



The right of access to information

1. Content and scope of the right of access to information protected by article 13 of the Convention

1. The right of access to information is a specific manifestation of the freedom of expression protected by article 13 of the American Convention. It is a manifestation of this freedom that is particularly important for the consolidation, functioning and preservation of democratic systems of government; as such, it has received significant attention in international case law and doctrine.

2. In general terms, freedom of expression includes the right and the freedom to seek, receive and impart information and ideas of all kinds; that is, it encompasses freedom of information, a right enshrined in the American Convention on Human Rights as well as in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. According to the case law, freedom of information is a right in and of itself, and not just a manifestation of the right of freedom of expression of which it is a part. Article 13-1 of the American Convention provides in this respect that “[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s Choice”; in turn, the IACHR Declaration of Principles on Freedom of Expression establishes, in Principle 2, that “[e]very person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights”, and that “[a]ll people should be afforded equal opportunities to receive, seek and impart information.”

3. The right of access to information falls within the general framework of freedom of expression. According to the interpretations of the Inter-American Commission, article 13 of the American Convention comprises the positive obligation of the State to provide its citizens with access to the information in its possession, and the corresponding right of individuals to access the information held by the State.¹ On this point, the Commission’s Declaration of Principles on Freedom of Expression provides, in Principle 3, that “[e]very person has the right to access to information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it”, and in Principle 4, that “[a]ccess to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.”

2. Importance and function

4. The importance of the right to access to information is prominent in three specific areas.

5. The right of access to information is a *critical tool for democratic participation, oversight of the State and public administration, and the monitoring of corruption*. In democratic systems, in which the State’s conduct is governed by publicity and transparency, the right of access to information in the State’s possession is a fundamental requirement for ensuring

¹ I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151. Para. 77. IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Claude Reyes et al. v. Chile*, cited in the Judgment of September 19, 2006, Series C No. 151. Para. 58.a) and b).



democratic participation, good and transparent conduct of public affairs, and the oversight of government and its authorities by public opinion, as it enables civil society to scrutinize the actions of the authorities. Free access to information is a means for the citizens in a participatory and representative democracy to exercise their political rights. Indeed, the full exercise of the right to access to information is necessary to prevent abuses by public officials, promote accountability and transparency in government, and enable solid and informed public debate that ensures effective recourse against government abuse and prevents corruption. Only through access to information of public interest that is held by the State can citizens question, investigate and consider whether public duties are being performed properly.²

6. The importance of access to public information in guaranteeing the transparency, integrity and responsibility of the conduct of public affairs, respect for social rights, freedom of expression and freedom of the press, as well as the necessity of protecting the right to such access, have been the subject of regional consensus in the OAS, set forth in various resolutions of the General Assembly and in the Inter-American Democratic Charter. Likewise, it has been underscored in several multilateral treaties and other international instruments in the European arena and at the United Nations. In their Joint Declaration of 1999, the UN, OSCE and OAS Special Rapporteurs on Freedom of Expression declared that “[i]mplicit in freedom of expression is the public’s right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people’s participation in government would remain fragmented”; and in their Joint Declaration of 2004, they recognized “[t]he fundamental importance of access to information to democratic participation, to holding governments accountable and to controlling corruption, as well as to personal dignity and business efficiency.”

7. On the other hand, the right of access to information makes individual and collective self-determination possible, particularly democratic self-determination, because it tends to guarantee that collective decisions are adopted in a conscious and informed manner.

8. Finally, the right of access to information is a key instrument for the exercise of other human rights, particularly by the most vulnerable individuals.

3. Entitlement to the right of access to information

9. The right of access to information belongs to everyone. In principle, every person has the right to request access to information held by the State. Article 13 of the Convention establishes expressly the rights to seek and receive information as components of freedom of expression.

10. The Inter-American Court has specified on this point that it is not necessary to prove a direct interest or a personal implication in order to obtain information in the State’s possession, except in cases where there is a legitimate restriction permitted by the Convention, under the terms explained further below.³

11. In addition, any person who accesses information under the control of the State has, in turn, the right to disclose that information so that it circulates publicly and the public can know about it, access it and evaluate it. The right of access to information thus shares the individual and social dimensions of freedom of expression, and the State must guarantee both simultaneously.⁴

²I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151. Paras. 86 and 87.

³I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151. Para. 77.

⁴I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151. Para. 77.



