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

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

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TABLE OF ACRONYMS AND REFERENCES

African Commission or ACHPR:	African Commission on Human and Peoples' Rights
American Convention:	American Convention on Human Rights
Declaration of Principles:	Declaration of Principles on Freedom of Expression
FOIA:	Freedom of Information Act
IACHR:	Inter-American Commission on Human Rights
ICCPR:	International Covenant on Civil and Political Rights
IFAI:	Federal Institute for Access to Information and Data Protection (Instituto Federal de Acceso a la Información y Protección de Datos)
ILO:	International Labor Organization
Inter-American Court:	Inter-American Court of Human Rights
Joint Declaration	Joint Declaration of the Special Rapporteur on Freedom of Opinion and Expression for the United Nations (UN), the Representative on Freedom of the Media for the Organization for Security and Co-operation in Europe (OSCE), and the Special Rapporteur on Freedom of Expression for the Organization of American States (OAS)
OAS:	Organization of American States
OSCE:	Organization for Security and Cooperation in Europe
Office of the Special Rapporteur:	Office of the Special Rapporteur for Freedom of Expression of the IACHR
UN:	United Nations
UNESCO:	United Nations Educational, Scientific and Cultural Organization

PROLOGUE

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

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

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

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

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

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

Since then, much has changed. With the passage of the Transparency Act and the creation of the Transparency Council in 2009, Chile has become one of the region's leading countries in access to information policy. Many other countries have also adopted access and transparency policies. A total of 19 countries in the Americas have passed access to public information laws, while others are on their way to doing so.

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

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

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

These standards were not arrived at by chance. They are the result of a virtuous circle created through regional and national bodies' mutual recognition of the protection of

human rights in response to the demands of civil society. This framework produces a dialogue out of which comes a reciprocal learning process. Happily, this process ultimately favors the inhabitants of the hemisphere, to whom we owe our work.

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

The efforts required are not insignificant. The path is neither short nor easy, but we are following it thanks to the invaluable efforts of the hemisphere's civil society and the fundamental support of the international community. This book seeks to shore up the efforts of the former. As for the latter, we would like to thank the European Commission for sponsoring the development of the project titled *Strengthening Freedom of Expression in the Americas 2009-2012*, which made the preparation of this book possible.

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

I. Content and scope of the right to access to information

A. Introduction

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

2. The IACHR's interpretation of Article 13 of the American Convention holds that it includes a positive obligation for the State to allow its citizens access to information under its control.[3] In this sense, the IACHR's Declaration of Principles on Freedom of Expression establishes in Principle 2 that, "Every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights," and that, "All people should be afforded equal opportunities to receive, seek and impart information;" Principle 3 holds that, "Every person has the right to access to information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it;" and Principle 4 indicates that, "Access to information […] is a

[1] The right of access to information has been one of the recurrent topics of the annual reports and publications of the Office of the Special Rapporteur since its creation. This document is an updated version of the annual reports, especially the Annual Reports of the Office of the Special Rapporteur for Freedom of Expression 2005 (Chapter IV), 2008 (subsection [f] of Chapter III), and 2010 (Chapters III and IV). A version of this book was originally published as Chapter IV of the Annual Report 2009.

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

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

fundamental right of every individual. States have the obligation to guarantee the full exercise of this right."

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

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

5. Effectively, the right of access to information *is a crucial tool for controlling State affairs and public administration, as well as monitoring corruption.* The right of access to information is a fundamental requirement for guaranteeing transparency and good public administration by the government and other State authorities. Effectively, the full exercise of the right of access to information is a guarantee that is indispensable in preventing abuses by public officials, holding public administration accountable and promoting its transparency, as well as preventing corruption and authoritarianism. In a representative and participatory democratic system, free access to information is also a measure that allows the citizenry to exercise adequately their political rights. Of course, political rights presume the existence of broad and vigorous public discourse. For this discourse, it is indispensable to have access to public information that allows for serious evaluation of the progress made and difficulties faced by the authorities in their achievements.

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

[5] "Free access to information is a measure that, in a representative and participative democratic system, the citizens exercise their political rights; effectively, the full exercise of the right of access to information is necessary for preventing abuses by public officials, promoting transparency in government administration, and allowing solid and informed public debate that ensures the guarantee of effective recourses against government abuse and prevents corruption. Only through access to State-controlled information in the public interest can citizens question, investigate, and weigh whether the government is adequately complying with its public functions." *Cf.* I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. paras. 86-87.

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

Only through access to information under State control is the citizenry able to know if the State is adequately complying with its public functions.[7] Finally, access to information also has a fundamental instrumental function. Only through adequate implementation of this right can people know what exactly their rights are and what mechanisms exist to protect them. In particular, the adequate implementation of the right of access to information in its full scope is an essential condition for the fulfillment of the social rights of excluded or marginalized sectors of society. Indeed, these sectors do not tend to have systematic and reliable alternatives for learning the scope of the rights that the State has recognized and the mechanisms for demanding them and making them effective.

6. On the functions of the right of access to information, in a 1999 Joint Declaration, the Special Rapporteurs for Freedom of Expression of the UN, OSCE, and the OAS stated that, "Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented."[8] Likewise, the 2004 Joint Declaration recognized "the fundamental importance of access to information to democratic participation, to holding governments accountable and to controlling corruption, as well as to personal dignity and business efficiency."[9]

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

B. Guiding Principles of the Right of Access to Information

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

[8] Joint Declaration of the Special Rapporteur on Freedom of Opinion and Expression for the United Nations (UN), the Representative on Freedom of the Media for the Organization for Security and Co-operation in Europe (OSCE), and the Special Rapporteur on Freedom of Expression for the Organization of American States (OAS) (1999). Available at: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&lID=1

[9] Joint Declaration of the Special Rapporteur on Freedom of Opinion and Expression for the United Nations (UN), the Representative on Freedom of the Media for the Organization for Security and Co-operation in Europe (OSCE), and the Special Rapporteur on Freedom of Expression for the Organization of American States (OAS) (2004). Available at: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&lID=1

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

1. Principle of maximum disclosure

9. The principle of maximum disclosure has been recognized by the inter-American system as a guiding principle of the right – found in Article 13 of the American Convention – to seek, receive, and impart information. In this sense, both the Inter-American Court and the IACHR have established that the right of access to information must be governed by the "principle of maximum disclosure."[10] Similarly, the Inter-American Juridical Committee in Resolution CJI/RES.147 (LXXIII-O/08) on "Principles on the Right of Access to Information," in Principle 1, has established that: "In principle, all information is accessible. Access to information is a fundamental human right which establishes that everyone can access information from public bodies, subject only to a limited regime of exceptions."[11]

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

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

11. The right of access to information is not an absolute right; it can be subject to limitations. However, as will be explored in greater detail below, these limitations must comply strictly with the requirements derived from Article 13.2 of the Convention, namely that limitations are of an exceptional nature, legally enshrined, based on a legitimate aim, and necessary and proportional for pursuing that aim.[12] However, the exceptions should not become the general rule; they must

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[10] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151. para. 92; IACHR. *Annual Report 2003*. OEA/Ser.L/V/II.118 Doc. 70 rev. 2. December 29, 2003. Vol. II, Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter IV, Report on Access to Information in the Hemisphere, para. 32.

[11] CJI/RES. 147 (LXXIII-O/08), *Principles on the right of access to information,* August 7, 2008. Available at: http://www.oas.org/dil/CJI-RES_147_LXXIII-O-08_eng.pdf

[12] In this particular sense, Principle 4 of the Declaration of Principles holds that "Access to information […] allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies."

take into account that access to information is the rule and secrecy the exception. Likewise, domestic legislation must make clear that confidential documents remain so only as long as their publication could effectively compromise the interests that their secrecy protects. This means that domestic legislation should mandate that information classified as secret or confidential under the limitations allowed under the American Convention must be published after a reasonable period of time.

12. As far as its scope, the Inter-American Court has emphasized in its jurisprudence that this principle "establishes the presumption that all information is accessible, subject to a limited system of exceptions,"[13] which must have been established by law, serve an objective allowed under the American Convention, and be necessary in a democratic society, which in turn requires that they be intended to satisfy a compelling public interest.[14]

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

13. The Inter-American Court's jurisprudence has established that the State has the burden of proof of demonstrating that limits to access to information are compatible with inter-American norms on freedom of expression;[15] the Inter-

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[13] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151. para. 92; Cfr. I/A Court H. R., *Case of Gomes Lund et al. v. Brazil (Guerrilha do Araguaia)*, Judgment of November 24, 2010. Series C No. 219, para. 230. In the same sense, the Offices of the Special Rapporteurs on Freedom of Expression of the UN, OAS, and OSCE in the Joint Declaration 2004 explained that this principle "establishes a presumption that all information is accessible subject only to a narrow system of exceptions."

[14] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151. paras. 89-91. I/A Court H. R., *Case of Gomes Lund et al. v. Brazil (Guerrilha do Araguaia)*, Judgment of November 24, 2010. Series C No. 219, para. 229. Also see, I/A Court H. R., *Case of Palamara-Iribarne v. Chile.* Judgment of November 22, 2005. Series C No. 135. para. 85; I/A Court H. R., *Case of Ricardo Canese v. Paraguay.* Judgment of August 31, 2004. Series C No. 111. para. 96; I/A Court H. R., *Case of Herrera-Ulloa v. Costa Rica.* Judgment of July 2, 2004. Series C No. 107. paras. 121 and 123; and I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 46. Similarly, the Inter-American Juridical Committee in its Resolution CJI/RES.147 (LXXIII-O/08) on "Principles on the Right of Access to Information" in Point 1 establish that, "In principle, all information is accessible. Access to information is a fundamental human right which establishes that everyone can access information from public bodies, subject only to a limited regime of exceptions in keeping with a democratic society and proportionate to the interest that justifies them. States should ensure full respect for the right to access to information through adopting appropriate legislation and putting in place the necessary implementation measures."

[15] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151. para. 93; I/A Court H. R., *Case of Gomes Lund et al. v. Brazil (Guerrilha do Araguaia)*, Judgment of November 24, 2010. Series C No. 219, para. 230.

American Judicial Committee affirmed this point in its resolution "Principles on the Right of Access to Information," stating that "The burden of proof in justifying any denial of access to information lies with the body from which the information was requested."[16] This allows for the creation of legal certainty in the exercise of the right of access to information. Since the information is under the control of the State, discretionary and arbitrary acts of the State must be avoided in establishing restrictions of the right.[17]

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

14. As the Office of the Special Rapporteur has broadly recognized within the rappourteurships of freedom of expression, in cases of discrepancies or conflicting statutes, the law of access to information must prevail over all other legislation.[18] This has been recognized as an indispensable prerequisite for the proper functioning of democracy.[19] This requirement helps encourage the States to comply effectively with the obligation to establish a law on access to public information and interpret the law favorably toward that right.[20]

2. Principle of Good Faith

15. To guarantee the effective exercise of the right of access to information, it is crucial that those bound to guarantee this right act in good faith; that is, that they ensure the strict application of the right, provide the necessary measures of assistance to petitioners, promote a culture of transparency, contribute to making public administration more transparent, and act with due diligence,

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[16] CJI/RES. 147 (LXXIII-O/08), *Principles on the right of access to information,* August 7, 2008. Para. 7. Available at: http://www.oas.org/dil/CJI-RES_147_LXXIII-O-08_eng.pdf

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

[18] Joint Declaration of the Special Rapporteur on Freedom of Opinion and Expression for the United Nations (UN), the Representative on Freedom of the Media for the Organization for Security and Co-operation in Europe (OSCE), and the Special Rapporteur on Freedom of Expression for the Organization of American States (OAS) (2004). Available at: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&lID=1

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

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

professionalism, and institutional loyalty. They must take the actions necessary to serve the general interest and not betray the people's confidence in State administration.

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

1. Every person has the right of access to information

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

17. The Inter-American Court has specified on this point that it is not necessary to prove a direct interest or a personal stake in order to obtain information in the State's possession, except in cases where there is a legitimate restriction permitted by the Convention, under the terms explained further below.[21]

18. In addition, any person who accesses information under the control of the State has, in turn, the right to disclose that information so that it circulates publicly and the public can know about it, access it and evaluate it. The right of access to information thus shares the individual and social dimensions of freedom of expression, and the State must guarantee both simultaneously.[22]

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

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

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[21] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151. para. 77; I/A Court H. R., *Case of Gomes Lund et al. v. Brazil (Guerrilha do Araguaia)*, Judgment of November 24, 2010. Series C No. 219, para. 197.

[22] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile* Judgment of September 19, 2006. Series C No. 151. para. 77; I/A Court H. R., *Case of Gomes Lund et al. v. Brazil (Guerrilha do Araguaia)*, Judgment of November 24, 2010. Series C No. 219, para. 197.

20. As such, reiterating the existing case law, the Resolution of the Inter-American Juridical Committee on "Principles on the Right of Access to Information"[23] states, in Principle 2, that "[t]he right of access to information applies to all public bodies, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory bodies, bodies which are owned or controlled by government, and organizations which operate with public funds or which perform public functions."

3. Object of the right

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

22. In that sense, the resolution on the "Principles on the Right to Access to Information" of the Inter-American Juridical Committee states that the right to access to information includes "all significant information, defined broadly to include everything which is held or recorded in any format or medium".[24]

4. State obligations with regard to the right of access to information

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

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

24. The State has an obligation to provide a substantive response to requests for information. Indeed, by protecting the right of individuals to access information held by the State, Article 13 of the American Convention establishes a positive obligation for the State to provide the requested information in a timely, complete, and accessible manner. Otherwise, the State must offer, within a

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[23] CJI/RES. 147 (LXXIII-O/08), *Principles on the right of access to information,* August 7, 2008. Principle 2. Available at: http://www.oas.org/dil/CJI-RES_147_LXXIII-O-08_eng.pdf.

[24] CJI/RES. 147 (LXXIII-O/08), *Principles on the right of access to information,* August 7, 2008. Principle 3. Available at: http://www.oas.org/dil/CJI-RES_147_LXXIII-O-08_eng.pdf

reasonable time period, its legitimate reasons for impeding access.[25] In this sense, as will be explored in greater depth in the next section, inter-American doctrine has specified that in the event of exceptions, they "must have been established by law to ensure that they are not at the discretion of public authorities."[26]

25. The State's obligation to supply requested information includes special duties of protection and guarantee, which are briefly explained below.

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

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

27. With regard to the obligation of creating a special mechanism to make the right to access enforceable, the Inter-American Court has held that the

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[25] 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 *Claude-Reyes et al. v. Chile*, cited in I/A Court H. R., *Case of Claude-Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151. para. 58.a)-b); I/A Court H. R., *Case of Gomes Lund et al. v. Brazil (Guerrilha do Araguaia)*, Judgment of November 24, 2010. Series C No. 219, para. 197.

[26] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151. para. 89; I/A Court H. R., *Case of Gomes Lund et al. v. Brazil (Guerrilha do Araguaia)*, Judgment of November 24, 2010. Series C No. 219, para. 229.

State must "guarantee (…) the effectiveness of an appropriate administrative procedure for processing and deciding requests for information, which establishes time limits for making a decision and providing information, and which is administered by duly trained officials."[27]

28. As stated by the UN, OAS and OSCE Special Rapporteurs on Freedom of Expression in their Joint Declaration of 2004, "[a]ccess to information is a citizens' right. As a result, the procedures for accessing information should be simple, rapid and free or low-cost."[28] In the words of the Inter-American Juridical Committee, in its "Principles on the Right of Access to Information," "[c]lear, fair, non-discriminatory and simple rules should be put in place regarding the processing of requests for information. These should include clear and reasonable timelines, provision for assistance to be given to those requesting information, free or low-cost access, and does not exceed the cost of copying and sending the information, and a requirement that where access is refused reasons, including specific grounds for the refusal, be provided in a timely fashion."[29]

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

29. States should enshrine the right to administrative review and subsequent judicial review of administrative decisions through a recourse that is simple, effective, quick, and non-onerous, that allows the challenging of decisions of public officials that deny the right of access to specific information or simply neglect to answer the request.[30] Together with that, the remedy should also: a) review the merits of the controversy to determine whether the right of access was inhibited, and b) in the affirmative case, order the corresponding government body to turn over the information. In these cases, the recourses should be simple and quick, since the

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[27] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151. para. 163; I/A Court H. R., *Case of Gomes Lund et al. v. Brazil (Guerrilha do Araguaia)*, Judgment of November 24, 2010. Series C No. 219, para. 231.

[28] Joint Declaration of the Special Rapporteur on Freedom of Opinion and Expression for the United Nations (UN), the Representative on Freedom of the Media for the Organization for Security and Co-operation in Europe (OSCE), and the Special Rapporteur on Freedom of Expression for the Organization of American States (OAS) (2004). Available at: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&lID=1

[29] CJI/RES. 147 (LXXIII-O/08), *Principles on the right of access to information,* August 7, 2008. Principle 5. Available at: http://www.oas.org/dil/CJI-RES_147_LXXIII-O-08_eng.pdf

[30] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151. para. 137; I/A Court H. R., *Case of Gomes Lund et al. v. Brazil (Guerrilha do Araguaia)*, Judgment of November 24, 2010. Series C No. 219, para. 231.

expeditious delivery of the information is indispensable for the fulfillment of the functions this right presupposes.[31]

30. The Inter-American Court has established that a legal remedy is compatible with the requirements of the Convention as long as it is adequate and effective.[32] That is to say, it must be adequate to protect the right that has been infringed upon[33] and able to produce the sought-after result.[34] The absence of an effective remedy will be considered a transgression of the American Convention.[35]

31. Also, the Court has established that the guarantee of an effective legal remedy for violations of fundamental rights "is one of the basic mainstays, not only of the American Convention, but also of the rule of law in a democratic society in the sense set forth in the Convention."[36]

d. Obligation of active transparency

32. The right of access to information imposes on the State the obligation to provide the public with the maximum quantity of information proactively, at least in terms of a) the structure, function, and operating and investment budget of the state; b) the information needed for the exercise of other rights – for example, those pertaining to the requirements and procedures surrounding pensions, health, basic government services, etc.; c) the availability of services, benefits, subsidies, or contracts of any kind; and d) the procedure for filing complaints or requests, if it exists. This information should be understandable, available in approachable language and up to date. Also, given that significant segments of the population do

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[31] I I/A Court H. R., *Case of Claude-Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151. paras. 116-139; I/A Court H. R., *Case of Gomes Lund et al. v. Brazil (Guerrilha do Araguaia)*, Judgment of November 24, 2010. Series C No. 219, para. 231.

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

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

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

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

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

not have access to new technologies yet many of their rights can depend on obtaining information on how to realize them, in these circumstances the State must find efficient ways to fulfill its obligation of active transparency.

33. In this respect, the UN, OAS and OSCE Special Rapporteurs on Freedom of Expression specified in their Joint Declaration of 2004 that "[p]ublic authorities should be required to publish pro-actively, even in the absence of a request, a range of information of public interest;" and that "[s]ystems should be put in place to increase, over time, the amount of information subject to such routine disclosure."[37]

34. The scope of this obligation is also defined in the resolution of the Inter-American Juridical Committee on "Principles on the Right of Access to Information," which establishes that "[p]ublic bodies should disseminate information about their functions and activities – including, but not limited to, their policies, opportunities for consultation, activities which affect members of the public, their budget, subsidies, benefits and contracts – on a routine and proactive basis, even in the absence of a specific request, and in a manner which ensures that the information is accessible and understandable."[38] In the same sense mentioned above, this obligation includes the duty to refrain from interfering with the right of access to information of all kinds, which extends to the circulation of information that may or may not have the personal approval of those persons who represent State authority at a given time.

e. Obligation to produce or gather information

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

36. To this effect, in its report on Guidelines for Preparation of Progress Indicators in the Area of Economic, Social, and Cultural Rights, 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

[37] Joint Declaration of the Special Rapporteur on Freedom of Opinion and Expression for the United Nations (UN), the Representative on Freedom of the Media for the Organization for Security and Co-operation in Europe (OSCE), and the Special Rapporteur on Freedom of Expression for the Organization of American States (OAS) (2004). Available at: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&lID=1

[38] CJI/RES. 147 (LXXIII-O/08), *Principles on the right of access to information,* August 7, 2008. Principle 4. Available at: http://www.oas.org/dil/CJI-RES_147_LXXIII-O-08_eng.pdf

properly categorized so as to determine what sectors are disadvantaged or relegated in the exercise of their rights, from this perspective, is not only a way to guarantee the effectiveness of a public policy, but is also an indispensable obligation that allows the State to fulfill its duty to provide such sectors with special and prioritized attention. As an example, the desegregation of data by sex, race, or ethnicity is an indispensable tool for illustrating problems of inequality."[39]

37. In this same report, the IACHR reiterates that "the Committee on Economic, Social, and Cultural Rights has determined that it is an obligation of the State to produce information databases from which it would be possible to validate indicators [of progress] and, in general, the access to many of the guarantees covered by each social right. This obligation is, thus, fundamental for the enforceability of these rights."[40] The IACHR[41] has also pointed out that in international legislation, clear and explicit obligations exist regarding the production of information related to the exercise of the rights of sectors that are excluded or historically discriminated against.[42]

f. Obligation to create a culture of transparency

38. The State has an obligation to promote within a reasonable time period a true culture of transparency. This means systematic campaigns to inform the general public of the existence of the right of access to information and ways of exercising that right. In this respect, the Inter-American Juridical Committee finds in its resolution on "Principles on the Right of Access to Information" that, "Measures should be taken to promote, to implement and to enforce the right to access to information, including (…) implementing public awareness-raising programmes."[43]

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[39] IACHR, Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights. OEA/Ser.L/V/II.132. Doc. 14 rev. 1. 19 July 2008. para. 58. Available at: http://cidh.org/countryrep/IndicadoresDESC08eng/Indicadoresindice.eng.htm

[40] IACHR, Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights. OEA/Ser.L/V/II.132. Doc. 14 rev. 1. 19 July 2008. para. 78. Available at: http://cidh.org/countryrep/IndicadoresDESC08eng/Indicadoresindice.eng.htm

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

[42] 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".

[43] CJI/RES. 147 (LXXIII-O/08), *Principles on the right of access to information,* August 7, 2008. Principle 10. Available at: http://www.oas.org/dil/CJI-RES_147_LXXIII-O-08_eng.pdf

g. Obligation of adequate implementation

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

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

41. Second, the State must adopt laws, policies, and practices to preserve and administer information adequately. The Offices of the Special Rapporteurs for Freedom of Expression of the UN, OAS, and the OSCE declared in their Joint Statement in 2004 that "[p]ublic authorities should be required to meet minimum record management standards" and "[s]ystems should be put in place to promote higher standards over time."[44]

42. Third, States must adopt a systematic policy for training public officials who will work in satisfying the right of access to information in all of its facets, as well as "training [of] public entities, authorities and agents responsible for responding to requests for access to State-held information on the laws and regulations governing this right."[45] This obligation also means the training of public officials on the laws and policies on the creation and maintenance of information archives that the State is obligated to safeguard, administer, and produce or gather. In this sense, the Inter-American Court has referred to the States' obligation to "train (…) public entities, authorities and agents responsible for responding to requests for access to State-held information on the laws and regulations governing this right."[46]

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

43. Finally, and in conjunction with the preceding, the State has an obligation to adjust its domestic legal code to international standards on access to

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[44] Joint Declaration of the Special Rapporteur on Freedom of Opinion and Expression for the United Nations (UN), the Representative on Freedom of the Media for the Organization for Security and Co-operation in Europe (OSCE), and the Special Rapporteur on Freedom of Expression for the Organization of American States (OAS) (2004). Available at: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&lID=1

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

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

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

44. As the Inter-American Court has explained, the State must adopt the measures necessary to guarantee the rights protected under the Convention. This includes both repealing laws and practices that violate these rights and issuing laws and practices that effectively protect these guarantees.[47] Likewise, the Court has established that States should have a legal framework that adequately protects the right to information. They should guarantee the effectiveness of an adequate administrative procedure for processing and resolving requests for information, with clear deadlines for turning over information. The procedure should be under the supervision of appropriately trained officials.[48]

5. Limitations to the right of access to information

a. Admissibility and conditions of limitations

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

46. It is incumbent upon the State to demonstrate, when it restricts access to information under its control, that it has complied with the requirements set forth in the Convention. The Inter-American Juridical Committee addressed this point in its Resolution on the "Principles on the Right of Access to Information,"

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

[48] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151. para. 163; I/A Court H. R., *Case of Gomes Lund et al. v. Brazil (Guerrilha do Araguaia)*, Judgment of November 24, 2010. Series C No. 219, para. 228.

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."[49]

47. The Inter-American Court has held that the establishment of restrictions to the right of access to information held by the State through the practice of the authorities and without meeting the requirements of the American Convention (a) creates fertile ground for the discretionary and arbitrary action of the State in the classification of information as secret, reserved or confidential; (b) gives rise to legal uncertainty with respect to the exercise of such right; and (c) gives rise to legal uncertainty as to the scope of the State's powers to restrict the right.[50]

b. Exceptional nature of limitations

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

c. Legal establishment of exceptions

49. First, limitations to the right to seek, receive and impart information must be prescribed by law expressly and in advance, to ensure that they are not set at the government's discretion. Their establishment must be sufficiently clear and specific so as to not grant an excessive degree of discretion to the public officials who decide whether or not to disclose the information.[51]

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

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[49] CJI/RES. 147 (LXXIII-O/08), *Principles on the right of access to information,* August 7, 2008. Principle 7. Available at: http://www.oas.org/dil/CJI-RES_147_LXXIII-O-08_eng.pdf

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

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

the constitution, according to the procedures established in the constitution, and tied to the general welfare.[52]

51. Also relevant here is Principle 6 of the Resolution of the Inter-American Juridical Committee regarding the "Principles on the Right of Access to Information," which states that "[e]xceptions to the right to access should be established by law, be clear and narrow."[53]

d. Legitimate aim under the American Convention

52. The laws that set limitations on the right of access to information under the State's control must correspond expressly to an objective that is permissible under Article 13.2 of the American Convention, that is: to ensure respect for the rights or reputations of others, and to protect national security, public order, or public health or morals.[54] The scope of these concepts must be clearly and precisely defined and coincide with their meaning in a democratic society.

e. Necessity and proportionality of limitations

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

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

[53] CJI/RES. 147 (LXXIII-O/08), *Principles on the right of access to information,* August 7, 2008. Available at: http://www.oas.org/dil/CJI-RES_147_LXXIII-O-08_eng.pdf

[54] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151. para. 90; I/A Court H. R., *Case of Gomes Lund et al. v. Brazil (Guerrilha do Araguaia)*, Judgment of November 24, 2010. Series C No. 219, para. 229.

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

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

55. When there is in fact a reason allowed by the Convention for the State to limit access to information in its possession, the person who requests the access must receive a reasoned response that provides the specific reasons for which access is denied.[55] 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.[56] Similarly, the Inter-American Court has specified that the unfounded failure to provide access to information, without a clear explanation of the reasons and rules on which the denial is based, also constitutes a violation of the right to due process protected by Article 8.1 of the Convention, in that decisions adopted by the authorities that may affect human rights must be duly justified; otherwise, they would be arbitrary decisions.[57]

g. Confidential or secret information

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

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[55] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151. para. 77; I/A Court H. R., *Case of Gomes Lund et al. v. Brazil (Guerrilha do Araguaia)*, Judgment of November 24, 2010. Series C No. 219, para. 230.

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

[57] I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 120; I/A Court H. R., *Case of Gomes Lund et al. v. Brazil (Guerrilha do Araguaia)*, Judgment of November 24, 2010. Series C No. 219, paras. 211-12.

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."[58]

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

[58] Joint Declaration of the Special Rapporteur on Freedom of Opinion and Expression for the United Nations (UN), the Representative on Freedom of the Media for the Organization for Security and Co-operation in Europe (OSCE), and the Special Rapporteur on Freedom of Expression for the Organization of American States (OAS) (2004). Available at: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&lID=1

protected against legal, administrative or employment-related sanctions if they act in 'good faith.'"[59]

58. In this same fashion, in the Joint Declaration of 2006, the Special Rapporteurs affirm that "[j]ournalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it. It is up to public authorities to protect the legitimately confidential information they hold."[60] These points were later reaffirmed in the Joint Declaration on Wikileaks of 2010.[61]

59. The Inter-American Court of Human Rights ruled specifically on the issue of "secret" or "confidential" information for the first time in 2003, in a case that involved the provision of information on serious human rights violations to the judicial and administrative authorities in charge of investigating such cases and administering justice on behalf of the victims. In the *Case of Myrna Mack Chang v. Guatemala*,[62] it was proven before the Court that the Ministry of National Defense had refused to provide certain documents relating to the operation and the structure of the Presidential General Staff after repeated requests from the Attorney General's Office and federal judges in the investigations of an extrajudicial execution. The refusal invoked state secrecy pursuant to article 30 of the Guatemalan Constitution. In the opinion of the Inter-American Court, "in cases of human rights violations, the State authorities cannot resort to 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

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[59] Joint Declaration of the Special Rapporteur on Freedom of Opinion and Expression for the United Nations (UN), the Representative on Freedom of the Media for the Organization for Security and Co-operation in Europe (OSCE), and the Special Rapporteur on Freedom of Expression for the Organization of American States (OAS) (2004). Available at: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&lID=1

[60] Joint Declaration of the Special Rapporteur on Freedom of Opinion and Expression for the United Nations (UN), the Representative on Freedom of the Media for the Organization for Security and Co-operation in Europe (OSCE), and the Special Rapporteur on Freedom of Expression for the Organization of American States (OAS), and the Special Rapporteur on Freedom of Expression for the African Commission on Human and Peoples' Rights (ACHPR) (2006). Available at: http://www.oas.org/en/iachr/expression/basic_documents/declarations.asp

[61] Joint Declaration of the Special Rapporteur on Freedom of Opinion and Expression for the United Nations (UN) and the Special Rapporteur on Freedom of Expression for the Organization of American States (OAS) on Wikileaks (2010). Available at: http://www.oas.org/en/iachr/expression/basic_documents/declarations.asp

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

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.

60. In recent years, both the Inter-American Court and the Commission have expanded their jurisprudence on the subject of reserved or secret information in the context of human rights violations, in cases that will be examined below.[63]

h. Personal information and the right of access to information

61. One of the limits on the right of access to information is the protection of personal data, which belongs only to the person it concerns and whose disclosure could affect a legitimate right of this person, like the right to privacy. As a consequence, in principle only the person whom it concerns may have access to information of a personal nature. Effectively, and in keeping with the IACHR's Declaration of Principles on Freedom of Expression, "Every person has the right to access to information about himself or herself or his/her assets expeditiously and not

[63] I/A Court H. R., *Case of Gomes Lund et al. v. Brazil (Guerrilha do Araguaia)*, Judgment of November 24, 2010. Series C No. 219; IACHR, *Report No. 116/10 (Merits)*, Case 12.590, José Miguel Gudiel Álvarez et al. ("Diario Militar"), Guatemala, February 18, 2011; IACHR, *Report No. 117/10 (Merits)*, Caso 12.343, Edgar Fernando Garcia et al., Guatemala, February 9, 2011.

onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it."

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

63. Regarding personal information – or *habeas data* – in its Report on Terrorism and Human Rights,[64] the IACHR stated that, in addition to the general right to access information held by the State, "Every person has the right to access to information about himself or herself, whether this is in the possession of a government or private entity." The report continues that "this right includes the right to modify, remove, or correct such information due to its sensitive, erroneous, biased, or discriminatory nature."[65] Later in the same report, the IACHR indicated that "The right to access to and control over personal information is essential in many areas of life, since the lack of legal mechanisms for the correction, updating or removal of information can have a direct impact on the right to privacy, honor, personal identity, property, and accountability in information gathering."[66] Similarly, and more recently, the Commission reiterated that the right to habeas is based on three premises: (1) the right of any individual to not have his privacy disturbed, (2) the right of any individual to access information about him or herself that is contained in public or private databases, and to modify, remove, or correct information if it is sensitive, false, biased, or discriminatory, (3) the right of any individual to use habeas data action as a mechanism for obtaining access to evidence required in judicial proceedings, and (4) and the right of any individual to use the action of habeas data as an oversight mechanism.[67]

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

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

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

[67] IACHR, *Report No. 116/10 (Merits)*, Case 12.590, José Miguel Gudiel Álvarez et al. ("Diario Militar"), Guatemala, February 18, 2011, para. 467; Cf. IACHR. Report on Terrorism and Human Rights. OAS/Ser.L/V/ll.116. October 22, 2002. Chapter III, Section E. para. 289. Available at: http://www.cidh.oas.org/Terrorism/Eng/toc.htm; Cf. IACHR, *Annual Report 2001*. OEA/Ser/L/V/II.114 doc. 5 rev. 16. April 2002. Vol. II, *Report of the Office of the Special Rapporteur for Freedom of Expression*, Chapter III, para. 28.

