

Disclosing Justice

A Study on Access to Judicial Information
in Latin America



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Judicial Information in Latin America

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INTRODUCTION

In 2002, countries in Latin America enacted a wave of freedom of information (FOI) laws. While there were some existing national laws that attempted to promote greater transparency, it was not until the beginning of this century that a more concerted effort was made throughout the hemisphere to make information available to the public. These efforts were also propelled by a series of standards established by regional and international organizations, both governmental and non-governmental,¹ culminating in the decision of the Inter-American Court of Human Rights in the case *Claude Reyes vs. Chile*.²

Nevertheless, the impact of these laws on accessibility to judicial information has been quite varied. The impact of the laws on the judicial system is dependent on the breadth of the laws' provisions, and has certainly not been as evident as in other government branches.³

This report is a review of the legal frameworks for access to judicial information in ten Latin American countries. While mentioning some practices, particularly the use of Web sites to make information available, this report is focused on the review of laws and pertinent case law in Argentina, Chile, Colombia, the Dominican Republic, Ecuador, Honduras, Mexico, Panama, Peru, and Uruguay. These countries were selected based on the variety of national access to judicial information regulations they offer: from countries where such norms are basically absent, to countries where freedom of information regulations apply fully to the judicial branch. The development of the debate in these countries is also varied, from that in Uruguay, where the debate on access to information needs to be enhanced, to countries with substantial experience in requiring transparency from public entities, such as Mexico.

The research that appears in this publication was carried out by the Due Process of Law Foundation (DPLF) and commissioned by the Open Society Justice Initiative as part of its project, "Access to Information: Best Law and Practice" (forthcoming in 2008, see www.justice-initiative.org).⁴ DPLF requested the assistance of local organizations to gather the texts of national laws and judicial decisions relevant for access to judicial information. This information was classified and processed at DPLF, and summarized in Part One of this report. When needed, DPLF complemented the information through open sources and available bibliographies. Most of these summaries have been double-checked by the local consultants.⁵

The summary and analysis for each country is grouped into two kinds of information: that related to judicial proceedings, and that related to the management of the judicial system (administrative information).⁶

We acknowledge that access to information from judicial proceedings may present particular conflicts of rights. For example, the success of criminal investigations may be jeopardized if some information is made public, dissemination of family cases may collide with individuals' right to privacy, and child victims' rights may be put at risk when their identities are revealed. In contrast, the aforementioned conflicts are not present, at least not to the same extent, in information related to the administration and management of the judicial system. However, this difference may not be as clear in a number of Latin American judicial systems, where many management decisions, such as appointments, budgets, and expenditures, are made within the judicial system itself, sometimes by the judges themselves.⁷ There are a number of justice officials in the region who do not agree, or feel comfortable, with the argument that administrative information should not be subject to the same restrictions as judicial information, and that its disclosure does not jeopardize judicial independence. Additionally, many of the regulations on transparency enacted before the aforementioned wave of FOI laws in 2002 did not apply to any information from the judicial branch at all, including administrative information, which added to a culture of secrecy that only now is beginning to diminish. This report begins with the premise that judicial management or administrative information should not be treated any differently than the same kind of information made public by other state entities.

Throughout this report, we define a freedom of information law as "an Act to promote maximum disclosure of information in the public interest, to guarantee the rights of everyone to access information, and to provide for effective mechanisms to secure that right."⁸

The second part of the report presents the findings and conclusions based on a general analysis of the legal framework in those countries under study. First, it describes the different models of regulating access to judicial information. Then, it looks at specific sets of information, to discern trends and commonalities, as well as lacunae in the laws and decisions.

We believe this report is an important step towards developing recommendations for improving access to judicial information. Despite the fact that, as this report shows, there are many regulations governing access to judicial information, it is important to continue to examine and study how these regulations are actually applied in practice. DPLF will continue its efforts in this area of research.

