

Inter-American Jurisprudence and Access to Information

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Acts of corruption like the ones we recently witnessed are fueled by environments in which access to public information is nil or restricted. In this particular case, the right-hand man of former president Alberto Fujimori used the public purse illegally to buy out the consciences of the owners of three important TV stations in order to control information and the media's political line. The fact that these activities became public was critical for this corrupt regime's collapse in November of 2000. If, during the 1990s, Peru had had mechanisms to ensure access to public information, it is possible that history would have played out differently.

The denial of access to information coupled with secrecy and closeness in the administration of matters of public interest are key elements of authoritarianism and corruption. The steps taken to reverse this trend have been fundamental to consolidate the democratic processes in our region and the rest of the world, by implementing laws and practices whose purpose is to ensure citizen access to public information. These positive developments come hand in hand with an increasing public awareness that is crucial for the strength and continuity of the policies that are being drafted in some countries.

Within this context, an important statistic is the number of laws that have been passed in recent years to ensure access to public information. In fact, more than half of the current laws worldwide were passed after 2000, showing the momentum that this new thinking has gained recently.

One of the things that has stood out in the inter-American system, in different shapes and forms during recent years, is the strong correlation between access to public information and democracy. There have been many resolutions passed by successive General Assemblies in the Organization of American States (OAS) addressing the importance of and need to protect access to public information. The Inter-American Democratic Charter puts forth, specifically, that one of the key components of democracy is "the transparency in government activities, honesty, ability to hold governments accountable for their public management, respect for social rights, and freedom of expression and freedom of the press." The same Charter stipulates that citizen input in public decision-making is a necessary condition for democracy to be exercised fully and effectively.

In this brief presentation I have been asked to refer to the decisions included in a ruling, in September of 2006, by the Inter-American Court for Human Rights regarding this issue. These decisions are relevant because of their conceptual implications and the fact that they are binding on those countries that have recognized the Court's jurisdiction. In other words, compliance is mandatory.

The Inter-American Court had, in previous decisions, made reference to the right of access to information. It had done so in 1985, in Advisory Opinion No. 5 regarding the “Mandatory Schooling for Journalists”. More recently, in contentious cases like that of Palamara Iribarne vs. Chile in November 2005, in which the Court emphasized the importance of democratic control by the people in order to further the transparency of state activities and official accountability. In addition, in the Myrna Mack Chang vs. Guatemala case in 2003, the Court reiterated that the authorities should not use the “state secret” mechanism to withhold information required by the judicial branch.

So, let us analyze the case that I have been asked to comment on, which was ruled upon in 2006. The facts of the case took place in Chile in 1998. They have to do with the denial by the Chilean state to provide all the information required by Mr. Marcel Claude Reyes and others from the Foreign Investment Commission in connection to the environmental investment that was to take place in that country under the *Proyecto Río Condor* (Condor River Project). The project included the development of a forestry complex that those requesting the information thought would have “considerable environmental impact.” This project had also engendered much public discussion.

At the time, the Commission’s vice chairperson argued that any information concerning the project’s investors was “private.” The state furnished information relevant to only four of the seven issues requested. Subsequently, the Court of Appeals of Santiago de Chile and the Supreme Court dismissed the charges that those who had requested the information pressed in order to safeguard their rights. After examining the facts, the Inter-American Court concluded that the information withheld was of public interest and, therefore, Chile had failed to fulfill her international obligations.

There are five basic concepts to this ruling that I would like to highlight. All of them emphasize something fundamental: that access to information is a “right”. In that light, they reiterate the state’s obligations thereto and put forth the substantive guidelines to ensure the protection of this right. The concepts I am talking about are:

1. Access to information is a right.
2. The state must comply with a number of positive obligations to ensure that citizens can exercise this right.
3. The state must act according to the principles of openness and transparency in public administration.
4. The restrictions posed on the right of access to information should be the least required and must be sanctioned in advance by the law.
5. The state must ensure the right of individuals to be fully heard and put in place a simple and quick process to exercise this right.

Let us take a closer look at these five points:

First, something that is fundamental: we are talking about a right, not a generous concession by the state. The Court has established, by consistent precedent, that the right to freedom of thought and expression includes searching, receiving, and sharing all kinds of

pieces of information and ideas. By seeing it as a right –enshrined under article 13 of the American Convention on Human Rights– it is possible for stakeholders to seek national or international courts whenever this right is violated. It is, of course, understood that any person can request information without having to prove any direct interest with the information requested.

