CHAPTER IV
THE RIGHT TO ACCESS TO INFORMATION[1]

Introduction

1. The right to access to information is a fundamental right protected by Article 13 of the American Convention. It is a particularly important right for the consolidation, functioning, and preservation of democratic systems, and as such has received significant attention from the Member States of the OAS[2] and in international case law and doctrine.

2. The Inter-American Court has established that Article 13 of the American Convention, by expressly stipulating the rights to "seek [and] receive . . . information," protects the right of every individual to access information under the control of the State, with the exceptions permitted under the narrow system of restrictions set forth in that instrument.[3]

3. The right to access to information has been considered an essential tool for the public oversight of government and the operation of the State—especially for the control of corruption,[4] for citizen participation in public matters through, *inter alia*, the informed exercise of political rights and, in general, for the effective exercise of other human rights, especially by the most vulnerable groups.[5]

4. Indeed, the right to access to information is a critical tool for monitoring the public administration and operation of the State, and for keeping corruption in check. The right to access to information is a fundamental requirement for guaranteeing transparency and good governance. The full exercise of the right to access to information is an essential guarantee for preventing abuses by public servants, promoting accountability and transparency in public management, and preventing corruption

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[1] The right of access to information has been one of the recurrent topics of the annual reports and publications of the Office of the Special Rapporteur. This chapter contributes to the collection of material compiled by the Office on best judicial practices of Member States in the area of access to information contained in the annual reports of 2005 (Chapter IV), 2008 (Section F of Chapter III), 2009 (Chapter IV), 2010 (Chapters III and IV), as well as the study on *The Inter-American Legal Framework regarding the Right to Access to Information (Second Edition)* of 2011.

[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 for everyone's access to public information and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application." 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. 2057 (XXXIV-O/04), AG/RES. 2121 (XXXV-O/05), AG/RES. 2252 (XXXV-O/06), AG/RES. 2288 (XXXVII-O/07), AG/RES. 2418 (XXXVIII-O/08), AG/RES. 2514 (XXXIX-O/09), and AG/RES. 2661 (XLI-O/11).

[3] I/A Court H.R. *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 58.a)-b). See also, I/A Court H.R. *Case of López Álvarez v. Honduras.* Judgment of February 1, 2006. Series C No. 141, para. 77; *Case of Herrera Ulloa v. Costa Rica.* Judgment of July 2, 2004. Series C No. 107, para. 108.

[4] "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.

[5] IACHR. Annual Report 2008. OEA/Ser.L/V/II.134 Doc. 5 rev. 1. February 25, 2009. *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). Para. 147. Available at: http://cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf

and authoritarianism. Free access to information is also a means by which, in a representative and participatory democratic system, citizens can properly exercise their political rights. Indeed, political rights necessarily require the existence of a broad and vigorous debate, for which it is essential to have the public information that makes it possible to evaluate reliably progress and difficulties in the achievements of different authorities. Only through access to information under the control of the State is it possible for citizens to know whether government is operating properly.[6] Finally, access to information has an essential, instrumental function. Only through an adequate implementation of this right can individuals know exactly what their rights are, and what mechanisms are available for their protection. In particular, the proper implementation of the right to access to information, in all of its aspects, is a basic condition for the effective realization of social rights among socially excluded or marginalized sectors. Indeed, those sectors do not usually have safe and systematic alternative ways of knowing the scope of the rights that the State has recognized and the mechanisms for asserting and enforcing them.

5. This chapter continues in the vein of the reports on freedom of expression and access to public information put out by the Office of the Special Rapporteur in the fulfillment of its mandate, highlighting the good practices recognized and implemented by the judicial authorities of the OAS Member States. In the future, this Office of the Special Rapporteur also hopes to advance the study and systematization of the decisions rendered by some of the autonomous bodies entrusted with protecting the right to access to public information in OAS Member States, such as the Federal Institute for Access to Information and Data Protection in Mexico [*Instituto Federal de Acceso a la Información y Protección de Datos de Mexico*] (IFAI) or the Chilean Council for Transparency [*Consejo para la Transparencia*] (CPLT), which have made significant progress in the improvement of good practices in the field.

6. This Office of the Special Rapporteur has recognized that, regardless of the legal frameworks of the OAS Member States, there are some court decisions that have notably promoted the standards of access to public information in the domestic law of each one of the States. The study of this case law has been vitally important, in that it makes it possible to observe, in practice, the ways in which different judges and courts have implemented the guiding principles of the right to access to public information.

7. In addition, the Office of the Special Rapporteur continues to affirm the special importance of inter-American comparative law and its role in enriching the regional case law and doctrine. Although one of the objectives of the regional human rights protection bodies is to achieve the domestic application of inter-American standards, those standards have also been elevated thanks to developments in the institutional practices of the Member States of the OAS. The interpretations of civil society and the domestic bodies of the different States continue to create the conditions for the regional system to keep on the path of strengthening and refining its doctrine and case law on the right to access to information.

8. The following paragraphs summarize some of the most important recent decisions on access to information to which the Office of the Special Rapporteur has had access. These decisions were organized according to the main issues they address. Nevertheless, it is important to note that most of the decisions refer to various issues, and therefore it is relevant to view them comprehensively.

1. Case law on access to information as a fundamental, autonomous, universal right

9. The courts of the region have continued with the good practice of recognizing the right to access to information as a fundamental universal right.

10. In a decision dated December 5, 2012,[7] the Constitutional Division of the Supreme Court of El Salvador ruled on the constitutionality of some articles of the Regulations to the Access to Public

[6] 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.

[7] Republic of El Salvador. Constitutional Chamber of the Supreme Court of Justice. Judgment 13-2012 (Unconstitutionality). December 5, 2012. Available at: http://www.jurisprudencia.gob.sv/visormlx/pdf/13-2012.pdf

Information Act, finding that its "indisputable status as a fundamental right" is a "starting point for approaching the right to access to information." The Court found that this status rests on two essential pillars: "the constitutional recognition of the right to freedom of expression, which assumes the right to investigate or to seek and receive public or private information of all kinds that is of public interest; and (…) the democratic principle of the rule of law or the Republic as a form of government, which imposes upon public authorities the duty to guarantee transparency and disclosure in government, as well as accountability with respect to the use of public funds and resources."[8]

11. The "fundamental right status" of the right to access to information has certain significant regulatory implications, according to the Constitutional Division of the Supreme Court of El Salvador. Indeed, the recognition of the right to access to information as a fundamental right entails, in regulatory terms: "(a) the prohibition against altering its essential content, in both its interpretation and its regulation; (b) the recognition of its objective or institutional dimension, with its positive implications of guarantees; (c) the requirement of its harmonization, proportion, or balance with other, conflicting rights; and (d) the recognition of its expansive and optimizing force."[9]

12. The Argentine Supreme Court ruled similarly in its December 4, 2012[10] decision on a petition for a constitutional remedy (*amparo*), which addressed whether the National Institute of Social Services for Retirees and Pensioners (PAMI) "is obligated to provide information regarding the official advertising developed by the institute." In resolving this issue, the Court found that it was necessary to "clarify the meaning and scope of the right to access to information." It held on this point that, "even when the [entity requesting the information] is not a State entity, given its special characteristics and the important and significant public interests involved, the refusal to provide the requested information is an arbitrary and illegitimate act [that amounts to] an action that severely curtails rights to which (…) any citizen is entitled, insofar as the information is unquestionably of public interest; those same rights make transparency and disclosure in government fundamental pillars of a society that considers itself democratic."

13. In a judgment handed down on February 8, 2012, the Supreme Court of Panama[11] recognized the universal nature of the right to access to information. The case involved the appeal of a *habeas data* petition seeking information about the Curricular Transformation system, filed by a citizen in his capacity as the Secretary of a Teachers' Association. When he failed to receive a reply within the legally established time period, the citizen filed the writ of *habeas data* in his individual capacity. The Institute questioned the petitioner's legal standing, and the Supreme Court determined that "regardless of the letterhead on which the request was filed, or whether Mr. Herrera acted in his own name or on behalf of a third party, the information in this case is public, accessible to any interested party, without any need to justify the request." The Court added that "every person has the right to request public access to information in the hands of the State, without the need to provide a justification. At the same time, they will have standing to file a writ of *habeas data*, which does not require further legal formalities—unless the information in question is personal or confidential, in which case it is understood to be of interest only to the person concerned, and no one else." The Court thus concluded that "the nature of the writ of *habeas data*, its purposes, the law in question, and the public nature of the information sought, overcome the censorship of the administrative authority. The State is therefore required to provide information about its

[8] Republic of El Salvador. Constitutional Chamber of the Supreme Court of Justice. Judgment 13-2012 (Unconstitutionality). December 5, 2012. Considerando III.1. Available at: http://www.jurisprudencia.gob.sv/visormlx/pdf/13-2012.pdf

[9] Republic of El Salvador. Constitutional Chamber of the Supreme Court of Justice. Judgment 13-2012 (Unconstitutionality). December 5, 2012. Considerando III.1. Available at: http://www.jurisprudencia.gob.sv/visormlx/pdf/13-2012.pdf

[10] Republic of Argentina. Supreme Court of Justice. December 4, 2012. *Asociación de Derechos Civiles v. EN – PAMI – (dto. 1172-03) on amparo ley 16.986*. Available at: http://www.cij.gov.ar/nota-10405-La-Corte-Suprema-reconocio-el-derecho-de-los-ciudadanos-de-acceso-a-la-informacion-publica.html

[11] Republic of Panama. Supreme Court of Justice. February 8, 2012. Case file 156-11. Available at: http://bd.organojudicial.gob.pa/registro.html

workings and activities to any person, except where it involves data that is confidential or personal, or restricted."[12]

14. In a November 30, 2010 decision, the Constitutional Court of Guatemala[13] ruled on several constitutional challenges to the Public Information Access Act. The Court dismissed the four charges relating to: legal entitlement to the right and the need to verify the interest in order for the right to be exercised; information considered confidential; the obligation to publish information on the salaries and emoluments of public servants; and changes to the system of the autonomous bodies as a result of requiring them to implement the Act.