12. In this sense, the Inter-American Commission has explained that, by virtue of article 13 of the Convention, the right of access to information must be governed by the principle of maximum disclosure.⁵ The scope of this principle was explained by the UN, OAS and OSCE Special Rapporteurs on Freedom of Expression in their Joint Declaration of 2004, which specifies that “[t]he right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (...) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.” In the application of that principle, this same document states that, “[t]he access to information law should, to the extent of any inconsistency, prevail over other legislation.” This principle was also set forth by the Inter-American Juridical Committee in Resolution CJI/RES.147 (LXXIII-O/08) on “Principles on the Right of Access to Information”, in number 1, in the following terms: “In principle, all information is accessible. Access to information is a fundamental human right which establishes that everyone can access information from public bodies, subject only to a limited regime of exceptions in keeping with a democratic society and proportionate to the interest that justifies them. States should ensure full respect for the right to access to information through adopting appropriate legislation and putting in place the necessary implementation measures.”

4. Parties bound by the duties inherent to the right of access to information

13. The right of access to information gives rise to obligations, mainly for the State, for those who replace it in the fulfillment of its functions, or for those who administer public resources. Likewise, in accordance with the Statement of Principles on Freedom of Expression, individuals have the right to access to personal information or information about their assets contained in private databases and registries.

14. In terms of access to information held by the State, it should be noted that the State’s duty to provide the information requested (or to respond clearly when the information falls under some exception) binds all of the bodies and authorities that make up the different branches of government, not just those of the Executive Branch. As such, reiterating the existing case-law, the Resolution of the Inter-American Juridical Committee on “Principles on the Right of Access to Information”⁶ states, in Principle 2, that “[t]he right of access to information applies to all public bodies, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory bodies, bodies which are owned or controlled by government, and organizations which operate with public funds or which perform public functions.”

5. Object of the right

15. The exercise of the right of access to information pertains to different types of information that is, or should be, in the possession of the authorities or private citizens. According to the Inter-American Juridical Committee, in the aforementioned Resolution on “Principles on the Right of Access to Information”, “[t]he right to access to information applies to all significant information, defined broadly to include everything which is held or recorded in any format or medium.”

16. The types of information that this right pertains to include the following in particular: information that is in the custody, administration or possession of the State; information that the State produces, or information that it is required to produce; information in the possession

⁵ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Claude Reyes et al. v. Chile*, cited in the Judgment of September 19, 2006, Series C No. 151. Para. 58.c).

⁶ Inter-American Juridical Committee. Resolution 147, of the 73rd Ordinary Period of Sessions: Principles on the Right of Access to Information. August 7, 2008. Para. 2.



of persons who manage public services and utilities or public resources; information that the State receives, or is required to collect in the course of conducting its duties; and information concerning one's own personal data (*habeas data*) or assets, in the possession of those who administer private registries or databases and are legally required to provide it.

6. Obligations imposed upon the State by the right of access to information

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

18. First, the State is under the obligation to respond substantially to requests for information within a reasonable period of time, determining whether there is a right to access and, if so, providing the information requested. Indeed, by protecting the right of individuals to access information held by the State, article 13 of the American Convention establishes a positive obligation for the State to provide such information, in such a manner that the person is able to obtain and know this information, or be informed through a well-founded response of the legitimate reasons that prevent such access in accordance with the Convention.⁷ On this point, the Inter-American Commission has also held that the law must guarantee broad and effective access to public information, and that any exceptions may not confer an excessive degree of discretion upon the public officials who decide whether or not to disclose the information⁸, that is to say, exceptions "must have been established by law to ensure that they are not at the discretion of public authorities"⁹.

19. In other words, States have the obligation to provide individuals with an administrative procedure for accessing information. Such procedure must be established by law. It must provide reasonable time periods within which the authorities shall decide, in a reasoned manner, whether there is a right to access to the information, whether the authority to which the request for access was made is authorized to provide said information, and if not, it must indicate the proper agency. This duty to establish an administrative procedure for access to information is the necessary consequence of the inclusion of the right to access to information as a human right protected by the Convention and covered by all of the guarantees provided therein. Likewise, as is further explained in detail, States must establish the right to judicial review of the administrative decision through a simple, effective, rapid, and unburdensome recourse that allows the contravention of the decisions of those public officials who deny the right of access to some specific information, or who simply fail to provide a response to the request.¹⁰