NOTES

1 See particularly “Access to Information Monitoring Tool” developed by Open Society Justice Initiative (OSJI), available at “www.justiceinitiative.org/activities/foifoe/foi/foi_aimt”; also follow link on same page for “FOI Laws of the World.” See also the standard-setting work of Article XIX at: www.article19.org/publications/law/standard-setting.html, as well as some efforts of the Organization of American States to promote access to information by many resolutions passed by the OAS General Assembly: AG/RES. 1932 (XXXIII-O/03); AG/RES. 2057 (XXXIV-O/04); AG/RES. 2121 (XXXV-O/05); AG/RES. 2252 (XXXVI-O/06). The Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (OSRFE-IACHR) had issued biannual reports on the situation of access to information in the region (see annual reports at: www.cidh.org/relatoria, reports of 2001, 2003 and 2005). The Inter-American Commission on Human Rights included access to information in its Declaration of Principles on Freedom of Expression (2000): “4. Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.” In: www.cidh.org/relatoria/showarticle.asp?artID=26&IID=1.

2 See: www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc. See also a summary of the case in: Eduardo Bertoni, “Inter-American Court of Human Rights Issues Landmark Ruling on Freedom of Information,” at MLRC Media Law Letter, October 2006, page 47.

3 The Due Process of Law Foundation (DPLF) has been analyzing the difference in the impact in a project that was launched in 2006, the results of which will be published in the second semester of 2007.

4 This report was drafted by Montserrat Solano Carboni, coordinator of DPLF’s judicial accountability and transparency program, under the supervision of Eduardo Bertoni, DPLF’s executive director.

5 DPLF wants to thank the local organizations for all the information provided. We also want to thank Kristina Aiello, collaborator of DPLF, who helped in drafting the section on Peru.

6 This division of information was used by the Justice Studies Center of the Americas and the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights in a 2002 project on access to judicial information. See: www.cejamericas.org/accinfo/muestra_seccion.php?idioma=ingles&capitulo=ACJU-030&tipereport=ACCINFOR&seccion=INTRODUCC.

7 In some countries, this is the task of councils of the judiciary, but some of these councils, even if independent, are within the judicial system, and their members are treated as “judges.” In other cases, administrative decisions are made by the Supreme Court, or organs under the control of the Supreme Court. More recently, independent councils of the judiciary, outside the judicial system and with participation of different sectors of society, have been established.

8 See: Article XIX, “A Model Freedom of Information Law,” August 3, 2001, in: www.article19.org/pdfs/standards/modelfoiaw.pdf.

Part I Country Analysis



ARGENTINA¹

The information gathered in Argentina was limited to the National Supreme Court, although some of the information is applicable broadly to the whole federal system, including some state jurisdictions.

Argentina has not enacted a freedom of information (FOI) law. In 2003, the Executive Branch issued a decree establishing mechanisms to increase transparency in government actions, although it does not apply to the judicial branch. Nevertheless, it establishes an exception to the general rule of access in relation to information prepared by lawyers, which, if disseminated, could reveal the legal strategy of public bodies in a judicial procedure or investigation, or jeopardize due process.

While there is a lack of legislative acts establishing or regulating, specifically, the right of access to information originating in the judicial system, there are decrees issued by the Supreme Court and other judicial bodies, as well as case law offering guidance in this respect. Additionally, there are legislative provisions in the Act on Ethics in the Public Office applicable to members of the judicial branch requiring them to exercise their duties with transparency, without limiting access to information unless there is a public interest law clearly allowing limitations.²

It has been interpreted that the constitution provides an obligation of transparency that would also apply to the judicial system.³ This duty would stem from Article 1 of the Argentinean National Constitution, which establishes a republican form of government.⁴ According to Argentina's Supreme Court of Justice, a republic requires that government information be available to the public, and such a requirement applies to information originating from the judicial system, such as its case law,⁵ administrative acts, and personnel and general decrees (*acordadas de alcance general*) from the Supreme Court.⁶ Most of the analyzed decisions and norms upholding access to judicial information refer to this constitutional principle.

