

Resumo: Em uma perspectiva comparada latino-americana, o texto se desenvolve no sentido de que o acesso à informação oficial, como um direito fundamental exigível diretamente de normas constitucionais e convencionais, deve ser assegurado por autoridades administrativas independentes. Na ausência destas autoridades, o autor reforça a importância de uma codificação legislativa que tenha como papel preponderante reduzir a ampla margem de manobra do poder decisório das autoridades públicas e os seus efeitos negativos.

Palavras-chave: Acesso à informação; Direitos Humanos; Códigos Legislativos; Autoridades Administrativas Independentes; Lei Modelo Interamericana sobre Acesso à Informação Pública

Abstract: From a Latin American comparative perspective, this paper proposes that access to official information, as a fundamental right that can be claimed directly from the Constitution and international conventions, even in the absence of pre-existing (statutory) laws to that purpose, should be guaranteed by independent administrative authorities (quasi-judicial). In the absence of such authorities, the author stresses the importance of a legislative code whose main role would be to reduce the wide leeway (room for interpretation) enjoyed by the public authorities in their decision-making powers and the associated negative effects.

Keywords: Access to Information; Human Rights; Legislative Codes; Independent Administrative Authorities; Model Inter-American Law of Access to Public Information

Introduction

1. Implementation of the right of access to information held by the authorities

Although the right of access to information is not explicitly mentioned in most constitutions and not uniformly protected by statutes in Latin America, notions of transparency and rules requiring public disclosure are commonly found, along with constitutional court precedents establishing transparency as a necessary condition according to the basic principles of the democratic constitutional State¹.

With that in mind, we may ask how public authorities should deal with the need for constitutional interpretation and gaps in the laws governing the right to access information held by the state.

¹ See SOMMERMANN, Karl-Peter - La exigencia de una Administración transparente en la perspectiva de los principios de democracia y del Estado de Derecho. In GARCÍA MACHO, Ricardo, org. - *Derecho administrativo de la información y administración transparente*. Madrid: Marcial Pons, 2010, p. 12 e 19.

Is the right of access to information a benefit that can be claimed directly from the constitution and international conventions?

Are administrative authorities entitled to grant the demands to exercise rights of access to information held by the State with no underlying basis in [statutory] law?

In 2000, the Inter-American Commission on Human Rights of the OAS approved the “Declaration on the Principles of Freedom of Expression²” [affirming that the State has the obligation to allow public access to its information, which may be denied only in exceptional circumstances previously established by law].

Thus, it is only the restrictions that need to be previously established by [statutory] law according to that Declaration, which is seconded by the information access laws of many countries.

Later on, the 2004 OAS Special Summit of the Heads of State and Government of the Americas approved the Declaration of Nuevo León, according to which access to information held by the State must comply with the applicable constitutional and legal norms, including the rights to privacy and confidentiality³.

In fact, it is not an absolute principle that the actions of the public authorities are circumscribed by the pre-existing [statutory] laws. It depends on the social, cultural and legal reality of each country.

Nevertheless, in order to grant benefits based on constitutional norms without any underlying statutory basis, it is necessary to understand the dual implications of the principle of legality: the principle of supremacy of law – in the sense of a statute or act of Parliament – over other forms as norms and the principle that only the law may set limits to fundamental/constitutional rights (*Grundsatz des Vorbehalts des Gesetzes* – *Princípio da reserva da lei* – interferences in the freedom of citizens need to be covered by a law that was adopted by parliament in accordance with the Constitution).

It is generally agreed that the administrative authorities in a well-established State under the rule of law should act according to the hierarchy of fundamental rights.

The principle that the public authorities must act in accordance with pre-established laws, is connected with the idea that [statutory] law, in the strict sense of the term, has a three-fold foundation: the powers and duties of the public authorities must (i) respect the constitutional rights and liberties of the citizens; (ii) be derived from effective democratic deliberations by society; and (iii) ensure equal access to advantages and equal exposure to disadvantages.

In reality, however, we may observe in certain systems an exaggerated concentration of powers in the public authorities for various reasons, which range from the apathetic inertia on the part of lawmakers to the need for laws governing subjects related to new

² ORGANIZATION OF AMERICAN STATES - *Declaration of Principles on Freedom of Expression*. 2000. Available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26&IID=1>. Access in 27 Jan. 2014.

³ CÚPULA DAS AMÉRICAS, 4, 2004, Mar del Plata - *Declaração de Nuevo León*. Available at: http://www.oas.org/xxxivga/portug/reference_docs/CumbreAmericasMexico_DeclaracionLeon.pdf. Access in 31 Jan. 2014.

technologies that require highly specialised and complex expertise that is often only comprehensible to a government agency (this phenomenon has been called “parliamentarisation of the Executive Branch”)⁴.

Evolving in a field in which the Legislative Branch formerly held a monopoly, (non judicial) administrative procedures intended to grant public services or benefits or to restrict individual rights have come to play a crucial role in democratic societies. It is therefore imperative to ensure that such procedures are effective through compliance with due process of law.