15. With respect to legal entitlement to the right to access to information and the need for prior verification of interest in the information sought, the Constitutional Court found that "the constitutional recognition of the right to access to public information (…) signifies the ability of any citizen to obtain information from the government, without having to prove any interest other than that which arises from his own will as a citizen, in connection with the principle of transparency in government." According to the Court, in view of the international standards, the Constitution of Guatemala recognizes that "all acts of government are public" and also that the people have the right "to access this information, as the owners of national sovereignty." Consequently, in order to exercise this right, "the citizen needs only to express their legitimate desire to gain knowledge of the organization, the workings, and the decision-making processes of the government apparatus meant to secure their welfare and that of their peers; it is herein that their interest in the matter in question is understood to exist, and not in the purely procedural sense of the term."[14]

16. The Third Chamber of the Civil and Commercial Appeals Division of the Province of Salta, Argentina, handed down a decision on May 28, 2010,[15] ruling on an amparo petition arising from a request for access to detailed information on government advertising expenditures in the Province of Salta. Regarding the nature of the right to access to information, the Court found that, "the right to access to information acquires substance because of its procedural and instrumental status. Without it, other rights could not exist, and thus it is vitally important to pave the way for it to be protected, refined, and maximized." Therefore, understanding the right to access to information "as a fundamental right, and

[12] Republic of Panama. Supreme Court of Justice. February 8, 2012. Case file 156-11. *Fundamentos jurídicos* 1, 2, 3 y 10. Available at: http://bd.organojudicial.gob.pa/registro.html

[13] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

[14] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. *Considerando IV*. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

[15] Republic of Argentina. Chamber III of the Civil and Commercial Chamber of Appeals of the Province of Salta. May 28, 2010. *CORNEJO, Virginia v. SECRETARÍA GENERAL DE LA GOBERNACIÓN DE LA PROVINCIA DE SALTA – ACCIÓN DE AMPARO*- Case files N° CAM 301.440/10. Available at: http://justicia.salta.gov.ar/nuevo/index.php?option=com_content&view=article&id=325:publicidad-oficial-sala-iii&catid=48:derecho-de-acceso-a-la-informacion-publica

beyond the debatable notions of the concept, the general rule then will be for the citizen to have free access to public information in the hands of, or under the control of, State entities."[16]

17. In this same decision, the Third Chamber asserted the universal nature of the right to access to public information, noting in particular that the person who was requesting the access to information was a representative in the provincial legislature. On this point, it found that, "If any person can request public information, with no exclusion provided under the law, if the requesting party cannot be required to state the purpose of his request—and therefore there is no reason to inquire about his motivations or whether he has a specific interest—there is no justification to exclude the legislators of the province from the access to public information provided for in Decree No. 1.574/02, as the respondent asserts."[17]

18. In Judgment 48 of September 11, 2009, the Trial Court of Mercedes, Uruguay (Second Rotation)[18] ruled on a petition for *habeas data* (*amparo informativo*) related to the disclosure of information on the procurement of government advertising. The Court held that the right to access to public information "follows from" the right to information, and it found that the latter is "a basic right, inherent in the human personality." This understanding, says the Court's judgment, has also been set forth in the relevant doctrine, even before the Access to Information Act entered into force.

19. In general, the essential and universal nature of the right to access to information has been widely recognized in most of the decisions cited in this report, which will be reviewed in greater detail in the sections below.

2. Case law on the principle of maximum disclosure

20. In a judgment handed down on March 18, 2011, the Constitutional Division of the Supreme Court of Costa Rica[19] heard an amparo petition that was filed against the Costa Rican Labor Ministry for refusing to turn over information relating to three lists (persons who were visited by inspectors and written up for noncompliance with the minimum wage laws, persons visited by inspectors a second time, and persons against whom complaints were filed in court). The information had been requested for

[16] Republic of Argentina. Chamber III of the Civil and Commercial Chamber of Appeals of the Province of Salta. May 28, 2010. *CORNEJO, Virginia v. SECRETARÍA GENERAL DE LA GOBERNACIÓN DE LA PROVINCIA DE SALTA – ACCIÓN DE AMPARO*- Case Files N° CAM 301.440/10. *Consideración IIIa*. Available at: http://justicia.salta.gov.ar/nuevo/index.php?option=com_content&view=article&id=325:publicidad-oficial-sala-iii&catid=48:derecho-de-acceso-a-la-informacion-publica

[17] Republic of Argentina. Chamber III of the Civil and Commercial Chamber of Appeals of the Province of Salta. May 28, 2010. CORNEJO, *Virginia v. SECRETARÍA GENERAL DE LA GOBERNACIÓN DE LA PROVINCIA DE SALTA – ACCIÓN DE AMPARO*- Case Files N° CAM 301.440/10. *Consideración IIIg*. Available at: http://justicia.salta.gov.ar/nuevo/index.php?option=com_content&view=article&id=325:publicidad-oficial-sala-iii&catid=48:derecho-de-acceso-a-la-informacion-publica

[18] Oriental Republic of Uruguay. Trial Court of Mercedes (Second Rotation). September 11, 2009. AA v. Junta Depatamental of Soriano- *Amparo* Action. I.u.e. 381-545/2009. Available at: http://www.uaip.gub.uy/wponwcm/connect/60fff8804ad59ad8a98beb5619f13f97/Judgment-juzgado-letrado-de-2do-turno-de-mercedes.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=60fff8804ad59ad8a98beb5619f13f97

[19] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

purposes of journalistic work. The Ministry made the information public, but using general data and percentages. In deciding the case, the Court affirmed its case law on government transparency and disclosure[20] in the following terms: "in the context of the social and democratic rule of law, each and every public entity and body within the respective administration must be subject to the implicit constitutional principles of transparency and disclosure that must be the rule that governs every administrative action or function. The collective organizations of Public Law—public entities—must be like glass houses, the insides of which all citizens must be able to view and supervise, in the light of day." In the opinion of the Court, "governments must create and foster permanent and fluid channels of communication or exchange of information with citizens and the collective media (…) According to this logic, administrative secrecy or confidentiality is an exception that is justified solely under qualified circumstances when constitutionally relevant values and interests are thereby protected."[21]

21. In this specific case, the Constitutional Division of the Supreme Court of Costa Rica found that the requested information had been denied under a law that prohibits "the disclosure of data that are obtained from inspections." In the Court's opinion, the government denied the right to access to information "without a necessary, sufficient, or reasonable justification," given that "the requested information is of clear public interest, as it refers to infractions involving the failure to pay minimum wages. It concerns both employees and employers, especially since the request was for general information and not information about a specific individual."[22]

22. The Supreme Federal Tribunal of Brazil, in a June 9, 2011 decision[23] suspending the effects of two precautionary measures that barred the disclosure of data on the incomes of some municipal employees, underscored the preponderance of the "principle of disclosure" and the resulting "State duty to disclose public acts." According to the Court, that duty is "eminently republican, because the '*res publica'* […] must be managed with maximum transparency", with the sole exception being information "whose confidentiality is essential to the security of society and the State" according to current law.

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[20] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. Judgment 2003-2120 of March 14, 2003, which lays out the scope and nuances of the right protected in Article 30 of the Political Constitution, reiterated in Judgments, 2004-09234 of August 25, 2004, 2005-14563 of October 21, 2005, 2007-011455 of August 10, 2007 and 2010-010982 of June 22, 2010.

[21] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

[22] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. *Consideración V*. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

[23] Federative Republic of Brazil. Supreme Federal Tribunal. June 9, 2011. *Segundo Ag. Reg. na Suspensão of Segurança* No. 3.902 – São Paulo. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628198

23. The Supreme Court held that every person has the right to receive information of general or particular interest from government entities, and that it must be provided within the legally established period of time to avoid the pertinent sanctions. In the Court's opinion, the best instrument of personal defense against "possible unlawful assaults by the State" is the right to "denounce irregularities or unlawful acts" before oversight bodies. In this respect, the Supreme Court added that "the preponderance of the principle of disclosure" is an effective way to "realize the republic as a form of government." It also indicated that "if, on one hand, there is a republican mode of administering the Brazilian State, on the other hand it is the public itself that has the right to see its State administered as a republic. The question of 'how' the *res publica* is administered should outweigh the question of 'who' administers it […] and the fact is that this public way of administering the government machine is a conceptual element of our Republic." The Court concluded that failing to observe the principle of disclosure could cause serious harm to public law and order.[24]

24. In Judgment 48 of September 11, 2009, the Trial Court of Mercedes, Uruguay (Second Rotation)[25] held, in relation to the principle of maximum disclosure, that: "the right to access public information is related to specific principles, namely, the principle of transparency in government; this is what makes it possible to clearly see the government's actions with respect to the use of public funds. The principle of disclosure in government activity […] in a system such as ours, the first solution is always disclosure, and restriction is the exception. Finally, […] the principle of participation, which means that citizens are informed and consulted on the matters that concern them. These principles […] are important in taking account of the purpose of this [access to information] law and the objective it pursues, which provides guidance for interpretation in case of doubt."[26]

3. Case law on limits to the principle of maximum disclosure

25. In a November 30, 2010 decision on a constitutional challenge, the Constitutional Court of Guatemala,[27] based on the standards set forth in the decision of the Inter-American Court of Human

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[24] Federative Republic of Brazil. Supreme Federal Tribunal. June 9, 2011. *Segundo Ag. Reg. na Suspensão of Segurança* No. 3.902 – São Paulo, paras. 12 y 16 Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628198

[25] Oriental Republic of Uruguay. Trial Court of Mercedes (Second Rotation). September 11, 2009. AA v. Junta Depatamental of Soriano- *Amparo* Action. I.u.e. 381-545/2009. Available at: http://www.uaip.gub.uy/wponwcm/connect/60fff8804ad59ad8a98beb5619f13f97/Judgment-juzgado-letrado-de-2do-turno-de-mercedes.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=60fff8804ad59ad8a98beb5619f13f97