D. Specific Applications of the Right of Access to Information

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

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

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

66. In these cases, the Court indicated that, "With respect to the accreditations or authorizations necessary for the media to participate in official events, which imply a possible restriction to the exercise of the freedom to seek, receive and impart information and any kind of ideas, it is essential to prove that their application is legal and legitimate and necessary and proportionate to the goal in question in a democratic society. The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent. It corresponds to the State to show that it has complied with the above requirements when establishing restrictions to the access to the information it holds."[68]

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

67. As explained previously, according to the Inter-American Commission on Human Rights, the right of access to information "comprises the positive obligation of the State to provide its citizens with access to the information in its possession, and the corresponding right of individuals to access the information held by the State."[69] In the specific context of indigenous peoples' rights, the Commission

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

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

has emphasized the need to ensure the right of access to information "for proper exercise of democratic control of the State's affairs in the exploration and exploitation of natural resources within the territory of indigenous communities, which is a matter of obvious public interest."[70]

68. The right of access to information cannot be reduced to the duty of turning over information requested by a particular person. The right also includes the obligation to make public administration transparent[71] and to provide, *ex officio*, the information needed by the public (the general citizenry or a particular group) for the exercise of other rights. Effectively, when the exercise of the fundamental rights of

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

[70] IACHR, *Application of the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against Ecuador*. Case 12.465, Kichwa Indigenous Peoples of Sarayaku and its members. April 26, 2010. Para. 140; Cf. IACHR. *Indigenous and tribal peoples' rights over their ancestral lands and natural resources*. OEA/Ser.L/V/II. Doc. 56/09. December 30, 2009. Paras 273 et seq.

[71] IACHR, *Application of the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against Ecuador*. Case 12.465, Kichwa Indigenous Peoples of Sarayaku and its members. April 26, 2010. Para. 136; I/A Court H. R., *Case of Claude-Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151. para. 77. In this respect, the UN, OSCE and OAS Special Rapporteurs on Freedom of Expression, in their Joint Declaration, established that "Public authorities should be required to publish pro-actively, even in the absence of a request, a range of information of public interest" (Joint Declaration on Access of Information and Secrecy Legislation, December 6, 2004, available at: http://www.cidh.oas.org/relatoria/showarticle.asp?artID=319&lID=1), which is particularly relevant when the information is necessary for the exercise of other fundamental rights. The scope of this obligation is also spelled out by the Inter-American Juridical Committee in its Resolution CJI/RES.147 (LXXIII-O/08) on "Principles on the Right of Access to Information," Rio de Janeiro, Brazil, August 7, 2008, available at: http://www.oas.org/cji/eng/CJI-RES_147_LXXIII-O-08_eng.pdf, in which it is established that "Public bodies should disseminate information about their functions and activities – including, but not limited to, their policies, opportunities for consultation, activities which affect members of the public, their budget, and subsidies, benefits and contracts – on a routine and proactive basis, even in the absence of a specific request, and in a manner which ensures that the information is accessible and understandable" (id., Principle 4).

people depend on those people having relevant public knowledge, the State must provide it in a manner that is *timely*, *accessible*, and *complete*.[72] In this sense, the Commission has established that the right of access to information is a key instrument for the exercise of other human rights, "particularly by the most vulnerable individuals."[73]

69. The timely, sufficient, and clear provision of information to Indigenous Peoples on outside interventions that can affect their territory is an indispensable condition for adequately guaranteeing the exercise of their right to collective property over their territories. Likewise, the close relationship that indigenous peoples have with their territory means that the right of access to information about possible exogenous interventions on indigenous territory that could have a serious impact on the community's habitat can become a mechanism that is necessary for ensuring other rights like the right to the health of group members and even their right to exist as a community. Finally, the right of access to information on exogenous interference on indigenous land is an indispensable condition for guaranteeing control over political decisions that can compromise the collective rights of a People, as well as fundament rights that would also be affected.[74]

70. On this topic, the Commission has indicated that one of the central elements for the protection of indigenous property rights is that States establish effective and previously-informed consultations on actions and decisions that could affect their traditional territories.[75]

71. The Inter-American Court has indicated that Indigenous Peoples' exercise of the right to collective property requires "the State to both accept and disseminate information, and entails constant communication between the parties.

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[72] IACHR, *Application of the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against Ecuador*. Case 12.465, Kichwa Indigenous Peoples of Sarayaku and its members. April 26, 2010. Para. 136.

[73] IACHR, *Application of the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against Ecuador*. Case 12.465, Kichwa Indigenous Peoples of Sarayaku and its members. April 26, 2010. Para. 136; *IACHR, Annual Report 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Vol. II: Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter III. para. 147. Available at: http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf Likewise, Article 9 of the Inter-American Democratic Charter provides that "the promotion and protection of human rights of indigenous peoples […] contribute to strengthening democracy and citizen participation."

[74] IACHR, *Application of the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against Ecuador*. Case 12.465, Kichwa Indigenous Peoples of Sarayaku and its members. April 26, 2010. Para. 137; IACHR. Report No. 40/04. Case 12.053. Merits. Maya Indigenous Communities of the Toledo District. Belize. October 12, 2004. para. 142.

[75] IACHR. *Report No. 40/04 (Merits).* Case 12.053. Maya Indigenous Communities of the Toledo District. Belize. October 12, 2004. para. 142; IACHR. *Indigenous and tribal peoples' rights over their ancestral lands and natural resources*. OEA/Ser.L/V/II. Doc. 56/09. December 30, 2009. Para. 280.

[…] [that] must be in good faith, through culturally appropriate procedures and [have] the objective of reaching an agreement."[76]

72. According to a systematic interpretation of the jurisprudence and instruments of the inter-American system for the protection of human rights, the right of access to information as a condition for the exercise of the rights derived from the collective property of Indigenous Peoples and as a condition for an adequate prior consultation in those cases in which that right is enforceable includes Indigenous Peoples' right to have the State provide *accessible*, *sufficient*, and *timely* information on two aspects: (1) the nature and the impact of the outside intervention on goods or resources that are the People's property; and (2) the consultation process to be carried out and the reasons justifying it. Only in this way can it be ensured that the information submitted by the State will allow the communities to form a genuinely free and informed opinion in the decision-making process on the exploration and exploitation of natural resources in their territories.[77]

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

[77] I/A Court H. R., *Case of the Saramaka People v. Suriname. Preliminary Objection, Merits, Reparations, and Costs.* Judgment of November 28, 2007 Series C No. 172. paras. 133-137; I/A Court H. R., *Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs.* Judgment of June 23, 2005. Series C No. 127. para. 225; IACHR, *Application of the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against Ecuador*. Case 12.465, Kichwa Indigenous Peoples of Sarayaku and its members. April 26, 2010. Para. 144*;* IACHR. Report No. 75/02. Case 11.140. Mary and Carrie Dann. United States. December 27, 2002. para. 140; IACHR. Report No. 40/04. Case 12.053. Merits. Maya Indigenous Communities of the Toledo District. Belize. October 12, 2004. para. 142; IACHR, Access to Justice and Social Inclusion: the road towards strengthening Democracy in Bolivia. OEA/Ser.L/V/II. Doc. 34. 28 June 2007. paras. 246 and 248. Available at: http://cidh.org/countryrep/Bolivia2007eng/Bolivia07indice.eng.htm; IACHR. Draft American Declaration on the Rights of Indigenous Peoples. Article XVIII 5-6. In this sense, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people has indicated: "Any development projects or long-term strategy affecting indigenous areas must involve the indigenous communities as stakeholders, beneficiaries and full participants, whenever possible, in the design, execution and evaluation stages. The free, informed and prior consent, as well as the right to self-determination of indigenous communities and peoples, must be considered as a necessary recondition for such strategies and projects. Governments should be prepared to work closely with indigenous peoples and organizations to seek consensus on development strategies and projects, and set up adequate institutional mechanisms to handle these issues". *United Nations Economic and Social Council.* Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*,* Rodolfo Stavenhagen, *submitted according Resolution 2002/65 of the Human Rights Commission, E/CN.4/2003/90, paras. 66, 68-69 and 73-77. See also, International Labor Organization.* Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989)*, Articles 6, 7 and 15; Committee on the Elimination of Racial Discrimination.* Consideration of Reports submitted by States Parties Under Article 9 of the Convention. Concluding Observations concerning Ecuador*, CERD/C/62/CO/2 (2003), para. 16; International Labor Organization.* Convention No 169 concerning Indigenous and Tribal Peoples: A Manual (2003), *pp. 15-20; United Nations Economic and Social Council.* Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples *(2005). E/C.19/2005/3, pp. 13-14; United Nations General Assembly. 61/295,* United Nations Declaration of the Rights of Indigenous Peoples*. A/RES/61/295, September 13, 2007, Article 27; International Labor Organization.* United Nations Development Group. Guidelines on Indigenous

73. The information provided by the State in the prior consultation process should be clear and accessible. This means that the information must be truly understandable, which includes the condition (among others) that its dissemination be carried out in clear language and, where necessary, distributed with the help of a translator or in a language or dialect that allows the members of the indigenous communities involved to understand it fully.[78] The provided information also must be sufficient. That is to say, it must be suitable and complete enough that those who receive it can form non-manipulated consent to the proposed project or activity.[79]

Peoples' Issues. *February, 2008, p. 18; Colombian Constitutional Court.* Sentencia SU 039/97 (February 3, 1997), Sentencia C-169/01 (February 14, 2001), Sentencia C-891/02 (October 22, 2002), Sentencia SU-383/03 (May 13, 2005), Sentencia C-030/08 (January 23, 2008); *and* Sentencia C-175 de 2009 (March 18, 2009)*; and Resolution 2002/65 of the Human Rights Commission, E/CN.4/2003/90.,* op. cit. *paras. 66-69 and 74-77.*

[78] IACHR, *Application of the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against Ecuador*. Case 12.465, Kichwa Indigenous Peoples of Sarayaku and its members. April 26, 2010. Para. 145. The ILO has indicated in this context that the "process of consultation must be specific to the circumstances and the special characteristics of the given group or community. Thus, a meeting with village elders conducted in a language they are not familiar with, e.g. the national language, English, Spanish etc, and with no interpretation, would not be a true consultation." See International Labor Organization. *Convention No 169 concerning Indigenous and Tribal Peoples: A Manual (2003),* p. 16. The United Nations has indicated that the "information should be accurate and in a form that is accessible and understandable, including in a language that the indigenous peoples will fully understand," and that "consent to any agreement should be interpreted as indigenous peoples have reasonably understood it." United Nations Economic and Social Council. *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples* (2005). E/C.19/2005/3, pp. 12-13. See also, I/A Court H.R., *Case of the Saramaka People. v. Suriname.* paras 133-37; and IACHR, Access to Justice and Social Inclusion: the road towards strengthening Democracy in Bolivia. OEA/Ser.L/V/II. Doc. 34. 28 June 2007. paras. 246 and 248. Available at: http://cidh.org/countryrep/Bolivia2007eng/Bolivia07indice.eng.htm

[79] IACHR, Application of the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against Ecuador. Case 12.465, Kichwa Indigenous Peoples of Sarayaku and its members. April 26, 2010. Para. 145. The Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, convened by the United Nations, held that the there should not be "coercion, intimidation or manipulation" in the release of information. United Nations Economic and Social Council. Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (2005). E/C.19/2005/3, p. 12. Also, Article 6.2 of ILO's Convention 169 provides that "the consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures." Likewise, the Constitutional Court of Colombia has indicated that the right to prior consultation mandates that, "The people have full knowledge on projects designed to explore for or exploit natural resources in the territory they occupy or that belongs to them, as well as the mechanisms, procedures, and activities necessary to carry out the exploration or exploitation." Colombia Constitutional Court. Sentencia SU 039/97 February 3, 1997). See also I/A Court H.R., *Case of the Saramaka People. v. Suriname.* paras 133-37; and IACHR, Access to Justice and Social Inclusion: the road towards strengthening Democracy in Bolivia. OEA/Ser.L/V/II. Doc.

The condition of timeliness means that information must be presented sufficiently in advance of any authorization or beginning of negotiations, taking into account the consultation process and the time periods required for the indigenous community in question to make decisions.[80]

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

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

75. As mentioned in previous paragraphs, the right of access to information entails an obligation for the State to produce and preserve certain information. On this point, the IACHR has understood that the State has the obligation to produce and preserve archives or registries of police detentions. Effectively, the duty to produce and preserve archives on police detentions is essential for fulfilling the right of access to information of detained individuals and their families. Indeed, as pertains to detentions, it is crucial for the State to keep records of all detained individuals, with complete personal details of the person arrested, the circumstances of the arrest – including time, manner, and place of detention – and other legal formalities. This information must be registered, guarded, and not manipulated since it is a mechanism of exceptional importance for controlling the administration of matters as sensitive as the imprisonment of a person and

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34. 28 June 2007. paras. 246 and 248. Available at: http://cidh.org/countryrep/Bolivia2007eng/Bolivia07indice.eng.htm

[80] IACHR, *Application of the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights against Ecuador*. Case 12.465, Kichwa Indigenous Peoples of Sarayaku and its members. April 26, 2010. Para. 146. The ILO has indicated that FPIC should be sought sufficiently in advance of commencement or authorization of activities, taking into account indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project." International Labor Organization. Convention No 169 concerning Indigenous and Tribal Peoples: A Manual (2003), p. 14. See also I/A Court H.R., *Case of the Saramaka People. v. Suriname*. paras 133-37; IACHR, Access to Justice and Social Inclusion: the road towards strengthening Democracy in Bolivia. OEA/Ser.L/V/II. Doc. 34. 28 June 2007. paras. 246 and 248. Available at: http://cidh.org/countryrep/Bolivia2007eng/Bolivia07indice.eng.htm; and United Nations Economic and Social Council. Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (2005). E/C.19/2005/3, p. 13. Likewise in Sentencia C-175 de 2009 (March 18, 2009), the Colombian Constitutional Court held that regarding the condition of timeliness, "what is at stake is that the participation of African-American communities include the ability to materially influence the content of the measure."

possible subsequent violations of human rights. Altering or destroying this kind of information is usually accompanied by State silence on the whereabouts of a person arrested by its agents. It generates fertile ground for impunity and for the propagation of the worst kind of crimes.

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

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

77. The thesis advanced the IACHR and its Special Rapporteur is that under any circumstances, but especially in processes of transition to democracy, victims and their relatives have the right to know with regard to information on serious violations of human rights in the archives of the State. This is the case even if the archives in question pertain to the security agencies or military or police agencies. Furthermore, the IACHR has maintained that the obligation of access to information in such cases generates a set of affirmative obligations. This section explains the reasons that both the IACHR and the Special Rapporteur have in various reports maintained this thesis and lays out the state obligations stemming from it, while discussing the incorporation of this in the most recent verdict of the Inter-American Court on the matter, in the case of *Gomes Lund et al (Guerrilha do Araguaia).*[81]

78. This chapter is divided into four parts. First, it sets forth the most important arguments by virtue of which the IACHR has found that it is possible to maintain that the victims of serious violations of human rights and their relatives have the right to know the information on such violations even when it is to be found on military or police premises (i). Second, it describes the special obligations that correspond to the State in order to make this right truly effective (ii). Third, and very briefly, it indicates the characteristics necessary for a legal regime to satisfy the right of access to information in these matters, in accordance with international standards (iii). Finally, it sets forth the way in which the Inter-American Court responded to this doctrine, in the aforementioned verdict in the case *Gomes Lund et al (Guerrilha do Araguaia)*.[82]

a. The right of victims of serious human rights violations and their families to access information about such violations

[81] I/A Court H.R., *Case of Gomes Lund et al (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219.

[82] I/A Court H.R., *Case of Gomes Lund et al (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219.

79. For the reasons explained in the first part of this publication, access is the rule and only in exceptional circumstances can certain limits be put in place—limits which, in turn, must comply with the requirements derived from Article 13.2 of the Convention.[83] All limitations should be prescribed expressly by law, have a legitimate aim, and be necessary and proportionate in a democratic society.

80. However, one of the exceptions to the right of access applies when permitting access to a particular item of information could endanger national defense or security. In some cases, States have recurred to this exception to maintain as classified or secret, even vis-à-vis the judicial authorities of the State itself, information that would make it possible to clarify serious violations of human rights, such as the forced disappearance of persons. It is true that in some cases there is national security information that should remain reserved. However, there are at least three strong arguments according to which the State can, in no case, maintain the secrecy of information on serious human rights violations – especially that related to the forced disappearance of persons – and prevent access to such information by the authorities in charge of investigating said violations, or even by the victims and their relatives.

81. First, the Inter-American Court of Human Rights has held that victims of grave human rights violations and their relatives, as well as society as a whole, have the right to know the truth about atrocities committed in the past.[84] The right to the truth is established not only in Article 13 but also in Articles 8 and 25 of the Convention.[85] Therefore, under no circumstances may a State agency refuse to

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[83] In this sense, Principle 4 of IACHR's Declaration of Principles on Freedom of Expression provides that "access to information […] is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies." See Also I I/A Court H. R., *Case of Claude-Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151. paras. 77, 89-90, 98, 120 and 137. In its 2008 Annual Report the Office of the Special Rapporteur for Freedom of Expression expanded on this point. *cf*. IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. paras. 166-176. Available at: http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf

[84] I/A Court H. R., *Case of Gomes Lund et al. v. Brazil (Guerrilha do Araguaia)*, Judgment of November 24, 2010. Series C No. 219, para. 200; Cf. *Case of* the *19 Tradesmen v. Colombia*. Judgment of July 5, 2004. Series C No. 109, para. 261; *Case of Carpio Nicolle et al. v. Guatemala*. Judgment of November 22, 2004. Series C No. 117, para. 128; *Case of Myrna Mack Chang v. Guatemala*. Judgment of November 25, 2003. Series C No. 101, para. 274.

[85] On this point, the Court has stated: "The case law of the Inter-American Court has considered the content of the right to know the truth, in particular in cases of forced disappearance. Ever since the *Case of Velásquez Rodríguez,* the Court has affirmed the existence of the "right [of the victim's relatives] to know what happened to him and, if appropriate, where his remains are located." The Court has recognized that the right of the relatives of victims of grave human rights violations to know the

provide state-held information that might help establish the facts surrounding such violations to the authorities investigating human rights violations. This information must be provided to judges, as well as to autonomous investigation agencies (such as, for example, the public prosecutor or a truth commission).[86] In this regard, in the case *Myrna Mack Chang v. Guatemala,*[87] the Inter-American Court found it proven that the Ministry of National Defense had refused to provide documents related to the functioning and structure of the Presidential Military Staff that were necessary to advance with the investigation on an extrajudicial execution. The Public Prosecutor and the judges repeatedly requested the information, but the Ministry of National Defense denied the delivery by invoking the state secrecy exception governed by Article 30 of the Guatemalan Constitution[88] and the alleged incineration of the corresponding documents.[89] In the view of the Inter-American Court:

> "[I]n cases of human rights violations, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the

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truth is included within the right of access to justice. The Court has also considered the duty to investigate as a form of reparation, given the need to redress the violation of the right to know the truth in the specific case. Similarly, in this case, the right to know the truth is related to the Ordinary Action filed by the next of kin, which is tied to access to justice and to the right to seek and receive information enshrined in Article 13 of the American Convention." (citations omitted). I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*. Judgment of November 24, 2010. Series C No. 219, para. 201.

[86] "Truth commissions" are one of the most-used mechanisms in comparative perspective by the countries that have to face a past with mass human rights violations. According to the International Center for Transitional Justice (ICTJ), "truth commissions" are non-judicial and independent investigation panels established generally for the purpose of establishing the facts and the context of mass violations of human rights or of international humanitarian law committed in the past (definition of ICTJ, available at http://www.ictj.org). Among the countries that have used these mechanisms to clarify crimes committed in their past we can mention Argentina, Haiti, Guatemala, South Africa, Peru, East Timor, Ghana and Sierra Leone. See in this respect the entry on "Truth Commissions" in the Encyclopedia of Genocide and Crimes Against Humanity. Available at: http://www.ictj.org/static/TJApproaches/Truthseeking/macmillan.TC.eng.pdf

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

[88] I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala.* Judgment of November 25, 2003. Series C No. 101, para. 175. Article 30 of the Constitution of the Republic of Guatemala establishes: "Article 30. - Publicity of administrative acts. All the acts of the administration are public. Interested parties have the right to obtain, at any time, reports, copies, reproductions and certifications they request and the showing of the files they wish to consult, unless this involves military or diplomatic matters of national security, or data supplied by individuals under the guarantee of confidence."

[89] I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala.* Judgment of November 25, 2003. Series C No. 101, para. 176. It should be underscored that the allegation of nonexistence of the documents requested is not an unusual practice among some States. In this regard, the Supreme Court of Moldova decided in the case *Tasca vs. SIS* that the authorities that alleged the supposed nonexistence of certain documents were obliged to: a) turn over to the person requesting the information an inventory of the total archive of the authority summoned and b) they should allow personal access by the applicant to the archives.

> 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."[90]

82. The Inter-American Court adopted the considerations of the IACHR, which had alleged before the Tribunal:

> "In 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…'"[91]

83. Following the above reasoning, it can be concluded that failing to grant the organs that investigate human rights violations State information that can facilitate the clarification of such events undermines public order and national security, the foundation of which is respect for human rights and application of the rule of law to public servants. It also compromises the possibility of clarifying the

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[90] I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala.* Judgment of November 25, 2003. Series C No. 101, para. 180.

[91] I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala.* Judgment of November 25, 2003. Series C No. 101, para. 181.

crimes committed and the right of the victims and their relatives to justice. Finally, it undermines the so-called "equality of arms", one of the central principles of due process, for if the agency denying access to information is the same one accused of actions or omissions in relation the aggressions committed, the victim of such aggressions finds it impossible to prove his or her arguments.

84. In particular, with respect to the importance of Truth Commissions as a mechanism for clarifying the right to know, the Court has stated: "The Court deems that the establishment of a Truth Commission - depending on its object, proceedings, structure and purposes - can help build and safeguard historical memory, clarify events, and determine institutional, social and political responsibilities in certain periods of time for a society."[92]

85. The second argument to take into account is related to the fact that the Inter-American Court has stated on numerous occasions that "[t]he continued denial of the truth about the fate of a disappeared person is a form of cruel, inhuman and degrading treatment for the close family."[93] If States takes jurisprudence of the Inter-American Court seriously, they must understand that denying the relatives of the victims information, depriving them access to valuable information on the fate of their loved ones, is equivalent to keeping them in a situation that has been equated to torture, which is manifestly contrary to the American Convention and admits no contrary argument. In fact, the prohibition of torture and inhuman or degrading cruel treatment is absolute and admits no exceptions.

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[92] I/A Court H.R., *Case of Radilla-Pacheco v. Mexico.* Judgment of November 23, 2009. Series C No. 209, para. 74. I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219, para. 297.

[93] I/A Court H.R., *Case of Trujillo Oroza v. Bolivia*. *Reparations and Costs.* Judgment of February 27, 2002. Series C No. 92, para. 114. See also I/A Court H.R., *Case of Anzualdo Castro v. Peru*. Judgment of September 22, 2009. Series C No. 202, para. 113; I/A Court H.R., *Case of La Cantuta v. Peru*. Judgment of November 29, 2006. Series C No. 162, para. 125. In relation to the suffering caused to the relatives of direct victims, see I/A Court H.R., *Case of Bámaca Velásquez v. Guatemala.* Judgment of November 25, 2000. Series C No. 70, para. 160; I/A Court of H.R., *Case of the "Street Children" (Villagrán Morales and others) v. Guatemala*. Judgment of November 19, 1999. Series C No. 63, para. 175 and 176; I/A Court H.R., *Case Blake v. Guatemala. Reparations and Costs.* Judgment of January 22, 1999. Series C No. 48, para. 114 and 116. See also case *Kurt v. Turkey*, ECHR, Judgment of May 25, 1998, Reports of Judgments and Decisions 1998-III para. 133 (in which the court considered the situation of a mother who had suffered the "anguish of knowing that her son had been arrested and that there was a complete lack of official information regarding his fate". By virtue of that, the European Court considered that the State of Turkey had violated Article 3 of the European Convention on Human Rights). In the same regard, see *Diana Kordon et al. Forced Disappearance: A Particular Form of Torture*, in James M. Jaranson & Michael K. Popkin (editors) Caring for Victims of Torture (1998) (in which it is maintained that the "scope of the phenomenon of disappeared persons made it into a paradigm of the repressive policies of the junta. In the light of its characteristics, we can consider that disappearance is a particular form of torture, a torture suffered by those disappeared which is extended to their family and friends. The disappeared person lives in a land without an owner, lives beyond life and death, without legal protection and at the mercy of his captors. The relatives had a high degree of mental suffering and a profound alteration of their daily life.") Finally, see also Brazil Report: *Nunca Mais*, pp. 65 and 66 (where it is maintained: "More

86. The third argument that reinforces the thesis according to which information on serious human rights violations that resides in state archives should be turned over to the victims and their relatives refers to the conditions necessary for a true process of transition to democracy to be successful. In any transition, the right of access to information becomes an essential tool to further the clarification of atrocities of the past. That is why the IACHR has pointed out that in contexts of transition to democracy, freedom of expression and access to information acquire a structural importance. Indeed, it is on the basis of these rights that it is possible to reconstruct the past, recognize the errors committed, provide redress to victims and generate a vigorous public debate that contributes to democratic recovery and the reconstruction of the rule of law.[94] In particular, the right of access to information is fundamental in dissolving authoritarian enclaves that seek to survive the democratic transition.[95]

87. In some cases States have argued that publicizing information about the past could nonetheless endanger "national security." In this regard, it is essential to recall that the concept of "national security" cannot be interpreted at will. This concept should, in all cases, be interpreted from a democratic perspective.[96] It is therefore suprising that the secrecy of serious human rights violations committed by agents of the State during the authoritarian regime from which the State is transitioning should be considered an indispensable condition for maintaining the "national security" of the new order based on the rule of law. Indeed, from a democratic perspective, the concept of "national security" can never include the secrecy of criminal state activities such as torture or the forced disappearance of persons.

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torturous than a sad certainty is the perennial doubt that, every day, renews the pain and augments it. And that pain gains force and color when those tormented by it feel impotent to undo the knot of uncertainty that afflicts them.")

[94] IACHR, Application to the Inter-American Court of Human Rights in Case 11.324, *Narciso González Medina v. Dominican Republic*, May 2, 2010, para. 159.

[95] See, in this regard, Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic ("Birthler Commission"), reports on activities of the years 1999, 2001, 2009, describing the contribution of the office of the Federal Commissioner to the convictions of guards and other persons involved in murders committed in the former borders of the German Democratic Republic. This commission has also facilitated the seeking of redress on the part of victims of arbitrary detention, political persecution, labor discrimination, illegal confiscation of property, etc. Between 1991 and 2009 more than 2.6 million persons consulted the archives kept by the Federal Commissioner. Information available at: www.bstu.bund.de

[96] See I/A Court H.R., *Case Molina Theissen v. Guatemala.* Judgment of May 4, 2004. Series C No. 106, para. 40.2 (in which the I/A Court H.R. recognized that the repression established in Guatemala toward the end of the 70s and beginning of the 80s was based on an interpretation of the concept of national security known as "doctrine of national security").

88. In this regard, it would be worth asking, as the European Court of Human Rights has done, what damage to the national security of a democratic State can be done by the dissemination of information on crimes of a past authoritarian regime whose legacy a nation seeks to overcome. The European Court of Human Rights had the opportunity to analyze this question in the context of the processes of "lustration" that were begun in Eastern Europe as the central element of the transition processes, after the fall of the Communist regimes in that region. In the case *Turek v. Slovakia*, the Court maintained the following:

> "[I]n proceedings related to the operations of state security agencies, there may be legitimate grounds to limit access to certain documents and other materials. However, in respect of lustration proceedings, this consideration loses much of its validity. In the first place, lustration proceedings are, by their very nature, oriented towards the establishment of facts dating back to the communist era and are not directly linked to the current functions and operations of the security services. Thus, unless the contrary is shown on the facts of a specific case, it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes. Secondly, lustration proceedings inevitably depend on the examination of documents relating to the operations of the former communist security agencies. If the party to whom the classified materials relate is denied access to all or most of the materials in question, his or her possibilities to contradict the security agency's version of the facts would be severely curtailed. Finally, under the relevant laws, it is typically the security agency itself that has the power to decide what materials should remain classified and for how long. Since, it is the legality of the agency's actions which is in question in lustration proceedings, the existence of this power is not consistent with the fairness of the proceedings, including the principle of equality of arms. Thus, if a State is to adopt lustration measures, it must ensure that the persons affected thereby enjoy all procedural guarantees under the Convention in respect of any proceedings relating to the application of such measures."[97]

89. Similar reasoning was applied in Brazil by the Federal Regional Court which resolved a remedy of appeal put forward by the State against a verdict that had ordered it to present, confidentially, all the documents containing information on military actions against the *Guerrilha do Araguaia.* In its appeal, the State argued that "by exposing strategic information, basic and indispensable elements for national

[97] European Court of Human Rights, *Case of Turek v. Slovakia (Application no. 57986/00).* Judgment of February 14, 2006, para. 115.

security are violated (…), and years of services essential to the public interest are immediately destroyed by a decision that is the result of a disproportionate request, at this time of full normality in the country's democratic life."[98] The Brazilian court rejected these allegations and denied the remedy of appeal on this point. In the opinion of the Court, "the Union does not deny the existence of said documents, and all the signs indicate that these documents exist, since it is not credible that the Army should have got rid of all the registers of such an important episode in Brazil's recent history. The *Guerrilha do Araguaia* ended more than 30 years ago, and after so long there can be no possibility that the restricted release of documents about it should violate 'basic and essential elements of national security.'"[99] Finally, it added: "Although the classification of the documents questioned is in force, Article 24 of Law 8.159 grants the Judicial Branch, in any case, the power to order the production, in a limited manner, of any classified (secret) document, as long as it is indispensable for the defense of a person's rights or the clarification of the personal situation of the party.'"[100]

90. Once again, in transitional processes full respect for the right of freedom of expression and access to information contributes, as few other rights do, to guaranteeing the rights of the victims to truth, justice and reparation.[101] In particular, the right to know the truth on what occurred with regard to forced disappearances can only be satisfied if appropriate mechanisms of access to the corresponding information are adopted. Likewise, the right of access to information constitutes an indispensable guarantee to ensure the implementation of measures of non-repetition of the events of the past: knowledge of the atrocities committed is a necessary condition for preventing the abuses committed from being repeated, promoting accountability and transparency in public management, and forestalling corruption and authoritarianism.[102]

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[98] Partial Remedy of Appeal of the Federal Union, dated March 24, 2006, against the decision of the 1st Federal Court of the Federal District, within the framework of Lawsuit 2001.39.01.000810-5. State Communication of September 4, 2007, Annex 7, para. 26. Free translation. Available at the case file of the case *Julia Gomes Lund et al.* before the Inter-American Commission on Human Rights, No. 11552.

[99] Decision of the Federal Regional Court of August 10, 2006 on the Appeal filed within the framework of Lawsuit 2001.39.01.000810-5. Free translation. Available at the case file of the case *Julia Gomes Lund et al.* before the Inter-American Commission on Human Rights, No. 11552.