The negative effects of public authorities wielding such power without the support of a truly effective (non judicial) administrative procedure are noticed in our courts: firstly, through the increasing number of disputes referred to the courts and secondly, paradoxically, in certain actions by the administrative authorities which have come to depend on prior judicial intervention, such as a court to disclose information protected by banking secrecy for the purposes of criminal or fiscal investigation.

2. What would be the ideal institutional conditions for an effective (non judicial) procedure of access to information?

In countries in which the proceedings of the public authorities are considered effective and democratic, it is less important to rely on the principles that the actions of public authorities are circumscribed by pre-existing laws and are subject to judicial approval⁵.

Naturally, more is demanded of the legislators and of judges in systems in which the administrative authorities tend to display authoritarian or “inquisitorial” behaviour without observing the basic rules of a fair administrative proceeding⁶.

How can such decision-making power be used to generate credibility among administrative authorities? What would be the ideal institutional conditions for an effective procedure of access to information?

3. To what extent could a legislative code promote the effectiveness of the right to information?

In any case, in the absence of such ideal conditions, to what extent can a legislative code contribute to the effectiveness of the right to information and avoid excessive judicial review?

Do the general rules and principles governing the right to information, when interpreted systematically with the support of a commentary by the legislative body, provide sufficient clarity and reduction of the freedom of interpretation of the administrative authorities with respect to the teleological exegeses currently open to controversy and uncertainty?

⁴ See SOMMERMANN, Karl-Peter - *Ob. cit.*.

⁵ See PERLINGEIRO, Ricardo - *Administrative Justice in Brazil: a Judicial, Non Judicial or Hybrid Jurisdiction?* (February 7, 2014). Available at SSRN: <http://ssrn.com/abstract=2390774> or <http://dx.doi.org/10.2139/ssrn.2390774>. Access in 31 Jan. 2014.

⁶ See ASIMOW, Michael - *Five Models of Administrative Adjudication*. Available at: <http://law.huji.ac.il/upload/Five.models.doc>. Access in: 31 Jan. 2014.

4. Proposed objectives

Thus, from a Latin American perspective, this paper is oriented in three different basic directions.

First, it proposes that the institutions supervising information access should be effectively independent. Secondly, in the absence of such independence, it emphasises the role played by general laws or legislative codes as instruments ensuring the effectiveness of the right to access information. Finally, it points out the fundamental principles and general rules that need to be given a higher degree of consideration in a system that does not provide for independence of supervisory institutions.

1. Access to information as a fundamental human right

The Inter-American Court of Human Rights, in its decision *Claude Reyes and Others v. Chile* of 2006⁷, recognised the existence of the right to access official information – to seek and receive information – based on Article 13 of the Inter-American Human Rights Convention on the principles of freedom of thought and expression.

A significant development in 2008 was the adoption, by the Inter-American Juridical Committee, of *Principles on the Right of Access to Information*. This document contains a statement of 10 principles governing the right to information, including that it is a fundamental human right, that it should apply broadly to all public bodies, including the executive, judicial and legislative branches of government, and all information, that exceptions should be clearly and narrowly drawn and that there should be a right of appeal to an administrative body against denial of the right⁸.

Indeed, the information about the institutions and actors in charge (institutional transparency), information about the processes of influencing policy-making (procedural transparency) and information about the decisions and the associated motives (material transparency) helps individuals monitor the behaviour of public institutions, participate in public affairs and facilitate the realisation of their rights⁹.

Thus, transparency of the public powers is an essential element in the strategy of restoring confidence in the democratic system and to safeguard the rule of law in an increasingly complex reality; as a logical corollary, the withholding or concealment of information that might show deficiencies in a public system are now considered characteristic of a dictatorial regime with problems of establishing its legitimacy¹⁰.

⁷ *Claude Reyes and Others v. Chile*, 19 Sep. 2006, Series C No. 151, para. 77 Inter-American Court of Human Rights. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf. Access in 27 Jan. 2014.

⁸ See MENDEL, Toby - *The Right to Information in Latin America*. UNESCO, 2009, p. 13. Available at: http://www.oas.org/cji/CJI-RES_147_LXXIII-O-08.pdf. Access in 27 Jan. 2014. See COMITÉ JURÍDICO INTERAMERICANO, CJI/RES. 147 (LXXIII-O/08) - *Principios sobre el derecho de acceso a la información*. Rio de Janeiro, 2008. Available at: http://www.oas.org/cji/CJI-RES_147_LXXIII-O-08.pdf. Access in 27 Jan. 2014.

⁹ See SOMMERMANN, Karl-Peter – *Ob. cit.*

¹⁰ See SOMMERMANN, Karl-Peter – *Ob. cit.*

2. The institutional guarantees in the implementation of the right to access information in the Model Inter-American Law of Access to Public Information

The administrative authorities behaving as an integral part of a genuine second Branch of the State, oriented according to fundamental rights, acting on the basis of administrative decisions preceded by (non judicial) procedures ensuring due process of law, having administrative procedures in which citizens have the possibility of influencing the result in a democratic manner, all mean that public authorities must have at least certain minimal favourable conditions if their actions are to be more than a mere formality.

