporteur would like to take this opportunity to elaborate requirements and strategies for adequate compliance with the Convention. This discussion will be followed by a summary of the laws and practices on the right of access to information in each of the OAS member States.

B. Adequately Guaranteeing Access to Information

1. Theoretical framework

12. The value of access to information extends to the promotion of the most important goals in the Americas, including transparent and effective democracies, respect for human rights, stable economic markets, and socioeconomic justice. Under the Inter-American System, access to state-held information is protected by Article 13.1 of the American Convention, which guarantees “the 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.” A state must acknowledge all of these factors in order to guarantee sufficiently the right to access information.

13. It is widely acknowledged that without public access to state-held information, the political benefits that flow from a climate of free expression cannot be fully realized. At the Third Summit of the Americas, the Heads of State and Government recognized that the sound administration of public affairs requires effective, transparent, and publicly accountable government institutions. They also assigned the highest importance to citizen participation through effective control systems.¹³ In accordance with this view, the Inter-American Court of Human Rights has stated that the “concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole.”¹⁴ Access to information promotes accountability and transparency within the State and enables a robust and informed public debate. In this way, access to information empowers citizens to assume an active role in government, which is a condition for sustaining a healthy democracy.

14. A transparent mechanism that provides access to state-held information is also essential to foster a climate that is respectful of all human rights. The right of access to information is also a component of the right to know the truth. In this respect, the Inter-American Commission has said that “(T)he right to know the truth is a collective right that ensures society access to information that is essential for the workings of democratic systems, and it is also a private right for relatives of the victims, which affords a form of compensation, in particular, in cases where amnesty laws are adopted. Article 13 of the American Convention protects the right of access to information.”¹⁵ Access to state-held information is similarly necessary to prevent future abuses by government officials and also to ensure that effective remedies against such abuses are guaranteed.

¹³ See Third Summit of the Americas, Declaration and Plan of Action. Québec, Canada, 20-22 April 2001.

¹⁴ I/A Court H.R., Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights), November 13, 1985, Ser. A, No 5 [hereinafter Advisory Opinion OC-5/85], para. 69.

¹⁵ Case 10.488, Report N° 136/99, Ignacio Ellacuría, S.J. y Otros (El Salvador), December 22, 1999, Annual Report of the IACHR 1999, OEA, Ser.L/V/II.106, Doc. 6 rev. April 13, 1999, Original: Spanish.

15. Access to information laws can also constitute a stabilizing force in financial markets:

To understand and anticipate market movements, investors require timely and accurate information on company financial indicators and macroeconomic data (...) Information on price and product standards helps consumers select products. Records of health inspections, school performance, and environmental data help citizens make informed social choices.¹⁶

16. This line of argumentation proposes that given the role of access to information in improving the flow of information in these various sectors, increasingly open regimes can benefit the world economy: "because better information flows can improve resource allocation, they may be able to mitigate global financial volatility and crises."¹⁷

17. As the Office of the Special Rapporteur elaborated in last year's Report on Freedom of Expression and Poverty, access to information is also a critical tool in the alleviation of socioeconomic injustice. The poor often suffer from a lack of access to information about the very services that the government offers to help them survive. Disenfranchised groups need access to information about these services as well as the many other decisions made by government and private agencies that profoundly affect their lives.¹⁸

18. The effective exercise of access to information also helps combat corruption, which has been identified by the Organization of American States as a problem requiring special attention in the Americas, given its capability to seriously undermine the stability of democracies. During the Third Summit of the Americas, the Heads of State and Government recognized the need to step up efforts to combat corruption, and highlighted the need to support initiatives to allow for greater transparency to ensure that the public interest is protected and that governments are encouraged to use their resources effectively for the collective good.¹⁹ Corruption can be controlled adequately only through joint efforts aimed at raising the level of transparency of government action.²⁰ Transparency of government action can be enhanced by creating a legal system that allows society to have access to information and that eliminates or restricts the resistance by governments to releasing information, delays in the processes for granting requested information, and the imposition of unreasonable fees on access. A recent report on global corruption has noted that "only by insisting on both access to information and greater transparency in every sphere of society, from the local to the intergovernmental, can civil society, business and government hope to forestall and expose corruption, and ensure that the corrupt will run out of places to hide."²¹

¹⁶ World Bank, World Development Report 2002, "Building Institutions for Markets", 189.

¹⁷ *Id.*

¹⁸ See IACHR, Annual Report 2002, Volume III, Report of the Special Rapporteur for Freedom of Expression, Chapter IV, *Freedom of Expression and Poverty*, OEA/Ser.L/V/II.117, Doc. 5, rev.1, 7 March 2003.

¹⁹ See Third Summit of the Americas, Declaration and Plan of Action, Quebec City, Canada, April 20-22, 2001.

²⁰ See Inter-American Convention against Corruption, Inter-American System of Legal Information, OAS.

²¹ Transparency International, *Global Corruption Report 2003*, 6.

19. Access to information is protected by the American Convention on Human Rights. Article 13.1 of the Inter-American Convention states that the right to freedom of thought and expression "includes the 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."

20. In order to understand the implications of access to information as guaranteed by the Convention, we must look to the guidance offered by the Inter-American Commission on Human Rights and by the Inter-American Court of Human Rights, given their interpretative authority with respect to the rights protected in the American Convention. As its Statute declares, the Commission was created to "promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter."²² For this reason, the Inter-American Court has written that "(...) if a State signs and ratifies an international treaty, especially one concerning human rights, such as the American Convention, it has the obligation to make every effort to apply with the recommendations of a protection organ such as the Inter-American Commission[.]"²³ In addition, the General Assembly of the OAS has urged its members to follow all recommendations of the Inter-American Commission.²⁴

21. Based on the text of Article 13.1 of the Convention, the Inter-American Commission on Human Rights has affirmed that "the right to freedom of expression includes both the right to disseminate and the right to seek and receive ideas and information."²⁵

22. The approval by the Inter-American Commission of the Declaration of Principles on Freedom of Expression developed by the Office of the Special Rapporteur for Freedom of Expression affirmed the notion that in order to adequately comply with the obligations set out by the Convention, States must take effective measures to ensure access to state-held information. Principle 4 states that:

Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of the right (...).

23. The Commission has supported the States' obligation to ensure the effective guarantee of the right to know the truth about serious past violations of human rights. In this respect, the Commission has said that States' obligations under the Convention include "the establishment of investigating committees whose membership and authority must be determined in accordance with the internal legislation of each country, or the provision of the necessary resources so that the judiciary itself may undertake whatever investigation may be necessary."²⁶

²² Article 1.1, Statute of the Inter-American Commission on Human Rights. Approved by Resolution No. 447 taken by the General Assembly of the OAS at its ninth regular session, held in La Paz, Bolivia, October, 1979, in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/SER.L/V/I.4 rev. 8 (May 22, 2001), at 131, [hereinafter BASIC DOCUMENTS].

²³ I/A Court H. R. "*Loayza Tamayo*" Case, September 7, 1997, Series C No. 33, para. 80.

²⁴ See, e.g., Resolution AG/RES. 1917 (XXXIII-0/03).

²⁵ See IACHR, *Report on Terrorism and Human Rights*, OAS/Ser.L./II.116, Doc. 5 rev. 1 corr. 22 October 2002, 180.

²⁶ Annual Report of the Inter-American Commission on Human Rights 1985-1986, 193.

24. The obligation of the States to guarantee access to state-held information is also supported by the Inter-American Court's interpretation of Article 1.1 of the American Convention on Human Rights. In the *Velazquez Rodriguez* case, after considering that "The first obligation assumed by the States Parties under Article 1 (1) is 'to respect the rights and freedoms' recognized by the Convention,"²⁷ the Court went on to say that:

The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention (...).²⁸

25. In its Advisory Opinion of November 13, 1985, the Inter-American Court further interpreted the provision of Article 13 of the Convention as containing both an individual and a collective right:

Those subject to 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... the freedom of expression and information requires, on the one hand, that no one be arbitrarily hindered or prevented from expressing his own thoughts, and therefore represents a right of every individual. But it also entails a collective right to receive any information and to have access to the thoughts of others.²⁹

26. The importance of an effective right of access to information has a solid basis in international and comparative human rights law. Although not all countries and international organizations ground the right of access to state-held information in the right to freedom of expression, there is a growing consensus that governments do have positive obligations to provide state-held information to their citizens, since this right is interdependent with other fundamental rights.³⁰

27. The Special Rapporteur on Freedom of Opinion and Expression of the United Nations has stated clearly that the right to access information held by public authorities is protected by Article 19 of the International Covenant on Civil and Political Rights (ICCPR).³¹ The protection of this right was found to be derived from the right to freedom of expression provided by the Covenant, which states that this right "shall include freedom to seek, receive

²⁷ I/A Court H.R. *Velásquez Rodríguez* Case, Judgment of 28 July 1988, Series C No. 4, at para. 165.

²⁸ *Id.*, para. 166.

²⁹ Advisory Opinion OC-5/85, *supra*, note 14, para. 30.

³⁰ See, e.g., *Shabalala v. Attorney-General of the Transvaal & Ano.* (South Africa), 1996 (1) S A 725 (CC); Eur. Ct. H.R., Case of *Guerra and Others v. Italy*, Judgment of 19 February 1998, Application No. 0014967/89; *Jane Doe v. Board of Commissioners of Police for the Municipality of Toronto* (Canada), 74 O.R. (2d) 225 (Div. Ct.); Saras Jagwanth, "The Right to Information as a Leverage Right" in Calland & Tilley, eds., *The Right to Know, The Right to Live*, Open Democracy Advice Center, 2002; In the United Nations System, the interdependence of free access to information with all other rights was made clear in 1946, when the General Assembly adopted Resolution 59(I) stating: "freedom of information is a fundamental human right and...the touchstone of all the freedoms to which the United Nations is consecrated, Toby Mendel, *Freedom of Information as an Internationally Protected Right*, Article XIX, 2000.

³¹ See Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Abid Hussein, UN doc. E/CN.4/1999/64, 29 January, 1999.

and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice (...)."³²

28. Also, it is interesting to note that the right of access to state-held information is recognized more explicitly in the Inter-American System than in the European Human Rights System. Article 10 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the European Convention"), says: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." The word "seek" is absent from this formulation of the right to free expression.³³ But despite this difference, the European Court has held in two recent cases that individuals do have the right to access state-held records, grounding it in the right to private or family life instead of the freedom of expression. Article 13 of the American Convention, by contrast, explicitly protects the "freedom to seek, receive and impart information and ideas of all kinds."³⁴ Given that the freedom to *receive* information should prevent public authorities from interrupting the flow of information to individuals, the word *seek* would logically imply an additional right.³⁵

29. While the international comparisons mentioned above are useful, there are more concrete legal strategies for arriving at an interpretation of the American Convention. The Vienna Convention on the Law of Treaties establishes rules for the interpretation of Treaties, and Article 31 of the Vienna Convention says that the ordinary meaning of the terms must be taken into account in their context. The context includes the preamble, annexes and any agreements or instruments made "in connection with the conclusion of the treaty."³⁶ To this end, it is important to note the preamble of the American Convention, where the State parties reaffirmed their "intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man."³⁷ Perhaps even more illuminating is Article 29 of the Convention, entitled "Restrictions Regarding Interpretation":

No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;

³² International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

³³ See Eur. Ct. H.R., *Case of Gaskin v. United Kingdom*, Judgement of 7 July 1989, Application No. 000104054/83; *Guerra and Ors v. Italy*, *supra*, note 30.