Second, since it is a right we are talking about, the state is responsible for ensuring compliance. Consequently, the state must make sure that the right can be exercised. The Court has consistently underlined two basic norms in the Convention that are intended to guide state action in this regard. On the one hand, the general obligation to protect human rights codified under article 1.1 of the Convention, and on the other, the commitment, pursuant to article 2, to modify the domestic laws and the functioning of the state according to the Convention. This implies the obligation to organize the overall structure of the state in order to ensure the full exercise of all human rights. The Court has established that this duty entails ending norms and practices that could be in violation of the protections stipulated by the Convention, as well as the concomitant obligation to pass norms and promote practices to guarantee that the established rights will be respected. To apply all of this to the specific ruling we are discussing, this means that the Chilean state must pass the necessary norms and implement the appropriate policies to ensure that citizens enjoy full access to public information.

Third, that in a democratic society, the state must act in accordance with the principles of openness and transparency in public administration. It is a fundamental concept that access to information of public interest in the hands of the state is key for the open participation in public administration, through the social control that such access makes possible. In its ruling, the Court determined that such democratic control fosters transparency in state activities and promotes public official accountability.

Fourth, and this is related to the last point, state authorities must act according to the principle of maximum disclosure. Openness must be the rule of thumb; secrecy, the exception. The discretionary and arbitrary labeling of information by public officials as “secret,” “private,” or “confidential” engenders juridical uncertainty in regards to the exercise of the right and the state capacity to restrict it. The Court has established three conditions any restriction must have for it to be legitimate: One: that it has been previously sanctioned by law as a means to make sure that it will not be decided upon by the public. Two: that such restriction must be in accordance with one of the objectives allowed by the American Convention, that is, just to ensure that “rights are respected or to protect individual reputations” or “to safeguard national security, public order, or public health or morality”. Three: The restrictions imposed must be necessary in a democratic society. In other words, their objective must be that of safeguarding an imperative public interest, always trying to interfere to the least extent possible in the effective exercise of the right.

The fifth concept learnt from the ruling we are discussing: The state must ensure the right of individuals to be fully heard and implement a simple and quick process to exercise this right. The Inter-American Court has determined that the decisions taken by domestic agencies to restrict access to public information must be properly justified, otherwise they will constitute arbitrary decisions. The Court points out that in this case, the administrative

decision to deny access was neither communicated in writing nor properly justified. In addition, the Court concluded that the legal process and resolution of the protection recourse put forth violated the standards of due process codified in article 8.1 of the Convention. The Court reiterates the very basic principle that once the disclosure of information in the hands of the state is denied, there must be a legal recourse that is simple, quick, and effective in determining whether the rights of the requestor were violated, and if that is the case, in requiring that the specific government agency deliver the information.

The ruling's conclusion established the international responsibility of the Chilean state for violating articles 13, 8.1, and 25, in connection to articles 1.1 and 2 of the Convention. Moreover, it was established that the state must furnish, through the pertinent agency, the information requested by the victims and take the necessary measures to ensure the right of access to information in the hands of the state. Furthermore, the state must provide training about the norms protecting this right to the agencies, authorities, and public officials in charge of processing requests of access to information under state control. It must also implement the international parameters for the restrictions to access said information.

This ruling is, therefore, a very important step to affirm that access to information is a "right." Considering the leverage of an international court ruling, its decisions become compulsory precedents in the internal organization of states and the design and implementation of their legal norms; things that transcend the particular case we are discussing. This happens not only because the Court's interpretation aims at establishing guidelines that go beyond the case in question, but also because the courts in the region have begun using this conceptual framework in the legal process and solution of cases they come across.

For example, this is precisely what happened with the Constitutional Court in Colombia. In a recent ruling in 2007 regarding a law suit against the Ministry of Defense on the basis of its denial to provide certain information that had been requested, the Court reiterated and developed fundamental principles of the right of access to information referring, explicitly, to the ruling by the Inter-American Court we have been discussing. In addition, the Advisory Opinion issued by the Inter-American Court in 1985 about the mandatory schooling for journalists was used as a source of legal doctrine and precedent, namely its statement that freedom of expression included searching and receiving all kinds of information.

Dear friends, access to information is not just important in its own right. Without it, people lack the necessary elements to make decisions that affect public life and in which they are entitled to participate. Without information and free access thereto, the control and accountability of the public sphere become illusory and superfluous.