[26] Oriental Republic of Uruguay. Trial Court of Mercedes (Second Rotation). September 11, 2009. AA v. Junta Depatamental de Soriano- *Amparo* Action. I.u.e. 381-545/2009. Available at: http://www.uaip.gub.uy/wponwcm/connect/60fff8804ad59ad8a98beb5619f13f97/Judgment-juzgado-letrado-de-2do-turno-de-mercedes.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=60fff8804ad59ad8a98beb5619f13f97

[27] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. Available at:

http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

Rights in *Claude Reyes v. Chile*, in the IACHR's 2009 annual report[28] and in the Declaration of Principles on Freedom of Expression,[29] among others, found that the limitations on access to public information contained in the Access to Information Act were consistent with the Constitution. Thus, for example, with regard to the confidentiality "of court files in cases that have not become final," it found that the confidentiality was not applicable "in cases or proceedings that are of clear public interest, even the mere handling of their procedural aspects, whether for objective reasons pertinent to the subject addressed—e.g., general unconstitutionality—or subjective, that is, relating to the capacity in which the parties are involved, as in the case of a trial determining the liability of a public servant […]. In society it is indispensable to have public opinion be the comptroller of government acts, and the actions of judges cannot be excluded."[30] In addition, in relation to information defined as "confidential under the Comprehensive Protection of Juveniles Act," the Court found that children and adolescents "who are involved in court cases […] require special treatment, given the implications of their age, in order to adequately preserve their human dignity; discretion in the handling of information is vital in view of that objective."[31] Finally, the Court concluded by leaving the door open to the possibility of limiting the exceptions to the principle of maximum disclosure. Indeed, at the end of point VI of its conclusions of law, the Court stressed that, "naturally, in each specific case, the authority in charge of the information (those considered bound by Article 6 of the challenged law) must weigh the particular circumstances, using the necessary premises of the previously underscored canons and scopes. It can thus determine, in accordance with the constitutional principles, whether the information being requested contains elements that justify its confidentiality or secrecy as an exception to the principle of maximum disclosure."[32]

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[28] IACHR. Annual Report 2009. OEA/Ser.L/V/II. Doc. 51. December 30, 2009. *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter IV (The Right of Access to Information). Available at: http://www.oas.org/en/iachr/expression/doconreportonannual/Informe%20Anual%202009%202%20ENG.pdf

[29] IACHR. Declaration of Principles on Freedom of Expression. Available at: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26&lID=1

[30] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. Considerando VI. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

[31] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. Considerando VI. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

[32] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. Considerando VI. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

26. In *amparo* appeal (*amparo en revisión*) decision 168/2011, of November 30, 2011[33] the First Division of the Supreme Court of Mexico recognized a limit to the confidentiality of information concerning preliminary investigations in criminal matters. According to this exception "secrecy cannot be claimed when the preliminary investigation concerns acts that constitute serious human rights violations or crimes against humanity."[34] This assertion is supported in general terms by the "preferential position" of the right to access to information "*vis-à-vis* the interests that would limit it, as well as its operation as a general rule *vis-à-vis* the exceptional limitations established by law."[35]

27. In this specific case, the Supreme Court held that the duty to turn over information is also based on the judgment of the Inter-American Court of Human Rights in the *Case of Rosendo Radilla Pacheco v. Mexico*, paragraph 258 of which recognized the rights of victims "to obtain copies of the preliminary inquiry carried out by the Attorney General of the Republic, [which] is not subject to confidentiality, since it refers to the investigation of crimes that constitute grave violations of human rights." The Supreme Court held that such considerations are "binding upon the Mexican State, including all judges and courts that carry out essentially judicial functions."[36]

28. In its decision of March 14, 2007 on a petition of *habeas data* seeking access to a file relating to the denial of a promotion to a government official, the Superior Court of Justice of Brazil[37] ruled on the principle of maximum disclosure. The Court found that that principle must be "observed by the government […] including, beyond the Union, the States, the Federal District, and the municipalities." According to the Court, disclosure is the general rule and is subject to "few exceptions, which also must be based on [current law]." In the case under examination, the Court did not find the exception for information that "is essential to the security of society and the State" contained in the Constitution; consequently, it applied the principle of maximum disclosure.[38]

29. In a decision of September 5, 2010, the Constitutional Court of Peru,[39] ruling on the refusal of a municipality to turn over copies of a file on the rehabilitation of a public road, addressed the

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[33] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. Available at: http://www2.scjn.gob.mx/red2/Case fileon

[34] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. Consideración 3. Available at: http://www2.scjn.gob.mx/red2/Case fileon

[35] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. Consideración 1. Available at: http://www2.scjn.gob.mx/red2/Case fileon

[36] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. Consideración 3. Available at: http://www2.scjn.gob.mx/red2/Case fileon

[37] Federative Republic of Brazil. Superior Court of Justice. Third Session. March 14, 2007. *Habeas data* No. 91-DF. Case file 2003/0235568-0. Available at: https://ww2.stj.jus.br/revistaeletronica/Abre_Documento.asp?sSeq=669609&sReg=200302355680&sData=20070416&formato=PDF

[38] Federative Republic of Brazil. Superior Court of Justice. Third Session. March 14, 2007. *Habeas data* No. 91-DF. Case file 2003/0235568-0. Available at: https://ww2.stj.jus.br/revistaeletronica/Abre_Documento.asp?sSeq=669609&sReg=200302355680&sData=20070416&formato=PDF

[39] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N° 00565-2010-PHD/TC. September 5, 2010. Available at: http://www.tc.gob.pe/jurisprudencia/2010/00565-2010-HD.html

"relevance of the principle of transparency in a democratic State." On this point, it held: "*habeas data* is linked directly to the importance that the principle of transparency in the exercise of government power has acquired in today's democratic systems. It is a constitutionally relevant principle that is implicit in the model of social and democratic rule of law […] Where power emanates from the people, as stated in Article 45 of the Constitution, it must be exercised not only in the name of the people but also for the people." In addition, in the Court's opinion, "putting the principle of transparency into practice helps fight corruption in the State and, at the same time, is an effective tool against the impunity of power. It enables the public to have access to the way in which power is delegated. One of the manifestations of the principle of transparency is, without doubt, the right to access to public information that this Court has developed in its case law."[40]

30. In addition, with respect to the regulatory implications and the content of the principle of transparency, the Constitutional Court of Peru held that it imposes "several obligations upon public entities, not only in relation to information but also in the management of public administration in general. Thus, for example, it has been held that not just any information creates transparency in the exercise of State power; rather, it is the information that is timely and reliable for the citizen. In that respect, the World Bank Institute, which puts out the well-known governance indicators, has established four components to transparent information: accessibility, relevance, quality, and reliability." The Court later added that the right to access to information "is also linked directly to […] the principle of responsibility. […] It is thus clear that the more transparent a government is, the more responsible and committed to public aims it will be. Secrecy, in general, encourages practices in the defense of individual or group interests, but not necessarily public objectives."[41] In this case, the Court ordered that the requested information be turned over.

31. In Judgment 354/11 of November 22, 2011, the Court of Civil Appeals of Uruguay (Third Rotation)[42] ruled on the supposed existence of a limit to the right to access to information (sensitive data). The case concerned a request for information on the number of labor union organizations (with government ties), the number of members in each organization, and the number of labor union hours requested and granted during the period from February to November of 2011. The Court found that such limitations were inadmissible, given that "neither the names of the unions nor their members were requested; rather, the request sought simply to establish quantitative data. Therefore, that information does not fall within the exceptions established in Art.10 of Law 18.381. The petitioner is interested in monitoring the criteria used by the government to comply with the allocation of "labor union hours" […] As such, there is no infringement of the fundamental rights of any identified subject, and the requested information is excluded from the concept of sensitive or protected data." The Court consequently indicated that "it can in no way be understood that the act of providing the number of labor unions that the respondent ministry recognizes and negotiates or has dealings with in such capacity, nor the number of members in those unions (at least what is known to the respondent from making the deductions for union dues), nor the number of "labor union hours" requested in the detailed form previously expressed,

[40] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N.° 00565-2010-PHD/TC. September 5, 2010. Fundamento §3.5. Available at: http://www.tc.gob.pe/jurisprudencia/2010/00565-2010-HD.html

[41] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N.° 00565-2010-PHD/TC. September 5, 2010. Fundamento §3.6. Available at: http://www.tc.gob.pe/jurisprudencia/2010/00565-2010-HD.html

[42] Oriental Republic of Uruguay. Civil Court of Appeals (Third Rotation). November 22, 2011. *Sindicato de Policía del Uruguay v. Ministerio del Interior- Acceso a la Información Pública Art. 22 Ley 18.381*, i.u.e. 2-105220/2011. Available at: http://bjn.poderjudicial.gub.uy/BJNPUBLICA/hojaInsumo2.seam?cid=323

exposes either the legal entities—the labor unions—or the individuals who belong to them, to any discrimination, or entails the disclosure of sensitive data relating to those particular individuals."[43]

4. Case law on parties bound by the right to access to public information

32. In the above-cited decision handed down on December 4, 2012,[44] the Supreme Court of Argentina found that by virtue of the international obligation of the Argentine State established in Article 2 of the American Convention (obligation to bring domestic law into line with international standards) in relation to the right to access to information, it was necessary "to guarantee this right not only in the purely administrative sphere or in institutions tied to the Executive Branch but also in all government bodies." As such, the Court found that, in "overseeing the institutions that perform public functions, the States must take account of both public and private entities that perform such functions. The important thing is for the focus to be on the service they provide or the duties they perform. Such scope means imposing this requirement not only upon public State bodies in all their branches and at all their levels, local and national, but also upon State-owned enterprises, hospitals, private institutions, or others that act in a government capacity or perform public duties." The Supreme Court found support for this in the "principle of maximum disclosure" recognized in the Inter-American Court's *Case of Claude Reyes v. Chile*. Based on these considerations, the Supreme Court ruled that the Institute (PAMI), in spite of not "forming part of the national State" and having a "legal personality and financial individuality legally differentiated from the State," had the obligation to turn over the information requested by the non-governmental organization relating to the 2009 government advertising budget and the advertising outlay made during some months in that year. This was in view of the fact that the case involved "the request for public information from an institution that manages public interests and has a function delegated by the State, and the interaction between the respondent and the government is indisputable."