³⁴ Emphasis added. American Convention on Human Rights, in BASIC DOCUMENTS, *supra*, note 22, Article 13.1.

³⁵ See Toby Mendel, "Freedom of Information as an Internationally Protected Human Right", *supra*, note 30, 3.

³⁶ See Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 [hereinafter Vienna Convention on the Law of Treaties], Article 31.2.

³⁷ American Convention on Human Rights, in BASIC DOCUMENTS, *supra*, note 22, Preamble.

- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

30. The emphasis on choosing the least restrictive interpretation possible and the dramatic importance of representative democracy in these contextual excerpts both suggest that an interpretation of the word "seek" that protects the right of access to state-held information is appropriate. The Vienna Convention on the Law of Treaties also offers other tools that further support this outcome.³⁸

31. Article 31.3.b of the Vienna Convention establishes that "[t]here shall be taken into account, together with the context...any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." In the case of the American Convention on Human Rights, the relevant interpretations in the course of its application are those made by the Inter-American Court and Commission. The Commission has unambiguously interpreted Article 13 to include a right of access to state-held information, and the Court's jurisprudence seems to support this analysis. Consequently, guaranteeing access to state-held information must be understood as more than a way of achieving political, fiscal, and socioeconomic advantage; it is also a human right protected by the American Convention.

2. Implementation of Access to Information regimes

32. Achieving an access to information regime that complies with the requirements of the American Convention on Human Rights is much more complex than simply declaring that the public may have access to state-held information. There are specific legislative and procedural characteristics that must be exhibited by any compliant access to information regime, including: a principle of maximum disclosure, a presumption of publicity with respect to meetings and key documents, broad definitions of the type of information that is accessible, reasonable fees and deadlines, independent review of denials, and sanctions for noncompliance. Even given all of these qualities, an access to information law could still never be successful without the presence of strong political will to implement it, along with an active civil society.

33. The foundation of any compliant access to information law is a presumption that all information held by public bodies should be subject to disclosure, which is sometimes referred to as the "principle of maximum disclosure."³⁹ Of course, information held by public

³⁸ See, e.g., Vienna Convention on the Law of Treaties, *supra*, note 36, Article 32, which allows interpretation of the "preparatory work of the treaty" in certain cases. However, the preparatory work of the American Convention on Human Rights makes it clear that "the debate turned on aspects of technical precision more than it did on substance" (Report of the Rapporteur of Committee I, Doc. 60 19 Nov. 1969, page 7). In fact, none of the member States commented on the language that subsequently became Article 13.1, and it was accepted in the form as it appeared in the Draft Convention. There is no documentation concerning interpretation of the word "seek."

³⁹ See, e.g., Article XIX, *The Public's Right to Know: Principles on Access to Information Legislation* (June 1999), available in <http://www.article19.org/docimages/1113.htm> [hereinafter Freedom of Information Principles], Principle 1. Article XIX is a global non-governmental organization dedicated to promoting freedom of expression and access to official information. Its Freedom of Information Principles have been used widely by international organizations and NGOs. See, e.g., Annual Report 1999, Vol. III, Report of the Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II.111, Doc. 3 rev., Vol. III, at 88; continued...

authorities is not acquired for the benefit of the officials that control it, but for the public as a whole.⁴⁰ For this reason, an access to information law must ensure that "[p]ublic bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information."⁴¹ Everyone present in the territory of the country should benefit from this right. The exercise of this right should not require individuals to demonstrate a specific interest in the information."⁴² New access to information regimes will need to openly promote this principle of maximum disclosure, through public dissemination of information regarding the right of access to information, its scope and its attendant procedures. Training within State organs is equally important, and should address how to maintain and access records efficiently, as well as the importance and legal protection of access to information.⁴³

34. Another essential element in the provision of the right of access to information is the presumption of openness with respect to certain important government functions. First, there should be a presumption that all meetings of governing bodies are open to the public. This tenet should affect any meeting involving the exercise of decision-making power, including administrative proceedings, court hearings, and legislative proceedings. Meetings may only be closed in accordance with established procedures and where adequate justifications exist, and the decision itself must always be public.⁴⁴ Second, public bodies should be under obligation to publish key information, including:

- operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public;
- information on any requests, complaints or other direct actions which members of the public may take in relation to the public body;
- guidance on processes by which members of the public may provide input into major policy or legislative proposals;
- the types of information which the body holds and the form in which this information is held; and
- the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.⁴⁵

...continued

Commission on Human Rights Resolution 2001/47, UN Commission on Human Rights, 57th Sess. Supp. No. 3, at 209, E/CN.4/RES/2001/47 (2001), Preamble.

⁴⁰ See Toby Mendel, "Freedom of Information as an Internationally Protected Human Right." Article XIX, *supra*, note 30, 1.

⁴¹ Freedom of Information Principles, Principle 1.

⁴² Freedom of Information Principles, Principle 1.

⁴³ Freedom of Information Principles, Principle 3.

⁴⁴ Freedom of Information Principles, Principle 7.

⁴⁵ Freedom of Information Principles, Principle 2.

35. The right of access to information as protected by the American Convention implicitly contains a broad understanding of the word "information," and States must match this breadth in their own laws. The public should have access to all records held by a public body, regardless of the source; the information may have been produced by a different body but should still be accessible. The date of production is also irrelevant. In addition, "information" encompasses all types of storage or retrieval systems, including documents, film, microfiche, video, photographs, and others.⁴⁶

36. The cost of searching and duplication can be significant for certain requests, so access to information laws may include provisions about charging a reasonable fee to those who request information. However, the cost of gaining access to information must never be high enough to deter potential applicants. Some states differentiate between commercial requests and private or public interest requests to address this problem.⁴⁷

37. Access to information laws must also establish a reasonable but strict deadline, requiring States to respond in a timely manner. In order to avoid putting an undue burden on the public body, some laws may choose to have a short time limit in which the State must acknowledge receipt of the request, and then up to several more weeks to substantively comply with the request. Requests should be handled promptly on a "first come, first served" basis, except when an applicant indicates an urgent need for the information, in which case the documents should be provided immediately.⁴⁸

38. Every adequate access to information regime must also protect an individual's right to appeal any decision in which information is denied. The independent administrative body charged with hearing this appeal can be an existing body such as an Ombudsman or Human Rights Commission or one established for this purpose. It should be composed of independent persons who are appointed by representative bodies, and required to meet standards of competence and follow strict conflict of interest rules. The body should have full powers to investigate any appeal, and to dismiss the appeal or require the body to disclose the information. When faced with a negative decision by the administrative body, both the applicant and the public body should have the right to appeal to the courts.⁴⁹

39. In addition to these remedies, there must be a system of sanctions in place, in the event that an agency fails or refuses to comply with the access to information law. The independent administrative body that hears appeals should have the power to fine public bodies for obstructive behavior. It should also have the power to refer certain cases to the court system, if the proceedings disclose evidence of criminal activity, such as damaging or destroying records, using documents for an illegal purpose, or criminal obstruction of access.⁵⁰

⁴⁶ Freedom of Information Principles, Principle 1. See also, Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Abid Hussein, UN Doc. E/CN.4/1999/64, 29 January, 1999, para. 12.

⁴⁷ Freedom of Information Principles, Principle 6.

⁴⁸ Kate Doyle, *Freedom of Information in Mexico*, 2 May 2002, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/index3.html>.

⁴⁹ See, e.g., Freedom of Information Principles, Principle 5.

⁵⁰ Freedom of Information Principles, Principle 5.

40. Finally, a successful access to information regime is absolutely dependent on the substantial political will necessary to implement it. For example, there must be a willingness to allocate public funds toward the establishment of an independent appellate body as well as educational programs to inform the public. Public officials must also be willing to adjust their day-to-day practices to consistently reflect a culture of openness. Perhaps most importantly, civil society must be willing and able to capitalize on the right of access to information in favor of the public interest. Non-governmental organizations and individual citizens can do this by participating in the debate surrounding the formation, implementation, and utilization of the laws that guarantee access to information, and then by using these laws to participate more fully in their democracies.

3. Exceptions to the Presumption of Publicity

41. Access to state-held information must be subject to certain exceptions, since there are legitimate state goals that could be harmed by the publication of particularly sensitive information. In Resolution AG/RES 1932 (XXXIII-0/33), the General Assembly of the Organization of American States recognized that “the goal of achieving an informed citizenry must sometimes 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” and urged member States “to take into consideration the principles of access to information in drawing up and adapting national security laws.”

42. Article 13.2 of the American Convention on Human Rights provides for circumstances under which States can deny public access to sensitive information and still comply with their obligations under international law. In this respect, the Convention states that restrictions must be expressly defined in the law and be “necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of the national security, public order, or public health or morals.”⁵¹ As was recently pointed out,⁵² it follows from this principle that exceptions must be provided by legislation which is carefully drafted and widely publicized, and approved by the formal mechanisms established in the legal systems.⁵³ Consequently, exceptions that are not expressly defined by law or do not fit reasonably into one of these categories are not acceptable. The Inter-American Court wrote in 1985 that limitations to the rights granted in Article 13 “must meet certain requirements of form, which depend upon the manner in which they are expressed. They must also meet certain substantive conditions, which depend upon the legitimacy of the ends that such restrictions are designed to accomplish.”⁵⁴

⁵¹ American Convention on Human Rights, in BASIC DOCUMENTS, *supra*, note 22, Article 13.2.

⁵² José Antonio Guevara, “El Secreto Oficial,” in *Derecho de la Información: Conceptos Basicos, Colección Encuentros*, Ecuador, August 2003, 438-439.

⁵³ *Id.*, footnote 342. Guevara notices that the Inter-American Court of Human Rights has said that: “Within the framework of the protection of human rights, the word “laws” would not make sense without reference to the concept that such rights cannot be restricted at the sole discretion of governmental authorities. To affirm otherwise would be to recognize in those who govern virtually absolute power over their subjects. On the other hand, the word “laws” acquires all of its logical and historical meaning if it is regarded as a requirement of the necessary restriction of governmental interference in the area of individual rights and freedoms. The Court concludes that the word “laws,” used in Article 30, can have no other meaning than that of formal law, that is, a legal norm passed by the legislature and promulgated by the Executive Branch, pursuant to the procedure set out in the domestic law of each State”, Inter-American Court of Human Rights, The Word “Laws” in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86, May 9, 1986, Inter-Am. Ct. H.R. (Ser. A) No. 6 (1986).