20. As stated by the UN, OAS and OSCE Special Rapporteurs on Freedom of Expression in their Joint Declaration of 2004, "[a]ccess to information is a citizens' right. As a result, the procedures for accessing information should be simple, rapid and free or low-cost." In the words of the Inter-American Juridical Committee, in its "Principles on the Right of Access to Information", "[c]lear, fair, non-discriminatory and simple rules should be put in place regarding the processing of requests for information. These should include clear and reasonable timelines, provision for assistance to be given to those requesting information, free or low-cost access, and does not exceed the cost of copying and sending the information, and a requirement that where

⁷ I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151. Para. 77. IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Claude Reyes et al. v. Chile*, cited in the Judgment of September 19, 2006, Series C No. 151. Para. 58. a) y b).

⁸ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Claude Reyes et al. v. Chile*, cited in the Judgment of September 19, 2006, Series C No. 151. Para. 58 d).

⁹ I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151. Para. 89.

¹⁰ I/A Court H.R., *Case of Claude-Reyes et al. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 15, par. 137.



access is refused reasons, including specific grounds for the refusal, be provided in a timely fashion.”

21. This obligation includes the duty to refrain from interfering with the right of access to information of all kinds, which extends to the circulation of information that may or may not have the personal approval of those persons who represent State authority at a given time.

22. The second State obligation in this field, is the duty to provide the public with the maximum quantity of information proactively, at least in terms of (i) the structure of the State; and (ii) the information required for the exercise of other rights—for example, information concerning requirements and procedures in the areas of pensions, health, essential state services, and so on. In this respect, the UN, OAS and OSCE Special Rapporteurs on Freedom of Expression specified in their Joint Declaration of 2004 that “[p]ublic authorities should be required to publish pro-actively, even in the absence of a request, a range of information of public interest”, and that “[s]ystems should be put in place to increase, over time, the amount of information subject to such routine disclosure.” The scope of this obligation is also defined in the resolution of the Inter-American Juridical Committee on “Principles on the Right of Access to Information”, which establishes that “[p]ublic bodies should disseminate information about their functions and activities – including, but not limited to, their policies, opportunities for consultation, activities which affect members of the public, their budget, and subsidies, benefits and contracts – on a routine and proactive basis, even in the absence of a specific request, and in a manner which ensures that the information is accessible and understandable.” In the same sense mentioned above, this obligation includes the duty to refrain from interfering with the right of access to information of all kinds, which extends to the circulation of information that may or may not have the personal approval of those persons who represent State authority at a given time.

23. In the third place, the State has the obligation to produce or obtain the information it needs to fulfill its duties, pursuant to international, constitutional, or legal norms. In this respect, for example, the IACHR has already mentioned the obligation of the State to produce statistical information that is categorized by vulnerable groups. To this effect, in its report on Guidelines for Preparation of Progress Indicators in the Area of Economic, Social, and Cultural Rights,¹¹ the IACHR noted that “[t]he obligation of the State to adopt positive means to protect the exercise of social rights has important effects, for example, in regards to the type of statistical information that the State must produce. The production of information that is properly categorized so to determine what sectors are disadvantaged or relegated in the exercise of their rights, from this perspective, is not only a way to guarantee the effectiveness of a public policy, but rather an indispensable obligation that allows the State to fulfill its duty to provide such sectors with special and prioritized attention. As an example, the desegregation of data by sex, race, or ethnicity is an indispensable tool for illustrating problems of inequality”¹². In this same report, the IACHR reiterates that “the Committee on Economic, Social, and Cultural Rights has determined that it is an obligation of the State to produce information databases from which it would be possible to validate indicators [of progress] and, in general, the access to many of the guarantees covered by each social right. This obligation is, thus, fundamental for the enforceability of these rights”¹³. Finally, the IACHR¹⁴ pointed out that in international legislation,

¹¹ OEA/Ser.LV/II.132, Doc. 14, July 19, 2008

¹² IACHR, *Guidelines for Preparation of Progress Indicators in the Area of Economic, Social, and Cultural Rights*, OEA/Ser.LV/II.132, Doc. 14, July 19, 2008, Par. 58

¹³ IACHR, *Guidelines for Preparation of Progress Indicators in the Area of Economic, Social, and Cultural Rights*, OEA/Ser.LV/II.132, Doc. 14, July 19, 2008, para. 78.