In this particular, I am referring to one of the administrative conflict-resolution techniques, namely making use of independent public authorities (quasi-judicial), so that the claims are settled by someone who is not under the control of the public authority at issue¹¹.

The prerogatives that ensure such independence vis-à-vis the public authorities tend to be similar to the prerogatives of the courts and judges, namely (i) institutional prerogatives, such as administrative and financial autonomy of the decision-making institutions; (ii) personal prerogatives, such as irremovability (security of tenure) and fair compensation for the individuals in the decision-making role, who should be appointed according to transparent selection criteria¹².

Indeed, conflict-resolution based on the technique of independent administrative authorities is appropriate for the procedures intended for the right to access official information, where vulnerability to the risks of political interference is even greater.

In addition, the more effective the (non judicial) administrative procedure, the less judicial intervention is required, and Latin American courts are already giving signs of exhaustion. Besides the fact that not all courts specialise in administrative law, many of them are saturated in a system with widespread judicial review; the administrative authorities, in the exercise of their powers, seem to depend on or take advantage of that situation.

In fact, although still in its initial phases, there has been a tendency to create independent institutions (quasi-judicial) for access to information.

¹¹ On the concept of independent administrative authority, see Conseil d'État, *Les autorités administratives indépendantes - Rapport public 2001*. Available at: <http://www.conseil-etat.fr/fr/rapports-et-etudes/contributions.html>. Access in 27 Jan. 2014. See also ZILLER, Jacques - *Les Autorités administratives indépendantes entre droit interne et droit de l'Union européenne*. *Revue Française de Droit Administratif*. 5 (2010) 901-906. On US independent agencies, see ASIMOW, Michael – Ob. cit.

¹² See Council of Europe, Consultative Council of European Judges - *Magna Carta of Judges: Fundamental Principles*. Available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE-MC\(2010\)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE-MC(2010)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864). Access in 24 Feb. 2014. See also United Nations Office on Drugs and Crime (UNODC) - *Commentary on The Bangalore Principles of Judicial Conduct*. *Comentar*. 26(a) 36. Available at: <http://www.coe.int/t/dghl/cooperation/cje/textes/BangalorePrinciplesComment.PDF>. Access in 24 Feb. 2014.

In Latin America, there are four examples of supervisory institutions that are inclined towards effective independence ensured by the legally established prerogatives: Mexico, with the *Instituto Federal de Acceso a la Información y Protección de Datos* [Federal Institution of Information Access and Data Protection]; or Chile, with its Consejo para la Transparencia [Council for Transparency]; Honduras, with the *Instituto de Comisionados* [Commissioners' Institute]; and El Salvador, with the *Instituto de Acceso à Información Pública* [Institute of Access to Public Information]¹³.

Independent supervisory institutions can also be found in countries of other regions, but there are not many that have similar characteristics.

Especially worthy of mention in this respect are Serbia, with The Commissioner, Slovenia, with The Commissioner for Access to Public Information, Liberia, Independent Information Commissioner, India, with The Central Information Commission, Antigua and Barbuda, with The Information Commissioner, Macedonia, with the Commission for Protection of the Right to Free Access to Information of Public Character, and Azerbaijan, with the Authorized Agency¹⁴.

In general, they are autonomous institutions, with their own legal personality and specific budget allocations. The members of such institutions hold a term of office. They are appointed and removed from office according to specific rules with the participation of the Legislative and Executive Branches and, in certain cases, the Judiciary.

It is also relevant to mention that the Model Inter-American Law of Access to Public Information, ratified in 2010 by the OAS General Assembly¹⁵, calls for an Information Commission to promote effective implementation of the right to access public information, including by acting as the highest decision-making authority for information access requests. The proposed Information Commission is to have full legal personality and operative, budgetary and decision-making autonomy (Articles 46 to 49 and 53 to 62)¹⁶.

According to Article 58 of the Model Inter-American Law, “[t]he Commissioners will be appointed by the [Executive Official] after nomination by a two-thirds majority vote of the [legislative body] and in a process in accordance with the following principles: (a)

¹³ Article 33 of the Law of Mexico, Article 31 of the Law of Chile, Article 8 of the Law of Honduras, and Articles 51 to 60 of the Law of El Salvador.