[100] Decision of the Federal Regional Court of August 10, 2006 on the Appeal filed within the framework of Lawsuit 2001.39.01.000810-5. Free translation. Available at the case file of the case *Julia Gomes Lund et al.* before the Inter-American Commission on Human Rights, No. 11552.

[101] See in this respect United Nations, Commission on Human Rights, Updated set of principles for the protection and promotion of human rights by means of the fight against impunity, E/CN.4/2005/102/Add.1, February 8, 2005, principle 5. See also, IACHR, *Report No. 25/98 (Merits*), Cases 11.505 et al., Chile, April 7, 1998, paras. 85-97.

[102] See IACHR, Report of the Special Rapporteur for Freedom of Expression, 2009. OAS/Ser.L/V/II.Doc.51, December 30, 2009, chap. IV, para. 5; IACHR, *Report No. 116/10 (Merits)*, Case 12.590, José Miguel Gudiel Álvarez et al. ("Diario Militar"), Guatemala, February 18, 2011, para. 456.

b. Positive obligations of the State in relation to access to information about widespread human rights violations

91. If the victims of human rights violations have the right to access – directly or indirectly –information relative to said violations contained in military or intelligence archives, the next question is how to ensure that such information will not be concealed, removed or disappeared and thus denied to those who have the right to know it.

92. First, as both the IACHR and the Inter-American Court have reiterated, it cannot be left to the institution accused of committing mass human rights violations to decide whether or not the information exists, and whether or not to make it public. In this regard, the States should permit on-site visits to military and intelligence archives by judges, investigators and other independent investigation authorities, including truth commissions created by the State for this purpose, whenever the existence of information crucial to their investigations has been denied and there are reasons to believe that the information may exist.[103] A measure of this nature is not unprecedented: the United Nations High Commissioner for Human Rights on various occasions urged the Attorney General of Colombia to "verify […] the precision and objectivity of the information contained in military intelligence archives on human rights defenders and to make public the result of this work."[104] Similarly, a number of countries of Eastern Europe opened their intelligence archives as a means of confronting the crimes committed in the past.[105]

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[103] IACHR, *Report No. 116/10 (Merits)*, Case 12.590, José Miguel Gudiel Álvarez et al. ("Diario Militar"), Guatemala, February 18, 2011, para. 465.

[104] United Nations High Commissioner for Human Rights, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia, E/CN.4/2003/13, February 24, 2003, para. 161. See also IACHR, *Third Report on the Situation of Human Rights in Colombia,* OAS/Ser.L/V/II.102, February 26, 1999, chap. VII, para. 59-60, indicating that "independent authorities should be in a condition to have access to intelligence information and decide whether it can be kept secret" and describing as of "utmost importance" the announcement by then President of Colombia Ernesto Samper in the sense that "the Attorney General of the Nation would examine military intelligence files." See also, United Nations High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia,* E/CN.4/2006/9, January 20, 2006, recommendation number 6, "The High Commissioner encourages the Government to promote legislation that adequately regulates the use of military intelligence archives, including the applicable procedure for their annual review by the Office of the Attorney General."

[105] One may cite, by way of example, the German Law on Stasi Records (Stasi Records Act) of 1990 (whose purpose was to facilitate access by individuals to personal data obtained by Stasi, protect the privacy of those individuals and assure a historical, political and juridical reevaluation of Stasi activities, see § 1 (1), para. 1 to 3); law No. III of 2003 of Hungary, known as the Disclosure Act; law No. 140 of 1996 of the Czech Republic, known as the STB Files Access Act; law No. 187 of 1999 of Romania, known as the Access to Personal Files Law; the Law of Rehabilitation of Victims of Political Persecution of Moldova; the Law for Access and Disclosure of Documents of Bulgaria of 2006. These laws establish legal

93. Second, the State cannot release itself from its obligations simply by alleging that the required information on mass human rights violations committed in the past was destroyed.[106] On the contrary, the State has the obligation to search for such information by all possible means. In this regard, the Inter-American Court has stated that "every person, including the next of kin of the victims of grave violations of human rights, has the right to the truth. Therefore, the next of kin of the victims [or the victims themselves] and society as a whole must be informed of everything that has happened in connection with said violations."[107] To comply with this obligation, the State should make a substantive effort, in good faith, and contribute all the necessary resources to reconstruct the information that was supposedly destroyed. In Germany, for example, after the fall of the Berlin Wall, thousands of bags containing the remnants of documentation belonging to the intelligence services were discovered. The Birthler Commission, in charge of applying the law on Stasi Archives, determined that the documents of 6,500 bags could be salvaged, and since then the documents in over four hundred of the bags were manually reconstructed.[108] The Commission has considered that States should make significant efforts to find information that was supposedly destroyed; if it was possible in Germany to reconstruct documents that were literally in pieces, States in our region should carry out serious, committed and effective investigations to find copies of the information that has supposedly been lost.

94. Third, should the above efforts prove unsuccessful, the State has in any case the obligation to reconstruct the lost information. With this in mind, it should carry out good faith investigations to make it possible to clarify the events under investigation. In effect, the "Set of principles for the protection and promotion of human rights by means of the fight against impunity" of the United Nations establishes that States have the "duty to preserve archives and other evidence concerning violations of human rights and humanitarian law," including archives of "(a) national governmental agencies, particularly those that played significant roles in relation to human rights violations; (b) local agencies, such as police stations, that were involved in human rights violations; (c) State agencies, including the office of the prosecutor and the judiciary, that are involved in the protection of human rights; and

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frameworks tending to provide citizens' access to the archives of repressive and vigilance agencies of previous regimes.

[106] IACHR, *Report No. 116/10 (Merits)*, Case 12.590, José Miguel Gudiel Álvarez et al. ("Diario Militar"), Guatemala, February 18, 2011, para. 465; IACHR, *Report No. 117/10 (Merits)*, Caso 12.343, Edgar Fernando Garcia et al., Guatemala, February 9, 2011, para. 143.

[107] I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala.* Judgment of November 25, 2003. Series C No. 101, para. 274.

[108] See, in general, Jefferson Adams, *Probing the East German State Security Archives*, 13 International Journal of Intelligence and Counterintelligence 21 (2000).

(d) materials collected by truth commissions and other investigative bodies."[109] In this regard, the investigations should be oriented toward the persons who could have had access to the information, if it was destroyed, or toward those who participated, at all levels, in the operations or the events under investigation.

95. In short, the obligations mentioned consist of the duty to carry out, in good faith, significant investigative efforts aimed at clarifying the human rights violations being examined. These efforts have to include the opening of archives so that the institutions investigating the event can conduct direct inspections; conducting searches of official installations and making inventories; advancing search operations that include searches of the places where the information could lie; and holding hearings and questioning those who could know where the information is or to those who could reconstruct what occurred; among other actions. A public call for those who have documents to turn them in is not sufficient to satisfy the abovementioned obligations.

c. The obligation to adapt States' normative framework to international obligations

96. Finally, in order to satisfy the right of victims of human rights violations to access the information in state archives that makes it possible to clarify such crimes, it is necessary to adapt the legal regime to relevant inter-American standards.[110] In this regard, the legal framework regulating the right of access to information should contain at least the following obligations of the State.[111]

97. First, the State has the obligation to define precisely and clearly through a law in the formal and material sense, the grounds for restricting access to certain information.[112] The right of access is governed by the principles of good faith and maximum transparency, and therefore, in principle, the information in the power of the State should be public save the limited exceptions established by law.[113] In any

[109] UN Commission on Human Rights. Updated Set of principles for the protection and promotion of human rights through action to combat impunity. E/CN.4/2005/102/Add.1. February 8, 2005. Definitions and Principle 3.

[110] IACHR, Report of the Special Rapporteur for Freedom of Expression, 2009. OAS/Ser.L/V/II.Doc. 51 December 30, 2009, chap. IV, para. 52.

[111] To see more detailed development of each of these principles Cfr. IACHR, Report of the Special Rapporteur for Freedom of Expression, 2009. OAS/Ser.L/V/II.Doc. 51 December 30, 2009, chap. IV

[112] I/A Court H.R., *Case of Claude Reyes and et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151, para. 89. I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219, para. 197.

[113] I/A Court H.R., *Case of Claude Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151, para. 92. I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219., para. 199.

event, exceptions such as "national security", "national defense" or "public order" should be defined and interpreted in accordance with the inter-American juridical framework and, in particular, with the American Convention on Human Rights.[114] In no case can the information on serious human rights violations imputed to the agencies of the State be kept secret and denied to the organs of administration of justice or of historical clarification.[115]

98. Moreover, the State has the obligation to guarantee appropriate and effective proceedings for the processing and resolution of requests for information that establish short timeframes for resolving and providing the information, and that are the responsibility of officials duly trained and subject to legal obligations.[116] This information should be supplied without requiring from the person a direct or personal interest or the reasons for which s/he has requested the information, except when one of the permissible exceptions is involved.[117] The person who has received the information has the right to disseminate and publish it through any means.[118]

99. In addition, the State should have a simple, rapid and effective judicial remedy which, in the cases in which a public authority denies information, determines whether an infringement of the right to information of the applicant took place and, if so, orders the corresponding institution to deliver the information.[119] The judicial authorities should be able to access the information *in camera* or on visits *in loco* to determine either if the arguments of State agencies are legitimate or to verify whether purportedly nonexistent information is indeed so.

100. Fourth, the State has the obligation to adopt well-founded written decisions in the cases in which the information is denied. Such a decision should make it possible to understand the motives and norms on which the authority based its

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[114] IACHR, Report of the Special Rapporteur for Freedom of Expression, 2009. OAS/Ser.L/V/II.Doc. 51 December 30, 2009, chap. IV.

[115] I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219, paras. 196-202; IACHR, *Report No. 116/10 (Merits)*, Case 12.590, José Miguel Gudiel Álvarez et al. ("Diario Militar"), Guatemala, February 18, 2011, para. 459.

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

[117] I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs.* Judgment of November 24, 2010. Series C No. 219, para. 197.

[118] I/A Court H.R., *Case of Claude Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151, para. 77. I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219, para. 199.

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

decision not to deliver the information or part of it and determine whether such a restriction is compatible with the parameters provided for by the Convention.[120]

101. In addition, the State should adopt norms, policies and practices that make it possible to conserve and administer the information appropriately. In this regard, the 2004 Joint Declaration of the rapporteurs for freedom of expression of the UN, OAS and OSCE explains that "public authorities should be required to meet minimum record management standards," and that "systems should be put in place to promote higher standards over time."[121]

102. Finally, the State has the obligation to produce, recover, reconstruct or capture the information it needs in order to comply with its duties under international, constitutional or legal norms. In this regard, for example, if information that it should safeguard was destroyed or illegally removed and such information was necessary to clarify human rights violations, the State should, in good faith, make every effort within its reach to recover or reconstruct said information, in the terms already described.[122]

103. In any case, when the response to the applicant is that the information is nonexistent, the State should indicate all the procedures carried out to try to recover it or reconstruct it in such a way that said procedures may be subject to judicial review.[123] In this regard, the Court indicated that in cases in which a punishable act is being investigated, the decision to maintain the confidentiality or deny delivery of information or to establish whether it exists or is nonexistent, cannot depend on the state organ to whose members the commission of the event being investigated is attributed.[124]

104. With regard to violations of human rights, the Court has established that "every person, including the next of kin of the victims of grave violations of human rights, has the right to the truth. Therefore, the next of kin of the victims and

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[120] I/A Court H.R., *Case of Claude Reyes et al. v. Chile.* Judgment of September 19, 2006. Series C No. 151, para. 122.

[121] Joint Declaration of the Rapporteurs for Freedom of Expression of the UN, OAS and OSCE, (2004). Available at: http://www.cidh.org/relatoria/showarticle.asp?artID=319&lID=1.

[122] IACHR, Report of the Special Rapporteur for Freedom of Expression, 2009. OAS/Ser.L/V/II.Doc. 51, December 30, 2009, chap. IV, para. 83; Cf. IACHR, *Report No. 116/10 (Merits)*, Case 12.590, José Miguel Gudiel Álvarez et al. ("Diario Militar"), Guatemala, February 18, 2011, para. 465.

[123] I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219, para. 211.

[124] I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219, para. 202.

society as a whole must be informed of everything that has happened in connection with said violations."[125]

105. Particularly in transitional justice processes, States should adopt novel, effective and reinforced measures to allow the victims and their relatives access to information on human rights violations committed in the context of the past regime.

106. Indeed, to offer true guarantees of non-repetition, the transition should break from the culture of authoritarianism in which secrecy in public management predominates, particularly regarding human rights violations.[126] This opacity in State proceedings is fertile ground for the renewed commission of serious human rights violations. Maintaining secret enclaves under the control of institutions accused of committing the violations of the past is of no use to the transitional process and hinders full consolidation of the democratic system by maintaining enclaves of authoritarianism. For this reason, it is imperative that transitional processes should incorporate special guarantees to protect the right of access to information on human rights violations, as mechanisms to strengthen the establishment of genuine rule of law on the basis of acknowledgment of the atrocities committed in the past and adoption of the necessary measures to prevent them in the future.[127] This is a fundamental debt to all those persons whose unjust suffering we were unable to avoid and whom today we have the duty to protect.

d. The Court's judgment in the case of *Gomes Lund et al (Guerrilha do Araguaia) v. Brazil* and the right of access to information

107. On November 24, 2010, in its verdict in the case of *Gomes Lund et al*, the Inter-American Court declared that the State of Brazil had violated its international obligations as a result of the military operations of the Brazilian army during the years 1973 and 1974, the result of which was the disappearance and death of the alleged members of the resistance group known as *Guerrilha do Araguaia*. The Court also found Brazil responsible for the absence of investigations, sanctions and suitable reparations to the victims of these operations. In its verdict, the Court found that the State had violated the right of access to information of the relatives of the

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[125] I/A Court H.R., *Case of the 19 Tradesmen v. Colombia.* Judgment of July 5, 2004. Series C No. 109, para. 261; I/A Court H.R., *Case of Carpio Nicolle et al. v. Guatemala.* Judgment of November 22, 2004. Series C No. 117, para. 128, and, I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala.* Judgment of November 25, 2003. Series C No. 101, para. 274. I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219, para. 202.

[126] See IACHR, Report of the Special Rapporteur for Freedom of Expression, 2008. OAS/Ser.L/V/II.134.Doc 5 rev.1, February 25, 2009, chap. IV, para. 3.

[127] IACHR, *Report No. 116/10 (Merits)*, Case 12.590, José Miguel Gudiel Álvarez et al. ("Diario Militar"), Guatemala, February 18, 2011, paras. 455-57.

victims of the military incursions by failing to provide them the information that existed on these operations in a timely manner.

108. In point of fact, one of the issues the Court had to resolve in the case was whether the State's refusal to turn over all the information available in military archives on the abovementioned military operations had violated the right of access to the information of the relatives of the victims who were disappeared and murdered. In the Commission's application to the Court and during the litigation of the case, the IACHR put forward the arguments set forth in the preceding paragraphs of this document. For the reasons set forth below and based on the standards cited in the paragraph immediately preceding, the Court found that despite the State's most recent efforts to deliver all the available information, the right of access to information of the victims and their relatives, enshrined in Article 13 of the American Convention, had been violated. Consequently, it ordered the State to continue implementing initiatives to search, archive and publish all the information on the *Guerrilha do Araguaia* as well as the information related to human rights violations during the military regime.[128] The Court further ordered Brazil to adopt all the legislative, administrative and other measures necessary to strengthen its normative framework on access to information, in accordance with inter-American standards.[129]

109. To support its position, the Court began by clarifying the scope of the right of access to information of the victims of grave human rights violations.[130] The Court found that victims have the right to access information on human rights violations in a direct and timely manner. In this respect, and based on the right of access to justice and access to information, the Court reaffirmed the obligation to satisfy the right of victims of grave human rights violations and their relatives, as well as of society as a whole, to know the truth.[131]

110. The Court indicated that the public official to define whether or not the authority delivers the information requested or establishes whether it exists cannot lie with the authority accused of violating human rights.[132] Likewise, the Court recognized that the right of access to information is not fully satisfied with a state

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[128] I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219, para. 292.

[129] I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219, para. 293.

[130] I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219, para 197.

[131] I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219, para. 200.

[132] I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219, para. 202.

response in which it is declared that the information requested is nonexistent.[133] When the State has the obligation to conserve information or to capture it and considers however that it does not exist, it should set forth all the steps it took to try to recover or reconstruct the lost or illegally removed information. Otherwise, the right of access to information is understood to be violated.[134] Finally, the Court understood that the right of access to information should be guaranteed by means of a suitable and effective remedy that is resolved within a reasonable time.[135]

111. The most important facts of the case in point regarding the right of access to information can be summarized in the following manner: on February 21, 1982, the relatives of the victims of forced disappearance of the military operations against the *Guerrilha do Araguaia*, filed a public civil action with the sole objective that all the information on these operations be turned over to them in order to know "the truth of what occurred." On June 30, 2003, 21 years after the action was initiated and after delays and conflicting decisions,[136] the verdict of first instance ordered the State to turn over the respective information to the victims and their relatives within a term of 120 days. The State, however, again filed a series of appeals that delayed the definitive judicial decision until October 9, 2007. Nonetheless, according to the Court, it was only in March 2009 that compliance with this judgment was actually ordered and the State began to execute acts tending to comply with the decision, which included, *inter alia*, the delivery of around 21,000 documents from the National Archive.

112. In its judgment, the Court recognized the important advances made by the State of Brazil on this issue, but underscores three important facts. First, it called attention to the fact that during the entire public access proceeding, the State alleged that the information did not exist and it was therefore impossible to deliver it, while in 2009 it delivered a considerable amount of information related to the issue in question. Second, the Court observed that the State had failed to provide the available information notwithstanding the fact that the first judicial requests were made in 2003. Finally, the Court emphasized that the definitive judgment and its subsequent execution were delayed unjustifiably for decades. These three facts, and the consideration that the victims had the right to access the information requested and to a remedy that would protect this right within a reasonable time, led the Court

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[133] I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219, para. 202.

[134] I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219, para. 211.

[135] I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219, para. 219-225.

[136] I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219, para. 222.

to declare the international responsibility of the State for the violation of the right of access to information enshrined in Article 13 of the American Convention.

113. In one of its most important paragraphs, the Court indicated: "The State cannot defend itself by citing the lack of evidence of the existence of the requested documents. Rather, it should justify the failure to provide them by demonstrating that it has adopted all the measures within its reach to prove that the information requested indeed did not exist. It is essential, in order to guarantee the right to information, that the public authorities act in good faith and diligently carry out the actions necessary to ensure the effectiveness of this right, especially when it is a question of knowing the truth of what happened in cases of serious human rights violations such as the forced disappearances and extrajudicial execution in the present case."[137]

114. Consequently, the Court ordered the State to continue implementing initiatives to search, archive and publish all information on the *Guerrilha do Araguaia* as well as the information relating to human rights violations that occurred during the military regime.[138] It further ordered Brazil to adopt all the legislative, administrative and other measures necessary to strengthen its normative framework on access to information, in accordance with inter-American standards.[139]

[137] I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.* Judgment of November 24, 2010. Series C No. 219, para. 211.

[138] I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs.* Judgment of November 24, 2010. Series C No. 219, para. 292.

[139] I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs.* Judgment of November 24, 2010. Series C No. 219, para. 293.

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

A. Introduction

115. The fundamental right of access to information has had a higher regional profile in recent years. Effectively, despite the fact that the majority of State constitutions in the region expressly or implicitly recognize the right to access, at the beginning of the 21st century only five had passed laws on transparency and access. However, at present, 19 States have passed this type of law.[140]

116. In its Annual Report of 2011, the Office of the Special Rapporteur prepared a study on the various legal frameworks that exist today. However, independently of the different statutory frameworks, there have been some legal rulings that have also notably advanced the standards applied in each of the States. The study of this jurisprudence is of particular interest because it reports on how the various judges and courts have been able to apply the principle of maximum disclosure. The following paragraphs are a review of some of the most important rulings on the subject.

117. For some countries, it is enough to simply point out that there have autonomous bodies in charge of ensuring due respect for the right of access to information. These include Mexico's Federal Institute for Access to Information and Data Protection (*Instituto Federal de Acceso a la Información y Protección de Datos*) and Chile's more recently created Council for Transparency (*Consejo para la Transparencia*). These entities have made a large number of very valuable decisions that in themselves could provide enough material for an independent study. However, this chapter emphasizes court rulings given that in the majority of the region's States, judges are directly responsible for resolving conflicts on the right to

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

access. In this sense, learning what their colleagues are ruling can be an important instrument for a better interpretation of the law.

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

B. The concept of judicial best practices in human rights

119. In the first place, the Office of the Special Rapporteur considers it appropriate to define the concept of best judicial practice with respect to human rights and access to information, in order to make clear the criteria by which the judgments reviewed in the second part were selected. The expression "best practice" has its origin in the English language, in which the term *good* or *best practices* is used to indicate those examples of actions that are particularly successful, original, or innovative in any field of human endeavor. The importance of best practice is that it provides indicators to identify, find, and evaluate specific decisions, and to promote the dissemination of these model behaviors.[141] In the area of human rights, best practice consists of State conduct that involves institutionalized and sustainable objectives, with levels of coordination and harmonization, aimed at the creation of public policies with verifiable results with respect to the guarantee and protection of individual rights.[142]

120. In the opinion of the Office of the Special Rapporteur, a best judicial practice with respect to access to information is a court decision that has tangible and measurable repercussions in terms of citizens' greater access to information, and which can serve as a model for other judges to learn about and adapt to their own situations. The determination of a best judicial practice is based on an objective criterion consisting of the adherence of the court decision to a specific normative

[141] Cabrera Cabrera, Pedro José. *¿Qué es una Buena Práctica?* Ministry of Labor and Social Affairs. European Parliament Office in Spain, 2004.

[142] IACHR. Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter IV: The Right of Access to Information, par. 91. Available at: http://www.cidh.org/pdf%20files/Annual%20Report%202009.pdf

perspective, which in the case of this report is that of the inter-American standards on the right of access to information.

121. In addition to the elements of the concept of best judicial practice with respect to access to information, the Office of the Special Rapporteur finds it relevant to consider that best practices, by having a tangible effect, also allow for a change in institutional culture at two levels: i) in the government that moves away from secrecy and opts for proactive transparency and the dissemination of information in the public interest; and ii) in the judiciary that, knowing the manner in which other judges have decided difficult cases, renders decisions fostering greater respect, increased guarantees, and the protection of the right of access to information.

122. It is important to clarify that another strong point of best practices is that they are not inimitable experiences; on the contrary, by having an objective and common reference such as the inter-American standards on access to information, they can be followed by other judges from the same country or other countries in the region.[143] That is precisely the origin of this report—a dialogue among the hemisphere's countries about their experiences, their challenges, and their best judicial practices with respect to access to information.

123. The process for identifying best judicial practice with regard to access to information is above all a process of study and observation, in which best practice and its transformational capacity was identified by its originality and in accordance with the previously mentioned criteria. The Office of the Special Rapporteur underscores that this power to create change is the greatest strength of best practice.[144] It is a constant, constructive cycle that leads to greater protection of the rights of citizens, increased transparency, the progressive shedding of secrecy, and the awareness that democracies are anything but hidden power that conceals and is concealed—and that, on the contrary, openness, transparency, and visibility are the essence of democracy.[145]

124. Finally, the Office of the Special Rapporteur emphasizes in this report the role that is played by national judges at all levels and ranks of authority in guaranteeing and protecting the fundamental right of access to information. It also

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[143] Rioseco Ortega, Luz. *Buenas Prácticas para la Erradicación de la Violencia Doméstica en la Región de América Latina y el Caribe*. Serie Mujer y Desarrollo, CEPAL, Santiago de Chile, 2005. Available at: http://www.eclac.cl/publicaciones/xml/4/22824/lcl2391e.pdf

[144] Rueda-Catry, Marleen and Vega Ruíz, María Luz. *Buenas Prácticas de relaciones laborales in the Americas. Oficina Internacional del Trabajo – Oficina Regional para América Latina y el Caribe*, No. 199, p. 12. Available at: http://www.oit.org.pe/WDMS/bib/publ/doctrab/dt_199.pdf

[145] Bobbio, Norberto. *O Futuro da Democracia*. 8ª ed., Trans. Marco Aurelio Nogueira. Paz e Terra, Río de Janeiro, 2002, p. 107.

highlights the existence of court decisions that develop and raise the standards on access to information. Nevertheless, a study of all the decisions rendered on the issue of access to information is beyond the scope of this report. Therefore, the Office of the Special Rapporteur shall refer solely to those court decisions of which it has become aware and which reflect best judicial practice with respect to access to information according to the previously mentioned criteria.

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

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

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

127. In this sense, Argentina's Supreme Court of Justice (*Corte Suprema de Justicia*) in a February 11, 2004[146] decision held that, "The principle of publicity of government action is inherent in the republican system established by the National Constitution, for which reason compliance with that principle is for public authorities an unavoidable requirement. […] This allows citizens their right to access State information in order to exercise control over the authorities […] and foster administrative transparency."[147]

128. The same court found -in a decision dated April 3, 2001[148]- that "the American Convention on Human Rights offers standards that are inexcusably worth considering for judging cases on the exercise of freedom of expression, [a right that] includes the freedom to seek, receive, and distribute information and ideas of all kinds."[149] The right of access to information contained in the American Convention is

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

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

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

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

recognized as a fundamental right due to the fact that "Article 75, Subparagraph 22 […] granted treaties the same authority as the Constitution [….] [Treaties] must be understood to be complementary to the rights and guarantees […] recognized [in the Constitution]"[150] and "must be interpreted in harmony, to find an environment of reciprocal communication in which individual rights and guarantees can reach their greatest depth."[151]

129. Following that same idea, Mexico's Eighth Associate Administrative Court of the First Associate Circuit held that the right of access to information is a fundamental and universal human right that must be subject to a restricted system of exceptions and whose process must be simple, fast, and free or low cost.[152]

130. Also, the Constitutional Chamber of the Supreme Court of Costa Rica (*Sala Constitucional de la Corte Suprema de Costa Rica*) held in a ruling dated April 2, 2002 that "The right to information […] is an inalienable and indispensable human right […]. This right […] has precedency, as it guarantees a constitutional concern: the formation and existence of free public opinion, a guarantee which, because it is a prior and necessary condition for the exercise of other rights inherent for the functioning of a democratic system, becomes […] one of the pillars of a free and democratic society." [153]

131. Similarly, in ruling on a writ of constitutional protection (*amparo*) filed upon the refusal of an Education Board to provide information relating to its financial balance sheets, the Constitutional Chamber of the Supreme Court of Costa Rica, in a January 15, 2003 decision[154], emphasized the importance of access to information as a mechanism of citizen oversight of government. As such, bearing in

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

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

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

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

[154] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 02-002774-0007-CO, Decision: 2003-00136, January 15, 2003. Available at: http://scij.org.poder-judicial.go.cr/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=1&nValor1=1&nValor2=224837&strTipM=T&lResultado=2

mind the nature of the entity that controlled the information, as well as its status as a public entity, the Court ordered that the information be provided.

132. The court stated that "[…] the Constitution guarantees free access to 'administrative departments for purposes of information on matters of public interest,' a fundamental right which legal scholars have called the right of access to government archives and records; however, the more accurate name is the right of access to government information, given that access to the physical or virtual files of governments is the instrument or mechanism for accomplishing the proposed aim, which is for public citizens to determine the information being held therein."[155]

133. In the same vein, the Constitutional Chamber established that "the content of the right of access to government information is truly broad, and consists of a bundle of entitlements held by the individual exercising the right, such as the following: a) access to government departments, agencies, offices and buildings; b) access to physical or automated (electronic database) archives, records, files, and documents; c) entitlement of the citizen to have knowledge of the stored personal or nominative data that affect him in some way; d) entitlement of the citizen to correct or eliminate those data if they are erroneous, incorrect or false; e) the right to know the content of the physical or virtual documents or files; and f) the right to obtain, at his own expense, certifications or copies of such documents or files."[156]

134. More recently, the Constitutional Chamber of the Supreme Court of Costa Rica, in a judgment handed down on September 5, 2008[157], identified the right of access to information as a public, subjective, and special right. In this case the court decided the petition for a constitutional remedy filed by a journalist from the newspaper *La Nación,* alleging the violation of the right of access to information and the right of petition following the refusal of the Ministry of the Treasury to provide the journalist with information concerning the acquisition of Costa Rican public debt by the People's Republic of China. The Ministry asserted that it was prohibited from disclosing the requested information because of legal regulations on stock exchange secrecy.

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[155] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 02-002774-0007-CO, Decision: 2003-00136, January 15, 2003. Available at: http://scij.org.poder-judicial.go.cr/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=1&nValor1=1&nValor2=224837&strTipM=T&lResultado=2

[156] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 02-002774-0007-CO, Decision: 2003-00136, January 15, 2003. Available at: http://scij.org.poder-judicial.go.cr/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=1&nValor1=1&nValor2=224837&strTipM=T&lResultado=2

[157] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 08-003718-0007-CO, Decision 2008-013658, September 5, 2008. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=419511&strTipM=T&strDirSel=directo

135. The court held that "[…] the right to information is considered an indispensable legal guarantee that enables citizens to exercise, to a greater or lesser extent, their participation in public undertakings. From this point of view, it is a public and subjective right. It is a public right insofar as it requires the participation of the State to obtain information on the activities conducted by government bodies. It is also a subjective right, because it assumes a legal capacity, subject to regulation under the legal system. That right to information, furthermore, is special in that it is considered to guarantee a constitutional interest: the formation and existence of a free public opinion. This guarantee is particularly important because, given that it is a necessary prior condition for the exercise of other rights inherent in the proper functioning of a democratic system, it in turn becomes one of the pillars of a free and democratic society."[158]

136. Likewise, the Constitutional Court (*Tribunal Constitucional*) of Chile held in its August 9, 2007[159] ruling that the right to public information is recognized at the constitutional level "because the right to access information in the power of State bodies is part of freedom of expression […] [which is] enshrined in Article 19 No. 12 of the Constitution,"[160] as well as because "Article 8 of the Political Constitution[161] […] enshrined the principles of the probity, publicity and transparency of State conduct." In this way, "the right of access to public information is recognized in the Constitution – although not explicitly – as an essential mechanism for full validity of the democratic regime" and "the publicity of the actions of [State] bodies guaranteed […] by the right of access to public information gives basic support to the appropriate exercise and defense of the fundamental rights of those who […] could be harmed as

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[158] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 08-003718-0007-CO, Decision 2008-013658, September 5, 2008. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=419511&strTipM=T&strDirSel=directo

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

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

[161] Political Constitution of Chile. "Article 8.- The exercise of public functions obligates public officials to comply with the principle of probity in all their actions. The actions and resolutions of State bodies are public, as are reasons and procedures it adopts. However, only a law passed by absolute majority can qualify as these as confidential or classified, and only when their publicity would affect the due completion of said body's functions, the rights of individuals, national security, or national interest." Available at: http://www.leychile.cl/Navegar?idNorma=242302. New language introduced by the August 26 constitutional reform by Law N° 20.050.

a result of actions or omissions of said bodies."[162] In this way, "the right of access to public information is recognized in the Constitution – although not explicitly – as an essential mechanism for the full maturation of a democratic regime" and "the publicity of actions of [State] bodies, guaranteed […] by the right of access to public information, constitutes basic support for the adequate exercise and defense of the fundamental rights of people that […] can be injured by the action or inaction of those bodies."