Furthermore, constitutional Article 75.22 ensures the domestic application of international human rights treaties, including the American Convention on Human Rights (ACHR),

the International Covenant on Civil and Political Rights (ICCPR), and the Inter-American Convention Against Corruption (IACAC). The Supreme Court has interpreted that, in light of these treaties, there is a duty to ensure access to information.⁷ Nevertheless, those same instruments may also allow or mandate some restrictions, such as those established by the Convention on the Rights of the Child (CRC) for the protection of the honor and reputation of children,⁸ and the limitations allowed by ICCPR in specific circumstances, such as those required for the protection of national security, *ordre public*, the interests of justice, juveniles, and some family matters.⁹

INFORMATION OF AN ADMINISTRATIVE NATURE

As stated before, the Supreme Court has determined that the principle of publicity in a republic should apply to judicial information. This statement has, in fact, been made clearer in a decree that requires the availability of mostly administrative information on the Web site of the Supreme Court.¹⁰ The Supreme Court has also recognized a need for transparency to ensure proper supervision over the work of the judicial system by the general public.¹¹

The Supreme Court has therefore ordered that the following information should be made public:¹²

- The list of personnel, their posts, and duties, which should be updated at least monthly;
- Administrative decrees and resolutions related to appointments and promotions, procurement, dismissals, extraordinary leave, and sanctions;
- Budgets;
- Statistics of the work of the Supreme Court;
- Any decree or resolution of general application; and
- How the cases in the docket are distributed among the justices of the court.

The Supreme Court has also established an information center, which has among its functions to ensure a better understanding by the public of the work of the judiciary.¹³

There are specific provisions in the Law on Ethics in the Public Office requiring every state official, including members of the judiciary, to issue a declaration of assets and information to control possible conflicts of interest. The act authorizes access to such information to anyone requesting it in writing. The request must include, among other requirements, the

name of the person requesting the information, the motive behind the request, and how the information received will be used.¹⁴ The act also establishes sanctions if the information received is used for illegal, commercial, or solicitation purposes, although those sanctions do not apply to the use of information by the media.

Nevertheless, in 2005, the Consejo de la Magistratura¹⁵ (Magistrates' Council) regulated the access to the declarations of assets of judiciary members by requiring two separate declarations, one to be publicly available, and the other one to be confidential.¹⁶ The latter includes information such as the names of the banks and numbers of judicial officials' accounts, their declarations on taxes for income other than their salaries, and the addresses of their properties.¹⁷ Access to such information can only be permitted by a judicial order, to disciplinary commissions or in relation to an indictment by the Consejo de la Magistratura.¹⁸ Access to the public record of assets must be requested in writing¹⁹ from the Administración General del Poder Judicial, and the request is forwarded to the concerned official, who must answer within 72 hours.²⁰ The Administración must provide reasons for its decision. Such a decision can be appealed to the Consejo de la Magistratura, which has 72 hours to issue a final statement.²¹

The Law of the Consejo de la Magistratura states that all its files are public, particularly those regarding disciplinary procedures against judges.²² The disciplinary proceedings must also be oral and public,²³ particularly the hearings.²⁴ In addition, there are public thematic and informative hearings, in which the court informs about its work and specific issues. The discussion of disciplinary and appointment issues is excluded from these hearings.²⁵

In relation to appointment procedures, the Law of the Consejo de la Magistratura establishes that the publicity requirement would be satisfied by three consecutive publications in the government's official publication and a national daily. It also establishes that information on vacancies should be updated and that the application forms for participating should be available on the Internet.²⁶ The statute on selection and appointment of judges²⁷ also includes some provisions on transparency. For instance, it requires vacancies to be announced through the Internet, posters, the law society, the judges' association, and law schools.²⁸ It also requires publicity of the list of candidates²⁹ and a public interview of short-listed candidates.³⁰ While the provisions are intended to ensure the integrity of the appointment procedure by guaranteeing access to information among participants, they are silent in relation to means for access to information by others. However, and in line with the Supreme Court decree, most of the information on selection and appointments is available on the Web site of the Consejo de la Magistratura.