¹⁴ SERBIA, *Law on Free Access to Information of Public Importance*, articles 32 to 35. Available at: <http://www.rti-rating.org/files/pdf/Serbia.pdf>. Access in 3 Feb. 2014; SLOVÊNIA, *Access to public information act*, articles 28 to 30. Available at: <https://www.ip-rs.si/index.php?id=324>. Access in 3 Feb. 2014; LIBERIA, *The freedom of information act of 2010*, Cap. 5. Available at: <http://www.liberianembassyus.org/uploads/documents/Liberia%20Freedom%20of%20Information%20Act%202010x.pdf>. Access in 3 Feb. 2014; INDIA, *Act n° 22/2005*, articles 12 to 14. Available at: <http://www.iitb.ac.in/legal/RTI-Act.pdf>. Access in 3 Feb. 2014; ANTIGUA and BARBUDA - *The Freedom of Information act of 2004*, articles 35 to 40. Available at: <http://www.laws.gov.ag/acts/2004/a2004-19.pdf>. Access in 3 Feb. 2014; MACEDÔNIA, *Law on free access to information of public character*, articles 30 to 35. Available at: <http://komspi.mk/DokumentiDetails.aspx?lang=3&itemID=1>. Access in 3 Feb. 2014; AZERBAIJÂN, *Law of the Republic of Azerbaijan on right to obtain information*, article 44. Available at: <http://www.rti-rating.org/files/pdf/Azerbaijan.pdf>. Access in 3 Feb. 2014.

¹⁵ ORGANIZATION OF AMERICAN STATES (OAS) - *Access to information*. Washington. Dec. 10 (2012). Available at: http://www.oas.org/dil/access_to_information_model_law.htm. Access in: 27 Jan. 2014.

¹⁶ Articles 46 to 49 and 53 to 62 of Model Inter-American Law.

participation by the public in the nomination process; (b) transparency and openness; and (c) publication of a short-list of candidates” and that “Commissioners hold office for a period of [5] years, which may be renewed once”

Regarding the Commissioners’ compensation, the Model Law stipulates that they “shall serve full-time and be paid the same salary as a [high court judge]. The Commissioners shall not hold another job, position or commission, except in educational, scientific or charitable institutions”.

As far as removal from office is concerned, “[t]he Commissioners may not be removed or suspended from office, except in accordance with the procedure by which he or she was appointed and only for reasons of incapacity or behaviour that renders him/her unfit to discharge his/her duties. Such behaviour includes: (a) conviction of a criminal offence; (b) infirmity that affects the individual’s capacity to discharge his duties; (c) severe breach of the provisions of the Constitution or of this Law; (d) refusal to comply with objective disclosure requirements, such as regarding salary or benefits”.

3. The contribution of codification to the realisation of access to information

The discussion of the pros and cons of a legislative code dates back to the debate between the legal scholars Thibault and Savigny in Germany in 1814. Thibault believed in scientific systematisation of unified norms, providing objectivity and clarity; Savigny was worried about the stagnation that codes might cause in the evolution of laws.

The codification of the right to information has been a global tendency in recent years. Nearly ninety laws on information access in the form of codes are currently in force worldwide; most of them were ratified after the 1990s.

Twelve out of the twenty Latin American countries have general laws on the right to access information: Mexico, Peru, Argentina, Ecuador, the Dominican Republic, Honduras, Nicaragua, Chile, Guatemala, Uruguay, El Salvador and Brazil¹⁷, Bolivia,

¹⁷ MÉXICO - Law n° 27.806/2002 (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*) [Federal Law on Transparency and Access to Public Information] of 2002. Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/244.pdf>. Access in 24 Jan. 2014; PERU - Ley n° 27.806/2002 (*Ley de Transparencia y Acceso a Información Pública*) [Law on Transparency and Access to Public Information]. Available at: <http://www.congreso.gob.pe/ntley/Imagenes/Leyes/27806.pdf>. Access in 24 Jan.2014; ARGENTINA - Administrative Decree n° 1172/2003 (*Reglamento general del acceso a la información pública para el Poder Ejecutivo Nacional*) [General regulations on access to public information for the National Executive Branch]. Available at: <http://www.infoleg.gov.ar/infolegInternet/anexos/90000-94999/90763/norma.htm>. Access in 24 Jan.2014 - the only country in which the code originated in a presidential decree; ECUADOR - Law 34/2004 (*Ley Orgánica de Transparencia y Acceso a la Información Pública*) [Organic Law on Access to Public Information]. Available at: <http://www.rti-rating.org/files/pdf/Ecuador.pdf>. Access in 24 Jan.2014; DOMINICAN REPUBLIC - Law 200/2004 (*Ley General sobre el Libre Acceso a la Información Pública*) [General Law on Transparency and Access to Information]. Available at: http://www.camaradediputados.gob.do/serve/listfile_download.aspx?id=904&num=1. Access in 24 Jan.2014; HONDURAS - Legislative Decree n° 170/2006 (*La Ley de Transparencia y Acceso a la Información*) [Law on Transparency and Access to Information]. Available at: http://www.tse.hn/Transparencia/Documentos-T/Leyes/Ley_de_Transparencia.pdf. Access in 24 Jan.2014; NICARAGUA - Law n° 621/2007 (*Ley sobre el Acceso a la Información Pública*) [Law on

Colombia, Costa Rica, Panama and Paraguay are currently discussing a legislative draft of a general national law¹⁸. The Inter-American Human Rights System includes the above-mentioned Inter-American Model Law on Access to Public Information of 2010.