137. The Full Chamber of the Constitutional Court (*Sala Plena de la Corte Constitutional*) of Colombia, in a ruling dated June 27, 2007, held that the right to access of information[163] is a "fundamental right […] [with] clear and rigorous requirements for its limitation […] to be constitutionally admissible." [164]

138. For its part, the Trial Court of Mercedes, Uruguay (Second Rotation), in a decision issued on September 11, 2009 (Judgment No. 48), also stressed that the right to information is fundamental, stating that it "[…] is a basic right, inherent in the human personality […], the right of access to public information emanates from it […]. The right of access to public information is one of the third-generation rights, given that it is an individual right as well as a collective right of society as a whole, and it is related to transparency in government, to the need to investigate, analyze, and inform the public of the content of public documents […]."[165]

139. For its part, in a decision dated May 28, 2010[166], the Second Chamber of the Constitutional Court of Peru made reference to the fundamental nature of the right of access to information, as well as to the national and international recognition that right enjoyed. It stated that "the fundamental right of access to public information is recognized not only in Article 2(5) of the Constitution of 1993 but also in Article 13 of the American Convention on Human Rights, having been developed by

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

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

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

[165] Trial Court of Mercedes, Uruguay (Second Rotation), Judgment No. 48, September 11, 2009. Available at: http://www.informacionpublica.gub.uy/sitio/descargas/jurisprudencia-nacional/sentencia-juzgado-letrado-de-2do-turno-de-mercedes.pdf

[166] Constitutional Court of Peru, Case N.º 04146-2009-PHD/TC, May 28, 2010. Available at: http://www.tc.gob.pe/jurisprudencia/2010/04146-2009-HD.html

the Inter-American Court of Human Rights in its judgment in the *Case of Claude Reyes v. Chile* of September 19, 2006, paragraph 77 of the operative part."[167]

140. In a judgment handed down on January 29, 2003 the same Court granted the writ of *habeas data* filed by the petitioner seeking the complete and accessible disclosure of requested information pertaining to expenses incurred by former president Alberto Fujimori and his retinue during the more than 515 days he spent out of the country while in office. In that respect, the petition requested that the following specific information be disclosed: a) the amount allocated for travel expenses; b) the amount allocated for representation expenses; c) the airfare costs of each trip taken; d) the fuel and operating expenses of the presidential aircraft; and e) the amount allocated for the expenses of the presidential retinue, among other things.

141. In protecting the right of access to information, the Court maintained: "the right of access to public information clearly is closely related to one of the subject matters protected by freedom of information. And just as in the case of the latter, it must be noted that the right of access to public information has a dual dimension. On one hand, it is an individual right, in the sense that it guarantees that no person shall be arbitrarily prevented from accessing information that is stored, maintained, or prepared by the various agencies and bodies of the State, without limitations other than those provided for as constitutionally legitimate. This right enables persons, individually, to be able to delineate their life plans, but also to fully exercise and enjoy other fundamental rights. From this perspective, in its individual aspect, the right of access to information is a prerequisite or means for the exercise of other fundamental freedoms, such as the rights of investigation, opinion, or expression, to name a few."[168]

142. For its part, the Civil and Commercial Appeals Court of Asunción, Paraguay (Third Rotation) also spoke to the autonomous nature of the right of access to information. The case leading to this judgment involved a request made by Mr. Picco Portillo to the Mayor of the City Lambaré, in which he asked for "a copy of the Budget approved for the year 2007, projects involving the payment of royalties to the Municipality, and the number of employees appointed and hired, detailed by department and position held." The mayor refused to provide that information, so Mr. Picco Portillo filed a petition for a constitutional remedy. His petition was not granted, and he then filed a motion for nullity against that ruling.

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[167] Constitutional Court of Peru, Case N.º 04146-2009-PHD/TC, May 28, 2010. Available at: http://www.tc.gob.pe/jurisprudencia/2010/04146-2009-HD.html

[168] Constitutional Court of Peru. Judgment in Case N° 1797-2002-HD/TC, January 29, 2003. Available at: http://www.tc.gob.pe/jurisprudencia/2003/01797-2002-HD.html.

143. In ruling on the motion for nullity, the Civil and Commercial Appeals Court of Asunción, Paraguay (Third Rotation) affirmed in Judgment No. 51 of May 2, 2008 that the right of access to information "is based on the most general right, essential to deliberative and participatory democracies, to freely form opinions and participate responsibly in public affairs; it contributes to the formation of one's own opinion, and that of the public, which is closely tied to political pluralism. It is thus an essential instrument in matters of interest to civic and collective life, and determines participation in the handling of 'public' matters—that is, the system of relationships and inter-relationships that constitute the essential basis for democratic coexistence." Thus, the Court held that access to information was a fundamental right, essential to the formation and strengthening of a democratic system.[169]

2. Jurisprudence on the universal nature of the right to access to information

144. The courts of the region have also addressed universal entitlement to the right of access to information. This characteristic implies, as the Inter-American Court of Human Rights has held, that it is not necessary to prove a special quality, a direct interest, or a personal stake in the matter in order to obtain information in the possession of the State.[170] Most of the judgments cited herein underscore the universal nature of the right of access to information. Therefore, it suffices to mention only a few of the most important references to the issue.

145. The Constitutional Court of Colombia has reiterated that, "all persons [have] the right to inform and receive information that is true and impartial, […] a precaution that constituent assembly introduced in order to guarantee the adecuate development of the individual in the context of a democratic State."[171]

146. For its part, the Eighth Collegiate Tribunal of administrative competence of the First Circuit of Mexico has also addressed the universal reach of this right by observing that, "[t]he joint declaration adopted on December 6, 2004 by the United Nations special rapporteur for freedom of opinion and expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Cooperation in Europe Representative on Freedom of the Media and the

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[169] Civil and Commercial Appeals Court of Asunción, Paraguay (Third Rotation), Judgment No. 51, May 2, 2008. Available at: http://www.idea.org.py/gfx/espanol/descargas/normativa_ambiental/jurisprudencia/nacional/Caso_Pico_Portillo_acceso_Informacion.pdf

[170] I/A Court H.R., *Case of Claude Reyes v. Chile.* Judgment of September 19, 2006. Series C No. 151, paras. 76 & 78.

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

Organization of American States Special Rapporteur on Freedom of Expression—applicable by virtue of article 6 of the Federal Transparency and Access to Public Governmental Information Law—establishes […] as a basic principle […] regarding […] access to information […] 1. The right to access to information is a fundamental human right; meanwhile, a systematic analysis of the Federal Transparency and Access to Public Governmental Information Law yields the conclusion that the right to access to information is universal."[172]

147. The Constitutional Chamber of the Supreme Court of Costa Rica—ruling on a petition for a constitutional remedy filed by a citizen based on the obstruction of access to information under the control of an association of doctors and surgeons relating to the performance and professional accreditation of its members—indicated that every person has the right to access information. In this respect, the Court established that "the right to information is one of the rights inherent to the human person, and refers to an individual public freedom for which the State itself must foster respect."[173] This tenet was reiterated, among other places, in another judgment of the same Court on the right of a journalist to obtain information on the purchase of Costa Rican public debt by the People's Republic of China. In that case, the court stressed that "the individual holder of the right enshrined in Article 30 of the Constitution is every person, or every citizen; as such, the purpose of the framers of the constitution was to reduce government secrecy to a minimum and to broaden government transparency and openness."[174]

148. In a 2003 judgment, the Supreme Court of Costa Rica ordered a Board of Education to provide information that had been requested of it with regard to its budget, without it being able to demand additional requirements.[175] In the Court's view, the information that the petitioner requested on the Board of Education's financial statements or balance sheets was "information that, insofar as it pertains to a public body and public funds, must be provided to the petitioner, without it being

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[172] Eighth Associate Administrative Court of the First Circuit (Mexico). Amparo en Revisión 133/2007. Aeropuerto de Guadalajara, S.A. de C.V. May 31, 2007. Available at: http://www.scjn.gob.mx/ActividadJur/Jurisprudencia/Paginas/IndexJurisprudencia.aspx.

[173] Constitutional Chamber of the Supreme Court of Costa Rica, Petition for Constitutional Remedy, Case: 07-012599-0007-CO, Decision No. 2007015343 October 23, 2007. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=396257&strTipM=T&strDirSel=directo

[174] Constitutional Chamber of the Supreme Court of Costa Rica., Case: 08-003718-0007-CO, Decision: 2008-013658, September 5, 2008. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=419511&strTipM=T&strDirSel=directo

[175] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 02-002774-0007-CO, Decision: 2003-00136, January 15, 2003. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=224837&strTipM=T&strDirSel=directo

covered by any type of secrecy or restricted access. [In this respect] there is no reason for the petitioner to tell the Board of Education about the investigation referred to in the initial request, as that is not a condition for the full exercise and enjoyment of the right contained in Article 30 of the Constitution. For purposes of deciding this appeal, the fact that the petitioner was invited to a meeting with the members of the Board of Education to explain certain aspects of the timely requested information, and the fact that the petitioner declined to attend, is irrelevant; from the beginning they could have provided the information without the need for further explanation."[176]

149. In the judgment in which it ordered the disclosure of information concerning the educational quality of a university, the Second Chamber of the Constitutional Court of Peru also established that the right of access to information consists "of the capacity that every person has to request and access information that is in the possession, mainly, of state entities."[177] The court ruled similarly in a 2003 decision in which information was requested on the expenses that had been incurred as a result of the trips taken by a former president of that country and his retinue, noting that "[…] the right of access to information has a collective dimension, as it guarantees the right of all persons to receive necessary and timely information, so that a free and informed public opinion may be formed, as required in an authentically democratic society."[178]

150. Universal entitlement to the right of access to information is directly related to the premise that proof of direct interest in the requested information cannot be required. Accordingly, the courts have indicated that petitioners need not provide reasons for their requests for public information. On this point, in another decision handed down on September 3, 2009, the Constitutional Court of Peru admitted a complaint that had been ruled inadmissible by the Chiclayo Specialized Constitutional Law Chamber of the Superior Court of Justice of Lambayeque because, among other reasons, the plaintiff had not disproved the possible prejudice to an investigation that would result from the request for information.

151. The Court indicated with respect to this issue that the above argument "misrepresents the correct order and the burden of proof that exists in *habeas data* cases. First of all, requests for access to public information do not, on their face, have to provide any justification. The Constitution so specifies [when] it

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[176] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 02-002774-0007-CO, Decision: 2003-00136, January 15, 2003. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=224837&strTipM=T&strDirSel=directo

[177] Constitutional Court of Peru, Case N.º 04146-2009-PHD/TC, May 28, 2010. Available at: http://www.tc.gob.pe/jurisprudencia/2010/04146-2009-HD.html

[178] Constitutional Court of Peru. Judgment in Case N° 1797-2002-HD/TC, January 29, 2003. Available at: http://www.tc.gob.pe/jurisprudencia/2003/01797-2002-HD.html

provides that information of a public nature may be requested 'without a statement of cause,' which is clearly based on the nature of the information; because it is public, the reasons for which such information is desired need not be explained, unless it affects personal privacy, national security, or [some other exception] provided by law."[179]

152. Along the same lines, "if there is any doubt as to whether certain information is public in nature, it must be explained by the Government, which must prove that it falls within one of the exceptions to access to public information."[180]

153. Finally, the Civil and Commercial Appeals Court of Asunción, Paraguay (Third Rotation), in the above-referenced Judgment No. 51 of May 2, 2008, stated that in order to demand access to information it was not necessary to prove a specific interest in it; rather, any person is entitled to request information of public entities. In its opinion, to demand proof of interest in the information as a prerequisite for its disclosure is a demand that is "improper and inconsistent with the exercise of the right to information, since it exists and is justified in its own right, in accordance with the general purposes of participation and oversight in democratic life."[181]

3. Jurisprudence on the principle of maximum disclosure

154. The courts of the region have referred generally to the principle of maximum disclosure as a guiding principle, and specifically to the different spheres in which it should be applied. In this section, the Office of the Special Rapporteur reviews important court decisions that develop the principle of maximum disclosure, and in the following paragraphs it sets forth some of the fields in which the principle has been used to decide specific cases.

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

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

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[179] Constitutional Court of Peru, Case No. 03652-2009-PHD/TC, September 3, 2009. Available at: http://www.tc.gob.pe/jurisprudencia/2010/03652-2009-HD%20Resolucion.html

[180] Constitutional Court of Peru, Case No. 03652-2009-PHD/TC, September 3, 2009. Available at: http://www.tc.gob.pe/jurisprudencia/2010/03652-2009-HD%20Resolucion.html

[181] Civil and Commercial Appeals Court of Asunción, Paraguay (Third Rotation), Judgment No. 51, May 2, 2008. Available at: http://www.idea.org.py/gfx/espanol/descargas/normativa_ambiental/jurisprudencia/nacional/Caso_Picco_Portillo_acceso_Informacion.pdf

156. In this sense, the Colombian Court established that, "According to the Constitution, the most important guarantee of an appropriately functioning constitutional regime is the full publicity and transparency of public administration. Decisions or actions of public servants that they do not want exposed are usually ones that cannot be justified. And the secret and unjustifiable use of State power is repulsive to the rule of law and appropriate functioning of a democratic society. Effectively, the transparency and publicity of public information are two conditions that are necessary for obligating the agencies of the State to publicly explain the decisions they make, as well as their use of power and public resources; they are the most significant guarantee in the struggle against corruption and in subjecting public servants to the purposes and procedures they are bound to by law; they are the foundation on which true citizen control of public administration and the satisfaction of related political rights is based. In this sense, […] access to information and official documents constitutes a condition that allows for the existence and exercise of mechanisms of criticism and oversight of government actions that, under the framework of the Constitution and the law, the political opposition can legitimately exercise. Finally […] the right of access to public information is tool that is crucial for the satisfaction of victims of arbitrary actions' right to truth, as well as society's right to historic memory."[182]

157. For this reason, according to the tribunal, as a general rule, "in keeping with the provisions of Article 74 of the Constitution, Article 13 of the [Inter-American] Convention on Human Rights, and Article 19 of the International Covenant on Civil and Political Rights, individuals have a fundamental right to access State information. In this sense, wherever there is no express legal exception, the fundamental right of access to information prevails. In this respect, the [Inter-American] Court has indicated that, 'In sum, in a democratic society, the general rule is to permit citizen access to all public documents. Public authorities have a constitutional duty to turn over clear, complete, timely, true, and up to date information on any State activity to anyone who requests it.'"[183]

158. Following the jurisprudence of the Inter-American Court, the Colombian Court held that the principle "of maximum disclosure" must imply at least two consequences: "The provisions that limit the right of access to information must be interpreted restrictively and all limits must be adequately reasoned."[184] Likewise,

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

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

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

the Constitutional Court of Colombia has indicated that, "The public servant has a clear obligation to justify a decision to deny access to a public document, and the justification must meet the requirements established in the Constitution and by law […]. In particular, it should expressly cite the provision on which the denial was based. This way, the matter can be submitted to disciplinary, administrative, or even judicial controls."[185]

159. Likewise, the Constitutional Chamber of the Supreme Court of Justice of Costa Rica has used the principle of maximum disclosure as a basis for rulings indicating that, "In the framework of a State governed by the rule of law and social rights, every public body and entity that forms part of the administration must be subject to the constitutional principles implicit in transparency and publicity, which should be the rule in every administrative action or function. Organizations under Public Law – public entities – are called upon to be true glass houses in whose interior all administrators can be scrutinized and supervised under the light of day. […]. Under this regime, secrecy or the classifying of administrative information as confidential are the exception and only justifiable under qualifying circumstances when protecting constitutionally relevant values or interests."[186]

160. The Dominican Republic courts also highlighted the significance of this principle in several rulings. It has indicated that, "It is necessary to specify that democratic States must follow the principles of publicity and transparency in their public administration. In this way, individuals can exercise democratic control, which legitimizes the actions of those making a living from the *res publica*."[187]

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[185] "The demand for justification is also found in the legal norms on the topic." Full Chamber of the Constitutional Court of Colombia. *Sentencia* C-491/07. June 27, 2007. *Fundamento Jurídico* 11. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/C-491-07.htm, citing Sentence T-074 of 1997. In its *Claude Reyes* ruling, the Inter-American Court established the obligation to justify in the following language: "In this case, the State's administrative authority responsible for making a decision on the request for information did not adopt a duly justified written decision, which would have provided information regarding the reasons and norms on which he based his decision not to disclose part of the information in this specific case and established whether this restriction was compatible with the parameters embodied in the Convention. Hence, this decision was arbitrary and did not comply with the guarantee that it should be duly justified protected by Article 8(1) of the Convention." Cf. I/A Court H. R., *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 122.

[186] Constitutional Chamber of the Supreme Court of Costa Rica, writ of amparo, exp. 04-012878-CO, Res. 2005-03673, April 6, 2005. *Considerando* III.- I Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=302552&strTipM=T&strDirSel=directo

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

161. Finally, the First Chamber of the Constitutional Court of Peru made statements on August 18, 2009, on the "culture of transparency," indicating that it is "inherent to our State governed by the rule law and social rights. This obligates the Administration to turn over requested information without requiring justification for the solicitation thereof."[188]

162. According to this court, "This paradigmatic turn is based on the already mentioned principle of publicity, according to which it is understood that all information under the control of the State or the control of legal entities that provide public services or administrative functions through a concession, delegation, or authorization, is in principle public."[189]

163. On a different topic, to promote the effectiveness of the right of access to information, the court pointed to a necessary element in "the punishment of public officials and servants who in any way obstruct the fulfillment of the right of access to public information. These sanctions are not only necessary but inherent to the defense and protection of fundamental rights, as they help achieve the objective of the effective fulfillment of these rights. Sanctions for conduct contrary to fundamental rights also seek to discourage that conduct, as well as encourage the rest of society to view the sanctions as normal, and socially and legally accepted."[190]

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

165. Chile's Council for Transparency has stated in general terms that any exceptions to the disclosure of information that can be used as a basis to consider all government documents confidential are invalid. Such was the Council's assertion when it examined complaints concerning access to audits performed by the internal auditing units of various State bodies during 2008 and the first quarter of 2009, as well as copies of prior audits that had been concluded during that same period. Those requests were denied by all of the agencies to which they were submitted,[191] which

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

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

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

[191] The bodies from which this information was requested were the following: the Ministry of the Interior, the Ministry of the Economy, the Ministry of the Treasury, the Ministry of Mining, the

claimed that revealing that information would cause irreparable harm to the auditing process, which is essential to the proper oversight and continuous improvement of the government's work. They further claimed that it would be an impediment to the determination of strategic measures they intended to design.

166. In the decision it issued in this case on September 4, 2009, the Council held that even if "a new set of decisions or decision-making processes arises from a final audit report" nothing guarantees that it will be so. Therefore, to accept that that argument is sufficient to keep the information confidential "would mean that every document in the Government's possession would be confidential in nature." It added that even in the event that it were demonstrated that the audit report is cause for the adoption of a specific policy, measure, or final decision, "it would likewise be public once it was adopted."[192] This decision of the Council for Transparency warns of the risk that such a broad exception to the principle of maximum disclosure could end up canceling it out entirely.

167. Likewise, the Council for Transparency has indicated that restrictions to the disclosure of information, given that they are exceptional, must be interpreted narrowly and restrictively. It so stated in its decision on a request for access to a list—including amounts, dates of signature, and other parties involved—of all of the research contracts entered into by two entities within the Ministry General Secretariat of Government, beginning on March 11, 2006. This information had been denied by the requested bodies, which argued that the information was confidential pursuant to the final clause of Article 22 of the Transparency Act, which establishes

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Ministry of National Assets, the Ministry of Justice, the Ministry of Planning, the Office of the Under Secretary of Telecommunications, and the National Council of Culture.

[192] Chilean Council for Transparency. Complaint code A11-09, September 4, 2009. Available at: http://www.consejotransparencia.cl/data_casos/ftp_casos/A11-09/A11-09_decision_web.pdf. Similarly, see: Chilean Council for Transparency. Complaint code A21-09, September 4, 2009. Available at: http://www.consejotransparencia.cl/data_casos/ftp_casos/A21-09/A21-09_decision_web.pdf; Complaint code A22-09, September 4, 2009. Available at: http://www.consejotransparencia.cl/data_casos/ftp_casos/A22-09/A22-09_decision_web.pdf; Complaint code A23-09, September 4, 2009. Available at: http://www.consejotransparencia.cl/data_casos/ftp_casos/A23-09/A23-09_decision_web.pdf; Complaint code A24-09, September 4, 2009. Available at: http://www.consejotransparencia.cl/data_casos/ftp_casos/A24-09/A24-09_decision_web.pdf; Complaint code A25-09, September 4, 2009. Available at: http://www.consejotransparencia.cl/data_casos/ftp_casos/A25-09/A25-09_decision_web.pdf; Complaint code A26-09, September 4, 2009. Available at: http://www.consejotransparencia.cl/data_casos/ftp_casos/A26-09/A26-09_decision_web.pdf; Complaint code A27-09, September 4, 2009. Available at: http://www.consejotransparencia.cl/data_casos/ftp_casos/A27-09/A27-09_decision_web.pdf; Complaint code A43-09, September 4, 2009. Available at: http://www.consejotransparencia.cl/data_casos/ftp_casos/A43-09/A43-09_decision_web.pdf; Complaint code A44-09, September 4, 2009. Available at: http://www.consejotransparencia.cl/data_casos/ftp_casos/A44-09/A44-09_decision_web.pdf

that "the results of surveys or opinion polls conducted by the authorized Government bodies shall remain confidential until the end of the presidential term during which they were conducted, in order to safeguard the proper performance of those bodies' duties."

168. The Council for Transparency dismissed the argument of the Ministry General Secretariat of Government, specifying that the last paragraph of Article 22 of the Transparency Act refers to the results of the surveys and opinion polls, not to the contracts entered into with the parties that performed those studies. Therefore, the exclusions, because they are exceptional, must be interpreted narrowly and restrictively, and cannot be extended to the documents regarding which the information is requested.[193]

169. The courts of the region have examined the scope of the principle of maximum disclosure in cases that involve different types of information that is of public interest, including access to information related to the assignment of government advertising and the conduct of cadets in military academies. In the following sections, judicial decisions exploring this topic are summarized.

b. Jurisprudence on the principle of maximum disclosure as a guarantee of participation and citizen oversight in a democratic State

170. In a previously cited judgment whereby the Constitutional Chamber of the Supreme Court of Costa Rica ordered a Board of Education to provide information concerning its financial statements or balance sheets, the Court stressed that, "[…] the right of access to government information is a mechanism of control in the hands of citizens, since it enables them to supervise the legality and timeliness, advisability or merit and, in general, the effectiveness and efficiency of the government duties performed by the various public entities."[194]

171. It likewise held that "in the context of social and democratic rule of law, each and every one of the public entities and bodies making up the respective

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[193] Chilean Council for Transparency. Complaint code A32-09, June 30, 2009. Available at: http://www.consejotransparencia.cl/data_casos/ftp_casos/A32-09/A32-09_decision_web.pdf

[194] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 02-002774-0007-CO, Decision: 2003-00136, January 15, 2003. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=224837&strTipM=T&strDirSel=directo. Similarly, see: Constitutional Chamber of the Supreme Court of Costa Rica, Petition for Constitutional Remedy, Case: 07-012599-0007-CO, Decision No. 2007015343 October 23, 2007. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=396257&strTipM=T&strDirSel=directo; Constitutional Chamber of the Supreme Court of Costa Rica, Case: 08-003718-0007-CO, Decision No. 2008-013658, September 5, 2008. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&param2=1&nValor1=1&nValor2=419511&strTipM=T&lResultado=3

government must be subject to the implicit constitutional principles of transparency and openness, which must be the rule for all administrative acts or functions. The collective organizations of Public Law—public entities—must be like glass houses, the inside of which all citizens must be able to view and supervise, in the light of day. Governments must create and foster permanent and fluid channels of communication or exchange of information with citizens and the collective media, in order to encourage greater direct and active participation in public administration and to put into practice the principles of evaluation of results and accountability currently incorporated into the text of our Constitution (Article 11 of the Constitution)."[195]

172. Accordingly, "efficient and effective governments are those that submit to public scrutiny and supervision, but there can be no citizen oversight without adequate information. Thus, there is a logical connection linking access to government information, knowledge and handling of such information, effective or timely citizen oversight, and efficient government. The right of access to government information is firmly based on several principles and values inherent to social and democratic rule of law, which operate in conjunction. Thus, direct and effective citizen participation in the administration and management of public affairs is inconceivable in the absence of a wealth of information on government services and competencies. Likewise, the democratic principle is strengthened when different social, economic, and political forces and groups participate in an active and well-informed manner in shaping and carrying out the public will."[196]

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[195] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 02-002774-0007-CO, Res: 2003-00136, January 15, 2003. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=224837&strTipM=T&strDirSel=directo. Similarly, see: Constitutional Chamber of the Supreme Court of Costa Rica, Case: 08-003718-0007-CO, Decision No. 2008-013658, September 5, 2008. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&param2=1&nValor1=1&nValor2=419511&strTipM=T&lResultado=3; Constitutional Chamber of the Supreme Court of Costa Rica, Case: 10-006785-0007-CO Decision No. 2010010201, June 11, 2010. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=484001&strTipM=T&strDirSel=directo

[196] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 02-002774-0007-CO, Decision: 2003-00136, January 15, 2003. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=224837&strTipM=T&strDirSel=directo. Similarly, see: Constitutional Chamber of the Supreme Court of Costa Rica, Case: 08-003718-0007-CO, Decision No. 2008-013658, September 5, 2008. Available at: Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&param2=1&nValor1=1&nValor2=419511&strTipM=T&lResultado=3; Constitutional Chamber of the Supreme Court of Costa Rica, Case: 03-012954-0007-CO Decision No. 2004-04637, April 30, 2004. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&param2=1&nValor1=1&nValor2=286387&strTipM=T&lResultado=3; Constitutional Chamber of the Supreme Court of Costa Rica, Case: 10-006785-0007-CO Decision No. 2010010201, June 11, 2010. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=484001&strTipM=T&strDirSel=directo

173. The same Constitutional Chamber of the Supreme Court of Costa Rica, in the judgment upholding the right to access information on the acquisition of the country's public debt, affirmed that "the right of access to government information is an indispensable tool, like so many others, for the full validity of the principles of government transparency and openness […]. In order for citizens to be able to freely form their opinions and participate responsibly in public affairs, they must be broadly informed so that they can form opinions, including contrary ones, and participate responsibly in public affairs. From this perspective, the right to information not only protects an individual interest but rather it entails the recognition and guarantee of a fundamental political institution, which is public opinion, inextricably linked to political pluralism, and therefore, collective in nature."[197]

174. For its part, in the oft-cited judgment ordering the disclosure of information regarding the expenses incurred by a former president of the country and his retinue on the trips taken during his administration, the Constitutional Court of Peru recalled that "information on the manner in which the *res publica* is managed ends up becoming an authentic public or collective good, which must be within the reach of any individual, not only to enable the full effectiveness of the principles of openness and transparency in government, on which the republican system is based, but also as a means of institutional control over the representatives of society; and also, of course, to encourage the supervision of those private individuals who possess the ability to induce or determine the conduct of other private individuals or—most seriously in a society such as the one in which we live—their very subordination."[198]

175. As such, the court noted in particular that "[…] the right of access to public information is intrinsic to a democratic system. Indeed, the right in question not only is a concrete realization of the principle of dignity of the human person […] but also is an essential component of the very demands of a democratic society, since its exercise enables the free and rational shaping of public opinion. Democracy, it has rightfully been said, is by definition the 'government of the public in public' (Norberto Bobbio). Hence, provisions […] of the Constitution […] are nothing but concretizations,

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[197] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 08-003718-0007-CO, Decision No. 2008-013658, September 5, 2008. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&param2=1&nValor1=1&nValor2=419511&strTipM=T&lResultado=3

[198] Constitutional Court of Peru, Judgment in Case No. 1797-2002-HD/TC, January 29, 2003. Available at: http://www.tc.gob.pe/jurisprudencia/2003/01797-2002-HD.html. Similarly, see: First Chamber of the Constitutional Court of Peru, Case No. 2579-2003-hd/TC, April 6, 2004. Available at: http://www.tc.gob.pe/jurisprudencia/2004/02579-2003-HD.html; First Chamber of the Constitutional Court of Peru, Case No. 0301-2004-HD/TC, March 5, 2004. Available at: http://www.tc.gob.pe/jurisprudencia/2004/00301-2004-HD.html

in turn, of a more general constitutional principle, such as the principle of the publicity of state action."[199]

176. Therefore, "openness in the actions of state authorities is the general rule, and confidentiality, when supported by the constitution, is the exception. This is because, if a democratic rule of law assumes the separation of powers, respect for fundamental rights, and the periodic election of its governors, this certainly cannot be ensured if individuals are not able to exercise control over the activities of the representatives of the people. One of the possible ways to adhere to that principle and, therefore, to meet the demands of an authentic democratic society, is precisely to recognize the right of individuals to be informed with respect to the actions of government bodies and their representatives."[200]

c. Jurisprudence on the definition of a public document

177. In carrying out an analysis of the "right of access to public documents" in its Judgment (*Sentencia*) T-473/92, the Colombian Constitutional Court indicated that the expressions "public document" and "public information" should not be exclusively limited to what the State has produced or generated, but rather should include all documentation that the State administers or archives, excepting those withheld in keeping with explicit provisions of the law. According to the court, under the right of access to information, "the nature of the subject or entity that produced the document[s] and the way in which they were produced are not as important as the objective fact of whether [they] contain information that should be withheld in keeping with an explicit provision of the law"[201] in determining whether a document should be made public. For the Colombian court, "this right of mankind to inform and be informed […] is a guarantee of the conscious exercise of the political right to participate in the *res publica*."[202]

178. Taking the aforementioned reasoning as a foundation, the tribunal ruled that the requested document was of a public nature. Consequently, the

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[199] Constitutional Court of Peru, Judgment in Case No. 1797-2002-HD/TC, January 29, 2003. Available at: http://www.tc.gob.pe/jurisprudencia/2003/01797-2002-HD.html. Similarly, see: First Chamber of the Constitutional Court of Peru, Case No. 2579-2003-hd/TC, April 6, 2004. Available at: http://www.tc.gob.pe/jurisprudencia/2004/02579-2003-HD.html

[200] Constitutional Court of Peru, Judgment in Case No. 1797-2002-HD/TC, January 29, 2003. Available at: http://www.tc.gob.pe/jurisprudencia/2003/01797-2002-HD.html. Similarly, see: First Chamber of the Constitutional Court of Peru, Case No. 2579-2003-hd/TC, April 6, 2004. Available at: http://www.tc.gob.pe/jurisprudencia/2004/02579-2003-HD.html

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

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

relevant authority was obligated to turn over the requested information within 48 hours of the notification of the decision.

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

179. In its September 11, 2009 ruling on a Motion of Habeas Data,[203] the Governmental Justice of the Peace of Uruguay, after recalling the principle of maximum disclosure and the importance of publicity in public administration and its impact on citizen participation, held that funds outlaid by a public body on official advertising were not excepted from the right of access to information. For the judge, information on public advertising is public by nature, since it forms part of the information produced by the public entity and whose distribution benefits public service and the democratic control of government.

180. The case resulting in this ruling was on a request for information made by a journalist of the Departmental Council (*Junta Departamental*) of Soriano, Uruguay, on the distribution of official advertising during different periods.[204] On August 11, 2009, the president of the council denied the request for access to the information, arguing that the petitioner was a representative of a press organization, which in keeping with Section b), Paragraph 1) of Article 10 of Law 18.381, constitutes an exception to the right of access. According to this provision, information that can be useful to a competitor is not distributed to press organizations. The petitioner reiterated in his arguments before the judge that the information requested included the amount of funds outlaid by a public entity, and that revealing the amount spent on public advertising would not give any advantage to a competitor.