¹⁴ IACHR, *Guidelines for Preparation of Progress Indicators in the Area of Economic, Social, and Cultural Rights*, OEA/Ser.LV/II.132, Doc. 14, July 19, 2008, Par. 81.



clear and explicit obligations exist regarding the production of information related to the exercise of the rights of sectors that are excluded or historically discriminated against¹⁵.

24. The fourth State obligation in this matter, is that of bringing its domestic laws into conformity with international standards in terms of access to information, by (i) removing legal or administrative obstacles that impede access to information; (ii) promoting the right of access within all of the State's entities and authorities, through the adoption and enforcement of rules and procedures and through the training of public officials on the custody, administration, filing and provision of information; and (iii) in general terms, adopting public policy that is favorable to the full exercise of this right. Indeed, as the Inter-American Court has explained, States must have an adequate legal framework for the protection of the right of access to information, and must guarantee the effectiveness of an adequate administrative procedure for the processing and adjudication of requests for information, with clear timelines for the issuance of decisions and the release of information under the control of public officials duly trained on the subject.¹⁶

25. Fifth, the State is bound by the obligation to disseminate among the public in general the existence and methods of exercising the right of access to information. In this respect, the Inter-American Juridical Committee affirmed in its Resolution on "Principles on the Right of Access to Information" that "[m]easures should be taken to promote, to implement and to enforce the right to access to information, including creating and maintaining public archives in a serious and professional manner, training public officials, implementing public awareness-raising programs, improving systems of information management, and reporting by public bodies on the measures they have taken to implement the right of access, including in relation to their processing of requests for information."¹⁷

26. Finally, the State has the duty to adequately preserve the information to which individuals have the right of access, through an appropriate file management system. The UN, OAS and OSCE Special Rapporteurs on Freedom of Expression addressed this point in their Joint Declaration of 2004, in which they asserted that "[p]ublic authorities should be required to meet minimum record management standards", and that "[s]ystems should be put in place to promote higher standards over time."

7. Limitations to the right of access to information

27. *Admissibility and conditions of the limitations.* As an element of freedom of expression protected by the American Convention, the right of access to information is not an absolute right. It may be subject to limitations that remove certain types of information from public access. Nevertheless, such limitations must be in strict accordance with the requirements derived from article 13-2 of the Convention—that is, the conditions of exceptional nature, legal establishment, legitimate objectives, and necessity and proportionality. In this precise sense, Principle 4 of the IACHR Statement of Principles on Freedom of Expression states that "[a]ccess to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that

¹⁵ The *Inter-American Convention in the Prevention, Punishment, and Eradication of Violence Against Women* (Belém do Pará) establishes the State's obligation "to ensure research and the gathering of statistics and other relevant information relating to the causes, consequences and frequency of violence against women, in order to assess the effectiveness of measures to prevent, punish and eradicate violence against women and to formulate and implement the necessary changes", article 8. h). This provision deals with an obligation to produce clear information that is enforceable as a right.

¹⁶ I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151. Para. 163.

¹⁷ Inter-American Juridical Committee. Resolution 147, of the 73rd Ordinary Period of Sessions: Principles on the Right of Access to Information. August 7, 2008. Principle. 10



threatens national security in democratic societies.” Furthermore, according to the case law of the inter-American system, simple, effective, expeditious and non-onerous judicial and administrative recourse must be provided for purposes of contesting the decisions of authorities that deny access to information in specific cases.¹⁸

28. It is incumbent upon the state to demonstrate, when it restricts access to information under its control, that it has complied with the requirements set forth in the Convention. The Inter-American Juridical Committee addressed this point in its Resolution on the “Principles on the Right of Access to Information”, stating that “[t]he burden of proof in justifying any denial of access to information lies with the body from which the information was requested.” The Inter-American Court has held that the establishment of restrictions to the right of access to information held by the State through the practice of the authorities and without meeting the requirements of the American Convention, (a) creates fertile ground for the discretionary and arbitrary action of the State in the classification of information as secret, reserved or confidential; (b) gives rise to legal uncertainty with respect to the exercise of such right; and (c) gives rise to legal uncertainty as to the scope of the State’s powers to restrict the right.¹⁹

29. *Exceptional nature of the limitations.* Bearing in mind the principle of maximum disclosure, the law must guarantee the effective and broadest possible access to public information, and any exceptions must not become the general rule in practice.