It is not difficult to understand why there is so much enthusiasm about legal codes governing access to information: a branch of the law that was practically unknown in the legal culture of most countries before the late 1990s; a branch of the law in which the State's duties to honour requests for information are derived directly from international and constitutional norms, which explains why there is such a wide margin of interpretation; branch of the law with scanty, unclear legislation in which the public authorities are expanding their margin of interpretation in decision-making.

The advantages of a legislative code of access to information may therefore be noted in the following respects: (i) the administrative authorities have to adapt to an extensive concept of the principle that the actions of public authorities are circumscribed by pre-existing laws [*Vorbehalt des Gesetzes*], reaffirming the institutional role of the legislators in a democratic State under the Rule of Law; (ii) the broad leeway of the administrative authorities is narrowed, which increases legal certainty; (iii) society is endowed with the means of implementing the right to information, which leads to reinforcing the corresponding institutional and procedural guarantees and to a gradual increase in their credibility.

Access to Public Information]. Available at: [http://legislacion.asamblea.gob.ni/Normaweb.nsf/\(\\$All\)/675A94FF2EBFEE9106257331007476F2](http://legislacion.asamblea.gob.ni/Normaweb.nsf/($All)/675A94FF2EBFEE9106257331007476F2) Access in 24 Jan.2014; CHILE - Law n° 20.285/2008 (*Ley sobre el Acceso a la Información Pública*) [Law on Access to Public Information]. Available at: <http://www.leychile.cl/Navegar?idNorma=276363>. Access in 24 Jan.2014; GUATEMALA - Legislative Decree n° 57/2008 (*Ley de Acceso a la Información Pública*) [Law on Access to Public Information]. Available at <http://old.congreso.gob.gt/archivos/decretos/2008/gtdcx57-0008.pdf>. Access in 24 Jan. 2014; URUGUAY - Law 18.381/2008 (*Ley sobre el Derecho de Acceso a la Información Pública*) [Law on the Right of Access to Public Information]. Available at: <http://www.parlamento.gub.uy/leyes/AccessoTextoLey.asp?Ley=18381&Anchor=>. Access in 24 Jan.2014; EL SALVADOR - Decree 534/2011 (*Ley de Acceso a la Información*) [Law on Access to Information]. Available at: <http://www.asamblea.gob.sv/eparlamento/indice-legislativo/buscador-de-documentos-legislativos/ley-de-acceso-a-la-informacion>. Access in 24 Jan. 2014; BRAZIL - Law 12.527/2011 (*Lei de Acesso à Informação*) [Law on Access to Public Information]. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12527.htm. Access in 24 Jan. 2014.¹⁸ BOLIVIA - *Proyecto de ley de transparencia y acceso a la información pública*. Available at: http://www.transparencia.gob.bo/data/marco_legal/anteproy_leyes/proyecto.pdf. Access in 21 fev. 2014; COLÔMBIA - *Proyecto de ley n° 156 de 2011 (Ley de transparencia y del derecho de acceso a la información pública nacional)*. Available at: http://www.oas.org/es/sla/ddi/docs/acceso_informacion_base_dc_leyes_pais_CO_10.pdf. Access in 21 fev. 2014; COSTA RICA - *Proyecto de ley de transparencia y acceso a la información pública*. Available at: http://www.asamblea.go.cr/Centro_de_informacion/biblioteca/Centro_Dudas/Lists/Formule%20su%20pregunta/Attachments/349/16198-proyecto.pdf. Access in 21 fev. 2014; PANAMÁ - *Proyecto de ley n° 584 (Que Crea la Autoridad Nacional de Transparencia y Acceso a la Información)*. Available at: http://www.asamblea.gob.pa/apps/seg_legis/PDF_SEG/PDF_SEG_2010/PDF_SEG_2013/PROYECTO/2013_P_584.pdf. Access in 21 fev. 2014; PARAGUAI - *Proyecto de ley de libre acceso ciudadano a la información pública y transparencia gubernamental*. Available at: <http://sil2py.senado.gov.py/formulario/VerDetalleTramitacion.pmf?q=VerDetalleTramitacion%2F101629>. Access in 21 fev. 2014.

In an effort to achieve such results, a code on the right to access information should define the vague concepts as explicitly as possible (through an authentic interpretation of law), indicate the fundamental principles and organise the general rules on at least two different levels.

Such a code should have four chapters on the introductory level: the first chapter defining the vague concepts (legal definition); the second the fundamental principles; the third the substantive rights and duties; and the fourth the procedural rights and duties.

On the next level, with a subdivision, such a code should cover the following aspects in the chapter on substantive rights and duties: (i) the scope of the State's duties to honour requests for access to information; (ii) the duties of *ex officio* disclosure; (iii) the restrictions on the duty to disclose information; and (iv) the various administrative, civil and criminal sanctions for a breach of such duties.