⁵⁴ Advisory Opinion OC-5/85, *supra*, note 14, para. 37.

43. The list of materials or documents that might be subject to public knowledge or classified as “secret” by the States generally comprise those related to personal privacy; national defense; external relations; prevention, prosecution, and punishment of illegal conduct (even criminal behavior); the functioning of public administration; and the economic interests of the State.⁵⁵

44. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information are guidelines that the Commission, like other international authorities, considers to provide authoritative guidance for interpreting and applying the right to freedom of expression in such situations.⁵⁶

45. It is consistent with the Johannesburg Principles⁵⁷ that when one of the criteria provided by Article 13 of the American Convention is used to justify a restriction on the disclosure of state-held information, the burden of proof is on the State to show that the restriction is compatible with the standards of the Inter-American System of Human Rights. To meet this burden, the government must show that the information meets a strict three-part test:

1. the information must relate to a legitimate aim listed in the law;
2. disclosure must threaten to cause substantial harm to that aim; and
3. the harm to the aim must be greater than the public interest in having the information.⁵⁸

46. In fulfilling the first requirement of this test, the aim is only legitimate if it is compatible with the limited exceptions listed in Article 13.2 of the American Convention. In addition, the aims that are listed in the law should be defined narrowly and precisely, both in terms of content and duration. For example, the justification for classifying information on the basis of national security should no longer be available when the threat subsides.⁵⁹ All

⁵⁵ See José Antonio Guevara, *El Secreto Oficial*, in “*Derecho de la Información*” *supra*, note 52, 431-432.

⁵⁶ See, e.g., The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (November 1996), *available at* <http://www.article19.org/docimages/511.htm>, last visited 30 July 2003 [hereinafter Johannesburg Principles]. The Johannesburg Principles constitute a set of voluntary principles drafted by an international group of experts on human rights and media law, and are frequently invoked by the UN Commission on Human Rights (see, e.g., Commission on Human Rights Resolution 2002/48, UN Commission on Human Rights, 58th Sess., UN Doc. E/CN.4/RES/2002/48 (2002), Preamble; Resolution 2001/47, UN Commission on Human Rights, 57th Sess., Supp. No. 3, at 209, E/CN.4/RES/2001/47 (2001), Preamble, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (See e.g., Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights resolution 1993/45, UN Commission on Human Rights, 52nd Sess., E/CN.4/1999/39, 22 March 1996, para. 4), the UN Special Rapporteur on the independence of judges and lawyers (See, e.g. Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Kumaraswamy, Addendum, Report on the mission to Peru, UN Commission on Human Rights, 54th Sess., E/CN.4/1998/39/Add.1, 19 February 1998, introduction.) and the Special Representative of the Secretary-General on Human Rights defenders (See e.g. Report submitted by Ms. Hina Jilani, Special Representative of the Secretary-General on human rights defenders in accordance with Commission resolution 2000/61, UN Commission on Human Rights, 57th Sess, E/CN.4/2001/94, 26 January 2001, para. 14)., and the Special Representative of the Secretary-General on human rights defenders.

⁵⁷ Johannesburg Principles, Principle 1(d).

⁵⁸ Freedom of Information Principles, Principle 4.

⁵⁹ Freedom of Information Principles, Principle 4.

exceptions listed in the law should be based on the content, rather than the type, of document requested.⁶⁰

47. In fulfilling part two of the above test by assessing whether the harm threatened is "substantial," States must consider both the short and long term consequences of the disclosure. As an example, exposing a pattern of bribery in the legislature may have negative consequences for the stability of the public body in the short term. However, in the long term it will help eliminate corruption and strengthen the legislative branch. Thus, the *overall* effect of disclosure must be substantially harmful in order to justify an exception.⁶¹

48. Finally, part three of the test involves an explicit balancing of the harm in question with the public interest in releasing the information. In the above example, the state-held information that exposes bribery may be private in nature, but the public interest in exposing corruption among democratic representatives should outweigh the legitimate aim of privacy. Thus, in order to protect the fundamental right of its citizens to access to state-held information, every justification given by a State must do more than relate to one of the aims in Article 13.2. The justification must also threaten to cause substantial harm to the aim, and this harm must be greater than the public interest in having the information.

49. This process of evaluation required to adequately justify a denial of access to state-held information takes on particular urgency and importance when the legitimate aim in question is that of protecting national security. Restrictions to access to information on these grounds must be highly scrutinized in order to determine whether they are legitimate. In the Report of the Inter-American Dialogue it was noted that:

[T]he standards of the inter-American system—whereby rights can be restricted only under certain rules—may provide an appropriate foundation for the legislatures to embrace the principle of strict scrutiny in matters of national security. One such rule holds that the restriction must be equal to the objective sought. Since Article 13 of the American Convention on Human Rights does indeed include information access rights, the principle of strict scrutiny may in fact be considered to apply.⁶²

50. In its Report on Terrorism and Human Rights, the Inter-American Commission on Human Rights highlighted the importance of the Johannesburg Principles with the objective of creating a balance between the public's right to information and the state's legitimate need to protect keep information secret in order to protect national security.⁶³ In this report, the Commission points out that the Principles confirm that "[a]ny restriction on the free flow of information may not be of such nature as to thwart the purposes of human rights and humanitarian law. In particular, governments may not prevent journalists or representatives of intergovernmental or non-governmental organizations with a mandate to monitor adherence to human rights or humanitarian standards from entering areas where there are reasonable grounds to believe that violations of human rights or humanitarian law have been committed".⁶⁴

⁶⁰ Freedom of Information Principles, Principle 4.

⁶¹ Freedom of Information Principles, Principle 4.

⁶² Comment by Victor Abramovich, *supra* note 6, 16.

⁶³ See IACHR, *Report on Terrorism and Human Rights*, *supra*, note 25, 203-204.

⁶⁴ Johannesburg Principles, Principle 19.

Further, the Report stresses that any exemption provided in access to information laws "must not only serve to protect the national security or ability to maintain public order, it must also require that the information should be disclosed unless the harm to one of these legitimate interests would be substantial."⁶⁵

51. The Johannesburg Principles define legitimate national security interests, stating:

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose or demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.⁶⁶

52. The Johannesburg Principles acknowledge that, when facing a lawfully declared state of emergency, States may have to impose additional restrictions on access to information, but "only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law."⁶⁷ In such cases, States bear the burden of proof in showing that the restrictions are not excessive in light of the exigencies of the situation. States that are under lawfully declared emergency situations and considering suspending any guarantees under Article 13 of the Convention should take into account the importance of freedom of expression for the functioning of democracy and guaranteeing other fundamental rights.

53. To the extent that access to information must be restricted in times threatening public order or national security, the State must carefully balance the threat with the public interest, and define the exceptions in a way that does not intensify the precarious status of human rights obligations. Thus, the Johannesburg Principles dictate that "[a]ny restriction on the free flow of information may not be of such a nature as to thwart the purposes of human rights and humanitarian law. In particular, governments may not prevent journalists or representatives of intergovernmental or non-governmental organizations with a mandate to monitor adherence to human rights or humanitarian standards from entering areas where there are reasonable grounds to believe that violations of human rights or humanitarian law are being, or have been, committed."⁶⁸ Indeed, governments may not restrict the entry of the above parties even into areas that are known to be experiencing violent conflict, unless doing so would pose "a clear risk to the safety of others."⁶⁹

⁶⁵ See IACHR, *Report on Terrorism and Human Rights*, *supra*, note 25, 204.

⁶⁶ Johannesburg Principles, Principle 2.

⁶⁷ Johannesburg Principles, Principle 3.

⁶⁸ Johannesburg Principles, Principle 19.

⁶⁹ Johannesburg Principles, Principle 19.

54. It is equally important that restrictions on access to information do not thwart the guarantee of fundamental human rights in the aftermath of threats to national security. As such, any restrictions based on national security should be bounded by a reasonable time limit. The Inter-American Commission acknowledged this principle in its 1998 Annual Report:

The administration of swift and effective justice, especially in exposing, sanctioning, and providing remedy for atrocities or grave violations of human rights by agents of the state, often requires reference to documents that have been classified as secret or inaccessible for reasons of national security. Maintaining State secrecy in such cases perpetuates impunity and erodes State authority, inwardly and outwardly. Such legal and administrative obstacles must be removed, and the way cleared for the Commission to establish state and individual responsibility for such reprehensible conduct, with all of the legal and moral consequences it entails, by opening the archives and declassifying documents requested by appropriate national as well as international authorities.⁷⁰

55. Finally, it is important that modern democracies establish a series of constitutional checks on the "official secrets." Keeping a record on secret information is necessary to ensure that it exists in accordance with legislation. In some cases, a public organ is created to this effect, and other times it is the Judicial Power which exerts this control.⁷¹ In every case, it must be evaluated whether the restrictions imposed outweigh the importance of the public's right to information.

C. Access to Information in the Member Countries

1. Introduction

56. The General Assembly of the OAS resolved, in Paragraph 6 of Resolution 1932 (XXXIII-0/03), to "instruct the Inter-American Commission on Human Rights, through the Special Rapporteur for Freedom of Expression, to continue including in its annual report a report on access to public information in the region." Pursuant to this mandate, this section of this report will summarize the current situation of the member States in relation to the right to freedom of information, in an effort to record the developments of the States in this area.

57. To this end, in July 2003, and following the procedure adopted for the 2001 Annual Report, an official questionnaire was issued to the permanent missions of the OAS member States, requesting them to provide information on constitutional and legal provisions as well as facts about jurisprudence and implementation procedures regarding access to information.⁷² The information received from the States has been integrated with research done

⁷⁰ See IACHR, Annual Report 1998, Chapter 7, *Recommendations to member states in areas in which steps need to be taken towards full observance of the human rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights*, para. 20.2. OEA/Ser.L/V/II.102 Doc. 6 rev. April 16, 1999, Original: Spanish.

⁷¹ This has been pointed out by Guevara, *supra*, note 52, 439-440.

⁷² In transmitting the questionnaire, the Office of the Special Rapporteur included the following clarification: "The concept of "access to information" is often confused with the concept of "*habeas data*". As explained in the 2001 Annual Report, the Office of the Special Rapporteur for Freedom of Expression understands that "access to information" refers to state-held information that should be available to the public. An action of *habeas data* refers to the right of any individual to access information *referring to him*, and to modify, remove or correct such information when necessary. This questionnaire only requests information about access to public information." The questions were formulated as follows:

1. Are there constitutional provisions that recognize the right to access to state-held information?
Please attach the text of the pertinent norms.

by media sources and non-governmental organizations in order to provide an overview of the situation in each member State.