30. *Legal establishment of the exceptions.* First, limitations to the right to seek, receive and impart information must be established by law expressly and in advance, to ensure that they are not set at the government’s discretion. Their establishment must be sufficiently clear and specific so as to not grant an excessive degree of discretion to the public officials who decide whether or not to disclose the information.²⁰ In the opinion of the Inter-American Court, such laws must have been enacted “for reasons of general interest” in accordance with the common good as an element of public order in a democratic State. The definition of the Inter-American Court in Advisory Opinion 6/86 is applicable in this respect, according to which the term “laws” does not just refer to any legal norm, but rather to general normative acts that are enacted by the democratically elected legislative body provided for in the constitution, according to the procedures established in the constitution, and tied to the general welfare.²¹ Also relevant here is Principle 6 of the Resolution of the Inter-American Juridical Committee regarding the “Principles on the Right of Access to Information”, which states that “[e]xceptions to the right to access should be established by law, be clear and narrow.”

31. *Legitimate purpose under the American Convention.* The laws that set limitations on the right of access to information under the State’s control must correspond expressly to an objective that is permissible under article 13.2 of the American Convention, that is: to ensure respect for the rights or reputations of others, to protect national security, public order, or public health or morals.²²

¹⁸ I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151. Para. 137.

¹⁹ I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151. Para. 98.

²⁰ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Claude Reyes et al. v. Chile*, cited in the Judgment of September 19, 2006, Series C No. 151. Para. 58.f).

²¹ I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151. Para. 89.

²² I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151. Para. 90.



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

33. *Duty to justify clearly the denial of requests for access to information held by the State.* When there is in fact a reason allowed by the Convention for the State to limit access to information in its possession, the person who requests the access must receive a reasoned response that provides the specific reasons for which access is denied.²³ According to the Inter-American Commission, if the State denies access to information, it must provide sufficient explanation of the legal standards and the reasons supporting such decision, demonstrating that the decision was not discretionary or arbitrary, so that individuals may determine whether the denial meets the requirements set forth in the Convention.²⁴ Similarly, the Inter-American Court has specified that the unfounded failure to provide access to public information, without a clear explanation of the reasons and rules on which the denial is based, also constitutes a violation of the right to due process protected by article 8.1 of the Convention, in that decisions adopted by the authorities that may affect human rights must be duly justified; otherwise, they would be arbitrary decisions.²⁵

34. *Duty to provide legal recourse for contesting the denial of requests for access to information.* Whenever the administrative procedures for obtaining access to information are unsuccessful, individuals must have legal recourse that enables them to appeal the case to a court authorized to decide on their legal claim to the information they request in their specific case. Indeed, according to the Inter-American Court, the State must guarantee, in cases where access to State-held information is denied, that there be a simple, quick and effective means of appeal to (a) decide on the merits of the controversy to determine whether the right to access was violated; and (b) if such right was violated, order the appropriate entity to turn over the information. In these cases, the appeals must be simple and expedited; the speedy release of information is indispensable. If no such means of judicial appeal exist, the States must create it; otherwise, there is an additional violation of article 25 of the Convention (right to judicial protection). Moreover, the court decisions that rule on such appeals must be adequately justified. If a person resorts to judicial protection to access information held by the State and the pertinent court decision is not well-founded, articles 25 and 8 of the Convention are also violated, in addition to article 13.²⁶ The Inter-American Juridical Committee spoke to this issue in its "Principles on the Right of Access to Information", in which it provided that [i]ndividuals should have the right to appeal against any refusal or obstruction to provide access to information to an administrative jurisdiction. There should also be a right to bring an appeal to the courts against the decisions of this administrative body."

²³ I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151. Para. 77.

²⁴ IACHR, Arguments before the Inter-American Court of Human Rights in the *Case of Claude Reyes et al. v. Chile*, cited in the Judgment of September 19, 2006, Series C No. 151. Para. 58 c) and d).

²⁵ I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151. Para. 120.

²⁶ I/A Court H.R., *Case of Claude Reyes et al. v. Chile*. Judgment of September 19, 2006, Series C No. 151. Para. 137.