The code's chapter on procedural law should point out: (i) the institutional guarantees, such as the organisation of the administrative authorities competent to rule on requests for information; and (ii) the procedures in the strict sense of the term, in light of the guarantees of *due process of law*, combining the right of petition with the right of defence, by defining the elements of standing to sue (*legitimatío ad causam*) and the following procedural rights: free assistance, argumentation, proof, adversary proceedings, statement of reasons for the decision, decision-making in a public hearing, right of appeal, and conclusion within a reasonable time.

This form of presentation of a legal code on the right of access to information may be found in certain Latin American laws, although not always in the sequence proposed above.

4. Vulnerabilities in the Latin American codes on access to information

From a comparative perspective based on national laws and the Model Inter-American Law of Access to Public Information, noticeable progress has been made in implementing the right to information in Latin America.

With clear orientations based on the Inter-American human rights system, the recent legislative codes have proven capable of resolving various controversial questions that had been raised by the authorities themselves.

There are numerous examples of this trend. We shall examine three of them: the scope of the information access laws; the right to information as a universal right; and information subject to proactive disclosure.

For the first example, the understanding has now been adopted that a law on access to information imposes duties on all public authorities, at every level of all three branches (Legislative, Executive and Judiciary). Such duties also extend to private entities or individuals exercising public authority or providing some other service with public funds, in which case the duties of disclosure are limited to the public activities and funds.

That rule is set out in Article 3 of the Model Inter-American Law, and likewise in the [above-cited] laws of El Salvador, Nicaragua, Brazil, Chile, Guatemala, Mexico and the Dominican Republic¹⁹.

It has now generally come to be accepted that all citizens are entitled to enforce the right to access information without having to identify themselves or to demonstrate any special interest, which reinforces the thesis that all information held by the administrative authorities is public in nature.

Such rule can be found in Article 5 “d” and “e” of the Model Inter-American Law and in the [above-cited] laws of El Salvador, Honduras, and Brazil²⁰.

Finally, regarding proactive disclosure, the codes have defined a class of key information to be disclosed within a certain time limit, such as the qualifications and remuneration of the high-ranking civil servants and the pay scales for all the categories of employees or consultants who work in a public administrative authority.

The norm in question is found in Article 11 of the Model Inter-American Law, as reflected in the legislation of El Salvador, the Dominican Republic, Guatemala, and Nicaragua²¹.

Despite the successful systematisation of countless rules in general laws on access to information, some of them still do not meet the standards of a legislative code, especially in confrontation with the socio-political reality of Latin America.

I am referring to the rules that continue to be highly imprecise and subject to controversial interpretations among the public authorities, almost always without any guarantees of independent action.

The rules of greatest impact are the ones concerning the limitations on information access. Such limitations are generally based on private interests, such as the right to privacy, and on public interests, such as public safety or national defence.

As a basis of analysis, Article 40 of the Model Law is transcribed below:

The public authorities may deny access to information only under the following circumstances, when **strictly and legitimately necessary** in a Democratic society based on the **standards and jurisprudence of the Inter-American system**:

a) When access would harm the following private interests:

1. the right to privacy, including privacy concerning one’s life, health and safety;

2. **legitimate commercial and economic interests**;

[...]

b) When access would create a clear, probable and specific risk of doing significant harm to the following public interests:

1. **public safety**;

2. **national defence**;

¹⁹ Articles 7 and 8 of the law of El Salvador, Article 1 of Nicaragua, Articles 1 and 2 of the Brazilian law, Article 2 of the Chilean Law, Articles 2 and 6 of the Guatemala, Articles 1 and 3(XIV) of the Mexican Law, and Articles 1 and 6 (4) of the Law of the Dominican Republic.

²⁰ Articles 2 and 9 of the Law of El Salvador, Article 20 of the Legislative Decree of Honduras, Article 10 (3) of the Brazilian Law.

²¹ Article 10 (7) of the law of El Salvador, Article 3 of the law of the Dominican Republic, Article 10 (4) of the law of Guatemala, and Article 20 c of the law of Nicaragua.

- [...]
7. **law enforcement**, prevention, investigation and prosecution of crime;
8. **the State's capacity to control the economy**;
9. **legitimate financial interests of the public authority**; and.
[...]

This Article has been adopted with similar wording in the laws on information access in Brazil, El Salvador, Guatemala, Uruguay, Mexico, the Dominican Republic and Honduras²².

Some of the expressions are excessively broad and vague, such as “legitimate commercial and economic interests”, “public safety”, national defence and law enforcement.

As we know, all of them require constant efforts of evaluation based on the principle of proportionality, which, enshrined in the preamble to Article 40 of the Model Inter-American Law (...when strictly and legitimately necessary in a Democratic society...), open the door to countless exceptions (to the limitations on free information) which are only detectable in the specific case by the public authorities.

Doubts are increasing significantly regarding the exceptions to the restrictions to free information (i.e., the cases in which there should no restrictions on information access).