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

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

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

living under the rule of law."[205] According to the judge, "a restriction of the publicity of administrative management should be reasoned well enough to supercede the generic reasoning that advises publicity. […] That is, in a system such as ours, the principle solution is always publicity, while restriction is the exception."[206]

182. Finally, the judge indicated that "the right to access public information is also related with the principle of participation, meaning that the inhabitants should be informed and consulted on matters that concern them."[207]

183. Taking into account the principles he mentioned, the judge found that "spending on official advertising is not information submitted to the Council but rather produced by the Council and is therefore public information from the moment in which it is placed in the body's five-year budget."[208] Also, in keeping with Article 5 of Law 18,381, information on the budget, the budget's execution, the results of any corresponding audits, as well as concessions, tenders, permits, or authorizations granted with specification of the recipients, as well as all public body statistical information of general interest "is not only non-confidential but public by nature."[209]

184. In keeping with the fact that the information requested was produced and held by a public body, and in guaranteeing the "principle of maximum publicity"

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

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

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

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

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

as well as complying with the parallel obligations of publicity and transparency, the judge ruled that the Departmental Council of Soriano, Uruguay must turn over to the petitioner the requested information within a period of 10 days from the notification of the judgment.

e. Jurisprudence on access to information regarding the funding of political parties

185. The Constitutional Chamber of the Supreme Court of Costa Rica addressed the issue of access to the financial information of political parties, and held that "[…] the funds contributed by the State—because of their origin and purpose—are subject to the constitutional principles of openness and transparency, and the same is true under the law and the Constitution with respect to private contributions, given that political parties are subject to a system of public law once they begin working and operating […]."[210]

186. In the opinion of the Costa Rican Court, the Constitution of that country does not allow any political party to shield itself with alleged financial or banking secrecy in order to prevent public knowledge of the origin and amounts of private contributions. According to the Court, "subjecting such contributions to the principle of publicity derives from the public interest nature of the information about them, given that the constitutional provision aims to ensure the legality, financial well-being, and transparency of the funds used to finance a political campaign by which the electorate designates the individuals who will hold publicly elected office, from where they will shape and adopt the major guidelines for the country's institutional policy."[211]

f. Jurisprudence on the principle of maximum disclosure as a limit to banking and stock exchange secrecy when public funds are involved

187. In the aforementioned judgment of the Constitutional Chamber of the Supreme Court of Costa Rica, which upheld the right to access information related to the purchase of Costa Rica' public debt by the People's Republic of China, the Court held that stock exchange secrecy cannot be used as an impediment to access to public information when that information concerns public funds. In this case, the Treasury Minister refused to provide the requested information, asserting that

[210] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 08-003718-0007-CO, Decision No. 2008-013658, September 5, 2008. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=419511&strTipM=T&strDirSel=directo

[211] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 08-003718-0007-CO, Decision No. 2008-013658, September 5, 2008. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=419511&strTipM=T&strDirSel=directo

because of stock exchange secrecy, he was required to maintain the confidentiality of the requested data, and that the investor had expressed its interest in having the information kept secret. In deciding the appeal, the Court took into consideration the role of the right of access to information in democratic States as a guarantee of the principles of transparency and openness of government as well as the existing regulations on banking and stock exchange secrecy, and held that the law was not inconsistent with allowing access to information relating to investments and commitments of a public nature that must be assumed by collective society.

188. To arrive at its conclusion, the Court cited prior case law on banking and stock exchange secrecy relating to access to the budgetary information of political parties. According to the Court, "banking secrecy is the obligation imposed upon banks, whether public or private, not to disclose to third parties information about their clients that comes to their attention as a result of the legal relationships between them. It is a duty of silence with respect to facts concerning the persons with whom the banking institutions maintain business relationships, as well as a professional obligation not to disclose information and data of which they become aware by virtue of the activity in which they are engaged. Nevertheless, this rule has its exceptions, as this Court so determined in assessing banking secrecy with regard to the assets of political parties and the public disclosure of private contributions."[212]

189. The court indicated with regard to this specific case that "such a denial of information is contrary to the constitutional principles of administrative transparency and openness. Insofar as a constitutional limitation is placed upon stock exchange secrecy with respect to future public investments and financial commitments, that denial, in turn, is a violation of the right of access to public information as established under constitutional law. This is particularly relevant in a general context that tends to provide increasing protection to access to public information, and where there are already numerous international decisions protecting access to information as a particularly useful tool for ensuring the transparency of government activity."[213]

190. In this case, the Supreme Court based its decision on the Inter-American Democratic Charter, Articles 10 and 13 of the United Nations Convention against Corruption, the judgment of the Inter-American Court of Human Rights in the *Case of Claude Reyes et al. v. Chile,* and the Principles on the right of access to

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[212] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 08-003718-0007-CO, Decision No. 2008-013658, September 5, 2008. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=419511&strTipM=T&strDirSel=directo

[213] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 08-003718-0007-CO, Decision No. 2008-013658, September 5, 2008. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=419511&strTipM=T&strDirSel=directo

information, adopted by a resolution of the Inter-American Juridical Committee of the Organization of American States.[214]

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

191. On August 14, 2009, Chile's Council for Transparency handed down a decision that is particularly relevant in its reiteration and incorporation of several criteria that, in keeping with domestic legislation, must be observed in the exercise of the right of access to information.[215]

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

193. On April 30, 2009, a private individual requested all the claims and complaints on police activities received from citizens during 2008. The request sought the inclusion in each claim of – among other things – "the complete name of the person who filed the claim or complaint."[216]

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

195. Three arguments were made to justify the denial of the full names of the claimants: (1) In the opinion of the Undersecretariat, the claims and complaints

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[214] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 08-003718-0007-CO, Decision No. 2008-013658, September 5, 2008. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=419511&strTipM=T&strDirSel=directo

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

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

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

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

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

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

complaints or claims with the Undersecretariat of the *Carabineros*, especially on sensitive issues like the ones indicated […].”[217]

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

200. Effectively, according to the Council, the relevant authority had a duty to the effect “that when documents or records that contain information that can affect the rights of third parties are requested, the relevant body must inform the aforementioned third parties (in this case, those who filed the complaints) of this fact so that they can exercise their right to challenge the revelation of the requested information. Only when challenges are produced will the information be retained. The petitioner can then file an *amparo* with this Council to appeal the petition.”[218]

201. Regarding the ability of the Undersecretariat to expedite the notification of all the individuals who filed complaints, the Council found that applying the procedure for informing those who filed complaints of their right to oppose the release of their names “presumes an excessive use of the time of the officials who work for the Undersecretariat of the *Carabineros*, causing undue distraction and, in doing so, affecting the due completion of institutional functions.”[219]

202. However, in the Council’s opinion, and in a reiteration of the public interest involved in the request for access, it was necessary “to know who has access to complaints filed before a public authority and what the effects of those complaints are” in order that “society can control the exercise of public administration.” This justified “on the basis of the principles of facilitation and divisibility […] a revision of whether there is a way to turn over at least part of the information.”[220]

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

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

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

[220] Chilean Transparency Council, Amparo A91-09, ruling of August 14, 2009. *Considerando* 10. Available at:

203. The Council found that under these principles, the public authority must strictly scrutinize the claims and complaints in order to: 1) determine which claims and complaints refer to alleged police procedures that were carried out poorly and which refer to other administrative questions not related to police actions or inquiries, only taking into account those that fit into the former category; 2) distinguish whether the complaint or claim comes from a public entity or a private individual, revealing the names in the case of the former but not in the case of the latter, maintaining the obligation to notify private individuals of their right to challenge the release of their names in the response to the request for access to information.

204. The Constitutional Court of Colombia, in Judgment T-527 of 2005, protected the right of access to information of a citizen who requested that the government provide him with all the information pertaining to the budget of a municipality over a three-year period, the investment and operational expenditures, and the corresponding ledgers.

205. The government denied the request because the citizen failed to assume the cost of having the documents copied. Although it stated that photocopies of the documents could be made, the government claimed that in order to do so it would be necessary to assign one to three employees from its office to the project for a period of one year.

206. In view of the citizen's inability to pay for the copies, he was offered the chance to view the information on site. The Constitutional Court considered that the citizen should be allowed to go to the entity's facilities in order to consult the information during business hours and following the consultation instructions provided to him.

207. The Court noted in particular that the nature of the information requested by the citizen was sufficiently consistent with the right of access to information as a tool for transparency and oversight of government activity, which undoubtedly includes knowing how the public budget and investments in the general interest are handled[221].

h. Jurisprudence on the publicity of statistical data

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http://www.consejotransparencia.cl/prontus_consejo/site/artic/20090706/asocfile/20090706202514/a91_09_decision_fondo.pdf.

[221] Constitutional Court of Colombia. Judgment T-527/05. Case T-1059221. May 20, 2005. Available at: http://www.corteconstitucional.gov.co/relatoria/2005/t-527-05.htm

208. The Constitutional Court of Guatemala issued a judgment on the scope of the publicity of information gathered by the National Statistics Institute. This judgment was rendered based on an advisory opinion requested by the President of the Republic, in which, among other things, the Court was asked whether the censuses conducted by the National Statistics Institute—which could be useful in helping to carry out social programs—are confidential.

209. In its decision of January 20, 2009, the Constitutional Court held that the information contained in "the censuses conducted by the National Statistics Institute, with the objective of supporting the implementation of the State's social programs, is confidential, unless the persons providing the information expressly authorize access to the information they give, or as determined under the legal provisions that allow for such access." Nevertheless, it also made clear that, "statistical results that do not individually identify the sources of information are not subject to this confidentiality," since they do not contain personal or family information.[222]

210. For its part, the Chilean Council for Transparency has had the opportunity to rule on the State's duty to provide statistical data. This opportunity arose based on a petition submitted to the National Statistics Institute requesting the disclosure of the results of an employment survey, information on the increase of employment (during the month and over 12 months), levels of employment in the national workforce by age and by sex, developments in salaried employment, self-employment, service personnel, employers, and non-remunerated family members, during the previous month and its variation as compared to previous months. The National Statistics Institute determined that it could not turn over the information as requested, claiming that it was impossible to provide monthly figures because the Institute works principally with quarterly periods.

211. In its decision of July 7, 2009, the Council found that the relevant issue to be resolved in the case was the secrecy or confidentiality of the data on which the statistics generated by the National Statistics Institutes are based, specifically those concerning employment. According to the Council, that is public information because it is prepared with public funds. Therefore, it found that such information cannot be refused based on the assertion that the methodology used by the Institute is different from that requested in the petition. On this point, the Council for Transparency stated that "the law requires the requested party to turn over official statistics, and the fact that the requested information has not been processed according to the standards and methods used by that Service does not prevent any

[222] Constitutional Court of Guatemala. Advisory Opinion, Case 4185-2008, January 20, 2009. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=809148.html

person from being able to request it […]; the authority to produce official statistics must not be confused with the confidentiality of the data on which it is based.[223]

212. For its part, the Federal Institute for Access to Information and Data Protection of Mexico ordered the Center for Investigation and National Security (*Centro de Investigación y Seguridad Nacional, CISEN*) to compile statistics and provide them to a person who had requested data on the number of deaths associated with criminal gangs in Mexico between 2000 and 2010. An individual had requested that CISEN provide this data and the number of women killed in Ciudad Juárez in 2010. In response, that agency indicated that it lacked competence to provide the data, directing the individual to the National Commission to Prevent and Eradicate Violence against Women and other state agencies. It also referred the individual to a database that contained some statistics regarding deaths associated with criminal gangs between 2006 and 2010. In its resolution, the IFAI confirmed that CISEN lacked competence to provide data on the number of women who were killed.[224] Nevertheless, with respect to the second request, it observed that CISEN "shares a concurrent competence with various other subjects obligated [to provide information]" which had the information requested, meaning that it should seek the pertinent statistics in order to provide a response.[225] It added that the response given to the individual did not correspond to the information required, and it instructed CISEN to "conduct an exhaustive search of its archives and provide the individual with the information broken down into the required format" in a period of 10 working days.[226]

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

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

214. The Air Force denied the request, citing two exemptions found in the 1996 Freedom of Information Act (FOIA); Section 522(b)(2) establishes that requests for access to information on issues "related solely to the internal personnel rules and

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[223] Chilean Council for Transparency. Complaint code A19-09, July 7, 2009. Available at: http://www.consejotransparencia.cl/data_casos/ftp_casos/A19-09/A19-09_decision_web.pdf

[224] Federal Institute for Access to Information and Data Protection (IFAI) (Mexico). Case File 145/11. March 23, 2011, pp. 38-39. Available for consultation at: http://www.ifai.org.mx/Sesiones

[225] IFAI (Mexico). Case File 145/11. March 23, 2011, pp. 52-54. Available for consultation at: http://www.ifai.org.mx/Sesiones

[226] IFAI (Mexico). Case File 145/11. March 23, 2011, pp. 45 and 64. Available for consultation at: http://www.ifai.org.mx/Sesiones. Free translation.

practices of an agency"[227] are not viable, while Section 522(b)(6) establishes that requests for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"[228] can be denied.

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

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

217. The Supreme Court upheld the ruling, highlighting the necessity of strictly interpreting the FOIA exemptions to the principle of maximum disclosure through "a general philosophy of full agency disclosure (…) unless information is exempted under clearly delineated statutory language."[229] The court emphasized that the law's objective is "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[230] According to the court, no content of the law should be read to "authorize withholding of information or limit the availability of records to the public, except as specifically stated."[231]

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[227] United States of America. Freedom of Information Act. 5 U.S.C. § 522(b)(2). Available at: http://www.justice.gov/oip/amended-foia-redlined-2010.pdf

[228] United States of America. Freedom of Information Act. 5 U.S.C. § 522(b)(6). Available at: http://www.justice.gov/oip/amended-foia-redlined-2010.pdf

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

[230] Supreme Court of the United States of America. Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

[231] Supreme Court of the United States of America. Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976).

218. Regarding the exemption provided for in Section 522(b)(2) on internal institutional proceedings, the court found it inapplicable to matters "subject to such a genuine and significant public interest."[232] According to the court, the exemption is not intended to force government entities to keep records of matters in which the public could not reasonably have an interest. But if there is a genuine public interest, government agencies cannot deny access to information by citing the "internal" nature of the information.

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

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

4. Jurisprudence on the right of access to personal information

a. Jurisprudence on the definition of "personal information"

221. The Constitutional Court of Guatemala, in its Judgment of October 11, 2006, indicated that in order to protect the right to privacy in light of "current technology and the broadcasting of information through the mass media" the right of every individual to informational self-determination with respect to personal information should be recognized.

222. In view of the absence of an existing legal definition of "personal information" that would lead to an understanding of the scope of the exercise of this right, the Constitutional Court formulated its own definition, according to which that concept must be considered to refer to "all that [information] that allows for a person to be identified, and thereby enables the determination of an identity that can be considered that person's own." This decision ruled on the appeal of a judgment on a writ for a constitutional protection (*amparo*) filed by a citizen against a company that had published and disclosed personal information without the prior authorization of the owner of that information.[233]

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[232] Supreme Court of the United States of America. Department of the Air Force v. Rose, 425 U.S. 352, 369 (1976).

[233] Constitutional Court of Guatemala. Appeal of the Judgment on a Petition for Constitutional Remedy, Case 1356-2006, October 11, 2006. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=790410.html&St_RegistrarConsulta=yes&sF=1356-2006

223. In the same respect, the Constitutional Court of Guatemala again noted the importance of making access to information and privacy rights compatible. It did so in deciding a constitutional challenge to the law regulating the so-called National Registry of Persons, in a Judgment dated September 27, 2007. In that decision the Court held that "the importance of the operation of a public registry containing information that makes it possible to identify the inhabitants of the Republic—an essential function to be performed by the National Registry of Persons—is key to ensuring the scope of the objectives that the Constitution imposes upon the State, and underscores the important function of the National Registry of Persons; nevertheless, in the performance of its work, that institution must adhere to the specific guidelines that prevent the violation of rights inherent to the human person."[234]

224. On this same issue, in Judgment T-729 of 2002, the Constitutional Court of Colombia reviewed the case of a writ for the protection of constitutional rights in which a citizen had requested the protection of his right to privacy in light of a proactive transparency program in which two State offices (the Land and Real Estate Registry Office and the Superintendence of Health) were disclosing information on their websites through a public inquiry mechanism. The former was disclosing financial information on all properties registered in Bogotá, including details of those properties; and the latter was publishing private family information on persons affiliated with the social security health system.

225. In this case, the Colombian Court examined the relationship between the right to obtain access to information and the right of informational self-determination or *habeas data*. The Court held that although in certain cases the right of access to information may conflict with the right of *habeas data*, the manner in which those conflicts should be resolved must first and foremost consider the type of information sought. In the Court's opinion, if it is confidential or private information, the degree of access must be less than when it is semi-private or public information.[235]

226. The Court decided in this case to order that the transparency program be brought into line with the principles of shared responsibility and mutual obligations in order to prevent indiscriminate access to the information, which would infringe upon the privacy and *habeas data* rights of citizens.

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[234] Constitutional Court of Guatemala. Judgment of unconstitutionality, Case 2101-2006, September 27, 2007. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=814248.html&St_RegistrarConsulta=yes&sF=fraseabuscar

[235] Constitutional Court of Colombia. Judgment T-729/02. Case T-467467. September 5, 2002. Available at: http://www.corteconstitucional.gov.co/relatoria/2002/t%2D729%2D02.htm

227. In another case, the Constitutional Court of Colombia discussed the connection between access to information and personal data. In Judgment T-216 of 2004, the Court held that information should be categorized in order to determine potentially secret personal information.

228. The confidential personal information that is "contained in public documents will never be able to be disclosed and, therefore, the exercise of the right of access to public documents cannot be claimed with respect thereto."[236] If the public documents in question contain private and semi-private personal information, "the exercise of the right of access to public documents is exercised indirectly, through administrative or judicial authorities (as appropriate) and within the respective government processes."[237]

229. Also in Judgment T-837 of 2008, the Constitutional Court of Colombia examined a writ for a constitutional protection (*amparo*) in which four individuals requested medical information on their relatives, who were unable to authorize the disclosure of their clinical histories because they were either deceased or in an unconscious state. In this case, the Court acknowledged that even though this type of information is confidential and can only be disclosed with the consent of its owner, relatives may be able to gain access to it in some special cases, provided that certain conditions are met to ensure family privacy.

230. In the Colombian Court's opinion, it is clear that "relatives have the right to consult the clinical history of their deceased or gravely ill relative when there is a fundamental legal interest in the request."[238] The Court understands "relatives" to mean parents, siblings, children, and spouses or life partners, who must agree to maintain the confidentiality of the medical information with respect to all matters not strictly necessary for the exercise of their fundamental rights.

231. In turn, in the previously cited judgment of the Constitutional Chamber of the Supreme Court of Costa Rica that upheld the right to access stock exchange information relating to the purchase of the country's public debt, the Court held as follows with regard to the rights of the investors: "There will be situations in which the information of a private individual in the possession of a public body or entity may have—above all when articulated with that of other private individuals—a

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[236] Constitutional Court of Colombia. Judgment T-216/04. Case T-726171. March 8, 2004. Available at: http://www.corteconstitucional.gov.co/relatoria/2004/t%2D216%2D04.htm

[237] Constitutional Court of Colombia. Judgment T-216/04. Case T-726171. March 8, 2004. Available at: http://www.corteconstitucional.gov.co/relatoria/2004/t%2D216%2D04.htm

[238] Constitutional Court of Colombia. Judgment T-837/08. Cases T-1823051, T-1836309, T-1908845 y T-1919472. August 26, 2008. Available at: http://www.corteconstitucional.gov.co/relatoria/2008/t%2D837%2D08.htm

clear public dimension and calling, circumstances that must be progressively and casuistically identified by this Constitutional Court."[239]

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

232. On October 29, 2003, the Supreme Court of Canada handed down a ruling in the case *Information Commissioner v. Canada*. The case was on a request for information on the positions and postings of five Royal Canadian Mounted Police (RCMP), made by a citizen under the Canadian Access to Information Act.[240]

233. The RCMP submitted partial information, limiting itself to reporting the current posting of its four active members and the last posting of the retired police officer involved in the request for access. The RCMP argued that the information on previous postings was "personal" information that was outside the reach of the access law in keeping with that established in the 1985 Privacy Act.[241]

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

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

236. The Supreme Court, meanwhile, rejected both restrictions on the right to access. First, the Court adopted a broad standard of revision according to which a decision of the government to turn over or deny access to information must

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[239] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 08-003718-0007-CO, Decision No. 2008-013658, September 5, 2008. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=419511&strTipM=T&strDirSel=directo

[240] Canada. Access to Information Act, R.S.C. 1985, c. A-1. Available at: http://laws-lois.justice.gc.ca/PDF/A-1.pdf

[241] Canada. Privacy Act, R.S.C. 1985, c P-21. Available at: http://laws-lois.justice.gc.ca/eng/acts/P-21/page-1.html

be reviewed by independent government bodies. In this respect, the court found that it was important to take into account the general purpose of the law, which is to "provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public."[242]

237. In applying this broad standard of review, the court found that the requested information was personal information, a concept that in the court's opinion included individuals' work history. However, the requested information was not protected by exemption, since Section 3(j) of the Privacy Act provided that it would be possible to access "information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual."[243]

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

239. According to the Supreme Court, the Access Act "makes this information equally available to each member of the public because it is thought that the availability of such information, as a general matter, is necessary to ensure the accountability of the state and to promote the capacity of the citizenry to participate in decision-making processes."[244]

240. The Constitutional Chamber of the Supreme Court of Costa Rica, in a decision dated April 22, 2009[245], ruled on a writ for a constitutional protection (*amparo*) alleging the violation of the right of petition and the right to obtain a prompt decision by the head of human resources at the University of Costa Rica, who had refused to provide information requested by the plaintiff. The requested information was related to the supporting documents that an official at that University had submitted with regard to her work history, position, working day,

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

[243] Canada. Privacy Act, R.S.C. 1985, c P-21. Section 3(j). Available at: http://laws-lois.justice.gc.ca/eng/acts/P-21/page-1.html. Section 3 (j) establishes that "for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, exception 3 does not include (…) (*j*) information about an individual who is or was an officer or employee of a government institution related to the position or functions of the individual…."

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

[245] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 09-005097-0007-CO, Decision No. 2009-006024, April 22, 2009. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=463890&strTipM=T&strDirSel=directo

schedule, and length of time worked. The Constitutional Chamber determined that because the requested information concerned the performance of a public servant—and therefore is public in nature—it must be provided by the competent authority.

241. On this occasion, the Court held that "[…] although access to the personnel files of public servants is prohibited, except for by the express authorization of that employee or by a court order, part of the information contained therein can in fact be requested by any interested person. That is, even without exactly having access to the personnel file of a public servant, any interest party may request to know, for example, the type of position that person holds, the duties assigned to that position, the requirements for the position and whether the employee meets those requirements. Those are all aspects that in no way jeopardize the right to the public servant's privacy, because they are matters of public interest."[246]

242. According to the Court, "the requested information […] related to the position, working day, schedule, and length of employment of an employee of the University of Costa Rica […] is public, and of general interest, as it concerns the proper oversight and management of public funds, as well as the relevance of the public services the university provides. Therefore, […] the requested information about an employee of that university—which is part of the public education system—cannot be considered to be personal employee information. Furthermore, given the duty of transparency that must characterize government employment, […] the Administration cannot deny access to information that is in the public interest, unless it concerns State secrets, confidential information, or information that could seriously affect the general interest if disclosed, which has not been demonstrated in this case."[247]

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

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

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[246] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 09-005097-0007-CO, Decision No. 2009-006024, April 22, 2009. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=463890&strTipM=T&strDirSel=directo

[247] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 09-005097-0007-CO, Decision No. 2009-006024, April 22, 2009. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=463890&strTipM=T&strDirSel=directo

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

245. HUD answered the request with a list of employees with the names, social security numbers, and salaries blacked out, since it considered that revealing that information would violate the exemption provided for in Section 522(b)(6) of the Freedom of Information Act ("FOIA"). That section establishes that requests for information can be denied when the information requested includes "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[248] According to HUD general counsel, the union had no legitimate interest in the information.

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

247. The district judge rejected both arguments through a broad interpretation of the goals of FOIA. Following the Supreme Court's resolution in the *Department of the Air Force v. Rose* case, the court found that "the dominant objective of FOIA is disclosure, and FOIA exemptions are accordingly constructed narrowly."[249] Applying the *Rose case* standard, the judge examined a) whether the requested information came from personnel files or medical records and b) whether the revelation of the information would imply a clear and unjustified invasion of personal privacy.

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

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[248] United States of America. Freedom of Information Act. 5 U.S.C. § 522(b)(6). Available at: http://www.justice.gov/oip/amended-foia-redlined-2010.pdf

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

249. First, the judge found that revealing the salaries of federal employees was not comparable to the kind of "embarrassing" information protected by Exemption 6 of the FOIA. As for the revelation of the names of the employees, the judge found that the alleged harassment to which they could be subject was only speculation that did not nullify the clear public interest involved. The Court added that "[t]he strong public interest in assuring compliance with the law tilts the balance in favor of disclosure."[250]

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

251. The ruling was appealed to the District of Columbia Court of Appeals, but on April 26, 1985, that court upheld the ruling of the lower court. The appeals court highlighted that one of the main objectives of FOIA was to allow citizens to exercise control over the workings of the government. In this sense, it found that, "it is a prime function of the Freedom of Information Act to enable the public to survey the operations of its government."[251]

252. Similarly, in a case in which U.S. federal judges had refused to turn over information on their personal assets, the Fifth Circuit Court of Appeals found that the public interest in a government subject to ethical limitations took substantial precedence over any private interest potentially affected by the revelation of that information.[252] In this sense, the Court restrictively construed the exemption for privacy and found that, because judges have taken on public responsibilities, their expectations of privacy are less than that of other people.[253]

253. For its part, the Superior Federal Court of Brazil ruled on the same issue in a case that involved a lawsuit brought by a state employees union against the

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

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

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

[253] United States Court of Appeals for the Fifth Circuit. Duplantier v. United States, 606 F.2d 654, paragraph 54 (1979).

decision of the mayor of Sao Paulo to publish on the Internet the names, positions, and salaries of the 147,000 employees of that mayoralty and the 15,000 city contract workers. After weighing the rights involved, the court found that the principle of maximum disclosure of public information should prevail over the private interests involved. The court noted the importance of the Internet for controlling public funds and found that hindering the release of information on the monthly compensation of public servants would have "negative effects for the consistent exercise of official and citizen control over public funds."[254]

254. For its part, the Constitutional Tribunal of Peru coincided with the standards mentioned in the previous paragraph when it held in a September 30, 2008[255] judgment that the obligation to provide information of general interest bound not only bodies of the State but also legal entities that, governed mainly by private law, provide public services.

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

256. The company requested that the *habeas data* motion be declared inadmissible, arguing that although the company was a legal entity offering a public service, "it does not carry out an administrative function, and therefore is only obligated to turn information over to third parties when it relates to: i) the characteristics of its public services, meaning (among others) the routes, frequency, and timetable of its flights; and ii) its fees, all of which are found fully described and detailed on its Web page."[256]

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

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[254] Superior Federal Tribunal of Brazil, Ruling dated July 8, 2009. The Web page of the court is: http://www.stf.jus.br. The full ruling is available at: http://right2info.org/resources/publications/Brazil%20S.Ct%20salarios%20SP%20Jul%202009.pdf An analysis of this ruling in the context of the right of access to information can be found in the *amicus curiae* brief filed by the Open Society Justice Initiative in the case of *Defensoría del Pueblo c. Municipalidad de San Lorenzo*, heard by the Supreme Court of Paraguay.

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

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

258. In applying this jurisprudence, the court found that "air transport, due to its regular nature and purpose of satisfying particular social needs, has an impact on the general interest and must therefore be considered a public service. Because of this, information closely linked to this service must be turned over to any citizen who requests it. Actions to the contrary will be considered detrimental to the fundamental right of access to information."[257]

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

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

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

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

262. The Superior Administrative Court of the Dominican Republic, in a judgment handed down on September 1, 2010[258], ruled on a writ of constitutional protection (*amparo*) filed by a journalist who was partially denied information concerning the payroll of the House of Representatives of the Dominican Republic. Pursuant to the journalist's request, the Office of Access to Information of the House of Representatives forwarded information listing positions, accrued salaries, addresses, departments and units of the institution, and number of staff and employees, as well as the total gross amount of funds allocated to payroll. Nevertheless, the Office failed to send the names of the public servants, arguing that it was protecting their privacy.

263. In order to determine whether the information requested by the journalist was part of the private sphere of public employees, the court clarified what was understood as personal data, establishing that it is information about a person concerning his residence, telephone number, medical records, social or ethnic origin, physical, psychological or emotional characteristics, photographs, and all information pertaining to his person and his privacy. Accordingly, it held that although one's name is what identifies and distinguishes a person, the names of employees and staff on the payroll of a government enterprise are public information.[259]

264. Following this line of reasoning, the court held that according to the legal regulations on the issue, the list of employees, staff members, and lawmakers is information that is public in nature, and that its public disclosure does not affect a person's privacy or private life. As such, it held that the information requested cannot be understood to be an exception to the State's obligation to turn over information.[260]

265. In addition, the Constitutional Chamber of the Supreme Court of Costa Rica, in a June 11, 2010 decision[261] ruled to uphold the right of access to government information of the Union of Professionals, Technicians and Similar Occupations of the People's and Community Development Bank [*Banco Popular y de Desarrollo Comunal*], following the refusal of the bank's Director of Human and Organizational Development to provide in detail the information the union had

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[258] Cf. Superior Administrative Court of the Dominican Republic, Judgment # 089-2010 D/F 01-09-2010, September 1, 2010. Available at: http://issuu.com/o.p.d/docs/tribunal_superior_administrativo

[259] Cf. Superior Administrative Court of the Dominican Republic, Judgment # 089-2010 D/F 01-09-2010, September 1, 2010. Available at: http://issuu.com/o.p.d/docs/tribunal_superior_administrativo

[260] Cf. Superior Administrative Court of the Dominican Republic, Judgment # 089-2010 D/F 01-09-2010, September 1, 2010. Available at: http://issuu.com/o.p.d/docs/tribunal_superior_administrativo

[261] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 10-006785-0007-CO Decision No. 2010010201, June 11, 2010. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=484001&strTipM=T&strDirSel=directo

requested with regard to: i) the total number of positions with fixed salaries and with base salaries plus bonuses; ii) the departments to which each one of those positions belonged; iii) the salary amounts for each bracket within the fixed salary and base salary plus bonuses categories. The requested authority indicated that the details of the salaries of each particular position could be disclosed provided that the employees gave their permission. The Court found that the petitioner's request had to be answered, since the information requested was public in nature.

266. On this point, the Constitutional Chamber held that "the requested authority is mistaken as to the scope of the petitioner's request, as what it is requesting is the base salary and the fixed salary for each category described in the table of reference, and not—as the authority understands—the individual salaries of the employees. As such, the requested information is clearly in the public interest and, to that extent, can legitimately be requested by any citizen. Accordingly, the verified denial at issue in this case constitutes an outward violation of the right of access to government information."[262]

d. Jurisprudence on access to information on "uncollectible" debts

267. The Office of the Special Rapporteur has affirmed that the right of access to information contained in Article 13 of the American Convention is not an absolute right, but rather is subject to limits that must adhere strictly to the requirements derived from Article 13.2 of the Convention – that is, conditions that are of an exceptional nature, legally enshrined, based on a legitimate aim, and necessary and proportional for pursuing that aim.

268. These rules for the establishment of limits to the right of access to information under Article 13.2 must be followed by domestic courts in order to guarantee the exercise of this right in accordance with inter-American law. On this point, the October 21, 2005 ruling of the Constitutional Chamber of the Supreme Court of Justice of Costa Rica on the right of access to tax information is relevant.[263]

269. On June 1, 2005, the appellant requested – from the General Director of Taxation (*Director General de Tributación*) – information on the individuals and companies declared by the Tax Administration as owning "uncollectible" debts in the years 2002, 2003, and 2004. The appellant requested information on the date of the

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[262] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 10-006785-0007-CO Decision No. 2010010201, June 11, 2010. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=484001&strTipM=T&strDirSel=directo

[263] Constitutional Chamber of the Supreme Court of Costa Rica, *Sentencia*: 14519, *Expediente*:05-011831-0007-CO, October 21, 2005. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=327472&strTipM=T&strDirSel=directo

declaration, the amount of money declared uncollectible, the reasoning for the declaration, the kind of taxes declared uncollectible, the justification for the declaration, the legal basis for the declaration, and the name and national identification number of those whose debts were declared uncollectible. In a June 14, 2003, response to the request, the director informed the appellant that there was a legal obstacle that blocked him from turning over the information – specifically, the information was of a confidential nature. This decision was repeated in the ruling on the writ of reconsideration that the appellant filed. Consequently, the appellant filed a writ of amparo before the Supreme Court of Justice for the violation of his access to public information.