58. In this chapter, the Special Rapporteur reports on existing laws and practices in the member States of the Organization of American States with respect to the right of access to information. This account demonstrates that the topic of access to information has received a remarkable amount of attention during the past two years. Several states, such as Mexico, Jamaica, Panama, and Peru, have passed laws guaranteeing this right or are currently considering similar legislation, and civil society has been vigilant in observing the States' progress.

59. As of the date of the submission of this report to the Inter-American Commission on Human Rights for its consideration and inclusion in the IACHR's Annual Report, only the States of Argentina, Chile, Colombia, Honduras, Mexico, Paraguay, Suriname, Uruguay, and Venezuela, out of all the member countries of the Organization of American States, replied to the questionnaire sent by the Special Rapporteur. The Special Rapporteur greatly appreciates the efforts of these States in gathering the requested information, and encourages all member States of the OAS to collaborate in the preparation of future studies by this Office in order to better take advantage of the conclusions derived from them. It must be noted that the information provided below for the member States is an update of the information obtained in 2001, based on the information provided by the States in response to the questionnaire sent in July 2003, and complemented by information obtained from other sources such as non-governmental organizations (NGOs). Also, it must be noted that the excerpts below do not contain all the information submitted by the States, but rather a summary of it.

...continued

2. Are there laws and/or regulations that recognize and protect the right to access state-held information? Please attach the text of the laws or regulations.
3. Are there laws and/or regulations that limit, restrict, or define exceptions to the right to access to information? Please attach the text.
4. Are there legal proposals under consideration that recognize and protect the right to access to information? Please attach the text of the proposals.
5. Are there legal proposals under consideration that limit, restrict, or define exceptions to the right to access to information? Please attach the text.
6. Is there any jurisprudence in tribunals of justice that concedes access to information? Please attach a copy of the decisions from leading cases.
7. Is there jurisprudence in tribunals of justice that denies access to information? Please attach a copy of the decisions from leading cases.
8. Are there public campaigns to educate civil society and public functionaries about the right to access to information? If the answer is yes, describe these campaigns.
9. Is there a system to register requests for public information? If the answer is yes, describe the system and provide the following information:
 - a. How many requests did the State receive in the last two years? If possible, indicate the total number of requests directed to each state entity.
 - b. In how many cases during the last two years were requests denied completely? Partially? If possible, provide the reasons for these denials.
10. Are there local (provincial, municipal, departmental, etc.) norms regarding the right to access to information? Please attach the text of these norms.

60. The Special Rapporteur notes that since 2001, the issue of access to information has brought greater debate amongst the civil societies of member States, and several states have adopted positive measures towards the implementation of this right. However, as expressed in previous reports, the Rapporteur still believes that member States need to display greater political willingness to work toward amending their laws and ensuring that their societies fully enjoy freedom of expression and information. Democracy requires broad freedom of expression, and that cannot be pursued if mechanisms that prevent its generalized enjoyment remain in force in our countries. The Special Rapporteur again underscores the need for States to assume a stronger commitment toward that right, in order to help consolidate the Hemisphere's democracies.

61. The following paragraphs present the information gathered with respect to domestic provisions on freedom of information in the member States.

2. Laws and Practices on the Right to Access of Information: Information classified by country in alphabetical order

Argentina

62. The National Constitution of Argentina does not contain a specific provision regarding free access to state-held information. The official Argentine response to the questionnaire highlights that with the constitutional Reform of 1994 Argentina granted constitutional rank to several international instruments, amongst them the American Convention on Human Rights, which guarantees the right to "seek, receive and impart information and ideas of all kinds," as stated by Article 13 of the Convention.

63. Regarding legal provisions, a bill that would provide a comprehensive guarantee of access to information is under consideration and was already approved by the House of Representatives in May 2003. The bill will allow citizens to access databases from official organs, and provides for administrative and judicial sanctions to the public officials who fail to carry out the requests. It would also make public laws, decrees, and documents that have been kept secret by the State for more than 10 years and which have not been reclassified as secret.⁷³ Although approved by the House of Representatives, the bill is held up in the Senate.⁷⁴ The Special Rapporteur for Freedom of Expression encourages the treatment and approval by the Senate of the Bill under consideration. In October 2003, President Néstor Kirchner signed a decree which allows any person to gain access to information held by the State and by any organ that receives contributions or subsidies from the State. The decree establishes certain exceptions, such as when information is reserved for reasons of safety, national defense, or is protected by bank or fiscal secret.⁷⁵

⁷³ *La Nación* (Argentina), May 9, 2003, available at <http://www.lanacion.com> ; *El Clarín* (Argentina), May 19, 2003, available at <http://www.clarin.com.ar>.

⁷⁴ *El Clarín* (Argentina), *Apoyan medida de Kirchner*, October 21, 2003, available at <http://www.clarin.com.ar>.

⁷⁵ *El Clarín* (Argentina); *Kirchner firma un decreto para crear transparencia y controlar lobbies*, October 20, 2003, available at <http://www.clarin.com.ar>.

64. In the City of Buenos Aires, Law No. 104 of 1998 guarantees standing for all persons to request all information held by the State. The law includes exemptions for banking secrets, professional secrets, and other information exempted by specific laws, such as privacy laws. Requests must be made in writing and justification is not required. The law determines that replies are due in 10 days, with a one-time postponement of 10 days when absolutely necessary, and further establishes that if the information is not provided within the stipulated time frame, the requestor may seek a Court injunction to obtain the information, as stipulated in the national and city constitutions.⁷⁶

65. At the provincial level, the Argentine response points out that several provinces have passed laws that recognize free access to information.⁷⁷

66. Regarding the action of *habeas data*, Article 43 of the Argentine Constitution provides that:

All persons may file this action to ascertain what data about them is contained in public or private records or databases for the purpose of providing reports, and in the event of false or discriminatory information, can demand the removal, rectification, confidential treatment, or updating of the information concerned. The secrecy of news information sources cannot be affected.

67. National Law No. 25.326 of 2000 and Decree No. 1558 of 2001 regulate the above constitutional provision, and most provinces have also regulated in this respect in their constitutions and provincial legislation.

Bolivia

68. The Bolivian Constitution does not include provisions for the action of *habeas data* or regulating access to state-held information. The Statute of Journalists, however, does include provisions in this regard.

69. Article 9 of Chapter III of the Organic Statute of Journalists provides that:

No one may abridge the journalist's freedom of expression and information, subject to prosecution for the violation of constitutional rights.

70. Article 10 provides:

No one may adulterate or conceal news information in a manner prejudicial to the truth and the general welfare. Journalists may publicly denounce such adulteration or concealment and shall be protected from dismissal or reprisals.

⁷⁶ Martha Framelo, *The Freedom of Information campaign in Argentina*, posted October 14, 2003, available at <http://freedominfo.org/case/argentina.htm>.

⁷⁷ See Law No. 12.475 of 2002 of the Province of Buenos Aires on disclosure of information from public bodies of the Provincial State and Access to administrative documents; Law No. 8803 from 1999 of Córdoba on Access to information of acts by the state; Decree 486/1993 on Public Information; Law No. 4444 of Public Administration on publicity of the Acts of Government; Decree No. 462/1996 of Mendoza on publicity of the acts of government; Decree 929/2000 of the Province of Misiones; Law No. 1829 of 1984 and Law No. 3441 of 2002 of Rio Negro.

71. Although these articles exist, the professional statute does not carry the legislative force necessary to effectively ensure the citizenry's right of access to information or afford persons the protection inherent in the action of *habeas data*.

72. The Office of the Special Rapporteur has received information regarding an initiative by the government of Bolivia to carry out workshops for the discussion of a bill that would guarantee access to state-held information.

Brazil

73. Article 5 of the Constitution of the Federative Republic of Brazil provides:

All persons are assured of access to information and protection for the confidentiality of their sources when necessary for the exercise of their profession (...) (Section XIV).

[T]he right to *habeas data* is granted: a) to ensure knowledge of information relating to the person of the petitioner, contained in records or data banks of government entities or of public entities; b) for the correction of data, if the petitioner does not prefer to do so through confidential, judicial, or administrative proceedings (...) (Section LXXII)

74. A bill on Access to Public Information that would regulate Article 5 of the Constitution is being examined by the National Congress, and will be treated by the Chamber of Representatives. The bill would establish that every citizen has the right to receive information of personal, collective, or general interest from public organs, to be rendered in the time set out by law, subject to penalties. The bill would exclude from this provision the information that must be kept secret to guarantee the safety of society or the State.

75. In 2001, the Ministry of Justice indicated that there are legal provisions regulating the right to information. Law 9.507 of November 12, 1997 "regulates the right of access to information subject to the *habeas data* procedure", and Law 9.265 of February 12, 1996 "regulates section LXXII of Article 5 of the Constitution...".

76. Law 8.159 of January 8, 1991 contains provisions on national policy with respect to public, private, and other archives, regulated by decrees 1.173 of June 29, 1994 and 1.461 of April 25, 1995. There are also two bills in this area, one in the Federal Senate and the other in the Chamber of Deputies.

77. Decree No. 4.553 of December 27, 2002, signed by former President Cardoso and maintained by President Lula da Silva, extends the time limit for maintaining the confidentiality of secret documents to 50 years, and further provides for an indefinite renewal of this time limit.

Canada

78. Paragraph 2b of the Canadian Charter of Rights and Freedoms establishes the right of the media to access information referring to judicial proceedings, but, according to the information submitted by the State in 2001, this "does not include the general right of access to information generated in the process of government," since "in general terms, section 2b pertains to intellectual freedom and the right to communicate with others."

79. In 1997, the Supreme Court of Canada ruled in favor of access to information in a case brought against the Minister of Finance. The arguments were based on "the facilitation of democracy in helping to ensure that citizens obtain requested information and participate in a significant way in the democratic process[.]"

80. With respect to legal provisions, the Privacy Act governs the protection of personal information held by government institutions, and the Access to Information Act

guarantees the right, subject to certain exceptions, of access to files held by government institutions.

81. Any physical or legal person present in Canada can file requests under the Access to Information Act, subject to the imposition of reasonable fees. From April 1, 1998 to April 1, 1999, 14,340 requests for access to information were made under the Act. Requests for information under the Privacy Act are free of charge.

82. Requests under the Access to Information Act must be processed within a period of 30 days, although "under special circumstances" this period can be extended one time by government institutions. The duration of this extension is not limited, and the reasons given for denial of information range from the exception based on the right to confidentiality of commercial information, to the exception based on the right to confidentiality of information received from other governments.

83. According to the information received in response to the questionnaire sent in 2001, the Royal Canadian Mounted Police (RCMP) and the Canadian Secret Intelligence Service (CSIS) can deny information "that may interfere with law enforcement or national security." The Access to Information Act is limited by the exceptional circumstances indicated above, although the Act stipulates that such exceptions must be used in moderation and only when necessary.