35. In their Joint Declaration of 2004, the UN, OAS and OSCE Special Rapporteurs summarized the requirements that limits to the right to access to information must meet, and addressed in greater depth some issues concerning “restricted” or “secret” information and the laws establishing those classifications, as well as the public officials legally required to maintain its confidentiality. The Special Rapporteurs established, in general terms: (i) that “[t]he right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy”, that “[e]xceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information”, and that “[t]he burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions”; (ii) that “those requesting information should have the possibility to appeal any refusals to disclose to an independent body with full powers to investigate and resolve such complaints”; and (iii) that “[n]ational authorities should take active steps to address the culture of secrecy that still prevails in many countries within the public sector”, which “should include provision for sanctions for those who willfully obstruct access to information”, and that “[s]teps should also be taken to promote broad public awareness of the access to information law.” In this same Joint Declaration of 2004, they examined in greater detail the issue of confidential or restricted information and laws regulating secrecy, declaring: (iv) that “[u]rgent steps should be taken to review and, as necessary, repeal or amend, legislation restricting access to information to bring it into line with international standards in this area, including as reflected in this Joint Declaration”; (v) that “[p]ublic authorities and their staff bear sole responsibility for protecting the confidentiality of legitimately secret information under their control”, that “[o]ther individuals, including journalists and civil society representatives, should never be subject to liability for publishing or further disseminating this information, regardless of whether or not it has been leaked to them, unless they committed fraud or another crime to obtain the information”, and that “[c]riminal law provisions that don’t restrict liability for the dissemination of State secrets to those who are officially entitled to handle those secrets should be repealed or amended”; (vi) that “[c]ertain information may legitimately be secret on grounds of national security or protection of other overriding interests”, but that “secrecy laws should define national security precisely and indicate clearly the criteria which should be used in determining whether or not information can be declared secret, so as to prevent abuse of the label ‘secret’ for purposes of preventing disclosure of information which is in the public interest”, for which “[s]ecrecy laws should set out clearly which officials are entitled to classify documents as secret and should also set overall limits on the length of time documents may remain secret”, likewise that “[s]uch laws should be subject to public debate”; and (vii) finally, that “[w]histleblowers’ are individuals releasing confidential or secret information although they are under an official or other obligation to maintain confidentiality or secrecy,” with regard to whom it was declared that “[w]histleblowers’ releasing information on violations of the law, on wrongdoing by public bodies, on a serious threat to health, safety or the environment, or on a breach of human rights or humanitarian law should be protected against legal, administrative or employment-related sanctions if they act in ‘good faith’.”

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

37. The Inter-American Court of Human Rights ruled specifically on the issue of “secret” or “confidential” information in another area concerning public access to information, namely, the provision of information on grave human rights violations to the judicial and administrative authorities in charge of investigating such cases and administering justice on behalf of the victims. In the *Case of Myrna Mack Chang v. Guatemala*,²⁷ it was proven before the

²⁷ I/A Court H.R. *Case of Myrna Mack Chang v. Guatemala*. Judgment of November 25, 2003, Series C No. 101, pars. 180 to 182.



Court that the Ministry of National Defense had refused to provide some documents relating to the operation and the structure of the Presidential General Staff after repeated requests from the Attorney General's Office and federal judges in the investigations of an extrajudicial execution. The refusal invoked state secrecy pursuant to article 30 of the Guatemalan constitution. In the opinion of the Inter-American Court, "in cases of human rights violations, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding". In this respect, the Court adopted the considerations of the Inter-American Commission on Human Rights, which had argued before the Court that "[i]n the framework of a criminal proceeding, especially when it involves the investigation and prosecution of illegal actions attributable to the security forces of the State, there is a possible conflict of interests between the need to protect official secret, on the one hand, and the obligations of the State to protect individual persons from the illegal acts committed by their public agents and to investigate, try, and punish those responsible for said acts, on the other hand. [...P]ublic authorities cannot shield themselves behind the protective cloak of official secret to avoid or obstruct the investigation of illegal acts ascribed to the members of its own bodies. In cases of human rights violations, when the judicial bodies are attempting to elucidate the facts and to try and to punish those responsible for said violations, resorting to official secret with respect to submission of the information required by the judiciary may be considered an attempt to privilege the "clandestinity of the Executive branch" and to perpetuate impunity. Likewise, when a punishable fact is being investigated, the decision to define the information as secret and to refuse to submit it can never depend exclusively on a State body whose members are deemed responsible for committing the illegal act. (...) Thus, what is incompatible with the Rule of Law and effective judicial protection "is not that there are secrets, but rather that these secrets are outside legal control, that is to say, that the authority has areas in which it is not responsible because they are not juridically regulated and are therefore outside any control system...". In this context, the Inter-American Court considered that the refusal of the Ministry of National Defense to provide the documents requested by the judges and the Attorney General's Office, alleging state secrecy, amounted to the obstruction of justice.