33. In a decision rendered on March 18, 2011, the Constitutional Division of the Supreme Court of Costa Rica[45] addressed the question of which entities are subject to the principle of maximum transparency. It reiterated that "all public entities and their bodies, both of the Central Government and the Decentralized Government, whether institutional or corporate service providers, are required to observe [the right to access to information] (…) The right of access must be observed broadly by public enterprises that assume collective forms of organization under private law, through which some government entity performs a business, industrial, or commercial activity, and participates in the economy and the market." The Court also found that "private persons who exercise public power or authority, on a temporary or ongoing basis, by virtual of legal or contractual authorization (…) such as utilities or public works concessionaires, interested managers, public notaries, public accountants, engineers, architects,

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[43] Oriental Republic of Uruguay. Civil Court of Appeals (Third Rotation). November 22, 2011. *Sindicato de Policía del Uruguay v. Ministerio del Interior- Acceso a la Información Pública Art. 22 Ley 18.381*, i.u.e. 2-105220/2011. *Considerando* VI. Available at: http://bjn.poderjudicial.gub.uy/BJNPUBLICA/hojaInsumo2.seam?cid=323

[44] Republic of Argentina. Supreme Court of Justice. December 4, 2012. *Asociación de Derechos Civiles v. EN – PAMI – (dto. 1172-03) on amparo ley 16.986*. Available at: http://www.cij.gov.ar/nota-10405-La-Corte-Suprema-reconocio-el-derecho-de-los-ciudadanos-de-acceso-a-la-informacion-publica.html

[45] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

topographers, etc., may potentially become subject to this requirement when they handle or possess information—documents—of clear public interest."[46]

5. Case law on access to public information related to the investigation of human rights violations

34. The First Division of the Supreme Court of Mexico, in amparo appeal decision 168/2011 of November 30, 2011,[47] ordered the Office of the Attorney General "to allow access and provide certified copies of the preliminary investigation" to the petitioner, in relation to the judicial investigations into the forced disappearance of Rosendo Radilla Pacheco. In spite of the fact that the Transparency and Access to Public Information Act of Mexico has, since 2002, prohibited the invocation of confidentiality with respect to files on the "investigation of serious violations of fundamental rights or crimes against humanity," the Office of the Attorney General had refused to provide access to preliminary investigations. With this decision, the Supreme Court sets an important precedent in the area of access to public information related to the defense of human rights.

35. In this case, the First Division of the Supreme Court of Mexico found that "with respect to the right to public information, the general rule in a democratic State under the rule of law must be to favor access and the maximum disclosure of information," the exceptions to which, "by constitutional mandate, must be provided by law, substantively and procedurally."[48] It also acknowledged the dual nature of the right to access to information, "as a right in and of itself, but also as a means or instrument for the exercise of other rights," in which case "the right to access to information is the basis upon which citizens exercise the respective oversight of the institutional workings of the State."[49]

6. Case law on access to information on government advertising

36. In a May 28, 2010 decision,[50] the Third Chamber of the Civil and Commercial Appeals Division of the Province of Salta, Argentina, in ruling on a petition for amparo stemming from a request for access to detailed information on government advertising expenditures in the Province of Salta, Argentina, held that, "the refusal of the respondent [the Office of the Governor of the Province of Salta] to

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[46] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. *Consideración IV*. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

[47] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. Available at: http://www2.scjn.gob.mx/red2/Case fileon

[48] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. *Consideración* 3. Available at: http://www2.scjn.gob.mx/red2/Case fileon

[49] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. *Consideración* 3. Available at: http://www2.scjn.gob.mx/red2/Case fileon

[50] Republic of Argentina. Chamber III of of the Civil and Commercial Chamber of Appeals of the Province of Salta. May 28, 2010. *CORNEJO, Virginia v. SECRETARÍA GENERAL DE LA GOBERNACIÓN DE LA PROVINCIA DE SALTA – ACCIÓN DE AMPARO*- Case files N° CAM 301.440/10. Available at: http://justicia.salta.gov.ar/nuevo/index.php?option=com_content&view=article&id=325:publicidad-oficial-sala-iii&catid=48:derecho-de-acceso-a-la-informacion-publica

provide the requested information is unjustified and is not based on any law; it also violates the principle of the disclosure of acts of government and the scope of the right to access to information as established in Article 13 of the Inter-American Convention of Human Rights (*sic*)." In the opinion of the Court, according to the evidence in the case, "the requested information arises from the State's own administrative action, which, as such, must be documented not only because it involves the decision and execution of public spending but also because it concerns government advertising, a matter of indisputable public interest in that it is linked to freedom of expression. As stated by Dolores Lavalle Cobo, there is a very close relationship among freedom of expression, the allocation of government advertising, and access to information." Finally, the Court held that "we must consider that observance of the duty to inform in this case is simple, since it only requires making available to the requesting party the file or files containing the documentation of the government's decision to place the advertising in question, the action itself, and the accounting records (invoices or similar documents) that reflect its execution. In other words, the response required of the respondent does not mean that it has to draft a complete report, or perform any activity more demanding than what is stated."[51]

37. In Judgment 48 of September 11, 2009, the Trial Court of Mercedes, Uruguay (Second Rotation)[52] ruled on a *habeas data* petition filed against the Departmental Board of Soriano, and ordered the disclosure of information on the procurement of government advertising. The Court found that the information relating to the procurement of government advertising must be disclosed by the respective agency to the extent that such information is not "turned over to the Board, but rather produced by the Board, and is public information from the moment it is [included] in the Board's five-year budget."

7. Case law on the right to access to information on private government contractors or providers of public services

38. The Constitutional Court of Peru, in a decision of August 27, 2010,[53] addressed the obligation of private parties that provide public services to disclose requested information relating to their activities. In this case, a citizen requested that a private company (an electrical power service provider) disclose information relating to service complaints over the past five years. The company had refused to turn over the information. The Court ordered that it disclose the requested information, holding that, "[w]ith respect to access to information in the possession of non-state entities, that is, private legal entities, not all of the information they possess is exempt from disclosure. Bearing in mind the type of work they perform, it is possible for them to have some information that is public in nature, and that the general public is therefore entitled to request and obtain. In this context, the entities subject to requests for this type of information are those that, in spite of being private, provide public services or exercise government functions as provided [by law]." Indeed, according to the Court, "[p]rivate legal entities that perform public services or government functions are obligated to provide information on the nature of the public services they provide, their fees, and the government functions they perform. This means that accessible information must always pertain to one of these three aspects, and not to any others."[54]

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[51] Republic of Argentina. Chamber III of of the Civil and Commercial Chamber of Appeals of the Province of Salta. May 28, 2010. *CORNEJO, Virginia v. SECRETARÍA GENERAL DE LA GOBERNACIÓN DE LA PROVINCIA DE SALTA – ACCIÓN DE AMPARO*- Case files N° CAM 301.440/10. *Consideración VI*. Available at: http://justicia.salta.gov.ar/nuevo/index.php?option=com_content&view=article&id=325:publicidad-oficial-sala-iii&catid=48:derecho-de-acceso-a-la-informacion-publica

[52] Oriental Republic of Uruguay. Trial Court of Mercedes (Second Rotation). September 11, 2009. *AA v. Junta Depatamental de Soriano- Acción de Amparo*. I.u.e. 381-545/2009. Available at: http://www.uaip.gub.uy/wponwcm/connect/60fff8804ad59ad8a98beb5619f13f97/Judgment-juzgado-letrado-de-2do-turno-de-mercedes.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=60fff8804ad59ad8a98beb5619f13f97

[53] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N.° 01347-2010-PHD/TC. August 27, 2010. Available at: http://www.tc.gob.pe/jurisprudencia/2010/01347-2010-HD.html

[54] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N.° 01347-2010-PHD/TC. August 27, 2010. Fundamentos 5 - 7. Available at: http://www.tc.gob.pe/jurisprudencia/2010/01347-2010-HD.html

39. In a decision dated April 29, 2009,[55] Court No. 2 for Administrative Disputes and Tax Matters of the Autonomous City of Buenos Aires, heard a petition for *amparo* stemming from the refusal of the Government of the City of Buenos Aires (hereinafter GCBA) to provide information related, *inter alia*, to the names of individuals associated with various private security firms, their percentages of ownership in the firms, and their membership in the armed forces. In relation to the classification and nature of the requested information and the criteria for considering it sensitive or classified, the Court held as follows: "[n]o part of the requested information can be considered sensitive under the terms of Article 3 of Law 1845. This is obvious. […] The GCBA has also not asserted, nor does it arise from any applicable law, that the requested records are classified for reasons of national or local security, or for strategic or intelligence reasons—a situation that would obviously not make the records inviolable, but could require greater care in judicially manipulating the disclosure of their content. In sum, neither the nature of the information requested, nor the characteristics of the database, provides any evidence to support the GCBA's restriction of the information that is the subject of the petition."[56]

40. Additionally, in this case, the Court found that access to the information had "institutional gravity," to the extent that it facilitated compliance with some legal provisions relating to the transition from dictatorship to democracy in Argentina. Indeed, the Court found that, "Law 1913 (…) establishes as a requirement for the provision of private security services that the provider not have been convicted or pardoned for crimes that are human rights violations. […] In this case, the information on individual members of the agencies is of even greater institutional relevance. […] The institutionalization of the right to information and the institutionalization of criticism are conditions *sine qua non* of a democratic society." Accordingly, the Court concluded that, "the mere possibility that persons who participated in human rights violations during the last military dictatorship could directly or indirectly form part of business organizations engaged in the provision of private security services is of such a magnitude that it is hard to imagine what reasons the GCBA might have in mind for preventing the disclosure of the requested information, using clearly avoidable procedures to do so."[57]

8. Case law on the subject matter of the right to access and the definition of public document

41. In a decision of April 29, 2009,[58] Court No. 2 for Administrative Disputes and Tax Matters of the Autonomous City of Buenos Aires held as follows with regard to the subject matter of the right to