There are situations that admit objective analysis, such as the case of civil servants, who cannot claim the right to privacy in the exercise of their duties according to the Model Inter-American Law and the laws of Brazil, Guatemala and Mexico²³.

Similarly, public disclosure and access to information constitute absolute values in cases of severe human rights violations and crimes against humanity according to the Model Inter-American Law, and the laws of Brazil, Nicaragua, El Salvador, and Guatemala²⁴.

However, the rules establishing restrictions on information access are open to subjective evaluation. One common technique, for example, is to weigh the interests at issue to determine whether the public interest in accessing information outweighs the public or private interests in protecting classified information. As a result, the above-cited rules defining situations in which secrecy should prevail are inapplicable to cases in which non-disclosure would do greater harm to the public interest in disclosure than to the interests by confidentiality.

Consider the wording of the following norm (Article 43 of the Model Inter-American Law): “No public authority may refuse to indicate whether or not a document is in its possession or refuse to disclose a document in accordance with the exceptions referred to in Article 40 unless the harm that would be done to the protected interest outweighs the public interest in obtaining access to the information”²⁵.

²² Articles 23 and 24 of the Brazilian Law, Articles 19 and 24 of the Law of El Salvador, Article 23 of the Law of Guatemala, Article 9 of the Law of Uruguay, Articles 13 and 14 of the Law of Mexico, Articles 17 and 18 of the Law of the Dominican Republic, and Article 17 of the Legislative Decree of Honduras.

²³ Article 21 (*parágrafo único*) of the Brazilian Law, Article 24 of the law of Guatemala, and Article 14 (2) of the law of Mexico.

²⁴ Article 31 V of the Law of Brazil, Article 3 (7) of the Law of Nicaragua, Article 21 (c) of the Law of El Salvador, and Article 26 (3) of the Law of Guatemala.

²⁵ Article 43 of the Model Inter-American Law.

That rule is reflected in the national laws of El Salvador, Guatemala and Uruguay²⁶.

As we have seen, there are many uncertainties; it is apparent, however, that the principle of action circumscribed by pre-existing laws should be followed, as is required by various national laws and international declarations, including the recommendations in the preamble of the Model Inter-American Law (*The exceptions to the right of access to information must be clearly and **specifically** established by law*).

In reality, there is no difference between a law that fails to specify the requirements for restrictions on information disclosure and a law that makes a general reference to “public safety”, for example, as a justification for restricting disclosure.

In the absence of a law [prescribing otherwise], it would be perfectly natural to deny access to information whenever there is a risk of injury to the public interest. That is due to a collision between fundamental values. The expression “public safety”, which is now consecrated as intrinsic to the public interest, would inevitably be derived from an interpretation of any kind of norm ([statutory] law, Constitution or International Convention) that lays down unspecified rules concerning the “public interest”.

A law that merely mentions “public safety” is therefore unnecessary and does not comply with the principle of action circumscribed by pre-existing laws, at least not in the Latin American context.

In the absence of a law, or when the law is so general that it amounts to the absence of a law, the administrative authorities therefore have to rely on the Constitution and international conventions in order to back up their actions.

Incidentally, the Model Inter-American Law indicates that the national administrative authorities must comply with the case law of the Inter-American Court of Human Rights. Yet what degree of certainty can we expect from the Latin American public authorities, with their well-known structural defects, by obligating them to base their administrative decisions directly on the case law of the Inter-American system, as above their national legal system?

It cannot be denied that the rules limiting the right to information involve subjects that are not easy for legislators to deal with on an abstract level²⁷, but more detailed laws are required²⁸, especially in legal systems that lack administrative authorities endowed with the prerogatives of independence, even the more so when the courts are overloaded. In such cases, the objective of the principle of action circumscribed by pre-existing laws is to prevent the public authorities from having an unlimited range of interpretations at their disposal.

²⁶ Article 4 (a) of the Law of El Salvador, Article 21 of the Law of Guatemala, and Article 8 of the Law of Uruguay.

²⁷ On the difficulty of interpreting vague legal terms in the abstract, see MAURER, Hartmut - *Derecho administrativo alemán*. México: UNAM, 2012, p. 141.

²⁸ On the possibility of reducing the vagueness of norms, including general clauses, by means of “definitions”, see GUASTINI, Riccardo - Interpretare e argomentare. In MESSINEO, Francesco [et al.] - *Trattato di Diritto Civile e Commerciale*, Milano: Giuffrè, 2011, p. 56. On interpretation in the abstract and authentic interpretation of law, ver MESSINEO, Francesco [et al.] – *Ob. cit.*, p. 81-90. On general clauses, vague legal terms, interpretation in the abstract and legal definitions, see WOLF, Hans J.; BACHOF, Otto; STÖBER, Rolf - *Direito Administrativo* [Administrative Law]. Lisboa: Fundação Calouste Gulbenkian, 2006, vol. 1, p. 448-450.