84. Finally, the system for archiving state information includes various provisions for the preservation of documents: the National Archives Act specifies that no federal government document may be destroyed without the permission of the National Archivist, who publishes an agenda indicating what documents can be destroyed and when. The Access to Information Act was amended to incorporate a provision making the destruction of documents a criminal offense, as an infringement of the rights of citizens to access information.

Chile

85. Article 19.12 of the Political Constitution of the State of Chile ensures the freedom to impart opinions and to inform, without prior censorship, in any way and by any means. The Constitution also provides for the right to petition to the authorities on any matter of public interest.

86. Law No. 19.653, known as the Administrative Probity Act (*Ley de Probidad Administrativa*), was published in 1999 and reforms the constitutional organic law on government administration. The Administrative Probity Act incorporates a series of provisions on the publicity of the acts of the Administration of the State, stating that the administrative acts of the organs of the Administration of the State and the documents which support them are public. It also regards as public the reports and records of the private corporations which provide public services and of government-controlled corporations.

87. Article 11 of the Administrative Probity Act provides that it is legitimate to limit access to information on the grounds that the effective functioning of government agencies

would be impaired. Concern over this broad language has been expressed, since it could give rise to abuses of discretionary authority by government agents.⁷⁸

88. In January of 2001, a Supreme Decree was passed to regulate, pursuant to Article 13 of the Organic Law on Government Administration (*Ley de Bases Generales de la Administración*), the cases of secret and reserved information applicable to administrative acts, documents, and records held by the organs of the Administration of the State. It has been pointed out that the Decree has exceeded the provision of the law which it regulates by illegitimately extending the cases of secret and reserved information to administrative acts, and that the limitations established by the Decree are too broad in scope and allow for great discretion on behalf of the state organs in charge of its implementation.⁷⁹ Another source states that the regulatory regime adopted undermines the principle of transparency guaranteed by the Administrative Probity Act and is contrary to the provisions of the Political Constitution and international treaties.⁸⁰

89. In May 2003, Law No. 19.880 was passed, which establishes standards for the administrative procedures of the organs of the Administration of the State, adopting the principle of transparency regarding administrative procedures and allowing each citizen to keep track of the administrative processes.

Colombia

90. Article 20 of the Political Constitution of Colombia of 1991 states that:

Every person is guaranteed the freedom to express and disclose his thoughts and opinions, to inform and to receive impartial and truthful information, and to found broadcasting media.

91. Article 23 of the Political Constitution of Colombia of 1991 states that:

Every person has the right to respectfully request information to the authorities for reasons of general or particular interest and to obtain an expeditious response. The Legislative Branch may regulate the exercise of this right with respect to private organizations to guarantee fundamental rights.

92. Further, Article 74 of the Constitution of Colombia of 1991 states that:

Every person has the right to access public documents, with the exceptions provided by law.

93. The Constitution also recognizes the action of *habeas data* as a fundamental right in its Article 15, which specifies that:

(...) All persons are entitled to their personal and family privacy and their good name, which the state must respect and protect. They also have the right to investigate, update, and rectify information about them that has been collected and entered into the databases and archives of public and private entities (...)

⁷⁸ Pedro Mujica, *Acceso a la información según la legislación chilena*, available at <http://www.revistaprobidad.info/23/008.html>.

⁷⁹ See *Informe Annual sobre Derechos Humanos en Chile 2003 (Hechos de 2002)* (Annual Report on Human Rights in Chile 2003 (Facts from 2002)), *Facultad de Derecho, Universidad Diego Portales*, 231.

⁸⁰ *El Mercurio* (Santiago de Chile), November 18, 2003.

94. With respect to legal or regulatory provisions, Article 15 of the Constitution is supplemented by Chapter IV of the Code of Administrative Procedure (*Código Contencioso Administrativo*), on the right to request information. According to this chapter, any person has the right to consult documents on file in public offices and to receive copies of those documents, provided that they are not legally considered to be classified information and are not related to national defense or security. Any individual can exercise his right to request information from the state in Colombia. The Code of Administrative Procedure provides that requests for information must be processed within 10 days of their receipt.

95. Article 12 of Law 57 of July 5, 1985 entitles any person to consult documents held by public offices and to receive copies of those documents.

96. Regarding restrictions, the list of classified documents has been expanded with the approval of a law under which disciplinary and administrative investigations conducted by oversight agencies in connection with disciplinary and fiscal responsibility proceedings are to be kept secret (Anticorruption Statute, Law No. 190 of 1995, Article 33).

97. Decree 1972 of 2003 of Telecommunications establishes in Article 58 that the operator of telecommunication services may indicate to the Ministry of Communications expressly and in writing which information must be considered to be confidential according to law. Article 60 of this law requires that the Ministry of Communications maintain the confidentiality of the information received in this character.

98. Article 110 of the Code of Administrative Procedure establishes that:

The records of sessions of the Council of State, its divisions or sections and the administrative courts, shall be reserved for four years. The opinions of the Council of State, when acting as a consulting body of the government, shall also be reserved for the same period; but the government may disclose them or authorize their publication when it considers it advisable (...)

99. Law No. 270 of 1996, known as the "Statute Law of the Administration of Justice" (*Ley Estatutaria de la Administración de Justicia*), establishes the publicity and reserve criteria regarding the records of other organs of the Administration of Justice.

100. Article 323 of the new Code of Criminal Procedure (*Código de Procedimiento Penal*) establishes the confidentiality of preliminary findings during criminal procedures. However, the legal counsel of the accused who have rendered a preliminary statement may access this information and request copies. Article 330 of the Code also establishes restrictions to the release of information during preliminary criminal proceedings. Article 418 of the Code establishes a punishment for the public official who reveals information that has been classified as secret.

101. Article 114 of the Code of the Minor (*Código del Menor*) established that documents related to adoption procedures shall be kept reserved for 30 years.

102. Article 95 of Law No. 734 of 2002 regulates the confidentiality of information regarding disciplinary actions:

In the ordinary procedure, disciplinary actions shall be confidential until the charge sheet or the order to initiate the action is formulated, without prejudice to the rights of the individual who is the subject of the action. In the special procedure before the Solicitor General of the Nation and in the verbal procedure, until the decision to call for a hearing.

The person under investigation will have the obligation to refrain from disclosing the evidence that is considered to be reserved by provision of the constitution or the law.

Costa Rica

103. Article 27 of the Costa Rican Constitution ensures the freedom to petition, individually or collectively, to any public official or government agency, and the right to obtain prompt resolution. This right is protected by means of a summary procedure in the Constitutional Chamber in the case of arbitrary denial of information.

104. This is an expeditious procedure commonly used by journalists, who, under the procedure established by Article 31 of the Law of Constitutional Jurisdiction, must previously send a letter to the official from whom the information is being requested. If an adequate response is not received within 10 working days, the summary procedure is instigated before the Constitutional Chamber, which conducts a hearing of the public official concerned. If it is determined that the decision to deny the information was not satisfactory, the official is ordered to provide the information, subject to criminal prosecution for contempt should he fail to do so.⁸¹

105. Further, Article 30 of the Constitution expresses that:

The free access to administrative departments for the purposes of obtaining information on matters of public interest is guaranteed. State secrets are exempt from this provision.

106. Regarding legal provisions, Article No. 273 of the General Law of Public Administration (*Ley General de la Administración Pública*) of Costa Rica establishes that:

1. Access to parts of the proceedings will be denied when its disclosure may compromise secrets of the state or confidential information of the opposing party, or generally, when the possession of such contents grants the party an undue benefit or provides the party with an opportunity to illegitimately cause damage to the Administration, the opposite party or third parties, within or outside the proceedings.

2. There is a rebuttable presumption of nondisclosure of resolutions under consideration, reports directed to consultative organs, and opinions issued by these before they have been adopted.

107. In a 2002 case, the Constitutional Chamber of the Supreme Court of Costa Rica held that the refusal by the President of the Central Bank of Costa Rica to disclose a report of the International Monetary Fund entailed a violation of the right of information of the citizens of Costa Rica. The Court expressed that: "the State must guarantee that information of a public character and importance is made known to the citizens, and, in order for this to be achieved, the State must encourage a climate of freedom of information (...) In this way, the State (...) is the first to have an obligation to facilitate not only the access to this information, but also its

⁸¹ Report of the Inter-American Press Association (IAPA), available at <http://www.sipiapa.org>.

adequate disclosure and dissemination, and towards this aim, the State has the obligation to offer the necessary facilities and eliminate existing obstacles to its attainment."⁸²

108. The Constitutional Chamber of the Supreme Court of Costa Rica has also upheld the right of access to state-held information in a case of May 2, 2003.⁸³ In this case, the Board of Directors of the Bank of Costa Rica had denied the request of information presented by the Representative José Humberto Arce Salas regarding irregularities in the private financing of political parties, on the grounds that such information was protected by bank secrecy and the right to privacy. The Court assessed that "(...) in the case that there is unequivocal evidence that a political party has transferred part of its private funds to a privately-owned company (...) the information would cease to be of a private nature (...) and become of public interest."

Cuba

109. There are no legal or constitutional provisions protecting or promoting free access to information in Cuba. The legal system places a number of restrictions on the capacity to receive and disclose information. In February 1999, a law was approved "to protect national independence and the national economy", known as Law 88, permitting the government to control the information that can be disclosed within the country. This law establishes sanctions of up to 20 years imprisonment, the confiscation of personal property, and fines. According to the information received, the journalists Bernardo Arévalo Padrón, Jesús Joel Díaz Hernández, Manuel González Castellanos, and Leonardo Varona are currently in prison for such alleged offenses.

Dominica

110. Section 10 of the Constitution contains provisions recognizing the right of access to information held by the State and *habeas data*: "Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence."

Dominican Republic

111. Article 8.10 of the Constitution provides that the media have free access to government and private news sources consistent with public order and national security.

112. In March 2003, Senator José Tomás Pérez presented a bill on Free Access to Public Information (*proyecto de Ley General de Libre Acceso a la Información Pública*) for

⁸² Appeal for constitutional protection presented by Carlos Manuel Navarro Gutiérrez, General Secretary of the Employees Union of the Ministry of Economy, in favor of La Nación S.A., against Eduardo Lizano Fait, Executive President of the Central Bank of Costa Rica. File: 02-000808-0007-CO, Res. 20002-03074.

⁸³ Appeal for constitutional protection presented by the Representative José Humberto Arce Salas against the Bank of Costa Rica. File: 02-009167-0007-CO, Res. 2003-03489.

consideration. The purpose of this bill is to guarantee the right of individuals to investigate and to receive information and opinions and to disseminate them.

113. The bill establishes, in its Article 1, that "all persons have the right to request and to receive truthful, complete, adequate and opportune information from any organ of the Dominican State and of all corporations, firms or public companies with state participation."