[55] Republic of Argentina. Contentious Administrative and Tributary Court N° 2 of the autonomous city of Buenos Aires. Martínez. April 29, 2009. *Diego v. Gobierno de la Ciudad Autónoma de Buenos Aires*. Available at: http://www.cpdp.gov.ar/imageonarticuloscpdp/falloonmartinez.pdf

[56] Republic of Argentina. Contentious Administrative and Tributary Court N° 2 of the autonomous city of Buenos Aires. Martínez. April 29, 2009. *Diego v. Gobierno de la Ciudad Autónoma de Buenos Aires*. Consideración *VI.* Available at: http://www.cpdp.gov.ar/imageonarticuloscpdp/falloonmartinez.pdf

[57] Republic of Argentina. Contentious Administrative and Tributary Court N° 2 of the autonomous city of Buenos Aires. Martínez. April 29, 2009. *Diego v. Gobierno de la Ciudad Autónoma de Buenos Aires*. *Consideraciones VII y VIII*. Available at: http://www.cpdp.gov.ar/imageonarticuloscpdp/falloonmartinez.pdf

[58] Republic of Argentina. Contentious Administrative and Tributary Court N° 2 of the autonomous city of Buenos Aires. Martínez. April 29, 2009. *Diego v. Gobierno de la Ciudad Autónoma de Buenos Aires.* Available at: http://www.cpdp.gov.ar/imageonarticuloscpdp/falloonmartinez.pdf

access: “the aforementioned rules are related to the basic principle of the disclosure of acts of government, its nature being access to the information contained in documents—that is, physical formats of any type. As such, it does not concern access to the news, in the sense of the product or outcome of an activity performed by third parties; rather, it concerns direct access to the source of information—in this case, to the document.” In the Court’s opinion, “the activity of the government *vis-à-vis* the exercise of the right of access does not exactly consist of the provision of a benefit, but rather of intermediation. Certainly this configuration of the right entails some inevitable institutional requirements, including the prior existence of the document as an assumption for the exercise of the right. It can be held that the right to access to government documents is, structurally, a right to the freedom to be informed, which is based on the democratic principle of the disclosure of the information that is in the State’s possession.”[59]

42. On this same issue, in a decision handed down on March 18, 2011, the Constitutional Division of the Supreme Court of Costa Rica[60] reiterated that, “citizens or individuals can access any information in the possession of the respective public entities and bodies, regardless of its format, whether it be documentary (files, records, archives), electronic or digital (databases, electronic files, automated filing systems, diskettes, compact discs), audiovisual, tape-recorded, etc.”[61]

9. Case law on the material possibility of disclosing the requested information

43. In Judgment 354/11, of November 22, 2011, the Court of Civil Appeals of Uruguay (Third Rotation)[62] ordered the Ministry of Interior to provide the following information: the number of labor union organizations in a field, the number of members in each organization, and the number of labor union hours requested and granted in the period from February to November, 2011. In this case, the Ministry met the request for the specified information with silence, having reportedly stated before the court that its denial of access was justified on the basis of physical (nonexistent information) and legal (sensitive information) impossibility.

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[59] Republic of Argentina. Contentious Administrative and Tributary Court N° 2 of the autonomous city of Buenos Aires. Martínez. April 29, 2009. *Diego v. Gobierno de la Ciudad Autónoma de Buenos Aires. Consideración III.* Available at: http://www.cpdp.gov.ar/imageonarticuloscpdp/falloonmartinez.pdf

[60] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

[61] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. *Consideración IV.* Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

[62] Oriental Republic of Uruguay. Court of Civil Appeals (Third Rotation). November 22, 2011. *Sindicato de Policía del Uruguay v. Ministerio del Interior- Acceso a la Información Pública Art. 22 Ley 18.381*, i.u.e. 2-105220/2011. Available at: http://bjn.poderjudicial.gub.uy/BJNPUBLICA/hojaInsumo2.seam?cid=323

44. With regard to the impossibility of turning over information, the Court preliminarily dismissed "the respondent's simple assertion that it does not possess the records requested, and that the subject matter of the request is therefore impossible." With respect to the subject matter of the information, the Court found it necessary "to examine whether the plaintiff's request entails the 'production of information,'" to which, according to the Court, the respondent would not, in principle, be obligated. The decision stated that, "it must be understood that the request is for information about: (a) the number of labor union organizations in the field; (b) the number of members in each one; (c) the number of labor union hours requested from February 2011 to the present (specified month by month) for each organization; (d) the number of hours granted by the Ministry to each organization from February to the present." The Court thus opined that, "to the extent that the data, although not systematized, can be recorded in some form in the respondent's records and proceedings, it must be underscored that there is no demand for 'production,' but rather simply for compilation. Therefore, it is clear that they are not exempt from the potential aim of the 'improper *habeas data'*—as the provisions of Law 18.381 have been referred to in scholarly writings." This is the case, in that the Ministry, "at least in paying the salaries of its employees, had to have made records from which much of the information requested by the plaintiff can be gleaned." In addition, "the number of labor unions recognized by the respondent must be evident at least from the deduction of union dues from payments and/or the allocation of 'labor union hours' of leave granted to its employees. The number of members of each labor union can also be easily calculated in view of identical considerations, and the number of hours requested and granted will also emerge from those records."[63]

45. The Constitutional Court of Peru, in a decision of August 22, 2011,[64] ruled that the defense alleging the nonexistence of information was inadmissible to justify the denial of access. In the opinion of the Court, the guarantee of the right to access to public information "includes not only the obligation of public bodies to turn over the information requested but also that the information be complete, up-to-date, accurate, and true. Thus, if the right to access to information in its positive aspect imposes the duty to inform upon government bodies, in its negative aspect it requires that the information provided not be false, incomplete, fragmented, circumstantial, or confusing."[65]

46. In this case, a municipal government had alleged the "nonexistence" of the "file in which the property title was granted." The Constitutional Court rejected this defense on the argument of the government's duty to safeguard information storage media. The Court held that, "although it is inferred […] that the information requested by the plaintiffs was transferred from one file to another, it is the responsibility of the municipality to keep such information, and therefore it cannot avail itself of its "nonexistence" in order to avoid its obligation to provide it to the plaintiffs." The Court determined that, "the necessary procedures to locate the requested documentation must be exhausted. In its absence, and if it is proven to have been lost, the pertinent administrative file must be reconstructed, in order for copies to then be provided to the interested parties."[66]

10. Case law on the right to access to information on the salaries and incomes of public servants or contractors paid with public funds

[63] Oriental Republic of Uruguay. Court of Civil Appeals (Third Rotation). November 22, 2011. *Sindicato de Policía del Uruguay v. Ministerio del Interior- Acceso a la Información Pública Art. 22 Ley 18.381*, i.u.e. 2-105220/2011. Considerando V Available at: http://bjn.poderjudicial.gub.uy/BJNPUBLICA/hojaInsumo2.seam?cid=323

[64] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N° 01410-2011-PHD/TC. August 22, 2011. Available at: http://www.tc.gob.pe/jurisprudencia/2011/01410-2011-HD.html

[65] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N° 01410-2011-PHD/TC. August 22, 2011. *Fundamento 4*. Available at: http://www.tc.gob.pe/jurisprudencia/2011/01410-2011-HD.html

[66] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N° 01410-2011-PHD/TC. August 22, 2011. *Fundamento* 8. Available at: http://www.tc.gob.pe/jurisprudencia/2011/01410-2011-HD.html

47. In decision TC/0042/12 of September 21, 2012,[67] the Constitutional Court of the Dominican Republic ruled on a motion for the review of an amparo petition relating to the denial of access to information on the payroll and salaries of advisers working for the House of Representatives. The Court found that information relating to "names, positions, and salaries" in a public entity (House of Representatives) was not confidential. To reach this conclusion, the Court found it necessary to "weigh" the fundamental rights in apparent conflict—that is, the right to access to information and the right to privacy. This takes account of the fact that, according to one of the positions argued in the case, access to information relating to payroll and salaries—because it is private in nature—could "leave open the possibility of penetrating the private sphere of individuals."

48. In its balancing test, the Court found that "a name is a piece of information that makes it possible to identify people individually. [But it does not] involve data or information that every person might keep in a private personal and family space, removed from outside interference." It further considered that, "the purpose of the right of free access to public information is to monitor the use and management of public resources and, consequently, to put up obstacles to government corruption." Based on these premises, the Court concluded that "although the right to privacy is a fundamental value in the democratic system, just like the protection of personal data, they cannot (sic) generally—although they can in exceptional cases—restrict the right to free access to public information, since limiting it would deprive citizens of an essential mechanism for the control of government corruption."