270. In his arguments, the appellant claimed that, "despite requesting information on the companies and individuals declared uncollectible by the General Direction of Direct Taxation, this authority declined to supply the information, considering it confidential. This is a violation of the provisions in Subparagraph 30 of the Political Constitution. In reality, this is information related to the activity of this institution."[264]

271. For his part, the General Director of Direct Taxation indicated that, "The tax administration does not have the authority to turn over information to third parties that contains economic content that would allow one to determine the financial situation of taxpayers."[265]

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

273. Regarding the legal establishment of the supposed confidentiality limit (contained in Article 117 of the Code of Tax Rules and Procedures) cited by the director, the court found that in any case, the director "is making an erroneous interpretation of the confidentiality declared in this subparagraph. Although it is clear that the statements presented by private personages cannot be divulged because of

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[264] Constitutional Chamber of the Supreme Court of Costa Rica, Sentencia: 14519, *Expediente*:05-011831-0007-CO, October 21, 2005. *Considerando* III. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=327472&strTipM=T&strDirSel=directo.

[265] Constitutional Chamber of the Supreme Court of Costa Rica, *Sentencia*: 14519, *Expediente*:05-011831-0007-CO, October 21, 2005. *Resultando* 2. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=327472&strTipM=T&strDirSel=directo.

the kind of information they contain, the same is not true when a debt has already been declared uncollectible, since there is evidence of a public interest in determining the way in which the administration managed a case like this."[266]

274. According to the court, the aim presumptively pursued through the use of confidentiality "does not justify […] declining to turn over information on accounts declared uncollectible, because only through this information are private individuals able to exercise adequate oversight of public finances, determining whether the Tax Administration took the necessary measures to confront the problems of defaults."[267] As pertains to the general interest surrounding knowledge of the activities of public authorities in the area of taxation, "It is clear that the lack of compliance with taxation responsibilities is a detriment to the Public Treasury, for which reason it is in the public interest of everyone to learn about unpaid debts, as long as this is the only way to determine if the administration has acted with due diligence in collecting public resources."[268] Finally, the court indicated that, "As for the obligation of transparency that should characterize public administration […] the administration cannot deny access to information that is in the public interest when that information may reveal an improper use of funds that belong to all Costa Ricans, as is the case here."[269]

275. As a consequence, since there was in reality no limit on the right to access, the tribunal ruled "that in the instant case there was an evident violation of the provisions of Article 30 of the Political Constitution, considering that the information requested by the appellant is evidently in the public interest"[270] and not

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[266] Constitutional Chamber of the Supreme Court of Costa Rica, Sentencia: 14519, Expediente:05-011831-0007-CO, October 21, 2005. *Considerando* V. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=327472&strTipM=T&strDirSel=directo.

[267] Constitutional Chamber of the Supreme Court of Costa Rica, *Sentencia*: 14519, Expediente:05-011831-0007-CO, October 21, 2005. *Considerando* V. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=327472&strTipM=T&strDirSel=directo.

[268] Constitutional Chamber of the Supreme Court of Costa Rica, *Sentencia*: 14519, *Expediente*:05-011831-0007-CO, October 21, 2005. *Considerando* V. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=327472&strTipM=T&strDirSel=directo.

[269] Constitutional Chamber of the Supreme Court of Costa Rica, *Sentencia*: 14519, *Expediente*:05-011831-0007-CO, October 21, 2005. *Considerando* V. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=327472&strTipM=T&strDirSel=directo.

[270] Constitutional Chamber of the Supreme Court of Costa Rica, *Sentencia*: 14519, *Expediente*:05-011831-0007-CO, October 21, 2005. *Considerando* V. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=327472&strTipM=T&strDirSel=directo.

subject to any recognized exception under the laws or constitution of the State. The Court therefore ordered that the requested information be turned over to the appellant within a non-extendable deadline of eight days from the date of the notification of the ruling.

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

276. A ruling on a writ of *amparo* by the Constitutional Chamber of the Supreme Court of Justice of Venezuela dated August 7, 2007[271] established that the right of access to the content of public records or archives containing information on the petitioner must not be limited to requests filed within the framework of an administrative procedure, since the guarantee of this right requires that information be turned over when the individual affected requires it.

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

278. The *a quo* judge ruled that there had been no violation of the right to access under Article 143 of the National Constitution,[272] considering that "for a violation of the right to access to a file with information on the petitioner to have taken place, the denial must have been given in the framework of an administrative procedure in which the plaintiff has an interest with respect to the final Administrative ruling. This was not demonstrated in the instant case."[273]

279. In its ruling, the Venezuelan Constitutional Chamber found "that the *a quo* court incorrectly interpreted the provision and reached conclusions that cannot be derived from Article 143 of the Constitution" because "it is not evident […] that for

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

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

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

a violation there *must* be *an administrative procedure established*."[274] For the Tribunal, the existence of an administrative procedure is subordinate to the violation of a right to information, and would be equivalent to the imposition of an unfounded limitation on the constitutional right.

280. In the opinion of the Constitutional Chamber, "Constitutional provisions should not be interpreted restrictively, but rather broadly, especially when constitutional rights like the right to information are at stake. This right, as indicated in the provision's heading, belongs to all citizens, without distinction of the legal relationship that might exist between the petitioner and the Administration."[275]

281. The Tribunal therefore overruled the decision of the *a quo* judge, considering that the student who requested access to his academic records "has a right according to which the Office of Academic Control (*Oficina de Control de Estudios*) should turn over information on his academic development during the time that he was associated with the university. It should allow him to review his file and even take notes on its content, as well as copy it if he needs to."[276]

282. The Court of First Instance for the Review of Administrative Acts (Uruguay), in Judgment No. 36, of October 23, 2008, ruling on a writ of *habeas data*, ordered the National Defense Ministry to turn over certified testimony pertaining to the administrative investigation of a military squad in which the person filing the request was under investigation. The decision was affirmed by the Civil Appeals Court (Fifth Rotation), in Judgment No. 124 of November 14, 2008.

283. According to the judge, "the law […] establishes that the protection of the personal information of individuals is one of the factors inherent to the protection of human rights. […] With the prioritization and assessment of human rights, the right to information concerning the subject himself acquires far-reaching importance, as in the final analysis it is a matter of protecting the individual and the rule of law of the republic."[277]

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

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

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

[277] Court of First Instance for the Review of Administrative Acts (Uruguay), Judgment No. 36, October 23, 2008. Available at: http://www.redipd.org/documentacion/jurisprudencia/common/uruguay/sentencia-jca3.pdf

284. The Peruvian Court, in a Judgment that granted the writ of *habeas data* filed against the National Council of the Judiciary [*Consejo Nacional de la Magistratura*] to obtain information on the process by which the Council decided not to approve the position held by the petitioner, examined whether the restriction to the right of access to information was consistent with the law.

285. The court examined the content of the provision that limited the right of access to that information, and examined the reasonableness of the measure, bearing in mind the nature of the restricted right.

286. The Court studied the provision of the Internal Regulations of the National Council of the Judiciary based on which the Council justified the confidentiality of the requested information and prohibited the issuance of certifications or information of any kind to private citizens or authorities with respect to the data contained in the registry, except as provided in Article 96 of the Constitution or by court order.

287. The Court then examined whether the information available in the registry in question was public. Accordingly, it studied the provisions of the Transparency and Access to Public Information Act, according to which "[...] any type of documentation funded by the State budget that serves as the basis for an administrative decision is considered public information."[278]

288. Accordingly, the Constitutional Court stressed that, "[…] the requirement that the documentation be financed by public funds is unreasonably restrictive in defining what should be considered 'public information.' The truly important factor for purposes of determining what can be considered 'public information' is not its funding, but rather its possession and use by public bodies in the making of administrative decisions—except, of course, if the information has been declared confidential by law."[279]

289. Along the same lines, "[…] it is not constitutionally admissible for a declaration of confidentiality to be legitimate solely because it finds support in the law. Constitutional rights, under the rule of law, do not have value in the context of laws; rather, the inverse is true: laws have value in the context of fundamental rights [Herber Krüger]; thus, if the exercise of a fundamental right is restricted through a law, that restriction must necessarily be based on a constitutionally valuable aim, in

[278] Constitutional Court of Peru. Case No. 2579-2003-hd/TC, April 6, 2004. Available at: http://www.tc.gob.pe/jurisprudencia/2004/02579-2003-HD.html

[279] Constitutional Court of Peru. Case No. 2579-2003-hd/TC, April 6, 2004. Available at: http://www.tc.gob.pe/jurisprudencia/2004/02579-2003-HD.html

addition to being presented as a measure that is strictly necessary and appropriate to the accomplishment of the aims pursued."[280]

290. Bearing in mind that in this specific case the person requesting the information is the same person who was subjected to the confirmation process, the Court decided not to examine whether the general restriction is constitutionally justifiable. However, it stressed that according to an appropriate interpretation of the provision, the restriction of access to the information in question does not extend to the person who is the subject of the confirmation process.

291. The Court thus concluded that the denial of information about the petitioner's case was arbitrary; therefore, it ordered that the requested information be provided to the petitioner within a specific period of time.

f. Jurisprudence on access to personal information on the beneficiaries of social programs

292. In a judgment handed down on December 2, 2009, the Constitutional Court of Guatemala ruled on the appeal of a petition for a constitutional remedy filed by the Guatemalan Minister of Education, who had refused to disclose the identification numbers of persons who were the beneficiaries of a social program called "My Family Progresses" (*Mi Familia Progresa*). The information was requested by the Office of the Comptroller General for financial oversight purposes, which claimed that the beneficiaries' identities could not be known without their identity card numbers.

293. The Constitutional Court found that Article 232 of the Constitution[281] authorizes the Office of the Comptroller General to "supervise the revenue, disbursements, and in general every fiscal interest of the State," and therefore, "since the Office of the Comptroller General is requesting that the [Ministry of Education] provide the information necessary for it to perform its supervisory duties, it is admissible to grant the request." Accordingly, the Court ordered the Ministry of

[280] Constitutional Court of Peru. Case No. 2579-2003-hd/TC, April 6, 2004. Available at: http://www.tc.gob.pe/jurisprudencia/2004/02579-2003-HD.html

[281] Article 232 of the Constitution of Guatemala states: "ARTICLE 232.- Office of the Comptroller General. The Office of the Comptroller General is a decentralized technical institution, with oversight functions over the revenues, disbursements, and treasury interests in general of all State bodies, the municipalities, decentralized and autonomous entities, as well as any person who receives funds from the State or collects funds on behalf of the State. Public works contractors and any other persons delegated by the State to invest or administer public funds are also subject to this oversight. Its organization, operation, and powers shall be determined by law."

Education to provide the information requested by the Office of the Comptroller General.[282]

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

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

294. One of the standards of the right of access to information is the existence of an administrative procedure that is simple, prompt, and free of charge. With respect to this obligation, the Associate Courts of Mexico have held that in keeping with "the December 6, 2004, joint declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the representative of the Organization for Security and Co-operation in Europe on Freedom of the Media, and the Organization of American States' Special Rapporteur for Freedom of Expression […] it is announced that as a basic principle of access to information, the process for accessing public information must be simple, quick, and free or of low cost."[283]

295. On this topic, the Civil and Commercial Appeals Court of Asunción, Paraguay (Third Rotation), has underscored the importance of having a rapid means of demanding the right to information. As stated by this Court in Judgment No. 51 "the right to information, as a fundamental right, would not tolerate, because of its very nature, the delays arising from adversarial litigation."[284]

296. In Judgment C-872 of 2003, the Plenary Chamber of the Constitutional Court of Colombia examined a constitutional challenge to Order 1799 of 2001, which issued rules on the personnel evaluations and classifications of Officers and Non-commissioned Officers in the Military Forces, and established that all documents pertaining to the evaluation process were confidential.

297. The Court found unconstitutional the provisions ordering that the documents and decisions pertaining to the evaluation process were confidential. In

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[282] Constitutional Court of Guatemala. Appeal of interlocutory order, consolidated cases 4362-2009 & 4657-2009, December 2, 2009.

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

[284] Civil and Commercial Appeals Court of Asunción, Paraguay (Third Rotation), Judgment No. 51, May 2, 2008. Available at: http://www.idea.org.py/gfx/espanol/descargas/normativa_ambiental/jurisprudencia/nacional/Caso_Picco_Portillo_acceso_Informacion.pdf

addition, it recalled the importance in democracies of citizens' ability to access information, which means that the State must respond to citizen requests in a clear, timely, accurate, up-to-date, and accessible manner.

298. In deciding the case, the Colombian Court made direct reference to Article 13 of the American Convention on Human Rights and to Advisory Opinion 5 of 1985 of the Inter-American Court of Human Rights, in order to conclude that "[…] effective citizen oversight of government actions not only requires that the State refrain from censoring information but also it demands positive action consisting of providing individuals with the means to access the files and documents in which the day-to-day activities of the State are recorded."[285]

299. In reference to the 2001 Annual Report of the Office of the Special Rapporteur for Freedom of Expression of the IACHR, and to the Declaration of Principles on Freedom of Expression, the Court held that those documents "[…] are guidelines for conduct directed at the States, and furthermore serve as auxiliary criteria for the interpretation of international human rights treaties."[286]

300. The Colombian Court concluded by reiterating the rule on the publicity of information and the exception of secrecy, and by establishing that the Colombian State and the public authorities have a constitutional duty to "[…] turn over, to whomever so requests, clear, complete, timely, accurate, and up-to-date information regarding any activity of the State."[287]

301. For its part, in the previously cited decision on writ of constitutional protection (*amparo*) that was filed against the Association of Doctors and Surgeons based on the association's requirement that citizens pay for access to requested information, the Supreme Court of Costa Rica held that: "[…] in this Court's opinion, this charge [$0.75 for information on each associated doctor] is an unreasonable and disproportionate limitation on obtaining information that is totally public, such as the list of associated physicians specializing in plastic surgery, in view of the rights and authority that this right [to information] confers upon individuals."[288]

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[285] Plenary Chamber of the Constitutional Court of Colombia. Judgment C-872/03. Case D-4537. September 30, 2003. Available at: http://www.corteconstitucional.gov.co/relatoria/2003/C-872-03.htm

[286] Plenary Chamber of the Constitutional Court of Colombia. Judgment C-872/03. Case D-4537. September 30, 2003. Available at: http://www.corteconstitucional.gov.co/relatoria/2003/C-872-03.htm

[287] Plenary Chamber of the Constitutional Court of Colombia. Judgment C-872/03. Case D-4537. Bogotá, Colombia, September 30, 2003. Available at: http://www.corteconstitucional.gov.co/relatoria/2003/C-872-03.htm

[288] Constitutional Chamber of the Supreme Court of Costa Rica, Petition for Constitutional Remedy, Case: 07-012599-0007-CO, Decision No. 2007015343, October 23, 2007. Available at: http://200.91.68.20/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=XYZ&param2=7&nValor1=1&nValor2=396257&strTipM=T&lResultado=61&strTem=ReTem

302. In another decision, the Costa Rican Supreme Court heard a petition for a constitutional remedy alleging the violation of the right of petition based on the plaintiff's having received incomplete information after asking the program "State of the Nation" (*El Estado de la Nación*) for general information on consultancies, cooperation, and investigations it had conducted during the past five years. In that decision, the court underscored the obligation of the authorities that administer public information to provide it in a manner that is complete, prompt, and accessible. Thus, bearing in mind the nature of the requested information, as well as the recognition and scope the right of petition had been accorded within the Costa Rican legal system, the Court ordered the director of the program to turn over the information requested by the plaintiff within a specific period of time.

303. The court held that "the case law of this Constitutional Chamber has clearly established that when a citizen makes a request for information before a public agency, that agency must at all times respect the established deadlines for responding to it, in accordance with Article 27 of the Constitution in relation to Article 32 of the Constitutional Jurisdiction Act."[289]

304. Along this line of reasoning, the Court found that the plaintiff's right of petition had been violated, establishing that in this particular case "the information requested by the plaintiff is plain and simply general information about consultancies, cooperation and investigations that the program *Estado de la Nación* has conducted over the past five years […]. On this point, although on its own initiative […] on October 7, 2009, it provided the petitioner with a response to that request, it failed to satisfy the requirements of the right, as it required the petitioner to extract from the attachments the names of those who have provided professional services to the defendant—with the aggravating factor that it failed to clearly specify the amounts paid to those consultants for their services, or the income tax withheld; only the fees corresponding to the proposals and coordination of the investigations were indicated."[290]

305. In addition, the Constitutional Court of Peru has held that, bearing in mind the content of the right to access information, as well as its importance in

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[289] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 09-015926-0007-CO Decision No. 2009018175, November 27, 2009. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=468920&strTipM=T&strDirSel=directo

[290] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 09-015926-0007-CO Decision No. 2009018175, November 27, 2009. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=468920&strTipM=T&strDirSel=directo

democratic systems, the information provided by the competent authorities must meet certain minimum requirements.[291]

306. According to the Court, "the constitutionally guaranteed content of the right of access to public information includes not just the mere possibility of accessing the requested information and the correlative obligation of public bodies to provide it. If that were the only content protected under the constitution, the risk would arise of making a mockery of this right and the aims pursued by its recognition when, for example, the public bodies turned over any type of information, regardless of its accuracy. In the Court's opinion, not only is the right of access to information adversely affected when its provision is denied without any constitutionally legitimate reasons for doing so, but also when the information provided is patchy, out-of-date, incomplete, imprecise, false, untimely, or erroneous. As such, in its positive aspect, the right of access to information imposes upon Government bodies the duty to inform; in its negative aspect, it requires that the information provided not be false, incomplete, patchy, indirect, or confusing."[292]

307. Accordingly, the Court held that "if the right in question guarantees access, knowledge, and oversight of public information for purposes of fostering greater and better citizen participation in public affairs, as well as the transparency of the acts and administration of government entities, then a minimum requirement for the accomplishment of these aims is that the information be accurate, current, and clear."[293]

b. Jurisprudence on access to information and the duty to create and maintain archives

308. The Office of the Special Rapporteur underscores the obligation of States to build systems that enable the storage and maintenance of information.[294] The requirement to create file systems entails not just the arbitrary storage of information; rather, it requires the implementation of physical and computer systems that systematize data, so that information can be searched and retrieved within a reasonable period of time, and complete and verifiable data can be obtained.

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[291] Constitutional Court of Peru, Judgment in Case No. 1797-2002-HD/TC, January 29, 2003. Available at: http://www.tc.gob.pe/jurisprudencia/2003/01797-2002-HD.html

[292] Constitutional Court of Peru, Judgment in Case No. 1797-2002-HD/TC, January 29, 2003. Available at: http://www.tc.gob.pe/jurisprudencia/2003/01797-2002-HD.html

[293] Constitutional Court of Peru, Judgment in Case No. 1797-2002-HD/TC, January 29, 2003. Available at: http://www.tc.gob.pe/jurisprudencia/2003/01797-2002-HD.html

[294] IACHR. Annual Report 2009. Annual Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter IV: The Right of Access to Information, par 77. Available at: http://www.cidh.org/pdf%20files/Annual%20Report%202009.pdf

309. The Constitutional Court of Colombia addressed this obligation in Judgment T-216 of 2004, in which it decided the case of a citizen who requested access to records from labor conciliation proceedings, collective bargaining agreements, and other documents from a State enterprise. The request was denied, among other reasons, because there was no archive containing systematized information.

310. In the Colombian Court's view, it is clear that information is created rapidly, in large quantities, and that documents reproduce exponentially. Therefore, in the Court's view it is clear that the entities in charge of keeping information must create mechanisms of organization containing a rational document classification system.

311. An archive, according to the Court, "is not 'a pile of sacks' containing documents or the arrangement of pages and files in a physically 'ordered' manner";[295] rather, it is an information organization system meant to "[…] ensure that documents are in an archive and to design the means to duly maintain such documents, as well as to set parameters—compatible with constitutional law—for access to them."[296]

312. The Colombian Constitutional Court held that failure to comply with the duty to maintain documents—in addition to violating the right of access to information—can constitute a type of censorship that prevents access to documents that are not even subject to any kind of confidentiality.

313. The Court stressed that this special form of censorship can arise through subtle means, such as bureaucratic obstacles to accessing documents, or disorganization in archives that makes it impossible to find the documents or conceals their very existence.

c. Jurisprudence on the State's duty to justify any denial of a request for access to information

314. The Chilean Council for Transparency has said that State entities cannot fail to respond to a request for information based on the argument that the request does not meet the requirements provided for by law, unless they clearly specify what requirement has not been met. The Council so ruled on June 23, 2009, in a claim for information relating to the use of funds belonging to the National Fund for Regional Development during the years 2008 and 2009, specifically those related to the area affected by the emergency resulting from the Chaitén Volcano. The authority

[295] Constitutional Court of Colombia. Judgment T-216/04. Case T-726171. March 8 2004. Available at: http://www.corteconstitucional.gov.co/relatoria/2004/t%2D216%2D04.htm

[296] Constitutional Court of Colombia. Judgment T-216/04. Case T-726171. March 8, 2004. Available at: http://www.corteconstitucional.gov.co/relatoria/2004/t%2D216%2D04.htm

that received the request (the Regional Government of Los Lagos) had refused to provide the information, claiming—among other reasons—that the request was too general and failed to clearly identify the desired information.

315. In its decision, the Council for Transparency dismissed that argument, stating that the "specificity of a request is satisfied if it is limited to certain issues, if it specifies the parties to, or authors of, the information in question, and if it indicates the period of time covered by the request"—which occurred in this case. It also stated that to deny a request for access, "it is insufficient to invoke the argument that the request deals with a large number of administrative acts, or that it would entail the undue distraction of government employees", since it is necessary to prove those exceptions in addition to invoking them, and according to the Council, the Regional Government of Los Lagos failed to do so.[297]

316. Likewise, the Constitutional Court of Colombia, in Judgment T-1322 of 2000, held that a violation of the right of access to information occurs not only when the request is ignored but also when the response "is not in line with the request made—for example, because it is a vague response, or answers a question other than the one that was asked—or when it deviates from the constitutional and legal standards on the matter."[298]

317. The Colombian Court used this argument to order a company in which both public and private capital had been invested to publicly disclose the executive summary of the entity's management, which had been denied on the premise that it was the confidential information of a private company.

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

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

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[297] Chilean Council for Transparency. Complaint code A1-09, June 23, 2009. Available at: http://www.consejotransparencia.cl/data_casos/ftp_casos/A1-09/A1-09_decision_web.pdf

[298] Constitutional Court of Colombia. Judgment T-1322/00. Case T-317327. September 31, 2000. Available at: http://www.corteconstitucional.gov.co/relatoria/2000/t%2D1322%2D00.htm

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

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

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

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

323. The tribunal examined the Inter-American Court of Human Rights' interpretation of Article 25 of the American Convention, which states, "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."[299]

324. The judges argued that Article 25 of the American Convention was applicable to the right of access to information contained in Article 8, Subparagraph 10 of the National Constitution and Article 13 of the Convention. The tribunal ruled that the recourse was enshrined in Law No. 437-06 as "an autonomous recourse that does not require the exhaustion of administrative remedies nor any other for

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

admissibility; rather, it is sufficient that a fundamental right has been infringed up or that there is a possibility that such an infringement is imminent."[300]

325. Considering that this recourse does not require the exhaustion of other remedies, the tribunal called it "an action autonomous of all other procedures." According to the tribunal, "for an amparo judge to admit the recourse, a fundamental right must have been violated, or there must be a possibility of that happening." In the instant case, the court found that there was "a violation of a fundamental right, that right being the right of access to public information enshrined in the Constitution of the Dominican Republic, international treaties and law."[301]

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

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

327. A ruling handed down on April 3, 2007,[302] by the Supreme Court of Justice of Panama reiterated that, in the event that requested information has already been publicized, the authority who receives the request for information has the obligation to indicate the source, location and format in which the requested information can be accessed.

328. The facts of the case that resulted in this ruling involved a private individual's request for information from the director of Panama's Social Security Administration (*Caja del Seguro Social*). The request sought information on whether Panamanian law allowed or prohibited a woman from registering her husband so that

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

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

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

he can receive social security hospital and medical services.[303] The legal and constitutional deadlines expired, and the request was not answered by the relevant authority.

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

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

331. The tribunal held that "in the event that the information is already available to the public in printed forms such as books, public archives, and electronic formats accessible through the Internet, among others, it will inform the petitioner of the source, the location, and the format in which the previously published information can be accessed."[304] Likewise, the court indicated that even when the requested information appeared in law and was public and of general knowledge, the relevant authority had the duty to give a precise response within the legal time limit.

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

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

333. In a ruling dated January 28, 2005,[305] the Constitutional Chamber of the Supreme Court of Costa Rica made an important connection between the

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

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

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

"principle of informality to the benefit of the person administered" and the right of access to public information. In its ruling, the court held that any request for information from a entity that does not have the information but belongs to the same public body as the one that does have the information has the obligation to immediately transfer the request to the relevant entity for its resolution.

334. The incident that resulted in this ruling was a request for access to information, filed with two different branches of the same entity on two different occasions during the same month. In both cases, officials explained to the appellant that it was impossible to fully answer every point of the request[306] because part of the requested information was not in their power. They explained that the appellant must request it from other offices of the same public entity.

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

336. In ruling on the case, the tribunal's judgment explained the provisions of the "principle of informality to the benefit of the person administered" and its connection to public administration's obligation to comply with its obligations derived from the right of access to information.

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

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

and resolve the request. In this way, the constitutional principles of efficacy, efficiency, simplicity and celerity in the compliance of administrative functions are fulfilled."[307]

338. Consequently, the court found that there was an obligation to forward the request to the relevant branch within the same public entity in "the cases [in which] the issue is simple non-competence (within the same entity or public body), which must not be placed on the shoulders of the person administered, who does not know the internal distribution of the competencies among the different offices that make up an entity or body and does not have the duty to find that out."[308]

339. The tribunal concluded that "according to the principle of informality in public administration previously cited, the appellant's arguments are correct […], considering that [the authority from which information was requested] was obligated to attend the request for information filed by the appellant and forward it to the correct departments."[309]

340. With regard to the issue raised on this point, the Constitutional Chamber ruled to "therefore grant the writ of *amparo* on this matter, for having infringed upon the constitutional principle of administrative coordination with respect to the fundamental right of access to administrative information in detriment to the appellant,"[310] thereby obligating the authority in question to immediately turn over the requested information.

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

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

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

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

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

341. According to a decision made by the Federal Institute of Access to Information and Data Protection (IFAI) of Mexico dated August 19, 2009,[311] when a person files a request for access to information and does not receive a reply by the deadline set forth by domestic law, the authority responsible is obligated (in principle) to turn over the requested information.

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

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

344. The Institute found that the failure to respond to a request for access by the deadline established by law "will be understood as assent" and ruled that the State entity was obligated to turn over the requested information in a period of no more than 10 working days, "paying all the costs generated by the preproduction of the informative material, unless this institute determines that the documents in question are classified or confidential."[312]

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

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

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

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[311] Federal Institute for Access to Information and Data Protection (Mexico). *Expediente*: 279/09, August 19, 2009. Available at: http://www.ifai.org.mx/resoluciones/2009/3279.pdf.

[312] Federal Institute for Access to Information and Data Protection (Mexico). *Expediente*: 279/09, August 19, 2009. Available at: http://www.ifai.org.mx/resoluciones/2009/3279.pdf.

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

347. In a case on the supposed unconstitutionality of a law that regulates hidden spending, the Colombian court stated the principles used to determine the limits of the right of access. Effectively, this court found that, "A restriction of the right of access to public information – or the establishment of a legal exemption that holds back certain information – is only legitimate when: i) the restriction is authorized by law or the Constitution; ii) the provision that establishes the limit is clear and precise enough in its terminology that it does not provide opportunity for arbitrary or disproportionate actions of public officials; iii) public officials who chose to take refuge in the exemption give written justification of their decision, including citation of the legal or constitutional provision that authorizes it; iv) the law establishes a temporal limit on the exemption; v) adequate systems for watching over the information are in place; vi) administrative and judicial controls of the exempted actions or decisions are in place; vii) the exemption applies to the content of public documents but not to their existence; viii) the exemption applies to public servants, but does not block journalists who access the information from publishing it; ix) the exemption is strictly subject to principles of reasonability and proportionality; and x) judicial action or recourses are in place to challenge the decision to exempt particular information."[313]

348. The court reaffirmed these criteria in 2008, indicating that they must be observed with "extreme care" by government authorities, who can only deny access to documents or judicial proceedings when those conditions are met. For them to act otherwise, in the opinion of the Colombian Court, is a clear violation of a fundamental right.[314]

349. On this same issue, the Supreme Court of Costa Rica, in the judgment upholding the right of access to information following the denial of the Ministry of the Treasury to turn over information relating to the acquisition of Costa Rican public debt, the court underscored that any limits to the right in question must be exceptional.

350. According to the Court "[…] administrative secrecy or confidentiality is an exception that is justified solely under qualified circumstances when

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

[314] Constitutional Court of Colombia. Sentencia T-920/08. Expediente T-1919557, September 19, 2008. Available at: http://www.corteconstitucional.gov.co/relatoria/2008/t-920-08.htm

constitutionally relevant values and interests are thereby protected. There are various mechanisms for attaining greater levels of government transparency in a particular legal system, such as requiring legal explanations for administrative acts, the forms in which they are communicated—publication and notice—the processing of public information for the drafting of regulations and regulatory plans, participation in administrative procedures, government contracting processes, and so on. Nevertheless, one of the most precious tools for achieving that objective is the right of access to government information."[315]

351. The Court likewise found that, while "Article 30 of the Constitution refers to free access to 'administrative departments,' unrestricted access to the physical facilities of government offices or agencies would be useless and insufficient for achieving the aim of having citizens who are informed and knowledgeable about public administration. Therefore, a an axiological or finalist interpretation of the constitutional provision must lead to the conclusion that citizens or individuals can access any information in the possession of the respective public entities and bodies, regardless of its format, whether it is documentary—files, records, archives, indexes—electronic or computer—databases, electronic files, automated indexes, diskettes, compact disks—audiovisual, tape recordings, and so on."[316]

352. Accordingly, "State secrets, insofar as they are an exception to the constitutional principles or values of the transparency and openness of public authorities and their administration, must be interpreted and applied, at all times, restrictively."[317]

353. For its part, the First Chamber of the Constitutional Court (Peru) in a decision dated April 6, 2004[318], granted the writ of *habeas data* filed by the petitioner

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[315] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 08-003718-0007-CO, Decision No. 2008-013658, September 5, 2008. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&param2=1&nValor1=1&nValor2=419511&strTipM=T&lResultado=3. Similarly: Constitutional Chamber of the Supreme Court of Costa Rica, Case: 10-006785-0007-CO Decision No. 2010010201, June 11, 2010. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=484001&strTipM=T&strDirSel=directo

[316] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 08-003718-0007-CO, Decision No. 2008-013658, September 5, 2008. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&param2=1&nValor1=1&nValor2=419511&strTipM=T&lResultado=3

[317] Constitutional Chamber of the Supreme Court of Costa Rica, Case: 08-003718-0007-CO, Decision No. 2008-013658, September 5, 2008. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&param2=1&nValor1=1&nValor2=419511&strTipM=T&lResultado=3

[318] Constitutional Court of Peru, Case No. 2579-2003-hd/TC, April 6, 2004. Available at: http://www.tc.gob.pe/jurisprudencia/2004/02579-2003-HD.html

against the National Council of the Judiciary seeking access to the report of the Permanent Evaluation and Confirmation Commission on the conduct and suitability of the petitioner in his position as a Regular Superior Judge of the Judicial District; a copy of the personal interview he submitted to the Commission; and a copy of the Minutes of the Plenary Session of the National Council of the Judiciary containing the decision not to confirm him for the aforementioned position.