114. Article 2 of the bill expresses that the right established in Article 1 includes the right to access the information contained in public documents and files, activities performed by organizations or persons of a public nature, as long as it does not affect national security, public order, health, public morals, or the reputation of others.

115. Article 3 of the bill establishes the obligation of the State to publish all the acts and activities of the public administration including those of the Legislative and Judicial Branches. This information includes the presentation of budgets and calculation of resources and approved expenses, its evolution and state of execution. It also includes the programs and projects, their budgets, terms and execution, bids, offerings, purchases, expenses and results, listing of officials, legislators, magistrates, employees, categories, functions and salaries. Also, the lists of beneficiaries of welfare programs, subsidies, scholarships, pensions and retirement benefits, statements of account of the national debt, indicators, and statistics must be published.

116. Article 4 of the bill establishes that all the powers and organisms of the State will have to orchestrate the publication of their respective Web pages for the information dissemination and assistance to the public.⁸⁴

Ecuador

117. The first paragraph of Article 81 of the Political Constitution of the Republic of Ecuador provides that:

The state shall guarantee the right, in particular for journalists and social commentators, to obtain access to sources of information; and to seek, receive, examine, and disseminate objective, accurate, pluralistic, and timely information, without prior censorship, on matters of general interest, consistent with community values.

118. Paragraph 3 of this same article provides that:

Information held in public archives shall not be classified as secret, with the exception of documents requiring such classification for the purposes of national defense or other reasons specified by law.

119. The Office of the Special Rapporteur has received information regarding several bills that have been presented before Congress on Access to Public Information in Ecuador. Bill No. 23-931 on Disclosure and Access to Information grants the citizens access to information held by the organs of the public sector, with the exception of the information of a personal or reserved nature that has been classified as such by a competent public official. Bill No. 23-834

⁸⁴ The information in the foregoing paragraphs was obtained from *Periodistas Frente a la Corrupción* and is available at <http://probidad.org/regional/legislacion/2002/025.html>

guarantees the access of information held by public entities as well as by private entities that possess public information, excluding personal data. This bill provides that information may only be classified as reserved or confidential through an executive decree. A bill for an Organic Law on Access to Public Information has been subject to a first debate in Congress, and would grant the right to access information from public or private sources. The exceptions established in this bill include information related to commercial or financial matters, information which is reserved in the international sphere, information that affects personal or family security, information related to the government's control duties and the administration of justice, and information on safety and national defense.

120. Article 28 of the Modernization of the State Act (*Ley de Modernización del Estado*) regulates the right to petition, providing that:

All requests must be resolved within a period of no more than 15 days reckoned from the date of their submission, unless a legal provision explicitly provides otherwise. This practice shall not be suspended, and the issuance of decisions in response to requests or claims submitted by members of the community shall not be denied by any administrative agency. In all cases, once the specified period has elapsed, silence by the administrative agency shall be construed to mean that the request has been approved or that the claim has been resolved in favor of the claimant(...)

In the event that any administrative authority rejects a petition, suspends an administrative procedure, or fails to issue a decision within the period specified, criminal proceedings may be brought against such acts as contrary to the constitutionally protected right of petition, in accordance with Article 213 of the Penal Code, without prejudice to the exercise of other actions provided for by law.

121. Article 32 of this same Act refers to access to documents, as follows:

Subject to the provisions of special laws, any party having an interest in the disposition of legally protected situations shall have the right of access to administrative documents held by the state and the various public sector agencies, so as to maximize the legitimacy and impartiality of government activities.

122. Article 33 provides for the enforcement of these legal provisions:

Public officials or employees who violate any of the provisions under this chapter shall be punished with dismissal from their posts, without prejudice to their civil, criminal, or administrative responsibility pursuant to other laws.

El Salvador

123. Article 6 of the Political Constitution of El Salvador recognizes the right to freedom of expression. However, the Constitution does not contain a specific provision regarding freedom of information.

124. Some provisions establish limits to access to information.

125. The Code of Ethics of the Court of Accounts of El Salvador establishes that:

Confidentiality and the prudent use of information are basic components of the exercise of the functions of the Court. The servants of the Court must protect confidentiality and the professional

secret, without revealing information that is of their knowledge by reason of their work, except as required by law.⁸⁵

126. Article 28.c of the Internal Regulations of Personnel of the Court of Accounts (*Reglamento Interno de Personal de la Corte de Cuentas de la República*) of El Salvador establishes the duty of confidentiality and reserve for the personnel and former employees of the Court.⁸⁶

127. Article 66.4 of the Internal Regulations of the Executive Organ (*Reglamento Interno del Órgano Ejecutivo*) provides that: "The duties of the public employees are: (...) maintain confidentiality regarding matters that are of their knowledge by reason of their work."⁸⁷

Guatemala

128. With respect to state-held information, Article 30 of the Guatemalan Constitution provides that:

All government acts are public. Interested parties have the right at any time to obtain reports, copies, reproductions, and certifications upon request and the exhibition of such records as they wish to consult, unless they pertain to military or diplomatic matters of national security, or data provided by individuals subject to confidentiality.

129. Other information which is subject to confidentiality is information related to correspondence, telephone, radio, and cable communications, and other forms of communication available through modern technology (Article 24, Constitution of Guatemala). Financial and banking information is also protected (Article 134 of the Constitution), as well as information which may pose a threat to life, physical integrity, or security (Article 3 of the Constitution). Judicial information which is legally protected may also be withheld.

130. With respect to *habeas data*, Article 31 of the Constitution specifies that:

All persons have the right to know about information pertaining to them in state archives, files, or other records, and its intended use, as well as to correct, rectify, and update such information. Records and files regarding political affiliation are prohibited, with the exception of those maintained by election authorities and political parties.

131. Although Articles 30 and 31 of the Constitution establish the general principle of public disclosure of government acts and the action of *habeas data*, there are no provisions in Guatemalan law regulating the effective exercise of these rights, nor is there an independent body to which appeals can be filed when information is withheld.

132. Article 35 of the Political Constitution provides that:

Access to information sources is free, and no authority may limit that right.

⁸⁵ Carlos Rafael Urquilla Bonilla, *Estado del Acceso a la Información Pública en El Salvador*, available at <http://www.probidad-sv.org/cac/carlosurquilla.html>.

⁸⁶ *Id.*

⁸⁷ *Id.*

133. In August 2000, a bill on access to information was produced by the Office of Strategic Analysis of the Presidency of the Republic of Guatemala. This bill would regulate the right to access state-held information, and the exceptions to disclosure. The bill also regulates the action of *habeas data*. Several drafts of this bill have been studied by the government and civil society organizations.

134. A monitoring of the replies to requests for information to 67 entities that hold public information from the Capital City revealed that financial information is handled secretly by the public entities of the State. Requests for information related to public expenditures received no reply from the consulted institutions, and 70% of requests for information regarding purchases and contracting received negative responses.⁸⁸

Honduras

135. From a legal standpoint, there is no provision impeding media access to official sources. The legal provision establishing the obligation to inform is contained in Article 80 of the Constitution:

All persons or associations of persons have the right to present petitions to authorities for reasons of individual or general interest and to obtain a prompt response within the legally specified period of time.

136. The official response from Honduras to the questionnaire sent by the Office of the Special Rapporteur indicated that several laws in Honduras contain the principle of publicity of the acts of government. The Law of Organization and Powers of the Tribunals (*Ley de Organización y Atribuciones de los Tribunales*) establishes that the acts of the tribunals are public, with the exceptions provided by law. Additionally, Articles 3 and 5 of the Administrative Simplification Act (*Ley de Simplificación Administrativa*) establish the obligation of every organ of the State to develop systems for the organization of public information so as to guarantee its updating and easy access by the administration.

137. Restrictions to access to information apply to the disclosure of information on preliminary criminal procedures or of information that, if disclosed, may affect family privacy or persons under legal age. Other exceptions relate to bank secrecy and the imposition of sanctions against public officials who disclose confidential information.

138. The exercise of the right to access to information is not regulated in Honduras. However, the official response from Honduras to the questionnaire sent by the Special Rapporteur indicated that any citizen who deems his constitutional rights to have been violated may raise a *recurso de amparo* to regain or maintain the exercise of his rights.

139. On September 20, 2003, the Committee for Freedom of Expression C-Libre hosted a Regional Dialogue in the city of Choluteca on the subject of "The Right to Information

⁸⁸ Monitoring exercise conducted by *Observatorio Ciudadano para el Libre Acceso a la Información*, an organization set up in September 2002 by *Acción Ciudadana, Proyecto Libre Acceso a la Información Pública*. *Observatorio Ciudadano* is composed of non-governmental organizations, associations, academic institutions and the media. See "*Manual Ciudadano*", First Edition, Guatemala, May 2003.

in the National Agenda.” Two similar meetings had been held in other regions of Honduras. During this conference, the local limitations faced by journalists, social communicators, and citizens to access information of public interest were examined. Another topic that was discussed during the meeting was the demand of the parties involved in the study for a bill on Access to Public Information and *Habeas Data*, brought by C-Libre. Also, the participants expressed a commitment to investigate the handling of reserved information of public interest in the south of the country. The National Anti-Corruption Office has also produced a draft bill on Access to Information.

Jamaica

140. An Access to Information Act, approved by the Senate on June 28, 2002, is in the process of being implemented in Jamaica. The Act provides for the release of government documents but exempts the "opinions, advice or recommendations (and) a record of consultation or deliberations" of civil servants, including Cabinet members, from disclosure. As part of the Act, an Access to Information Unit within the Prime Minister's Office has been established to guide the implementation process, and establish a framework for citizens to effectively use the Act.⁸⁹ The implementation of the first phase of the Act was originally scheduled to begin in August 2003, but was later postponed until October 2003. In September 2003, the government announced that the Senate will not be debating the amendment to the Access to Information Act until the regulations governing its long-awaited implementation have been presented, to ensure that final consideration of the Bill and the regulations take place together.⁹⁰

141. There are a number of available avenues of recourse through which information is made public by law, guaranteeing access by the public, including the press, to files and documents. These processes refer to the records and documents of the Office of the Registry of Business Enterprises, the Title Registry, and the Registry of Births and Deaths. The registries of corporate shareholders and business executives are also public.

Mexico

142. The Political Constitution of Mexico includes two provisions concerning access to official information.

143. Article 6 of the Political Constitution provides that:

The expression of ideas shall not be subject to any judicial or administrative prosecution, provided that it does not offend morals, the rights of third parties, encourage criminal behavior or interfere with public order (...),

(...) the right to information shall be guaranteed by the State.

⁸⁹ David Banisar, The *www.freedominfo.org* Global Survey, *Freedom of Information and Access to Government Record Laws around the world*, 28 September 2003, available at <http://www.freedominfo.org/survey/survey2003.pdf> ; International Press Institute: 2002 World Press Freedom Review, available at: <http://www.freemedia.at/wpfr/world.html>.