49. In a decision of November 30, 2010, the Constitutional Court of Guatemala[68] found that the State's positive duty to publish information on salaries and other emoluments of public servants on its own initiative was consistent with the Constitution. In the Court's opinion, "those numbers are in the public interest by reason of their origin, which is the national treasury, the product of tax revenues paid by the citizens for the financial support of the State." It added that, "the citizens, being the holders of the sovereignty delegated to the government, have the prerogative to access the information administered by the government in and for the performance of its duties […] including the manner in which government resources are invested. The remuneration of public officials, employees, servants, and advisors to the public sector are, without a doubt, an important item in this respect. Herein lies the inflection point that validates the difference in treatment under the law of individuals who belong to this category, in terms of the open disclosure of their remuneration, as opposed to those in private sector employment relationships."[69]

50. Finally, the Court found that the information on salaries and other emoluments derived from public funds could not be considered "information included within the core of constitutionally protected personal privacy." It also found that although it "was not indifferent to the climate of insecurity

[67] Dominican Republic. Constitutional Tribunal. September 21, 2012. Judgment TV.0042/12. Available at: http://www.tribunalconstitucional.gob.do/node/582

[68] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files1373-2009, 1412-2009, 1413-2009. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

[69] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. *Considerando* VII. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

that afflicts Guatemalan society," it was of the opinion "that such situation was not attributable to the legislative decision" being reviewed.[70]

51. In a judgment handed down on June 9, 2011,[71] the Federal Supreme Court of Brazil upheld the suspension of the effects of two precautionary measures that barred the disclosure on a website of data on the incomes of public servants employed by the municipality of São Paulo. The precautionary measures had been granted by a lower court at the request of two organizations, under the theory that the disclosure of the information was a violation of the employees' rights to privacy and private life. In examining the case, the Supreme Court weighed the conflicting rights and concluded that the salaries of the municipal employees was information "of collective or general interest," and that it was therefore subject "to official disclosure." According to the Court, in this specific case, the public disclosure of the information did not pose a risk to "the security of the State or society as a whole." It was also not a violation of the employees' privacy or private lives, since "the data subject to disclosure referred to state agents (…) acting 'in that capacity'", and therefore the disclosure of the information is "the price they pay for choosing a career in public service in a republican State."[72]

11. Case law on the obligation to have a simple, rapid, and free administrative procedure for obtaining access to information

52. In a constitutionality decision handed down on November 30, 2010,[73] the Constitutional Court of Guatemala addressed the State's duty to provide an administrative mechanism for gaining access to information at all levels. In this case, the Court dismissed the constitutional challenge alleging that the Access to Information Act should have been passed by a special majority because it affected the autonomy of certain entities (the Act ordered the creation of information units in all government offices, including decentralized and autonomous agencies, as well as the creation of procedures to guarantee access to information). The Court held that the Act did not change the regulation of autonomous entities to the point of "altering their structure, functions, and responsibilities." In the Court's opinion, the Act, by creating "rules and procedures for all persons to be able to gain access to the information contained in the records, files, databases or systems of government offices" develops a "general mandate that concerns all levels of government, and does not affect the essential powers, responsibilities, or structure

[70] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. *Considerando* VII. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

[71] Federative Republic of Brazil. Supreme Federal Tribunal. June 9, 2011. *Segundo Ag. Reg. na Suspensão of Segurança* No. 3.902 – São Paulo. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628198

[72] Federative Republic of Brazil. Supreme Federal Tribunal. June 9, 2011. *Segundo Ag. Reg. na Suspensão of Segurança* No. 3.902 – São Paulo, para. 15. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628198

[73] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

of decentralized or autonomous entities." Therefore, it was not necessary to have "the favorable vote of the qualified majority in order to validly enact the challenged law."[74]

53. The Supreme Court of Panama, in a December 27, 2011[75] decision, ordered the disclosure of copies of files pertaining to the allocation of land titles, determining that the Ministry of Agricultural Development had hindered access to information by requesting that the petitioner demonstrate particular interest. The Court found that, "since it was not confidential or restricted, the petitioner was fully entitled to request [the information], and therefore the respondent authority's demand was not necessary for the provision of the copies." The Court dismissed the ministry's reasons regarding the complexity of turning over the information, observing that the authority should have "communicated the reasons for the complexity to the petitioner in writing" when it responded to the request at the administrative level, and not at the judicial stage of the proceedings. It concluded that, "the information requested is not confidential or restricted, and therefore the authority had the obligation to heed the request and provide the respective information in writing within the 30-day period established in Article 7 of the Act, with the possibility of extending the period for an additional 30 days if the request was complex or extensive, through written notification to the requesting party of the extension of time and its justification."[76]

54. At the same time, amparo appeal decision 168/2011 of November 30, 2011,[77] handed down by the First Division of the Supreme Court of Mexico, ruled on the effectiveness of the administrative guarantee of the right to access to information. The Supreme Court recognized the duty of all parties subject to the Transparency and Access to Public Information Act, including the Office of the Attorney General, to "comply unconditionally with the resolutions issued by the Federal Institute for Access to Public Information in ruling on motions for review," and added that "the use of *de jure* or *de facto* remedies[78] aimed at blocking timely and effective access to public information" shall not be valid. This ruling addressed the fact that the Office of the Attorney General had refused to provide access to preliminary investigations, whether through legal channels (challenges to the decisions of the IFAI) or through the unlawful denial of fundamental rights (not turning over the information).

12. Case law on the duty of the State to justify a decision to deny access to information

[74] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. *Considerando* III Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

[75] Republic of Panama. Supreme Court of Justice. December 27, 2011. Case file 1068-10. Available at: http://bd.organojudicial.gob.pa/registro.html

[76] Republic of Panama. Supreme Court of Justice. December 27, 2011. Case file 1068-10. Available at: http://bd.organojudicial.gob.pa/registro.html

[77] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. Available at: http://www2.scjn.gob.mx/red2/Case fileon

[78] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. Consideración 3. Available at: http://www2.scjn.gob.mx/red2/Case fileon

55. In a decision dated June 5, 2012, the Supreme Court of Panama[79] heard a *habeas data* action in which a request was made to the Research and Development Department of the Aquatic Resources Authority of Panama for access to a file that contained a request to research genetically modified salmon. The department's reply was outside the legal time limit, and it denied access to the information on the grounds that it was "restricted." The Court determined that "even when the public servant who receives a request for information does not possess it, or considers it to be restricted, that public servant has the obligation to communicate this to the petitioner, or specify where the petitioner can obtain the requested information in the event that it is an extensive or complicated request; for this, the public servant […] has a period of thirty (30) days." The Court also underscored the duty of government bodies to justify in detail every refusal to turn over information: "the institutions of the State that refuse to provide information on the grounds that it is confidential or restricted, must do so in a well-founded decision, establishing the reasons for the denial, as well as the legal basis for those reasons." In addition, the Supreme Court held that the government body must also explain in writing to the petitioner "the reasons for which it failed to respond to the request on time," in those cases in which the reply is not issued within the legally established time period.[80]

13. Case law on affirmative administrative silence

56. The Court of Civil Appeals of Uruguay (Third Rotation), in Judgment 354/11 of November 22, 2011,[81] found that failing to reply to a request for information from an individual triggered the government's obligation to turn over the requested information by virtue of the concept of affirmative administrative silence. On this point, it stated: "[t]he provision [Article 18 of Law 18.381] states that the interested party 'shall be able to access,' which, in conjunction with the aforementioned section (affirmative silence), leads to the conclusion that the absence of an express decision, unlike what is set forth in the Constitution of the Republic in relation to a common administrative petition, assumes that the petition is admitted—not denied." The Court concluded that: "the legal system prioritizes the right to information over the government's delay in rendering a decision." This is in the application of "a type of 'rule of admission' similar to that established under our procedural law when there is no effective challenge."[82]

14. Case law on the obligation to provide an appropriate and effective judicial remedy

57. In a May 28, 2010 decision, the Third Chamber of the Civil and Commercial Appeals Division of the Province of Salta, Argentina[83] ruled on a petition for amparo stemming from a request for

[79] Republic of Panama. Supreme Court of Justice. June 5, 2012. Case file 748-11. Available at: http://bd.organojudicial.gob.pa/registro.html

[80] Republic of Panama. Supreme Court of Justice. June 5, 2012. Case file 748-11. Available at: http://bd.organojudicial.gob.pa/registro.html

[81] Oriental Republic of Uruguay. Court of Civil Appeals (Third Rotation). November 22, 2011. *Sindicato de Policía del Uruguay v. Ministerio del Interior- Acceso a la Información Pública Art. 22 Ley 18.381*, i.u.e. 2-105220/2011. Available at: http://bjn.poderjudicial.gub.uy/BJNPUBLICA/hojaInsumo2.seam?cid=323

[82] Oriental Republic of Uruguay. Court of Civil Appeals (Third Rotation). November 22, 2011. *Sindicato de Policía del Uruguay v. Ministerio del Interior- Acceso a la Información Pública Art. 22 Ley 18.381,* i.u.e. 2-105220/2011. *Considerando III*. Available at: http://bjn.poderjudicial.gub.uy/BJNPUBLICA/hojaInsumo2.seam?cid=323

[83] Republic of Argentina. Chamber III of the Civil and Commercial Appeals Chamber of the Province of Salta. May 28, 2010. CORNEJO, Virginia v. *SECRETARÍA GENERAL DE LA GOBERNACIÓN DE LA PROVINCIA DE SALTA – ACCIÓN DE AMPARO*- Case files N° CAM 301.440/10. Available at:

access to information detailing government advertising expenditures in the Province of Salta. Before ruling on the merits, the Court considered the admissibility of amparo to address violations of fundamental rights, including the right to access to information, while administrative proceedings (seeking access to information) are still pending. The Court opined that: "preliminarily, it is necessary to establish that—by constitutional mandate—the action of *amparo* is admissible with respect to any decision, act, or omission of public authorities, except judicial authorities, or individuals who currently or imminently will harm, restrict, alter, or threaten, clearly arbitrarily or unlawfully, the rights and guarantees explicitly or implicitly recognized in the national and provincial constitutions, for purposes of putting a stop to the harm committed or the threat of harm (art. 87 of the Constitution of Salta)."[84]

58. The case discussed whether the amparo was admissible, inasmuch as the act of authority (of the Office of the Governor of Salta) that denied the access was not a final decision but rather a "mere opinion." In the Court's view, "the preclusion of the *amparo* because of the existence of other appeals cannot be founded on a merely procedural appraisal, since the purpose of *amparo* is to effectively protect rights rather than to arrange or protect spheres of jurisdiction. Indeed, in principle, opinions—including those of which the parties have been notified—are not the proper basis for an *amparo* petition, as they are not administrative acts in themselves, but rather mere preparatory acts." Nevertheless, the Court found that, "the argument in question is not worthy of consideration, given that the procedural position taken by the Office of the Governor on the record finds support in, and coincides with, the legal grounds of the opinion being challenged by the *amparo* petitioner. As such, referring the case to the conclusion of the pending administrative proceeding would amount to a solution that is merely procedural, and contrary to the proper service of justice." Thus, according to the Court, "it is not necessary to go through administrative proceedings prior to filing an *amparo* petition if, it being filed directly, the public authority objects to the petitioner's argument and upholds the legitimacy of the harmful act in the *amparo* proceedings; otherwise, the requirement of exhausting administrative proceedings would be transformed into a useless procedure." In this respect, "the position taken in the instant case is the one that is most consistent with the jurisprudence of the Inter-American Court of Human Rights, inasmuch as the State must guarantee the existence of a simple, rapid, and effective judicial remedy to challenge the denial of information in violation of the right of the requesting party and, if appropriate, to allow for the pertinent body to be ordered to turn it over (*Case of Claude Reyes et al. v. Chile*). On the contrary, sending the petitioner to conclude the administrative proceedings that resulted from his request for information would violate the principles of simplicity, expediency, and effectiveness of the judicial remedy upheld by the Inter-American Court."[85]