The Model Inter-American Law (Article 40 b), although it mentions the public interest, public safety and national defence in general terms, makes the application of such concepts conditional on more detailed laws. In that particular, however, it would have been better if the Model Inter-American Law itself had presented a detailed analysis of those concepts, which would make it easier to incite national legislators to do the same.

In that respect, the Model Law on Access to Information for African Union Member States, of 2013, drafted by the African Commission on Human and People's Rights²⁹ provides more detailed exceptions to the right to access information; in Articles 24 to 39, for example, "commercial and confidential information" is broken down into seven different items (Article 28), "national security and national defence" into nine items (Article 30) and "law enforcement" into four items (Article 33).

See, verbatim:

Art. 28 Commercial and confidential information of an information holder or a third party

(1) Subject to subsection (2), an information officer may refuse a request for information if it contains

- (a) trade secrets of the information holder or a third party; or
- (b) information about the information holder or a third party that would substantially prejudice a legitimate commercial or financial interest of the information holder or third party.

(2) A request may not be refused in terms of subsection (1) where

- (a) the disclosure of the information would facilitate accountability and transparency of decisions taken by the information holder;
- (b) the information relates to the expenditure of public funds;
- (c) the disclosure of the information would reveal misconduct or deception;
- (d) the third party consents to the disclosure; or
- (e) the information is in the public domain.

Art. 30 National security and defence

(1) An information officer may refuse to grant access to information where to do so would cause substantial prejudice to the security or defence of the state.

(2) For the purpose of this section, security or defence of the state means

- (a) military tactics or strategy or military exercises or operations undertaken in preparation for hostilities or in connection with the detection, prevention, suppression, or curtailment of subversive or hostile activities;
- (b) intelligence relating to
 - (i) the defence of the state; or
 - (ii) the detection, prevention, suppression or curtailment of subversive or hostile activities;
- (c) methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in paragraph (b);
- (d) the identity of a confidential source; or
- (e) the quantity, characteristics, capabilities, vulnerabilities or deployment of anything being designed, developed, produced or considered for use as weapons or such other equipment, excluding nuclear weapons.

(3) For the purpose of this section, *subversive or hostile activities* means

- (a) an attack against the state by a foreign element;
- (b) acts of sabotage or terrorism aimed at the people of the state or a strategic asset of the state, whether inside or outside the state; or
- (c) a foreign or hostile intelligence operation.

²⁹ AFRICA COMMISSION ON HUMAN AND PEOPLE' RIGHTS - *Model Law on Access to Information for Africa*. Available at: http://www.achpr.org/files/news/2013/04/d84/model_law.pdf. Access in 14 Feb. 2014.

Art. 33 Law enforcement

An information officer may refuse to grant access to information, where to do so would cause prejudice to:

- (a) the prevention or detection of crime;
- (b) the apprehension or prosecution of offenders;
- (c) the administration of justice; or
- (d) the assessment or collection of any tax or duty.

Closing considerations

In recent years, the codification process has been successful in most Latin American countries, thanks to approval of the general laws on access to official information compatible with the guidelines of the Inter-American human rights system, particularly the rules concerning proactive disclosure, information access and the associated restrictions.

However, the paucity of supervisory institutions with prerogatives of independence may be considered a fault in the systems of information access in Latin America.

This lacuna is exacerbated by the still embryonic culture of administrative law in Latin American in terms of the technique of conflict resolution through independent public authorities, despite the consensus that the (non judicial) administrative procedures on any subject must incorporate the guarantees of *due process of law*.

The most obvious negative effect of this situation is the intensified overload on the (non-specialised) courts; firstly, by conflicts that could be avoided or resolved more efficiently in the administrative sphere itself, and secondly by judicial claims that strictly speaking should have been referred to the administrative authorities from the start, but were not because of the lack of credibility of such authorities.

Against this backdrop, the right to access information would become more effective if the lack of independent supervisory institutions were compensated by legal codes, which should anticipate, as much as possible, interpretations (definitions or explanations) of the vague legal concepts that the public authorities are presently (still in many Latin American systems) free to interpret entirely at their discretion.

In the absence of legal prerogatives ensuring the independence of the institutions supervising the right to access information, it is advisable for the codes to modify the most sensitive rules open to fluid interpretation in such a way that the public authorities feel bound to abide by the letter of the law, which would create greater legal certainty and improve the credibility of the system in general.

This is a challenge that should be taken up by the legal codes in Latin America, increasing the effectiveness of the right to access information without depending on exaggerated judicial review, which is hardly ever ideal.

Final remark:

This text is an adaptation of the talk *The role of a legislative code in ensuring the effectiveness of the right of access to information in Latin America* of the Conference “Systematisation and

Codification of the Laws on Information” (*Систематизация и кодификация информационного законодательства*), held by the Institute of State and Law of the Russian Academy of Sciences (*Институт Государства и Права Российской Академии Наук*), in Moscow on 13- 14 March 2014.

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