354. The Council affirmed that the decision to refuse access to the aforementioned information was based on a provision of the Internal Regulations of the National Council of the Judiciary, according to which "it is prohibited to issue certifications or information of any kind to private individuals or authorities with respect to the data contained in the registry; with the exception of the provision set forth in Article 96 of the Constitution, or a court order."[319]

355. In the Court's opinion, "the expansive interpretation of a provision restricting the exercise of a constitutional right, such as in the instant case, is implicitly prohibited by the general principle derived [from] […] the Constitution, and developed by the […] Civil Code; likewise, it is specified, in an even better form, and categorically, by […] the Transparency and Access to Public Information Act, according to which limitations to the right of access to public information 'must be interpreted restrictively insofar as they limit a fundamental right.'"[320]

b. Jurisprudence on the requirements that limitations be set forth by law

356. Regarding the obligation to enact exemptions to the right of access through an act of the legislature, the Colombian court has said that, "No other branch of government has the authority to impose limits on this fundamental right. Doing so would be stepping outside its authority and contradicting the provisions of the Constitution."[321]

357. The court ratified this principle in a case in which Air Force authorities denied a citizen access to certain information because the information was confidential in accordance with Air Force rules contained in an administrative edict. The court found that it "is evident that the confidentiality of the administrative investigations into aerial accidents that the [Air Force] cites as grounds for the denial of documents to the petitioners does not originate in the law but rather in an edict

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[319] Constitutional Court of Peru, Case No. 2579-2003-hd/TC, April 6, 2004. Available at: http://www.tc.gob.pe/jurisprudencia/2004/02579-2003-HD.html

[320] Constitutional Court of Peru, Case No. 2579-2003-hd/TC, April 6, 2004. Available at: http://www.tc.gob.pe/jurisprudencia/2004/02579-2003-HD.html

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

from the Administration, handed down in the exercise of its regulatory function, as is the Aeronautics Regulations Manual (*Manual de Reglamentos Aeronáuticos*), passed by resolution […] of the head of the Administrative Department of Civil Aeronautics (*Departamento Administrativo de la Aeronáutica Civil*). By the same token, being as it is that this case does not concern an exemption in the strict sense, such a regulation can hardly be relied upon to dismiss the plaintiff's claims."[322]

358. In a decision handed down on June 19, 2002, the Constitutional Court of Guatemala examined the petition for a constitutional remedy filed by an individual who was denied access by a court to a certified copy of a recording of oral arguments before that court. The Court held that so long as the requirements set forth in the Constitution for accessing information from the judicial authorities were met, "[the court] has no choice but to turn over the requested certification, and in this case, that order shall be complied with by turning over a cassette recording to the petitioner."[323] In another case, decided on September 28, 2006, the same court held that when the refusal to turn over information is based on a reason other than the ones set forth in Article 30 of the Constitution of Guatemala[324], the requested information must be turned over, since there is no basis for the denial of such request.[325]

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

359. Likewise, the Colombian court established clear rules on the need for laws that place limits on the right to access to be written in clear and precise language. In this sense, the Court found that a law of this kind "must be precise and clear in defining what kind of information can be made confidential and what

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

[323] Constitutional Court of Guatemala. Appeal of Judgment on Petition for Constitutional Remedy, Case 567-2002, June 19, 2002. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=797523.html&St_RegistrarConsulta=yes&sF=567-2002

[324] Article 30 of the Constitution of Guatemala states that: ""All acts of government are public. Interested parties have the right to obtain, at any time, the reports, copies, reproductions, and certifications that they request, and to access the files they wish to consult, except in cases involving military or diplomatic matters of national security, or information provided by individuals under the guarantee of confidentiality."

[325] Constitutional Court of Guatemala. Appeal of Judgment on Petition for Constitutional Remedy, Case 1211-2006, September 28, 2006. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=807525.html&St_RegistrarConsulta=yes&sF=1211-2006

authorities can do so."[326] According to the court, the Constitution rejects "generic or vague provisions that can end up being a kind of general authorization for authorities to keep secret any information they feel is adequate at their discretion. So that this does not happen and the general rule of publicity is not inverted, the law must clearly and precisely establish the kind of information that can be made confidential, the conditions under which it can be made confidential, the authorities that can make it confidential, and the systems of control that supervise the actions that for this reason remain confidential."[327]

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

360. Based on the rule of time limits for confidential material, the Colombian court found that a law that did not place a time limit on the confidentiality of disciplinary investigations was "a disproportionate restriction on the exercise of […] fundamental rights."[328] The court ruled that the law was constitutional, but with the caveat that once the evidence had been gathered in the disciplinary process, the file should be made public. The court stated that, "Under these conditions, the public can be freely informed of the charges, the removal of charges, and the supporting evidence. The public can then access the file, even before any ruling is issued, ensuring that if new evidence emerges from the public scrutiny, it can be assessed before the final decision is made."[329] Extending the classification of information beyond this would be disproportionate and a violation of the right of access to public information.

361. In Judgment T-414 of 2010, the Constitutional Court of Colombia found that in order to decide the case at hand, it had to examine the concept of the confidentiality of information. It held that in all cases "[…] confidentiality must be temporary. The period of time established must be reasonable and proportionate to the legally protected interest sought to be protected by the confidentiality […]."[330]

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

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

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

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

[330] Constitutional Court of Colombia. Judgment T-414/10. Case T-2469460. May 27, 2010. Available at: http://www.corteconstitucional.gov.co/relatoria/2010/t%2D414%2D10.htm

The Court concluded by establishing an additional rule according to which, during the term of confidentiality, the information must be duly safeguarded and maintained for purposes of enabling its subsequent release.

362. The same Constitutional Court, in Judgment T-511 of 2010, established rules governing confidential information in its decision on the petition of two relatives of victims of forced disappearance who requested information on the police patrols that had been on duty in the same area in which their relatives had been detained. The Court stated: "Confidentiality may operate with respect to the content of a public document, but not with respect to its existence. The confidentiality must be temporary. Its length must be reasonable and proportionate to the constitutional interest it seeks to protect. It must be lifted at the conclusion of such time period. Confidentiality may be challenged by citizens, but it may not become a barrier to intra- or inter-organizational, legal, or political oversight of the government decisions and proceedings that are the subject of the confidential information. Confidentiality may operate only with respect to information that jeopardizes fundamental rights or constitutionally relevant interests, but not with respect to the entire government process that serves as the context of such information."[331]

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

363. Several courts throughout the region have issued rulings on the need to apply a test of strict proportionality when the confidential nature of information is invoked.

364. On December 3, 2007, the Second Review Chamber of the Constitutional Court of Colombia ruled on a writ of amparo (*tutela*) filed for the denial of information by the National Defense Ministry. In the case, a group of individuals had requested the names of the commanders of a checkpoint in an area where there had been a massacre. The information was needed to begin legal proceedings for failure in the duty to protect.[332]

365. The ministry denied the request for information, arguing that providing the names of these individuals affected their judicial guarantees, "among them the most elemental, the presumption of innocence, expressly recognized in […] many international human rights treaties [because] [n]ot recognizing this right implies

[331] Constitutional Court of Colombia. Judgment T-511/10. Case T-2.395.898. June 18, 2010. Available at: http://www.corteconstitucional.gov.co/relatoria/2010/t%2D511%2D10.htm

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

that the military and law enforcement personnel whose names are sought […] are presumed guilty."[333]

366. The Constitutional Court found: (1) that in the right of access to information, a test of strict constitutionality must be applied—that is, at the moment of restricting the right, the State must give sufficiently clear and compelling reasons demonstrating that confidentiality is useful, absolutely necessary, and strictly proportional to achieve a legitimate aim; and (2) that in some cases, keeping names confidential could meet both requirements – for example when it could violate the right to life and personal integrity. In this case, the court found that confidentiality was neither proportionate nor necessary. In its opinion, on analyzing the details of the case, the tribunal indicated that "the decision does not meet the standards of necessity and strict proportionality required by strict scrutiny of the […] measure [because] the decision of the Defense Ministry nullifies the right of citizens to access information held by State institutions. In reality, the protection of due process and the presumption of innocence of the Police Force members whose names the appellant requests could be achieved through measures that are less damaging to the right of access to information."[334]

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

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

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

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

369. However, considering that this hypothetical was not the case, the Court concluded that maintaining the confidentiality of the names of the soldiers who participated in the massacre would not meet the standards of a strict test of constitutionality, and therefore the Police Force could take other measures less damaging to the right of access to information. Therefore, the court ordered that the information requested by the petitioner be turned over, and that it include the names of the members of the Police Force, indicating their dates of service and their postings. However, the court found that the inclusion of a name on the list should in no way be understood as a suspicion, indication, or recognition of responsibility.

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

371. The Colombian court recalled that, "In Article 13.1, the American Convention on Human Rights holds that 'Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.'" It also recalled that the Inter-American Court of Human Rights reasoned that, "Article 13 indicates that freedom of thought and expression 'comprise the liberty to seek, receive, and disburse information and ideas of all kind….' This language establishes literally that those who are under the protection of the Convention have not only the right and freedom to express their own thoughts, but also the right and freedom to seek, receive, and impart information and ideas of all kinds. Therefore, when an individual's freedom of expression is illegally restricted, it is not only this individual's right that is being violated, but also the rights of everyone to 'receive' information and ideas. It is here that the right protected by Article 13 takes on special scope and character. Here the two dimensions of freedom of expression are clear. Effectively, this freedom demands on one hand that no one be arbitrarily blocked or prevented from expressing their own thoughts, and therefore represents an individual right; but it also implies, on the other hand, the collective right to receive any information and learn the thoughts of others."[335]

[335] Second Revision Chamber of the Constitutional Court, *Sentencia* T-1025/07, December 3, 2007. Fundamento jurídico 7. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/T-1025-07.htm, citing I/A Court H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 69.

372. The Court also recalled that in its 2001 report, the Office of the Special Rapporteur for Freedom of Expression established that, "The absence of participation by society in terms of access to information that directly affects its members prevents the full development of democratic societies, increasing the potential for corrupt conduct in the administration of government and spawning policies of intolerance and discrimination. The inclusion of all segments of society in the processes of communication, decision-making, and development is fundamental to ensuring that the needs, opinions, and interests of individual citizens are taken into account in the processes of policy design and decision-making."[336]

373. For its part, the Constitutional Court of Peru, in the judgment that ordered the disclosure of information on the expenses incurred by a former president of the country and his retinue on the trips taken during his administration, referred to the criteria of reasonableness and proportionality, which must be taken into account when limiting the right of access to information, as well as the presumption of unconstitutionality of laws that restrict that right.

374. According to the Court, "[…] when the exercise of the right of access to public information contributes to the shaping of a free and informed public opinion, it has the status of a preferred freedom […]. Nevertheless, in the case of legislative intervention with respect to a preferred freedom, that status means that the oversight of provisions and acts affecting it are not only subject to more intense judicial supervision, in view of the principles of reasonableness and proportionality, but also that such supervision must take into consideration that such acts or provisions affecting that freedom lack, *prima facie*, the presumption of constitutionality."[337]

375. In this respect "this presumption of the unconstitutionality of a law that […] restricts [the right of access to information] translates into the requirement that the State and its agencies must prove that there is a compelling public interest for the secrecy or confidentiality of the requested information and, in turn, that only by maintaining such secrecy can the constitutional interest that justifies it be served effectively. Thus, if the State cannot demonstrate the existence of a compelling public interest for denying access to information, the presumption that attaches to the provision or act must prevail and, to that extent, its unconstitutionality must be

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

[337] Constitutional Court of Peru, Judgment No. 1797-2002-HD/TC, January 29, 2003. Available at: http://www.tc.gob.pe/jurisprudencia/2003/01797-2002-HD.html. Similarly, see: First Chamber of the Constitutional Court (Peru), Case No. 2579-2003-hd/TC, April 6, 2004. Available at: http://www.tc.gob.pe/jurisprudencia/2004/02579-2003-HD.html

affirmed; however, it also means that the burden of proof with respect to the need to restrict access to information must be, exclusively, on the State."[338]

376. The Supreme Court of Mexico has held that not every publication of information considered confidential can be prohibited by the State; rather, each specific case must be examined, and it must be determined case-by-case whether the prohibition against making the information public is justified. This was the Court's ruling in its decision on a constitutional challenge relating to the use of the electromagnetic spectrum. In that decision, which was handed down on January 15, 2007, the Court ruled on the scope of specific information that was considered confidential. Under the Federal Transparency and Access to Government Information Act, court files in which final judgments have not been entered, as well as the opinions, recommendations, or points of view that form part of the deliberative process of public servants, so long as a final decision is not made, shall be confidential.

377. The Supreme Court's decision limits this general rule, stating that it is not absolute. It held that in those cases in which the dissemination of the information "would result in benefits to society that outweigh the harm its disclosure could cause, an exception to the general rule must be made in favor of the transparency and dissemination of the respective information."[339] In this decision the Court noted that it took into account the potential for harm as a reason to justify the confidentiality of information—which means that when such risk is not present, there is no longer a reason to prevent the disclosure of the information.

378. The Chilean Council for Transparency has in turn used the proportionality test and the weighing of interests as criteria for determining whether specific information should be disclosed or kept confidential. One of the cases in which it has employed this criterion arose from a request for information on the selection process used to create the position of Chief of Collections and Bankruptcies at the General Treasury of the Republic and, specifically, the results of the petitioner's evaluation in the process and the evaluation results of the person who ended up being appointed to the position.

379. When it decided this case on August 11, 2009, the Council ruled in favor of the claimant, based on two arguments: first, it affirmed that the confidentiality of the information on the selection process ended at the end of the process; and second, it applied the proportionality test *stricto sensu.* The Council called this test the "harm test", which consists of "striking a balance between the

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[338] Constitutional Court of Peru, Judgment No. 1797-2002-HD/TC, January 29, 2003. Available at: http://www.tc.gob.pe/jurisprudencia/2003/01797-2002-HD.html

[339] Supreme Court of Mexico. Record No. 170722. Excerpt from Supreme Court Decision Number 45 of 2007, January 15, 2007.

interest in withholding the information and the interest in disclosing it, so as to determine whether the resulting public benefit of knowing the requested information is greater than the harm its disclosure could cause." After applying this harm test to this specific case, the Council concluded that the interest in the disclosure of the information was greater than the possible harm it could cause. Accordingly, it ordered the release of the information on the selection process for the position of Chief of Collections and Bankruptcies at the General Treasury of the Republic.[340]

380. It should be noted that in a prior decision issued on July 28, 2009, the Council for Transparency had stated that the need to weigh the benefits of disclosing the information against the harm that would be cause if the information were public is a decision criterion that has been adopted by the Inter-American Court of Human Rights. Thus, the case law of the Inter-American Court is the source for establishing this interpretive criterion.[341]

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

381. In an April 22, 2009 ruling on a writ of review, Mexico's Federal Institution of Access to Information and Data Protection (IFAI) reaffirmed – upon finding that part of the requested information was of a confidential nature and part of a public nature – the obligation of preparing a public version of requested documents to guarantee the right of access to information.[342]

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

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

384. In order to resolve the dispute on its merits, the Institute did an analysis of Mexican legislation on sale of loans and banking secrecy and concluded

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[340] Chilean Council for Transparency. Complaint code A29-09, August 11, 2009. Available at: http://www.consejotransparencia.cl/data_casos/ftp_casos/A29-09/A29-09_decision_web.pdf. See also, Chilean Council for Transparency. Complaint code A115-09, September 22, 2009. Available at: http://www.consejotransparencia.cl/data_casos/ftp_casos/A115-09/A115-09_decision_web.pdf

[341] Chilean Council for Transparency. Complaint code A45-09, July 28, 2009. Available at: http://www.consejotransparencia.cl/data_casos/ftp_casos/A45-09/A45-09_decision_web.pdf.

[342] Federal Institute for Access to Information and Data Protection (Mexico), Case File 5404/08. Resolution of April 22, 2009. Available at: http://www.ifai.org.mx/resoluciones/2008/5404.pdf

that "information on assets of a legal entity that include facts and actions of an economic, accounting, legal, or administrative nature and that could be useful to a competitor, […]. is [only] confidential when it is designated as such by those – either legal entities or individuals – it concerns; that is to say, information that refers to the private affairs, in this case, of a legal entity, and that is not excepted by a legal provision determining its publicity, must be considered confidential."

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

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

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

388. Consequently, the Institute ordered "the National Banking and Securities Commission […] to prepare a public version of the requested information" that only leaves out information that according to the classification criteria is protected by confidentiality.[343]

7. Jurisprudence on the restrictive application of the concept of national security

389. With respect to the application of the concept of national security, in a March 8, 2005 judgment, the Constitutional Court of Guatemala ruled on the public nature of contracting by the Guatemalan Army. In that case, the Court was asked to render an advisory opinion as to whether, in light of Article 30 of the Constitution of

[343] Federal Institute for Access to Information and Data Protection (Mexico), Case File 5404/08. Resolution of April 22, 2009. Available at: http://www.ifai.org.mx/resoluciones/2008/5404.pdf

Guatemala,[344] administrative acts relating to procurements and contracting done by the Guatemalan Army were exempt from public disclosure. The Constitutional Court ruled in the negative, since the exception to publicity relating to national security "refers to those matters that are part of the State's policy to protect the physical safety of the Nation and its territory, in order to protect all of the elements of the State from any aggression on the part of belligerent foreign or domestic groups," and since the Army's procurement of supplies is not such a matter, it cannot be considered confidential information.[345]

390. For its part, the Chamber for the Review of Land, Labor, Administrative and Tax Matters of the Supreme Court of the Dominican Republic, in a judgment handed down on May 21, 2008 (Judgment # 164. D/F 21-05-2008), ruled on writ for a constitutional protection (*amparo*) filed after the Transportation Reorganization Office refused to provide a journalist with information on construction plans for the Santo Domingo subway system. The entity claimed that according to legal regulations the obligation to inform was limited because of predominant public interests, and therefore the confidentiality of certain information was allowed in order to protect scientific, technological, communications, industrial, commercial or financial strategies and projects, the disclosure of which could be detrimental to national interests. Therefore, in the opinion of the requested entity, the information in question was confidential and its publication would jeopardize the safety of subway users and be detrimental to national interests.

391. The Court ordered that the information be turned over in this case, holding that democratic States must be governed in their public undertakings by the principles of openness and transparency, guaranteeing that their citizens are able to exercise political oversight. The Court thus held that the information requested by the journalist was not secret information, in that its confidentiality was not established in a prior law as required under Article 13 of the American Convention on Human Rights. In this respect, the Court determined that the disclosure of the requested information guaranteed national security and public safety, as citizens have a legitimate interest in knowing whether, prior to initiating the project in question, the appropriate studies were conducted to ensure its viability and safety. As such, the Court concluded that

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[344] Article 30 of the Constitution of Guatemala establishes that: "All acts of government are public. Interested parties have the right to obtain, at any time, the reports, copies, reproductions, and certifications that they request, and to access the files they wish to consult, except in cases involving military or diplomatic matters of national security, or information provided by individuals under the guarantee of confidentiality."

[345] Constitutional Court of Guatemala. Advisory Opinion, Case 2819-2004, March 8, 2005. http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=790423.html&St_RegistrarConsulta=yes&sF=2819-2004

the refusal to provide the information in question violated the fundamental right of access to information.[346]

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

392. On August 24, 1978, the District of Columbia Court of Appeals ruled in a *per curiam* opinion on a request that two American citizens made of the Central Intelligence Agency (CIA) for "a copy of any file you may have on me."[347] The CIA rejected the request and argued that the documents fell into several categories of exemption under the 1966 Freedom of Information Act (FOIA), Section 5 U.S.C. § 552 (b), for which reason it requested a dismissal.

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

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

395. Specifically, the court highlighted a 1974 modification that held that denials of requests for access should be reviewed by a court *in novo*, which would review the relevant documents in judges' chambers.[348] The court found that because of this modification, the inspection of documents in chambers is necessary and appropriate under many circumstances. In addition, it held that although the government's sworn statements indicated that the documents clearly fell under legal exemption, the burden to prove this statement fell to the government.

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[346] Supreme Court of the Dominican Republic, Chamber for the Review of Land, Employment, Administrative and Tax Matters, Judgment # 164. D/F 21-05-2008, May 21, 2008. Available at: http://www.suprema.gov.do/consultas/consultas_sentencias/detalle_info_sentencias.aspx?ID=117040016

[347] United States Court of Appeals for the District of Columbia Circuit. Ray v. Turner, 585 F.2d 1187, 190 U.S. App. D.C. 290, 292 (1978) ("a copy of any file you may have on me"). The full decision is available at: http://openjurist.org/587/f2d/1187/ray-v-turner.

[348] United States Court of Appeals for the District of Columbia Circuit. Ray v. Turner, 585 F.2d 1187, 190 U.S. App. D.C. 290, 292 (1978), citing 5 U.S.C. § 552(a)(4)(B).

396. In this sense, Congress' intention to provide for an objective and independent judicial review on matters of national security is clear. Congress trusted in the magistrates' ability to analyze these matters in chambers and without risking the country's security. In matters of this kind, judges must pay close attention to the government's arguments; however the inspection of the documents in chambers is subject "to the discretion of the court, both in matters of national security as well as in any other kind."

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

398. In this case, the judges ruled that the arguments made by the CIA to deny the requested documents did not clearly demonstrate that the documents were covered by exemptions to FOIA's principle of maximum disclosure. As a result of this and of the broad interpretation of in camera inspections procedure, the Appeals Court ordered that the case be returned to the lower court for a new ruling in accordance with the aforementioned criteria.[349]

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

399. The Constitutional Court of Colombia reiterated that it is illegitimate to censor the publication of government information obtained by journalists, even if that information is confidential. In this sense, the Court indicated that "law […] that prohibits the publication of extracts or summaries of the content of confidential investigations until after a ruling is handed down is inexecutable as it is clearly and unequivocally a form of censorship, violating as it does the freedom and independence of journalism activities."[350] The obligation to maintain the confidentiality of the information should be understood to be binding essentially on public officials but not on journalists who have obtained the information in good faith and can only be subject to subsequent liability under the terms of Article 13.2 of the American Convention.

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[349] United States Court of Appeals for the District of Columbia Circuit. Ray v. Turner, 585 F.2d 1187, 190 U.S. App. D.C. 290 (1978).

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

c. Jurisprudence on access to information contained in documents directly related to the commission of violations of human rights and international humanitarian law

400. Several courts in the region have ruled on the importance of access to information in guaranteeing the rights to truth and justice for the victims of human rights violations.

401. First, the Constitutional Court of Guatemala, in a decision handed down on March 15, 2006, had occasion to address the duty of the President of the Republic to best protect and guarantee the conditions for safeguarding and maintaining information that could be useful in establishing the facts in criminal cases.

402. This judgment arose from a writ for a constitutional protection (*amparo*) that challenged an order issued by the President of the Republic providing for the transfer of the documents of the Presidential Military Staff and the Vice-Presidential Military Staff to the Office of the Adjutant General of the Army, which would be responsible for them.[351] The petitioners in the case alleged that in the past, the Presidential Military Staff had set up a military intelligence body that was accused of committing different human rights violations—some of which were under criminal investigation—and that transferring those documents to the Office of the Adjutant General of the Army could jeopardize the safety of those documents.

403. In this case, the Constitutional Court granted the writ for a constitutional protection (*amparo*), since "by assuming the existence of information that is useful and necessary for the establishment of the facts in criminal cases that are under investigation or could be under investigation in the future […], it should have been ordered that those documents be turned over to other state organizations in whose custody, given the issue at hand, the conditions for the maintenance and safekeeping of those documents would be best preserved and guaranteed—that is, bodies within the regular court system that are in charge of overseeing criminal investigations," in order to "prevent the risk that those documents could be altered, destroyed, invalidated, concealed, or be otherwise affected in such a manner that the

[351] See: Government Order seven hundred eleven (711) of two thousand three (2003), of November 12, 2003, Article 4 of which states: "all records and archives of regular or classified documents belonging to the Presidential General Staff and the Vice-Presidential General Staff shall be transferred, in an orderly fashion that will enable their easy location, to the Office of the Adjutant General of the Army, which shall be responsible for them until and unless the National Defense Ministry provides otherwise, provided that such arrangement guarantees the best conditions for the safeguarding and security of those documents."

determination of the facts or the investigation thereof would be adversely affected."[352]

404. For its part, in the previously cited Judgment C-872 of 2003, in which the Plenary Chamber of the Constitutional Court of Colombia examined the confidentiality of evaluations of members of the Military Forces, the Court established the duty of the Colombian State to preserve and maintain documents directly related to mass and systematic violations of human rights and international humanitarian law.

405. On that occasion, the Colombian Court held that "[…] the latest trends in international human rights law and international humanitarian law closely link the fundamental right of access to public documents to the rights of victims of crimes against humanity, genocide, and war crimes, with respect to justice, reparations, and—especially—to know the truth."[353]

406. In the Court's opinion, the duties of States to respect and guarantee human rights include the duty to investigate, prosecute, and convict the perpetrators of such violations, and to provide redress to the victims, which in most cases entails access to information that can lead to the appropriate attributions of liability and fight against the impunity that threatens the right to the truth.

407. The right to the truth—according to the Court—has both individual and collective connotations. The latter refers to the "right of every people to know its history, to know the truth about events that have taken place, [and] the circumstances and reasons that led to the commission of massive and systematic violations of human rights and international humanitarian law."[354]

408. One of the guarantees of the collective aspect of the right to truth is precisely the ability to access public records, which requires the assumption that the State has a policy for the protection of documents whereby "[…] precautionary measures [are taken] to prevent the destruction, tampering, or forgery of files that record the violations committed […]."[355]

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[352] Constitutional Court of Guatemala. Direct Petition for Constitutional Remedy, Case 2226-2003, March 15, 2006. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=807114.html&St_RegistrarConsulta=yes&sF=2226-2003

[353] Plenary Chamber of the Constitutional Court of Colombia. Judgment C-872/03. Case D-4537. September 30, 2003. Available at: http://www.corteconstitucional.gov.co/relatoria/2003/C-872-03.htm

[354] Plenary Chamber of the Constitutional Court of Colombia. Judgment C-872/03. Case D-4537. September 30, 2003. Available at: http://www.corteconstitucional.gov.co/relatoria/2003/C-872-03.htm

[355] Plenary Chamber of the Constitutional Court of Colombia. Judgment C-872/03. Case D-4537. September 30, 2003. Available at: http://www.corteconstitucional.gov.co/relatoria/2003/C-872-03.htm

409. The Court held that with respect to this type of information confidentiality or reasons of national defense cannot be invoked to keep courts or victims from consulting it.

410. Finally, the Colombian Court found that the individual aspect of the right to the truth—understood as the right of victims, their relatives, and their loved ones to know the circumstances under which the violations occurred, and in cases of murder or forced disappearance, the victim's location—entails the ability of those individuals to gain access to records containing information on the commission of those crimes.

411. In another case, the same Constitutional Court of Colombia (Judgment T-511 of 2010) ordered that the National Police turn over information to two citizens concerning patrols that were assigned to a specific area, the work they performed, and the personnel on duty. The information was requested in order to investigate the kidnapping and death of a person who was traveling in the same area at the same time.

412. The Court found that the right of access to information had undergone a transformation, and that it is now considered "an essential tool for the satisfaction of the right of victims of arbitrary acts and human rights violations, and to guarantee society's right to historical memory."[356]

413. The Colombian Court concluded by recalling the importance of access to information in democratic societies, summarizing the key international instruments on access to information, the inter-American standards on this fundamental right, and the recommendations made by the Office of the Special Rapporteur for Freedom of Expression in its annual reports.

414. Also, in Judgment T-049 of 2008, the Constitutional Court of Colombia examined the publicity of court proceedings being conducted in the so-called "Justice and Peace" cases in that country, which deal with the attribution of criminal responsibility to some of the illegal armed groups that demobilized in 2004.

415. The Court had to review a petition filed by victims of the crimes committed by the illegal groups, who requested that the hearings conducted in the corresponding criminal cases be broadcast via radio, Internet, and television. In rendering its decision, the Court examined the content of the right of access to information and arrived at the following conclusions: "[…] ii) the criminal investigations phase is confidential with respect to the general public, but not with

[356] Constitutional Court of Colombia. Judgment T-511/10. Case T-2.395.898. June 18, 2010. Available at: http://www.corteconstitucional.gov.co/relatoria/2010/t%2D511%2D10.htm

respect to the victims; they are entitled to have knowledge of the proceedings investigating the truth of the events, in the interest of the effective justice of the State and; iii) administrative and judicial decisions preventing the victims from having knowledge of the voluntary testimony provided in the Justice and Peace cases may be inconsistent with the victims' fundamental rights to truth, justice, and redress enshrined in the Constitution and in different international instruments that form part of our body of constitutional law."[357]

416. Regarding the request for television broadcasting, the Court held that "i) the hearings in which voluntary testimony is given by individuals seeking to avail themselves of Act 975 of 2005 are confidential with respect to the general public, but not with respect to the victims; ii) the voluntary testimony proceedings may be broadcast by the mass media with a delay, provided that the competent authority gives its permission and constitutional rights and guarantees are not adversely affected; iii) the victims may have knowledge of the voluntary testimony of the demobilized individuals, but they are required to maintain the confidentiality of their content."[358]

417. The Court concluded by stressing the importance of the right of access to information so that victims of serious human rights violations may seek the comprehensive redress of their rights, including truth, justice, and guarantees of non-repetition.

[357] Constitutional Court of Colombia. Judgment T-049/08. Case T-1705247. January 24, 2008. Available at: http://www.corteconstitucional.gov.co/relatoria/2008/t%2D049%2D08.htm

[358] Constitutional Court of Colombia. Judgment T-049/08. Case T-1705247. January 24, 2008. Available at: http://www.corteconstitucional.gov.co/relatoria/2008/t%2D049%2D08.htm

APPENDIX

A. AMERICAN CONVENTION ON HUMAN RIGHTS

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

Article 13. Freedom of Thought and Expression

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

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

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

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

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

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

PREAMBLE

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

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

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

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

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

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

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

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

CONSIDERING the importance of freedom of expression for the development and protection of human rights, the important role assigned to it by the Inter-American Commission on Human Rights and the full support given to the establishment of the Office of the Special Rapporteur for Freedom of Expression as a fundamental

instrument for the protection of this right in the hemisphere at the Summit of the Americas in Santiago, Chile;

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

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

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

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

PRINCIPLES

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

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

3. Every person has the right to access to information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.

4. Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

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

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

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

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

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

10. Privacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.

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

12. Monopolies or oligopolies in the ownership and control of the communication media must be subject to anti-trust laws, as they conspire against democracy by limiting the plurality and diversity which ensure the full exercise of

people's right to information. In no case should such laws apply exclusively to the media. The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.

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

C. MODEL INTER-AMERICAN LAW ON ACCESS TO PUBLIC INFORMATION

(Adopted at the fourth plenary session, held on June 8, 2010)

G/RES. 2607 (XL-O/10)

THE GENERAL ASSEMBLY,

RECALLING resolution AG/RES. 2514 (XXXIX-O/09), "Access to Public Information: Strengthening Democracy," which called for the drafting of a model law on access to public information and a guide for its implementation, in keeping with international standards in this field;

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

RECALLING FURTHER that, in the Declaration of Nuevo León of the Special Summit of the Americas, held in Monterrey in 2004, the Heads of State and Government expressed their commitment to providing the legal and regulatory framework and the structures and conditions required to guarantee the right to access to public information;

TAKING INTO ACCOUNT that, in order to carry out the mandate contained in resolution AG/RES. 2514 (XXXIX-O/09), the General Secretariat established a group of experts, in which representatives of the Inter-American Juridical Committee, the Office of the Special Rapporteur for Freedom of Expression, the Department for State Modernization and Governance [now: Department for Effective Public Management], and the Department of International Law participated**,** along with experts in access to information from a number of countries and civil society; and

WELCOMING the presentation made to the Committee on Juridical and Political Affairs of the Permanent Council on April 29, 2010, on the Model Inter-American Law on Access to Public Information and its Implementation Guide,

RESOLVES:

1. To take note of the Model Inter-American Law on Access to Information (document CP/CAJP-2840/10), which is part of this resolution; as well as its Implementation Guide, contained in document CP/CAJP-2841/10.

2. To reaffirm, as applicable, the mandates contained in resolution AG/RES. 2514 (XXXIX-O/09) "Access to Public Information: Strengthening Democracy."