⁹⁰ Jamaica Gleaner, 4 October 2003, available at: <http://www.jamaica-gleaner.com/gleaner/20031004/news/news1.html>.

144. Article 8 of the Political Constitution provides that:

Public officials and employees shall respect the right of petition, provided it is exercised in writing and in a peaceful and respectful manner; with regard to political matters, however, only citizens of the Republic may avail themselves of this right.

A written decision shall be issued in response to all petitions by the authority to whom they are addressed; such authorities have the obligation to inform the petitioner of such decisions within a brief period of time.

145. On June 11, 2002, the Federal Law of Transparency and Access to State Information (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*) came into force. This law recognizes and protects the free access to public information held by the three Branches of the Government of the United Mexican States, as well as by the autonomous constitutional organs and any other federal organ. Pursuant to Article 61 of the Law, each Branch of the Government of the United Mexican States and a number of federal organs submitted regulations to comply with this law.

146. Upon concluding his official visit to the United Mexican States in August 2003, the Special Rapporteur for Freedom of Expression recognized the importance of the promulgation of the Federal Law of Transparency and Access to State Information in achieving greater transparency in government operations and for combating corruption. However, the Special Rapporteur expressed concern over the perception that the principle of maximum disclosure and transparency set forth in that law was not being strictly followed by either the Legislative Branch, the Judicial Branch, or by certain autonomous constitutional agencies, such as the National Human Rights Commission:

As regards the Legislature, it has been noted that regulations for the Chamber of Deputies are different from regulations for the Senate. These regulations were issued separately by each of the Houses. However, the Rapporteur notes preliminarily that they are not complying with certain basic principles that guarantee access to public information, such as the right to appeal to administrative institutions that guarantee their independence, in the event that information is denied by the Chamber of Deputies. Moreover, the Rapporteur heard of instances in which requests for information submitted to the National Human Rights Commission were turned down. The Rapporteur is concerned that this agency for the protection of human rights would interpret the federal transparency law in force in Mexico in a way not in keeping with its own principles.

Finally, in the judicial sector, by Supreme Court Decision No. 9/2003, certain provisions were established to regulate access to information in the possession of that Branch of the Mexican State. From a preliminary analysis, the Rapporteur notes that the interpretation of some of the articles of that decision could jeopardize access to information, since it allows certain information to be considered as confidential in criminal or family proceedings for an excessively long period of time. In the opinion of the Rapporteur, certain criminal matters may involve crimes linked to subjects of keen public interest, such as corruption, and so it is important for the people to have full knowledge of them in a democratic society, without having this entail a violation of fundamental rights or guarantees.⁹¹

147. The Federal Law of Transparency and Access to State Information set up the "Federal Institute of Access to Public Information" (IFAI, initials in Spanish), an autonomous entity with the aim of overseeing all aspects of the information process, and guaranteeing the

⁹¹ Office of the Special Rapporteur for Freedom of Expression, Press Release 89/03.

right of access to information and the protection of personal data. The Institute is empowered to review the cases in which public authorities have denied access to information, and to determine whether the denial was justified in the light of the legal provisions. On August 12, 2003, the Institute reported that the agencies and dependencies of the Federal Public Administration had received 11,700 requests for information in the first two months of the Law's operation.⁹²

148. Several local governments have a law on the right to information, and many are in the process of reviewing and analyzing the adoption of such laws.

Nicaragua

149. Article 52 of the Constitution provides that:

Citizens have the right to file petitions, denounce irregularities, and express constructive criticism of the state or any authority, individually and collectively; to obtain a prompt decision and response; and to be informed of the decision within the periods of time established by law.

150. Article 66 of the Constitution provides that Nicaraguans have the right to truthful information and, in exercising that freedom, may seek, receive, and disseminate information and ideas, orally, in writing, in graphic form, or by another medium of their choice.

151. Article 26 of the Constitution provides for the possibility of obtaining all information contained in official files, and the reasons and purpose for which the information is held, when it pertains to the person requesting it:

All persons have the right to:

1. Their private life and that of their family.
2. The inviolability of their home, correspondence, and communications of every kind.
3. Respect for their honor and reputation
4. Knowledge of all information about them registered by state authorities, as well as the right to know why and for what purpose this information is held.

152. In early December 2003, the Office of the Special Rapporteur received information that a bill on Access to Information had been recently presented before the National Assembly of Nicaragua. The bill would guarantee the right of citizens to gain access to documents, files and databases held by the organs of the State, as well as by private institutions which administer public goods (Article 1 of the bill). This information is considered to be a "public good" available to whomever requests it as provided by the bill (Article 2 of the bill). The bill further provides for the setting up of Access to Information Offices in every State institution subject to the bill, with the aim of facilitating access to information.

153. In Nicaragua, the right of access to information has been made difficult by restrictions imposed by provisions such as the ones from the Penal Code, which make it a

⁹² IFAI/006/03 (Mexico), 12 August 2003, available at: <http://www.ifai.org.mx/textos/gaceta/comunicado06-120803.pdf>.

criminal offense to reveal state secrets and official information (Articles 538 and 540). Information is classified as “very secret”, “secret”, and “confidential” (Article 540). All information originating from sources within the government as a direct result of the conduct of official business is considered “official information” and its disclosure is subject to limitations guaranteeing the security of national defense.

154. Article 1 of the Law Regulating Information on Internal Security and the National Defense of 1980 (*Ley para Regular las Informaciones sobre Seguridad Interna y Defensa Nacional de 1980*) provides that the media may not disclose news or information compromising or undermining the country’s internal security or national defense.

155. This provision includes the communication of information or news on such matters as armed conflict, assaults on government officials, etc. without first reliably verifying such information or news with the Government Council on National Reconstruction (*Junta de Gobierno de Reconstrucción Nacional*) or with the Ministry of Interior or Defense.

156. As indicated in the section on international provisions on the public right to state-held information, the use of broad language to restrict access to information on grounds of national security could give rise to abuses of discretionary authority by state agents.

Panama

157. Panama does not have a constitutional clause expressly guaranteeing the right to access information. However, Article 41 of the Constitution of Panama does contain a clause establishing the right of petition, which can serve as the basis for petitions filed seeking public information:

Everyone has the right to file petitions and respectful complaints to public servants, for motives of private or social interest, and the right to receive a prompt resolution of the matter.

The public servant with whom a petition, inquiry or complaint is filed shall resolve the matter within thirty days.

The law shall stipulate the punishments for those who violate this provision.

158. With respect to legal provisions, Law 36 (5/6/1998) reinforces the provisions concerning the right to petition, and Article 837 of the Administrative Code explains that:

All individuals have the right to receive copies of documents existing in the secretariats and archives of administrative officers, provided that: the documents are not classified; the person requesting the copy provides the necessary paper and pays the fees specified in Book 1 of the Judicial Code; and that the copies can be removed under the inspection of an employee of the office concerned, without interfering with his work.

159. The constitutional provision on the right to petition is regulated by Law 15 of 1957, which provides that officials who do not respond to a petition within 30 days shall be punished with a fine of \$10 to \$100 the first time and double that amount for subsequent occurrences. Officials who fail to respond on more than three occasions are to be dismissed.

160. In cases in which the petition is denied, the Administrative Law Judicial Proceedings Act (*Ley Orgánica de la Jurisdicción de lo Contencioso Administrativo*) establishes

the procedure to be followed during the course of administrative proceedings, which includes the following avenues of recourse: the recourse for reconsideration, filed with the administrative official of the first instance for clarification, modification, or rescission of the decision; the recourse of appeal to the immediate supervisor, for the same purposes; and those indicated in the Judicial Code.

161. There are legal criteria for classifying state information as restricted (Articles 834 and 837 of the Administrative Code).

162. On January 22, 2002, Law No. 6 on transparency in government was enacted. This law provides that every individual or juridical person has the right to request information from government bodies and the official concerned has 30 days to provide such information. The official's failure to comply entails a fine or dismissal. The law sets out nine cases of "restricted access", among them those having to do with information on national security and cases under investigation by the Public Prosecutor's Office.⁹³

163. On May 21 of 2002, the Executive Branch approved the Regulatory Decree 124, which regulates Law No. 6. On August 9, 2002, Panama's Human Rights Ombudsman (*Defensor del Pueblo*) filed a legal suit seeking repeal of Articles 4, 5, 8, 9 and 14 of the Decree. The Special Rapporteur for Freedom of Expression expressed his concern regarding certain regulatory articles of the Decree. In particular, referring to Article 8 of the Decree, which provides that an "interested person" for purposes of Article 11 of Law No. 6 is "a person who has a direct personal interest in the information he or she is requesting," the Special Rapporteur expressed that "this article is inconsistent with the purposes of the law and international standards on access to information, as any person should be entitled to exercise this right."⁹⁴

164. The Office of the Special Rapporteur for Freedom of Expression received information regarding the presentation before the Legislative Board of a proposal for reform of Law No. 6. The Special Rapporteur values this effort, and recalls his comments in the Report of the Special Rapporteur for Freedom of Expression on the situation of Freedom of Expression in Panama, where he recommends that the adoption of internal legislation be brought into line with the American Convention on Human Rights and the jurisprudence of the Inter-American System.⁹⁵

Paraguay

165. The Forum for Freedom of Expression of Paraguay has informed that Article 28 of the National Constitution guarantees the right of every citizen "to receive truthful, responsible and impartial information" and further establishes that "the public sources of information are of free access to anyone".

⁹³ Inter-American Press Association, Press Release February 5, 2002, available at <http://www.sipiapa.com/pressreleases/srchphrasedetail.cfm?PressReleaseID=561>.

⁹⁴ See Report of the Special Rapporteur for Freedom of Expression on the situation of Freedom of Expression in Panama, OEA/Ser.L/V/II.117, Doc. 47, 3 July 2003, Original: Spanish.

⁹⁵ *Id.*

166. In spite of the Constitution's provision that laws would regulate the exercise of the above precept, a regulatory regime to this effect has not yet been adopted.

167. Paraguay's Criminal Code, Law No 1682/01 and Law No. 1626 establish restrictions to the free disclosure of information, in that they do not make a distinction between the public and private spheres to set limitations on publication and demands of publicity to the communications media and journalists.

168. In September 2001, the Executive Branch repealed Law 1729 on Administrative Transparency and Free Access to Information (*Transparencia Administrativa y Libre Acceso a la Información*). The law had been approved in July 2001 for the purpose of promoting transparency in government and ensuring access to information. However, this law provoked national and international protest, since it contained several articles imposing restrictions on the right of the press to access official documents.

169. The Forum for Freedom of Information of Paraguay has informed that there is a bill awaiting consideration by Congress on the subject of free access to public information.