59. The Constitutional Court of Guatemala, in an August 24, 2010 decision[86] concerning the existence of an effective judicial mechanism for the protection of the right to access to information, held that "all government acts are public, with the exceptions contained in the Constitution. Interested parties have the right to obtain, at any time, the reports, copies, reproductions, and certifications they request,

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http://justicia.salta.gov.ar/nuevo/index.php?option=com_content&view=article&id=325:publicidad-oficial-sala-iii&catid=48:derecho-de-acceso-a-la-informacion-publica

[84] Republic of Argentina. Chamber III of the Civil and Commercial Appeals Chamber of the Province of Salta. May 28, 2010. CORNEJO, Virginia v. *SECRETARÍA GENERAL DE LA GOBERNACIÓN DE LA PROVINCIA DE SALTA – ACCIÓN DE AMPARO*- Case files N° CAM 301.440/10. Consideración I. Available at: http://justicia.salta.gov.ar/nuevo/index.php?option=com_content&view=article&id=325:publicidad-oficial-sala-iii&catid=48:derecho-de-acceso-a-la-informacion-publica

[85] Republic of Argentina. Chamber III of the Civil and Commercial Appeals Chamber of the Province of Salta. May 28, 2010. *CORNEJO, Virginia v. SECRETARÍA GENERAL DE LA GOBERNACIÓN DE LA PROVINCIA DE SALTA – ACCIÓN DE AMPARO*- Case files N° CAM 301.440/10. Consideración II. Available at: http://justicia.salta.gov.ar/nuevo/index.php?option=com_content&view=article&id=325:publicidad-oficial-sala-iii&catid=48:derecho-de-acceso-a-la-informacion-publica

[86] Republic of Guatemala. Court of Constitutionality. August 24, 2010. Case file 1828-2010. Available at:

http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=815140.html&St_RegistrarConsulta=no

and to view the files they wish to consult, unless they pertain to military or diplomatic national security matters, or to information provided by individuals under a promise of confidentiality. Amparo as a guarantee against arbitrariness is viable in the prioritization of this constitutional right, which must be fully respected."[87]

60. In a decision handed down on September 5, 2010,[88] the Constitutional Court of Peru addressed the simplicity of the judicial proceeding of *habeas data* for purposes of guaranteeing access to public information. In its rejection of the lower court's arguments regarding the supposed existence of special admissibility requirements, the Court found that, "[i]n a *habeas data* case, the only prerequisite for filing the complaint is that provided in Article 62 [of the Code of Constitutional Procedure]. An unsatisfactory response, or silence on the part of the requested party, are reasons for the court to act in order to reestablish the exercise of the violated right." The Court also found that "in *habeas data* cases, the courts must adhere strictly to Article 62 of the Code of Constitutional Procedure, according to which the only prerequisite for filing the claim is the written, dated request and the respondent's refusal to turn over the information requested."[89]

15. Case law on active transparency

61. The Constitutional Division of the Supreme Court of Costa Rica, in a March 18, 2011 decision,[90] reiterated "the duty of public entities to provide information, [in view of which they] must provide facilities and eliminate existing obstacles. News professionals are intermediaries between public entities and the recipients of the information, and therefore they also have the right to obtain information and the duty to convey it as accurately as possible. The subject matter of the right to information is news, and therefore those events that may be of public significance must be understood as such."[91]

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[87] Republic of Guatemala. Court of Constitutionality. August 24, 2010. Case file 1828-2010. Considerando I. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=815140.html&St_RegistrarConsulta=no

[88] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N° 00565-2010-PHD/TC. September 5, 2010. Available at: http://www.tc.gob.pe/jurisprudencia/2010/00565-2010-HD.html

[89] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N° 00565-2010-PHD/TC. September 5, 2010. Fundamento §2.4. Available at: http://www.tc.gob.pe/jurisprudencia/2010/00565-2010-HD.html

[90] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

[91] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. *Consideración* IV. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

62. In Judgment 48 of September 11, 2009, the Trial Court of Mercedes, Uruguay (Second Rotation)[92] ruled on a *habeas data* petition filed against the Departmental Board of Soriano, seeking the disclosure of information on the procurement of government advertising. In relation to the principle of active transparency, the Court found that the information on the procurement of government advertising should have been disclosed by the respective agency, not only upon request but also on its own initiative—to the extent that such information is not "turned over to the Board, but rather produced by the Board, and is public information from the moment it is [included] in the Board's five-year budget." Furthermore, according to Article 5 of the Access to Information Act, such information must be disseminated "on an ongoing basis" because it is "information about an allocated budget and its execution."

16. Case law on the duty to disseminate truthful information on sexual and reproductive rights

63. In decision T-627 of 2012, handed down on August 10, 2012,[93] the Constitutional Court of Colombia ruled on a special petition for a constitutional remedy (*tutela*) filed by a group of 1279 women against employees of the Office of the Attorney General of the Nation. In this case, the women stated that employees of the Attorney General's Office, in various contexts and by various means, had failed to recognize their right to accurate information on sexual and reproductive rights. The women alleged that the Attorney General's Office had misinterpreted decisions of the Constitutional Court relating to several of these rights, such as the voluntary termination of pregnancy under legally permissible circumstances, the mandatory nature of campaigns to promote those rights, the absence of institutional conscientious objection in such contexts, and others. The Constitutional Court found that the appropriate framework for examining the case was, in principle, sexual and reproductive rights, which include "reproductive self-determination, access to reproductive health services, and the right to information on reproductive matters."

64. With respect to the right to access to information on reproductive issues, the Court found, consistent with the inter-American standards, that: "both Article 20 of the [Colombian] Constitution and Article 13 of the ACHR on the right to information, by not having any limitation in terms of subject matter, protect information on reproductive issues and, consequently, all of the rules on its content that were summarized in paragraphs 4 to 6 are also applicable here. Nevertheless, in the aforementioned thematic report [*Access to Information on Reproductive Issues from a Human Rights Perspective*][94], the IACHR identifies some of the international standards that are especially important on this issue and that the Court finds worth mentioning: (i) the obligation of active transparency, (ii) access to information, and (iii) the obligation to disclose timely, complete, accessible, and reliable information."[95]

65. Later, the Court acknowledged the fundamental importance of the right to access to information in the context of sexual and reproductive rights. It held, in the following terms, that it was essential to the exercise of individual autonomy and to the eradication of discrimination against women: "if information is important for the exercise of all fundamental rights, insofar as it makes it possible to know

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[92] Oriental Republic of Uruguay. Trial Court of Mercedes (Second Rotation). September 11, 2009. *AA v. Junta Depatamental de Soriano- Acción de Amaparo. I.u.e. 381-545/2009.* Available at: http://www.uaip.gub.uy/wponwcm/connect/60fff8804ad59ad8a98beb5619f13f97/Judgment-juzgado-letrado-de-2do-turno-de-mercedes.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=60fff8804ad59ad8a98beb5619f13f97

[93] Republic of Colombia. Constitutional Court. August 10, 2012. Judgment T-627 of 2012. Available at: http://www.corteconstitucional.gov.co/relatoria/2012/t-627-12.htm

[94] IACHR. *Access to Information on Reproductive Health from a Human Rights Perspective*. OEA/Ser.L/V/II. Doc. 61. November 22, 2011. Available at: http://www.oas.org/en/iachr/women/docs/pdf/ACCESS%20TO%20INFORMATION%20WOMEN.pdf

[95] Republic of Colombia. Constitutional Court. August 10, 2012. Judgment T-627 of 2012. Consideración 46. Available at: http://www.corteconstitucional.gov.co/relatoria/2012/t-627-12.htm

their content and the mechanisms for asserting them, it becomes vital when it concerns reproductive rights, especially in the case of women. There are two reasons for this. First, […] this category of rights makes it easier […] to make decisions freely on different aspects of reproduction, and without information on the available options and the ways in which to make use of them, it is impossible to do so. The second reason is that one of the mechanisms for perpetuating the discrimination historically experienced by women has been—and continues to be—precisely to deny or hinder access to accurate and impartial information in this area, with the objective of denying them control over this type of decision. In its recent report on the issue, the IACHR recognized this, and thus noted that the States parties to the ACHR must permit access to information on those issues, and furthermore, must provide them on their own initiative (duty of active transparency)."[96]

66. The Court found that when the employees of the Attorney General's Office express themselves—like all public servants acting in their official capacity—they do not do so in the exercise of their freedoms, but rather in the exercise of an authority governed by and subject to the principle of legality in government. The expressions of public servants are then, according to the Court, manifestations of the exercise of the "power/duty of communication with the public." This power/duty is subject to certain limits, which, according to the Court, are as follows: "(i) accuracy and impartiality in conveying information; (ii) minimally sufficient factual justification and reasonableness of its opinions and, in all cases, (iii) respect for fundamental rights, especially of those subject to special constitutional protection."[97] In addition to these limits, the Court found that the abuse of the power/duty of communication or of a public servant's authority should be held to strict standards in light of the "prominent status [of the public servant] vis-à-vis the public," especially "when the mass media are used."[98]