In this regard, to establish that the special meeting scheduled for the second half of 2010 take into account the Model Inter-American Law on Access to Public Information and any observations on it that member states may present.

3. To instruct the General Secretariat to provide support to the member states that so request in the design, execution, and evaluation of their regulations and policies on access to public information by citizens.

4. To thank the General Secretariat and the experts for preparing the Model Inter-American Law on Access to Public Information and its Implementation Guide.

5. Execution of the activities envisaged in this resolution shall be subject to the financial resources available in the program-budget of the Organization and other resources.

APPENDIX

MODEL INTER-AMERICAN LAW ON ACCESS TO INFORMATION

[Document presented by the Group of Experts on Access to Information coordinated by the Department of International Law, of the Secretariat for Legal Affairs, pursuant to
General Assembly Resolution AG/RES. 2514 (XXXIX-O/09)]

RECALLING:

That the Heads of States and Governments of the Americas, in the Declaration of Nuevo Leon, made a commitment to provide the legal and regulatory frameworks necessary to guarantee the right of access to information;

That the Organization of American States (OAS) General Assembly instructed the Department of International Law, in resolution AG/RES. 2514 (XXXIX-O/09), to draft a Model Law on Access to Information and Guide for its Implementation, in cooperation with the Inter-American Juridical Committee, the Special Rapporteurship for Freedom of Expression, and the Department of State Modernization and Good Governance, with the cooperation of the member states, civil society, and other experts, to serve as a model for reform in the hemisphere; and

REAFFIRMING:

The American Convention on Human Rights, in particular Article 13 on Freedom of Thought and Expression;

The Inter-American Commission on Human Rights' Inter-American Declaration of Principles on Freedom of Expression;

The Inter-American Court of Human Rights' decision in *Claude Reyes v. Chile*, which formally recognized the right of access to information as part of the fundamental right to freedom of expression;

The Inter-American Juridical Committee's Principles on the Right of Access to Information;

The "Recommendations on Access to Information" drafted by the OAS Department of International Law, in coordination with the organs, agencies, and entities of the inter-American system, civil society, State experts, and the Permanent Council's Committee on Juridical and Political Affairs;

The Annual Reports of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights;

The Carter Center's Atlanta Declaration and American Regional Findings and Plan of Action for the Advancement of the Right of Access to Information, and UNDERSCORING:

That access to information is a fundamental human right and an essential condition for all democratic societies;

That right of access to information applies broadly to all information in possession of public authorities, including all information which is held or recorded in any format or medium;

That the right of access to information is based on the principle of maximum disclosure;

That exceptions to the right of access should be clearly and narrowly established by law;

That even in the absence of a specific request, public bodies should disseminate information about their functions on a routine and proactive basis and in a manner that assures that the information is accessible and understandable;

That the process of requesting information should be regulated by clear, fair and non-discriminatory rules which set clear and reasonable timelines, provide for assistance to those requesting information, assure that access is free or limited to the cost of reproduction of records and require specific grounds for the refusal of access;

That individuals should be afforded the right to bring an appeal against any refusal or obstruction to provide access to information before an administrative body, and to bring an appeal against the decisions of such administrative body before the courts;

That sanctions should be imposed against any individual who willfully denies or obstructs access to information in breach of the rules set forth in this law;

That measures should be taken to promote, implement and enforce the right of access to information in the Americas,

[Member State] agrees to the provisions of the following:

MODEL INTER-AMERICAN LAW ON ACCESS TO INFORMATION

I. DEFINITIONS, SCOPE, AND PURPOSE, RIGHT OF ACCESS AND INTERPRETATION

Definitions

1. In this Law, unless the context otherwise requires:

   a. "Information" refers to any type of data in custody or control of a public authority;

   b. "Information Officer" refers to the individual or individuals appointed by a public authority pursuant to Articles 30 and 31 of this Law;

   c. "Record" refers to any recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the public authority that holds it, and whether or not it is classified;

   d. "Publish" refers to the act of making information available in a form generally accessible to members of the public and includes all print, broadcast and electronic forms of dissemination;

   e. "Public Authority" refers to any governmental authority or private organization falling under Article 3 of this Law;

   f. "Interested Third Parties" refers to persons who may have a direct interest in non-disclosure of information they provided voluntarily to a public authority, because it will affect their privacy or their commercial interests;

   g. "Personal Information" means information which relates to a living individual who can be identified from that information; and

   h. "Senior Official" means any public official whose salary whom exceeds [USD$100,000].

Scope and Purpose

2. This Law establishes a broad right of access to information, in possession, custody or control of any public authority, based on the principle of maximum disclosure, so that all information held by public bodies is complete, timely and accessible, subject to a clear and narrow regime of exceptions set out in law that are legitimate and strictly necessary in a democratic society based on the standards and jurisprudence of the Inter-American system.

3. This Law applies to all public authorities, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory authorities, non-state bodies which are owned or controlled by government, and private organizations which operate with substantial public funds or benefits (directly or indirectly) or which perform public functions and services insofar as it applies to those funds or to the public services or functions they undertake. All of these bodies are required to make information available pursuant to the provisions of this Law.

   Comment: The term benefits should not be construed broadly so as to include any financial benefit received from the government.

4. To the extent of any inconsistency, this Law shall prevail over any other statute.

   Comment: While the model law does not contain a provision whereby private information that is required for the exercise or protection of international recognized human rights would be brought under the scope of the law, some states, including South Africa, have adopted this approach.

Right of Access

5. Any person making a request for information to any public authority covered by this Law shall be entitled, subject only to the provisions of Part IV of this Law:

   a. to be informed whether or not the public authority in question holds a record containing that information or from which that information may be derived;

   b. if the public authority does hold such a record, to have that information communicated to the requester in a timely manner;

   c. to an appeal where access to the information is denied;

   d. to make an anonymous request for information;

   e. to make a request without providing justifications for why the information is requested;

   f. to be free from discrimination based on the nature of the request; and

g. to be provided with the information free of charge or at a cost limited to the cost of reproduction.

6. The requester shall not be sanctioned, punished or prosecuted in response to the exercise of the right of access to information.

7. (1) The Information Officer must make reasonable efforts to assist the requester in connection with the request, respond to the request accurately and completely, and subject to the regulations, provide timely access to the records in the format requested.

(2) The Information Commission must make reasonable efforts to assist the requester in connection with the appeal.

Interpretation

8. When interpreting a provision of this Law, everyone tasked with interpreting this Law, or any other legislation or regulatory instrument that may affect the right to information, must adopt any reasonable interpretation of the provision that best gives effect to the right to information.

II. MEASURES TO PROMOTE OPENNESS

Adoption of Publication Schemes

9. (1) Every public authority shall adopt and disseminate widely, including on its website, a publication scheme approved by the Information Commission, within [six] months of:

a) the coming into force of this Law; or

b) its establishment.

(2) The publication scheme shall set out:

a) the classes of records that the authority will publish on a proactive basis; and

b) the manner in which it will publish these records.

(3) In adopting a publication scheme, a public authority shall have regard to the public interest:

a) in allowing access to the information it holds; and

b) in making information available proactively so as to minimize the need for individuals to make requests for information.

(4) Every public authority shall publish information in accordance with its approved publication scheme.

Approval of Publication Schemes

10. (1) When approving a publication scheme, the Information Commission may provide that the approval will expire at a certain point.

(2) When refusing to approve a publication scheme, the Information Commission shall give reasons and provide reasonable direction to the public authority as to how it may amend the scheme so as to obtain approval.

(3) The Information Commission may, upon giving [six] months notice with reasons, withdraw its approval of any publication scheme.

(4) The Information Commission shall take into account the need to comply with Article 11 (2) when approving or refusing to approve a publication scheme.

Model Publication Schemes

11. (1) The Information Commission may adopt or approve model publication schemes for different classes of public authorities.

(2) Where a public authority in a certain class adopts a model publication scheme which applies to that class of public authorities, it shall not require further approval from the Information Commission, provided that it shall inform the Information Commission that it is applying that model publication scheme.

(3) The Information Commission may put a time limit on the validity of a model publication scheme or, upon giving [six] months notice to all public authorities using it, terminate the validity of any publication scheme.

Key Classes of Information

12. (1) The following are the key classes of information subject to proactive disclosure by a public authority:

a) a description of its organizational structure, functions, duties, locations of its departments and agencies, operating hours, and names of its officials;

b) the qualifications and salaries of senior officials;

c) the internal and external oversight, reporting and monitoring mechanisms relevant to the public authority including its strategic plans, corporate governance codes and key performance indicators, including any audit reports;

d) its budget and its expenditure plans for the current fiscal year, and past years, and any annual reports on the manner in which the budget is executed;

e) its procurement procedures, guidelines and policies, contracts granted, and contract execution and performance monitoring data;

f) the salary scales, including all components and sub-components of actual salary, relevant to all employee and consultant categories within the public authority (including all data related to current reclassification of posts);

g) relevant details concerning any services it provides directly to members of the public, including customer service standards, charters and protocols;

h) any direct request or complaints mechanisms available to members of the public regarding acts, or a failure to act, by that public authority;

i) a description of the powers and duties of its senior officers, and the procedure they follow to make decisions;

j) any statutes, policies, decisions, rules, guidelines, manuals or other records containing interpretations, practices or precedents regarding the discharge by that public authority of its functions, that affect the general public;

k) any mechanisms or procedures by which members of the public may make representations or otherwise influence the formulation of policy or the exercise of powers by that public authority;

l) a simple guide containing adequate information about its record-keeping systems, the types and forms of information it holds, the categories of information it publishes and the procedure to be followed in making a request for information and an internal appeal;

m) its Disclosure Log, in accordance with Article 18, containing a list of requests received and records released under this Law, which shall be automatically available, and its Information Asset Register, in accordance with Article 17;

n) a complete list of subsidies provided by the public authority;

o) frequently requested information; and

p) any additional information deemed appropriate by the public authority

(2) The publication schemes adopted by every public authority shall, within [seven] years of the adoption of the first publication scheme by that public authority in accordance with Article 8 (1), cover all of the key classes of information set out in paragraph 11 (1).

(3) The public authority must create and archive a digital image of its website, complete with information required by its approved publication scheme, on a yearly basis.

Comment: The list of elements subject to proactive disclosure is, of course, subject to the exceptions in Section IV of the Law. However, it is the sole power of the Information Commission (not the public authority) to determine the application of Section IV in the formulation and approval of the publication scheme.

Policy Documents and Specific Populations

13. (1) Public authorities must make copies of each of its policy documents available for inspection. In order for policy documents to be publicly available:

(2) No one shall be subject to any prejudice because of the application of a policy that is not disclosed pursuant to paragraph (1).

14. Public authorities shall release public information which affects a specific population in a manner and form that is accessible to that population, unless there is a good legal, policy, administrative or public interest reason not to.

Other Laws & Mechanisms Providing for Disclosure of Information

15. This Law does not limit the operation of another Law or administrative scheme that:

a) requires information concerning records in the possession, custody or control, of government to be made available to members of the public;

b) enables a member of the public to access records in the possession, custody or control of government; or

c) requires the publication of information concerning government operations.

16. Whenever an individual makes a request for information, it should be treated at least as favorably as a request under this Law.

Information Asset Registers

17. (1) Every public authority shall create and maintain an updated Information Asset Register listing:

a) every category of information published by the public agency;

b) every published record; and

c) every record available for purchase by members of the public.

(2) The Information Commission may set standards regarding information asset registers.

(3) Every public authority shall ensure that its Information Asset Register complies with any standard set by the Information Commission.

Request and Disclosure Logs

18. (1) Public authorities shall create, maintain and publish a Request and Disclosure Log of all information released in response to a request made under this Law on its website and in the reception area of all its offices accessible by members of the public, subject to protection of privacy of the original requesting party.

(2) The Information Commission may set standards regarding information Request and Disclosure Logs.

(3) Every public authority shall ensure that its Request and Disclosure Logs comply with any standard set by the Information Commission.

Previously Released Information

19. (1) Public authorities must ensure and facilitate access to all records previously released, in the most convenient way possible, to persons requesting such information.

(2) Requests for records contained in Request and Disclosure Logs shall be made available as soon as practicable if they are in electronic form and no later than [three] working days after the records are sought if they are not in electronic form.

(3) Where a response to a request for information has been provided in electronic form, it shall proactively be made available on the public authority's website.

(4) If a second request is made for the same information, it shall proactively be made available on the public authority's website.

III. ACCESSING INFORMATION HELD BY PUBLIC AUTHORITIES

Request for Information

20. The request for information may be filed in writing, by electronic means, orally in person, by phone, or by any alternative means, with the relevant Information Officer. In all cases, the request shall be properly logged pursuant to Article 21 of this Law.

21. Unless the information can be provided immediately, all requests shall be registered and assigned a tracking number, which shall be provided to the

requester along with contact information for the Information Officer assigned to the request.

22. No fee shall be charged for making a request.

23. Requests for information shall be registered in the order in which they are received and handled in a fair and non-discriminatory manner.

24. (1) A request for information shall contain the following information:

a) contact information for the receipt of notices and delivery of the information requested;

b) a sufficiently precise description of the information requested, in order to allow the information to be found; and

c) the preferred form in which the information should be provided.

(2) If the form in which the information should be provided is not indicated, the information requested shall be provided in the most efficient and cost-effective manner for the public authority.

Comment: The requester need not provide their name on the request for information. However, insofar as the request concerns personal information, the requester's name may be required.

25. (1) The public authority in receipt of a request must reasonably interpret the scope and nature of the request.

(2) In the event the receiving authority is uncertain as to the scope and nature of a request, it must contact the requester to clarify what is being requested. The receiving authority must make reasonable efforts to assist the requester in connection to the request, and respond accurately and completely.

26. (1) If the receiving authority reasonably determines that it is not the proper authority to handle the request, it must, as soon as possible and in any case within [five] working days, forward the request to the proper authority for processing.

(2) The receiving authority must also notify the requester that his/her request has been routed to another public authority for processing.

(3) The forwarding authority must provide the requester with contact information for the Information Officer at the public authority where the request has been routed.[359]/

Third Party Response to Notification

27. Interested third parties shall be informed within [5] days of a request being received, and given [10] days to make written representations to the relevant authority either: -

a) consenting to disclosure of the information; or

b) stating reasons why the information should not be disclosed.

Cost of Reproduction

28. (1) The requester shall only pay for the cost of reproduction of the information requested and, if applicable, the cost of the delivery, if requested. Information provided electronically shall be free of charge.

(2) The costs of reproduction shall not exceed the actual cost of the material in which it is reproduced; delivery shall not exceed the actual cost of the same service in the market. The costs, for this purpose, shall be set periodically by the Information Commission.

(3) The public authorities shall provide information free of all charges, including reproduction and delivery, for any citizen below an income set by the Information Commission.

(4) The Information Commission will set additional rules regarding fees, which may include the possibility that information will be provided for free if in the public interest and that no charge may be levied for a minimum number of pages.

Form of Access

29. Public authorities shall facilitate access to inspection by making available facilities for such purpose.

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[359]. ALTERNATIVE: If the receiving public authority reasonably determines that it is not the proper authority to handle the request, it must, within [five] working days indicate the proper authority to the requester to the requester.

Information Officer

30. The head of the public authority responsible for responding to requests must designate an Information Officer who shall be the focal point for implementing this law in that public authority. The contact information for each such Information Officer must be posted on the website of the public authority and made readily available to the public.

31. The Information Officer shall, in addition to any obligations specifically provided for in other sections of this Law, have the following responsibilities:

a) to promote within the public authority the best possible practices in relation to record maintenance, archiving and disposal; and

b) to serve as a central contact within the public authority for receiving requests for information, for assisting individuals seeking to obtain information and for receiving individual complaints regarding the performance of the public authority to inform disclosure.

Searching for Records

32. Upon receipt of a request for information, the public authority in receipt of the request must undertake a reasonable search for records which respond to the request.

Records Management

33. The [body responsible for archives] must develop, in coordination with the Information Commission, a records management system which will be binding on all public authorities.

Missing Information

34. When a public authority is unable to locate information responsive to a request, and records containing that information should have been maintained, it is required to make reasonable efforts to gather the missing information and provide it to the requester.

Time to Respond

35. (1) Each public authority must respond to a request as soon as possible and in any event, within [twenty] working days of its receipt.

(2) In the event the request was routed to the public authority from another authority, the date of receipt shall be the date the proper authority received the request, but in no event shall that date exceed [ten] working days from the date the request was first received by a public authority designated to receive requests.

Extension

36. (1) Where necessary because of a need to search for or review of voluminous records, or the need to search offices physically separated from the receiving office, or the need to consult with other public authorities prior to reaching a disclosure determination, the public authority processing the request may extend the time period to respond to the request by up to [twenty] working days.

(2) In any event, the failure of the public authority to complete the processing of the request within [twenty] working days, or, if the conditions specified in paragraph 1 are met, the failure to respond to the request within [forty] working days, shall be deemed a denial of the request.

(3) In highly exceptional cases, involving large amounts of information, the public authority may appeal to the Information Commission for an extension beyond [forty] working days.

(4) Where a public authority fails to meet the standards of this article, no charge should be imposed for providing the information, and any denial or redaction must be specifically approved by the Information Commission.

37. Under no circumstances may a third party notification excuse the public authority from complying with the time periods established in this law.

Notice to the Requester

38. As soon as the public authority has reasonable grounds to believe that satisfaction of a request will either incur reproduction charges above a level set by the Information Commission or take longer than [twenty] working days, it shall inform the requester and giver him/her the opportunity to narrow or modify the scope of the request.

39. (1) Public authorities shall provide access in the form requested, unless this would:

a) harm the record;

b) breach copyright not held by public authority; or

c) be impractical because of the need to redact some information contained in the record, pursuant to Section IV of this Law.

(2) Where information requested in electronic format is already available on the internet, the public authority may simply indicate to the requester the exact URL where the requester may access the information.

(3) In cases where the requester requested the information in a non-electronic format, the public authority may not answer the request by making reference to a URL.

40. (1) Where information is provided to the requester, he/she shall be notified and informed of any relevant applicable fees and/or arrangements for access.

(2) In the event that any information or part of the information is withheld from a requester because it falls under the exceptions to disclosure under Section IV of this Law, the requester must be given:

a) a reasonable estimate of the volume of material that is being withheld;

b) a description of the precise provisions of this Law used for the withholding; and

c) notification of the right to appeal.

IV. EXCEPTIONS

Exceptions to Disclosure

41. Public authorities may deny access to information only in the following circumstances, when it is legitimate and strictly necessary in a democratic society, based on the standards and jurisprudence of the Inter-American system: -

a) Allowing access would harm the following private interests:

1. right to privacy, including life, health, or safety;

2. legitimate commercial and economic interests; or,

3. patents, copyrights and trade secrets.

Exceptions in this sub-paragraph do not apply when the individual has consented to its disclosure or where it was clear when the information was provided that it was part of a class of information that was subject to disclosure.

The exception under sub-paragraph (a) 1 does not apply to matters related to the functions of public officials or in cases where the individual in question has been deceased in excess of [20] years.

Commentary: In cases where information on legitimate commercial and economic interests was provided to the public authority in confidence, such information shall be exempt from disclosure.

b) Allowing access would create a clear, probable and specific risk of substantial harm, [which should be further defined by law] to the following public interests:

1. public safety;

2. national security;

3. the future provision of free and open advice within and among public authorities;

4. effective formulation or development of policy;

5. international or intergovernmental relations;

6. law enforcement, prevention, investigation and prosecution of crime;

7. ability of the State to manage the economy;

8. legitimate financial interest of a public authority; and

9. tests and audits, and testing and auditing procedures.

The exceptions under sub-paragraphs (b) 3, 4 and 9, do not apply to facts, analysis of facts, technical data or statistical information.

The exception under sub-paragraph (b) 4 does not apply once the policy has been enacted.

The exception under sub-paragraph (b) 9 does not apply to the results of a particular test or audit once it is concluded.

c) Allowing access would constitute an actionable breach of confidence in communication, including legally privileged information.

Comment: Although the Inter-American system provides for a potential exemption for the protection of "public order" it is explicitly rejected as a grounds for refusing access in the present Model Law as it is overly vague and provides for an overbroad application as an exemption.

Comment: In order to meet the standards of the Inter-American system for clear and specific exceptions, the bracketed language in paragraph (b) "further defined by law" should be understood to include both legislation and/or jurisprudence, from which the definition of the exceptions shall emanate. Moreover, although this bracketed language allows further definition by law, these additional definitions are limited in operation by the principles and provisions of this Law. To this effect, the Law establishes a broad right of access to information based on the principle of maximum disclosure (Article 2); establishes that this law prevails over any other law, in cases of inconsistency (Article 4); and requires that anyone interpreting this law, or any other law or instrument that may affect the right to information, must adopt any reasonable interpretation in favors disclosure (Article 8).

Partial Disclosure

42. For circumstances in which the totality of the information contained in a record is not exempted from disclosure by an exception in Article 41, protected information may be redacted. Information not exempted from disclosure in a same record, however, must be delivered to the requesting party and made available to the public.

Historical Disclosure

43. The exceptions under Article 41 (b) do not apply to a record that is more than [12] years old. Where a public authority wishes to reserve the information

from disclosure, this period can be extended for another [12] years only by approval by the Information Commission.

Public Interest Override

44. Public Authorities may not refuse to indicate whether or not it holds a record, or refuse to disclose that record, pursuant to the exceptions contained in Article 41, unless the harm to the interest protected by the relevant exception outweighs the general public interest in disclosure.

45. The exceptions in Article 41 do not apply in cases of serious violations of human rights or crimes against humanity.

V. APPEALS

Internal Appeal

46. (1) A requester may, within [60] working days of a refusal to respond, or of any other breach of rules in this Law for responding to a request, lodge an internal appeal with the head of the public authority.

(2) The head of the public authority must issue a written decision stating adequate reasons, within [10] working days from receipt of the notice of appeal, and deliver a copy of that decision to the requester.

(3) If the requester decides to present an internal appeal, he/she must wait the full term of the timelines in this provision prior to lodging an external appeal.

Comment: An internal appeal should not be mandatory, but instead optional for the requester before proceeding to the external appeals process.

External Appeal

47. (1) Any requester who believes that his or her request for information has not been processed in accordance with the provisions of this Law, whether of not he or she has lodged an internal appeal, has the right to file an appeal with the Information Commission.

(2) Such an appeal shall be filed within [60] working days of a decision being appealed against, or the expiration of the timelines for

responding to the request or an internal appeal established by this Law.

(3) Such an appeal shall contain:

a) the public authority with which the request was filed;

b) the contact information of the requester;

c) the grounds upon which the appeal is based; and

d) any other information that the requester considers relevant.

48. Upon receiving an appeal, the Information Commission may attempt to mediate between the parties with a view toward disclosure of the information without going through a formal appeal process.

49. (1) The Information Commission shall log the appeal in a centralized tracking system and inform all interested parties, including interested third parties, about the appeal and their rights to make representations.

(2) The Information Commission shall set fair and nondiscriminatory rules regarding the processing of appeals which ensure that all parties have an appropriate opportunity to make representations.

(3) In the event the Information Commission is uncertain as to the scope and/or nature of a request and/or appeal, it must contact the appellant to clarify what is being requested and/or appealed.

50. (1) The Information Commission shall decide appeals, including attempts to mediate, within [60] working days and may, in exceptional circumstances, extend this timeline by another [60] working days.

(2) The Information Commission, in deciding the case, may:

a) reject the appeal;

b) require the public authority to take such steps as may be necessary to comply with its obligations under this Law, such as, but not limited to, providing the information and/or reducing the fee;

(3) The Information Commission shall serve notice of its decision to the requester, the public authority and any interested party. Where the decision is unfavorable to the requester, he or she shall be informed of his or her right to appeal.

(4) If a public authority does not comply with the Information Commission's decision within the time limits established in that decision, the Information Commission or the requester may file a petition with the [proper] court in order to compel compliance.

Comment: The manner of enforcing the Information Commission's decisions in accordance with paragraph 4 will vary from country to country.

Court Review

51. A requester may file a case with the court only to challenge a decision of the Information Commission, within [60] days of an adverse decision or the expiration of the term provided in the law.

52. The court shall come to a final decision on all procedural and substantive aspects of the case as early as possible.

Comment: These rules are based on the assumption that in many countries courts have all of the inherent powers needed to process these types of cases, including for example imposing sanctions on public authorities. Where this is not the case, these powers may need to be explicitly given to them through the access to information law.

Burden of Proof

53. (1) The burden of proof shall lie with the public authority to establish that the information requested is subject to one of the exceptions contained in Article 41. In particular, the public authority must establish:

a) that the exception is legitimate and strictly necessary in a democratic society based on the standards and jurisprudence of the Inter-American system;

b) that disclosure will cause substantial harm to an interest protected by this Law; and

c) that the likelihood and gravity of that harm outweighs the public interest in disclosure of the information.

(2) The burden of proof shall also lie with the public authority to defend any other decision that has been challenged as a failure to comply with the Law.

VI. INFORMATION COMMISSION

Establishment of the Information Commission

54. (1) An Information Commission is hereby established, which shall be in charge of promoting the effective implementation of this Law;

(2) The Information Commission shall have full legal personality, including the power to acquire, hold, and dispose of property, and the power to sue and be sued;

(3) The Information Commission shall have operative, budgetary and decision-making autonomy and shall report to the legislature;

(4) The legislature shall approve the budget of the Information Commission, which shall be sufficient to enable the Commission to perform its duties adequately.

55. (1) The Information Commission shall be comprised of [three or more] commissioners, reflecting a diversity of skills and backgrounds.

(2) The Commissioners shall appoint a Chair from among themselves.

Commentary: It is preferable for the Commission to be comprised of five Commissioners. In contrast to a collegiate body of five members, a body of three can more easily isolate and render inoperable the advice and participation of one of the Commissioners in cases where the other two are closely associated philosophically, personally or politically – a dynamic that proves more difficult in a body of five.

56. No one shall be appointed Commissioner unless he/she:

a) is a citizen;

b) is a person of high moral character;

c) has not held a [high-ranking] position in government or with a political party within the past [2] years; and,

d) has not been convicted of a violent crime or a crime of dishonesty, within the last [five] years, for which he or she has not been pardoned.

57. The Commissioners will be appointed by the [Executive Official] after nomination by a two-thirds majority vote of the [legislative body] and in a process in accordance with the following principles:

a) participation by the public in the nomination process;

b) transparency and openness; and

c) publication of a short list of candidates.

Comment: In order to increase confidence in the institution, it is desirable that both the executive and legislature be involved in the selection process; that any decision by the legislature be by a supermajority (e.g. 60 percent or two thirds) sufficient to ensure bi- or multi-partisan support; that the public have an opportunity to participate in the nomination process; and that the process be transparent. There are two main approaches: executive appointment, with nomination or approval by the legislature; and legislative appointment, with nomination or approval by the executive.

58. (1) The Commissioners shall serve full-time and be paid the same salary as a [high court judge].

(2) The Commissioners shall not hold another job, position or commission, except in educational, scientific or charitable institutions.

Comment: It is strongly recommended that the Information Commissioners should serve full-time, and that their salaries should be linked to an externally established rate to enhance Commissioner's independence.

59. The Commissioners hold office for a period of [5] years, which may be renewed once.

Commentary: In order to ensure continuity of service, it is necessary to stagger the terms of the Commissioners, when the Commission is first created, so that no more than two thirds of the Commissioners' terms expire in any given year.

60. (1) The Commissioners may not be removed or suspended from office, except in accordance with the procedure by which he or she was appointed and only for reasons of incapacity or behavior that renders him/her unfit to discharge his/her duties. Such behavior includes:

a) conviction for a criminal offense;

b) infirmity that affects the individual's capacity to discharge his duties;

c) severe breach of the provisions of the Constitution or this Law;

d) refusal to comply with any objective disclosure requirements, such as regarding salary or benefits.

(2) Any Commissioner that has been removed or suspended has the right to appeal that removal or suspension to a court of law.

Duties and Powers of the Information Commission

61. The Information Commission shall, in addition to any other specific powers established by this Law, have all the necessary powers to discharge its duties, including:

a) to review any information held by a public authority, including through on-site inspection;

b) *sua sponte* authorization to monitor, investigate, and enforce compliance with the law;

c) to compel witnesses and evidence in the context of an appeal;

d) to adopt such internal rules as may be necessary to conduct its business;

e) to issue recommendations to public authorities; and

f) to mediate disputes between parties in an appeal.

62. The Commissioners shall, in addition to other duties specifically established by this Law, have the following duties:

a) to interpret this Law;

b) to provide support and guidance, upon request, to public authorities concerning the implementation of this Law;

c) to promote awareness and understanding of the Law and its provisions among the public, including through publishing and disseminating a guide on the right of access to information;

d) to make recommendations on existing and proposed legislation;

e) to refer cases of suspected administrative and criminal wrongdoing; and

f) to cooperate with civil society.

Reporting

63. (1) Public authorities shall report annually to the Information Commission on the activities of the public authority pursuant to, or to promote compliance with this Law. This report shall include, at least information about:

a) the number of requests for information received, granted in full or in part, and refused;

b) how often and which sections of the Law were relied upon to refuse, in part or in full, requests for information;

c) appeals from refusals to communicate information;

d) fees charged for requests for information;

e) its activities pursuant to Article 12 (duty to publish);

f) its activities pursuant to Article 33 (maintenance of records);

g) its activities pursuant to Article 68 (training of officials);

h) information on the number of requests responded to within the timeframe provided by this Law;

i) information on the number of requests responded to outside the timeframes provided by this Law, including statistics on any time delays in responding; and

j) any other information useful to assess compliance of public authorities with the obligations under the Law.

(2) The Information Commission shall report annually on the Commission's operation and the functions of the Law. This report shall include, at a minimum, all information it receives from public authorities in compliance with the right of access, the number of appeals filed with the commission, including a break-down of the number of appeals from various public authorities, and results and status of these appeals.

Criminal and Civil Responsibility

64. No one shall be subjected to civil or criminal action, or any employment detriment, for anything done in good faith in the exercise, performance or purported performance of any power or duty in terms of this Law, as long as they acted reasonably and in good faith.

65. It is a criminal offense to willfully destroy or alter records after they have been the subject of a request for information.

66. (1) It is an administrative offense to willfully:

a) obstruct access to any record contrary to Sections II and III of this Law;

b) obstruct the performance by a public authority of a duty under Sections II and III of this Law;

c) interfere with the work of the Commission;

d) fail to comply with provisions of this Law;

e) fail to create a record either in breach of applicable regulations and policies or with the intent to impede access to information; and

f) destroy records without authorization.

(2) Anyone may make a complaint about an administrative offense as defined above.

(3) Administrative sanctions shall follow the administrative law of the state and may include a fine [of up to x minimum salaries], a suspension of a period for [x] months/years, termination, or a restriction of service for [x] months/years].

(4) Any sanctions ordered shall be posted on the website of the Commission and the respective public authority within five days of their having been ordered.

VII. PROMOTIONAL AND COMPLIANCE MEASURES

Monitoring and Compliance

67. The [relevant legislative body] should regularly monitor the operation of this Law, in order to determine whether changes and improvements are necessary to ensure all public authorities comply with the text and spirit of the Law, and to ensure that the government is transparent, remains open and accessible to its citizens, and complies with the fundamental right of access to information.

Training

68. The Information Officer shall ensure the provision of appropriate training for the officials of the public authority on the application of this Law.

69. The Information Commission shall assist public authorities in providing training to officials on the application of this law.

Formal Education

70. The [Ministry of Education] shall ensure that core education modules on the right to information are provided to students in each year of primary and secondary education.

VIII. TRANSITORY MEASURES

Short Title and Commencement

71. This Law may be cited as the Access to Information Law [insert relevant year].

72. This Law shall come into effect on a date proclaimed by [insert relevant individual, such as president, prime minister or minister] provided that it shall automatically come into effect [six] months after its passage into law if no proclamation is forthcoming.

Regulation

73. This Law shall be followed by the adoption of an administrative regulation within [1] year after the adoption of the Law, which shall be drafted with the active participation of the Information Commission.