Peru

170. The right to information is set out in Article 2.5 of the Constitution of Peru, which states that every person has the following right:

(...) To request, without the need to express the reason, the information needed, and to receive it from any public entity, within the period of time established by law, provided the payment of the fee associated with such request. The following information is not included by this Article: information that affects privacy and that information specifically excluded by law or by reason of national security. Bank and fiscal secrecy can be lifted by a judge or investigative committee of the Congress, according to the law and as long as they refer to the case under investigation.

171. On August 2, 2002, Peruvian President Alejandro Toledo formally promulgated the Law of Transparency and Access to Public Information (*Ley de Transparencia y Acceso a la Información Pública*), which was then published on August 3, 2002 in the official government daily *El Peruano*. Only minor changes had been made to the second draft of the law, which had been approved by the Peruvian Congress in July. While this law represents a major advance for the right to information, attention has been drawn to Article 15 of the law, which refers to the exceptions of the Law that grant the Executive authority to classify information as "secret and strictly secret" for reasons of national security, as this procedure would grant the ministerial cabinet, an entity eminently political, the power to classify information as secret.⁹⁶

172. On August 6, 2003, the regulatory decree for the Law of Transparency and Access to Public Information came into force. This regulation was promoted by the Commission created by the Law to give compliance with the provisions set out therein.

Suriname

173. The official response from Suriname to the questionnaire sent by the Special Rapporteur points out that Article 158 of the Constitution of Suriname states that:

1. Everyone shall have the right to be informed by the organs of government administration on the advancement in the handling of cases in which he has a direct interest and on measures taken with regard to him.
2. Interested parties have access to the courts to have them judge the unjustified character of any final and executionable act by an organ of governmental administration.
3. In disciplinary procedures the right of interested parties to reply shall be guaranteed.

⁹⁶ Freedominfo.org, *Peru's new freedom of information law*, posted August 8, 2002, available at: <http://www.freedominfo.org/news/peru2/>.

174. In addition, Article 22 of the Constitution provides that:

1. Everyone has the right to submit written petitions to the public authorities.
2. The law regulates the procedure for handling them

175. The official response from Suriname also points out that Constitutional Law and Administrative Law of the State provide that the government is obligated to publish certain information in the official publications. This information pertains to laws, regulations, decrees and other decisions, as well as requests for licenses for trade, commerce, and other activities.

176. Non-governmental organizations in Suriname frequently organize general campaigns to educate or inform the general public, particularly in the sectors in which they operate (e.g., labor, women, children, health), on the right to free access to information.

Trinidad and Tobago

177. In its response to the questionnaire sent by the Special Rapporteur in 2001, the Government of Trinidad and Tobago cited general constitutional provisions that serve to protect freedom of information, such as "freedom of thought and expression," or "the right to express political opinions." Immediately afterwards, however, it recognized that the Constitution of Trinidad and Tobago does not contain provisions recognizing free access to state-held information. Nor are there judicial precedents in this area, or in the area of *habeas data*.

178. In the absence of specific legal provisions in this regard, reference was made to recognition of the Freedom of Information Act as the applicable legal provision:

All persons shall have the right to obtain access to official documents.
All persons are legally entitled to request information from various government agencies.

179. The procedure for requesting and obtaining information is free of charge, unless copies in printed form or other information storage formats, such as diskettes, tapes, etc., are requested.

180. If the information is denied, the requesting party must receive written notification, affording him the reasonable opportunity to consult with a government representative, who is required to provide the requesting party with the information needed to continue the procedure and renew the request. The reasons for denying the information must also be given to the requesting party, who must be informed of his right to appeal the decision to the High Court.

United States

181. In 1966, the United States approved the Freedom of Information Act (FOIA), which requires federal agencies to offer access to documents of public interest. Exceptions to the Freedom of Information Act include the following: information on national security, the internal regulations and policies of government agencies, matters specifically exempt from disclosure by statute, trade secrets, and other secret information pertaining to business, letters and memorandums between government agencies and individuals, personnel files and medical histories, bank information, police files, and geological and geophysical information.

182. The reach of statutory exemptions provided by the Freedom of Information Act (FOIA) has been expanded with new exemptions and statutory allowances for certain security-related information. A "critical infrastructure" exemption could limit public access to health, safety, and environmental information submitted by businesses to the government.⁹⁷

183. In addition to the Freedom of Information Act (FOIA) at the federal level, each of the 50 states has laws guaranteeing access to the official documents of state, county, and municipal agencies.

184. The Privacy Act of 1974 also prohibits federal agencies from revealing information about a person without his or her written consent, unless cited by the Freedom of Information Act as the type of information that must be disclosed.⁹⁸

185. In addition to laws providing access to files and documents, other laws, known as "open meetings" or "sunshine" laws, require state and local agencies to make most of their meetings open to the public.

186. The Government in the Sunshine Act of 1976 applies to all federal agencies. All agency meetings must be open to the public, unless the law provides otherwise, such as when personal matters are being discussed. For all agency meetings covered by this law, the agency in question must notify citizens through a public announcement and publication in the Federal Register, at least one week in advance, as to the time, place, and subject of the meeting, as well as the name and telephone number of a contact person for additional information.⁹⁹

187. Executive Order 13292 (E.O. 13292), issued by President Bush on March 28, 2003, also promotes greater government secrecy by allowing the executive to delay the release of government documents; giving the executive new powers to reclassify previously released information; broadening exceptions to declassification rules; and lowering the standard under which information may be withheld from release - from requiring that it "should" be expected to result in harm to that it "could" be expected to have that result. In addition, E.O. 13292 removes

⁹⁷ Report of the Lawyers Committee for Human Rights: *Assessing the New Normal: Liberty and Security for the Post-September 11 United States*; available at: <http://www.lchr.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf>.

⁹⁸ 5 U.S.C. §522a(b)(2).

⁹⁹ 5 U.S.C. §552b.

a provision from the previously operative rules mandating that "[i]f there is significant doubt about the need to classify information, it shall not be classified." In essence, this deletion shifts the government's "default" setting from "do not classify" under the previous rules to "classify" under E.O. 13292.¹⁰⁰

188. According to the National Archives and Records Administration, the number of classification actions by the Executive Branch of the United States rose 14% in 2002 over 2001 and declassification activity fell to the lowest level in seven years.¹⁰¹

Uruguay

189. There is no provision in Uruguay that requires the state to disclose information, or legal or judicial mechanisms obliging the state to provide information.

190. The official response to the questionnaire furnished reveals that there are several provisions that prohibit the disclosure of information related to professional, banking, and personal data.¹⁰²

191. There are two bills under consideration for regulating access to information awaiting their approval by the Uruguayan Parliament.

192. One of the bills was presented by the opposing party, and approved by the House of Representatives in October 2002. The bill regulates the right of any person to consult or request copies of the administrative acts issued by governmental bodies or public entities, whether national or departmental. This action only necessitates the presence of the interested party when the information requested might affect his right to privacy.¹⁰³

193. Article 11 of this bill regulates the action of *habeas data*, and stipulates that the action may be brought by the petitioner after 15 days have elapsed since the resolution that denies the disclosure of the requested information, and after the passing of 45 days since the request was made.¹⁰⁴

194. In June 2003, two senators from the National Party presented a bill for the protection of personal data of a commercial nature. This bill establishes the admissibility of the action of *habeas data* brought before any entity in charge of a public or private database under the following conditions:

¹⁰⁰ Report of the Lawyers Committee for Human Rights: *Assessing the New Normal: Liberty and Security for the Post-September 11 United States*, *supra*, note 94.

¹⁰¹ *Id.*

¹⁰² See Code of Organization of Tribunals (Article 207), Code of Children (Article 40), Law N° 4.056 of 1912 (article 13), Law No. 10.674 of November 20, 1945 (Article 6), Law No. 13.711 of November 29, 1968, Law No.14.068 of July 10, 1972, Decree No. 14.294 of October 31, 1974, Decree No. 15.322 of September 17, 1982, Decree No. 94/983, Law No. 16.320 of November 1, 1992.

¹⁰³ *Probidad, Ley sobre derecho a la información y acción de hábeas data*, available at: http://probidad.org/regional/legislacion/2002/041_a.html

¹⁰⁴ *Id.*

- a) that the interested party wishes to obtain information regarding his personal data and this information was not provided by the entity responsible for the database.
- b) when the rectification or elimination of personal data has been requested, and the entity responsible for the database has failed to carry out the requested action.

195. The official response of Uruguay declares that the wide majority of the jurisprudence on access to state-held information has recognized the right of the individuals to access state-held personal information, following the precedent of the Supreme Court on the matter. In the case LJ U 13.994 of 1999, the Supreme Court said that objective criteria must be used to determine when information is of public interest, regardless of the person involved being a public figure, and further stated that "freedom of information contributes to public opinion, which is inherent to every democratic system."¹⁰⁵

Venezuela

196. Article 28 of the Constitution, reformed in 1999, provides:

All persons have the right of access to information and data held in government or private files referring to them or to their property, except where the law provides otherwise; to know why and for what purpose the information is kept; and to file requests before the competent court for the updating, rectification, or destruction of information that is erroneous or that illegitimately affects their rights. They may also obtain access to documents of any kind containing information of interest to communities or groups of individuals.

197. Article 51 of the Constitution establishes the right to submit petitions to the authorities. According to this provision, all persons have the right to address petitions to any authority or public official on matters within their purview and to obtain a timely and adequate response. Violations of this right are punishable by law and can result in dismissal.

¹⁰⁵ Supreme Court of Uruguay, LJ U 13.994 of 1999, para. V.

198. Article 6 of the Organic Law on Public Administration (*Ley Orgánica de Procedimientos Administrativos*) of 2001 establishes that:

The Public Administration will carry out its activities and shall be organized in such a way that citizens:

May resolve their issues, be assisted in the formal drafting of administrative documents, and receive information of general interest by telephonic, electronic, and telematic means (...)

May easily access up-to-date information regarding the organizational structure of organs and entities of the Public Administration, and the services provided by them.

199. Article 7 of the Organic Law on Public Administration further provides that citizens shall have the following rights:

6. To obtain information and guidance regarding the legal or technical requirements imposed on projects, proceedings or requests that citizens may wish to undertake

7. To access the archives and records of the Public Administration in the terms provided by the Constitution of the Bolivarian Republic of Venezuela and the law (...)

200. The Organic Law on Administrative Procedures (*Ley Orgánica de Procedimientos Administrativos*) of 1981 provides the following:

Article 2. Every interested person may, by himself or by means of his representative, address requests to any organ, entity or administrative authority. These shall decide on the requests, or state the reason for their failure to do so.

201. Article 59 of the Organic Law on Administrative Procedures also provides for public information or access to government sources for interested parties or their representatives. However, documents classified as confidential are exempt.

202. The 2003 Law Against Corruption (*Ley contra la Corrupción*) also establishes in its Articles 8, 9 and 10 the right of the citizens to access information regarding the administration of the public patrimony of state organs.