67. In this specific case, the Court evaluated three circumstances pertinent to the right to access to information. First, it considered that the Attorney General, by changing the meaning of an order of the Constitutional Court related to sexual and reproductive rights in an official statement "violated the public's right to receive information or to be accurately informed of a matter of public interest." Indeed, the Court affirmed that "this public servant changed the meaning of the order in the aforementioned judgment by referring to 'the order […] to design and implement mass campaigns to promote abortion as a right,' when in reality the operative part of the judgment ordered 'mass campaigns to promote sexual and reproductive rights to help ensure that women throughout the country can freely and effectively exercise these rights.' It is clear that the Court did not order the promotion of abortion, as the Attorney General asserted in the statement […]. The Attorney General exceeded one of the limits that this Court has imposed on the exercise of his power/duty of communication with the public, which is the accuracy of information."[99] Second, the Court found that one of the employees of the Attorney General's Office, by publicly asserting the supposed unenforceability of Judgment T-388 of 2009 (in which the Court ordered campaigns to promote sexual and reproductive rights), and suggesting the need to wait for the decision on a motion to vacate that judgment, had "violated the fundamental right of the country's women to information on reproductive matters," by delaying the execution of the campaigns to promote sexual and reproductive rights. Finally, in relation to the scientific nature of emergency oral contraception, staff members of the Attorney General's Office stated in the mass media that it was an "abortifacient." After evaluating the scientific evidence in the case, the Court found that the official position of the Attorney General's Office was inconsistent with the expert science, and therefore disregarded the limits of the

[96] Republic of Colombia. Constitutional Court. August 10, 2012. Judgment T-627 of 2012. Consideración 46. Available at: http://www.corteconstitucional.gov.co/relatoria/2012/t-627-12.htm

[97] Similarly, see IACHR, Office of the Special Rapporteur for Freedom of Expression. *Inter-American Legal Framework of the Right to Freedom of Expression*. OEA/Ser.L/V/II CIDH/RELE/INF. 2/09. December 30, 2009. Paras. 200-206. Available at: http://www.oas.org/en/iachr/expression/doconpublicationonINTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf

[98] Republic of Colombia. Constitutional Court. August 10, 2012. Judgment T-627 of 2012. Consideración 13. Available at: http://www.corteconstitucional.gov.co/relatoria/2012/t-627-12.htm

[99] Republic of Colombia. Constitutional Court. August 10, 2012. Judgment T-627 of 2012. Consideración 56. Available at: http://www.corteconstitucional.gov.co/relatoria/2012/t-627-12.htm

"power/duty of government employees to communicate with the public," and threatened the sexual and reproductive rights of women. With respect to this issue, the Court ordered "the modification of the official position of the Office of the Attorney General inasmuch as, in Colombia: (i) emergency oral contraception prevents conception and does not cause abortion, (ii) its use is not restricted to the situations in which abortion is decriminalized, (iii) women who avail themselves of it outside the decriminalized grounds for abortion do not, in any case, commit the offense of abortion, and (iv) it is part of the reproductive health services that Colombian women are free to choose. Furthermore, said modification must be made (i) by the Attorney General, (ii) publicly, and (iii) as widely and with the same relevance as the statements given to the newspaper *El Espectador* on December 7, 2009."[100]

17. Case law on access to information consisting of personal data

68. In a decision of March 14, 2007, the Superior Court of Justice of Brazil[101] ruled on a *habeas data* petition, ordering the Commander of the Air Force to provide a Chief Petty Officer with copies and certifications of all of the documents used to support the Air Force's decision to deny him the right to enroll in a course for a promotion. The Court concluded that such information was not confidential, notwithstanding the existence of laws that established it as such. It found that the disclosure of the information requested did not entail a risk "to the security of the State or society." On this point, the Court cited the opinion of the Prosecutor, who considered that the disclosure of the information did not affect national security: "the concept of national security […] is not elastic; it should not be interpreted so broadly that it favors and promotes secrecy and authoritarianism, directly opposing the principle of democracy. […] The information contained [in the documents] is eminently private material that is unrelated to the concept of national security, which includes specific situations involving the defense of national borders, the keeping of the peace at home and abroad, and the preservation of democratic institutions."[102]

69. Decision T-1037 of 2008, handed down by the Constitutional Court of Colombia on October 23, 2008, dealt with the case of a journalist to whom a security team had been assigned—because of threats she had received—and then withdrawn. During the *tutela (amparo)* case, it was learned that the assigned bodyguard had been conducting intelligence activities unlawfully and without the journalist's knowledge. On the issue of *tutela*, initially meant to address the reestablishment of the security team, the Court also observed the violation of the journalist's right to know and control her personal data or *habeas data*. In this context, the Court recognized the right of access to one's own personal information in State intelligence records, and ordered the State security agency to provide all personal information it had on the journalist. The Court stated, "in principle, and unless there is a law that establishes otherwise, the information contained in State records is public. However, if this information concerns the private, personal, or confidential data of an individual, and those data are not of public relevance, in principle, they can neither be captured and filed away nor disclosed, as they are protected by the right to privacy. Nonetheless, if the information is contained in an official record—unless it is expressly classified—the individual owner of that data has the fundamental right to access it."[103] Later,

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[100] Republic of Colombia. Constitutional Court. August 10, 2012. Judgment T-627 of 2012. Consideración 72. Available at: http://www.corteconstitucional.gov.co/relatoria/2012/t-627-12.htm

[101] Federative Republic of Brazil. Superior Court of Justice. Third Session. March 14, 2007. *Habeas data* No. 91-DF. Case file 2003/0235568-0. Available at: https://ww2.stj.jus.br/revistaeletronica/Abre_Documento.asp?sSeq=669609&sReg=200302355680&sData=20070416&formato=PDF

[102] Federative Republic of Brazil. Superior Court of Justice. Third Session. March 14, 2007. *Habeas data* No. 91-DF. Case file 2003/0235568-0. Available at: https://ww2.stj.jus.br/revistaeletronica/Abre_Documento.asp?sSeq=669609&sReg=200302355680&sData=20070416&formato=PDF

[103] Republic of Colombia. Constitutional Court. October 23, 2008. Judgment T-1037 of 2008. Consideración 26. (citations omitted) Available at: http://www.corteconstitucional.gov.co/Judgmenton2008/T-1037-08.rtf

the Court concluded: "indeed, a person who has requested and obtained the protection of the State because she is at extraordinary risk has a fundamental constitutional right to know all of the information about her contained in intelligence records and all of the reports prepared by the persons in charge of protecting her, with the exception of information that is part of a judicial investigation and is subject to confidentiality on that basis."[104]

18. Case law on the general system of limits to the right to access to information

70. The Constitutional Division of the Supreme Court of El Salvador, in a decision of December 5, 2012,[105] held that the Regulations to the Public Information Access Act that introduced additional criteria to those established in the Act itself for the classification of confidential information constituted an excess of jurisdiction. On this point, the Court held that the regulations had failed to recognize the legal status of the right to access to information as a fundamental right. Indeed, the Court opined that, "one of the things regulations cannot do is *to limit* fundamental rights, and therefore it has been made clear that regulations only have the authority *to regulate* fundamental rights, while a limitation or restriction of rights can only be made by statute" (italics in the original). The Court continued, "Art. 29 RELAI [the challenged article] in fact adds other 'grounds of confidentiality' to the ones provided for in Art. 19 LAI [Access to Information Act], to wit: hindrance to the performance of the requested body's duties, national security, political security, and national interest." According to the Court, "the assumptions of confidential information operate as reasons to prevent individuals from accessing public information or, in other words, *to limit* the exercise of this fundamental right. This characterization of the reasons for confidentiality, which are added by the regulations, is the key to ruling on the alleged unconstitutionality, as (…) limitations to fundamental rights are typically the subject of the regulatory activity of the Legislative Assembly by statute." The Court thus concluded that, "no regulation or regulatory instrument other than a statute can create or impose limitations to the right to access to information."

71. Also regarding the limits to the right to access to information, the March 18, 2011 decision of the Constitutional Division of the Supreme Court of Costa Rica[106] reiterated the following: "(1) The subject matter of the right is 'information on matters of public interest,' so that when the government information that is sought is not about such a matter, the right is diminished and the information cannot be accessed. (2) The second limit is established in Article 30(2) of the Constitution, which stipulates that, 'State secrets are exempt.'" In the Court's opinion, "the handling of State secrets, insofar as they are an exception to the constitutional principles or values of transparency and disclosure in government, must be interpreted and applied, at all times, restrictively. […] As far as the restrictions or extrinsic limits to the right to access to government information are concerned, there are the following: (1) […] public morals and public order; (2) the sphere of privacy that is inviolable by all other legal persons, so that the private, sensitive, or nominative information that a public entity or body has gathered, processed, and stored, and has in its physical or digital archives, records, and files, cannot be accessed by any person […]; and (3) the investigation of crimes."[107]

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[104] Republic of Colombia. Constitutional Court. October 23, 2008. Judgment T-1037 of 2008. Consideración 31. Available at: http://www.corteconstitucional.gov.co/Judgmenton2008/T-1037-08.rtf

[105] Republic of El Salvador. Constitutional Chamber of the Supreme Court of Justice. Judgment 13-2012 (Unconstitutionality). December 5, 2012. Available at: http://www.jurisprudencia.gob.sv/visormlx/pdf/13-2012.pdf

[106] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

[107] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. *Consideración IV*. Available at:

72. Finally, in decision T-1037 of 2008, handed down on October 23, 2008, the Colombian Constitutional Court ruled on the right to access one's own personal information contained in government files, and on the application of the so-called principles of *habeas data* recognized in Colombian case law. It held "that the information contained in State databases—including intelligence reports—cannot be kept confidential from the individual owner of the information, at least until and unless a statute consistent with the Constitution is passed. The exception to this is if there is express legal authorization for it—for example, if the information is part of a criminal investigation that, consequently, despite being confidential, is reviewed by a court. Indeed, at least for now, only this type of information can legally be kept confidential from its owner."

73. The Court later concluded, "given that intelligence data can only be kept confidential from its owner if so established by a law that is specific, clear, and compatible with the Constitution, and that the existing provisions support only the confidentiality of information that is part of a judicial investigation, only this information may be withheld from its owner."[108] Based on these arguments, the Constitutional Court ordered the security agency of the Colombian State to turn over all of the petitioner's personal information that had been unlawfully obtained.

http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

[108] Republic of Colombia. Constitutional Court. October 23, 2008. Judgment T-1037 of 2008. Consideración 29. Available at: http://www.corteconstitucional.gov.co/Judgmenton2008/T-1037-08.rtf