In relation to the appointment of the Supreme Court justices,³¹ their approval by the Senate should be done in a public session. The candidates' resumés should be published in at least two newspapers distributed nationwide and in the official bulletin (*Boletín Oficial*) during three days. In addition, it should be published on the Web site of the Ministry of Justice, Security and Human Rights.³²

Information on acquisitions of goods is regulated by the general norms of administrative contracts, according to which publicity is one of the main principles to ensure efficacy and efficiency of contracts. The statute on state contracts includes some provisions to ensure transparent procedures, such as the publicity of the inclusion of changes to the providers' registry,³³ and the possibility for anyone to attend the meeting for the opening of offers³⁴ and the announcement of decisions of purchase.³⁵ Procurement law requires public announcement of the procedure, and the opening of offers in a public meeting.³⁶ The decisions of the Consejo de la Magistratura in this respect are available on its Web site.

INFORMATION FROM JUDICIAL PROCEEDINGS

The Regulation for National Justice establishes that access to information regarding judicial procedures is not limited to parties before the court.³⁷ As for restrictions on access to information from judicial procedures, the case law and the forewords of the decrees usually refer to those allowed by Article 14.1 of the ICCPR, Article 8.5 of the ACHR, and national laws. The latter refer to the protection of minors,³⁸ family matters, and some privacy issues, such as those related to the AIDS Act³⁹ and domestic violence.⁴⁰

The Supreme Court, in a general decree, established the importance of access to its case law and requested the improvement of its dissemination, particularly by publishing it and improving the search engine of the database. The Code of Civil Procedure does not require, but allows, the publication of final decisions, unless some restrictions are needed for reasons of honor,⁴¹ and, when privacy requires, the Code permits concealing the names of those involved or third parties.⁴²

The Supreme Court has upheld a limited interpretation of these restrictions. In a 2005 case, the plaintiff requested the elimination of his name from a publicized decision convicting him of a sexual crime. He claimed that its distribution could affect his privacy and have negative consequences on his life. The court invoked the republican principle of publicity

of government acts and established that the guarantees of justice require decisions to be made public. The court decided that “the republican rule is to publish the decisions with full names, and the exceptions are only those allowed by the National Constitution, international treaties, Article 14.1 of the International Covenant on Civil and Political Rights, and national laws.”⁴³ While admitting that the publication of the plaintiff’s name could be damaging, the court decided that such damage would derive from the acts of the plaintiff and not from the decision itself. Moreover, it ruled that the supervision by citizens over the judicial branch can only be exercised through a comprehensive knowledge of court decisions.⁴⁴

Lawyers may have access to all judicial files, and after the final decision, all journalists also have access to the files.⁴⁵ Any other third party can have access to the files if accompanied by a lawyer or if requesting such access through the secretary of the court.⁴⁶ The exceptions are those related to information declared as secret and family matters. In relation to criminal investigation files, the Code of Criminal Procedure establishes that third parties may not have access to these files.⁴⁷

Since 2004, the Supreme Court has allowed civil society groups to file *amicus curiae* briefs in cases of a general interest.⁴⁸ To make such participation possible, the court has decided that those cases should be made public and announced by the court.⁴⁹

As for the public hearings, the Civil and Criminal Procedure Codes establish publicity as the general rule. Nevertheless, they allow some restrictions, when the case so requires, or for reasons of security, morality, or *ordre public*.⁵⁰

Invoking the republican publicity rule, calling for justice to be open to the public and upholding the need for public control over government activities, the Procuración General de La Nación has established that all its opinions should be made public, excepting those that, according to the law, cannot be published.⁵¹

As for the mechanisms to make this information available, as stated before, the Supreme Court has established an information center in charge of making its case law available. It has also requested that its decisions be published through the Internet and it has established that, as a general rule, its decisions should be published in full.

The Procuración General de la Nación, in relation to its own opinions filed with the Supreme Court, has determined that, while there is a clear demand for publicity, it is subject to the restrictions and provisions of the Protection of Personal Data Act and other legislation.⁵²

NOTES

- 1 The Asociación por los Derechos Civiles (ADC) provided the background information for drafting this section.
- 2 Ley de Ética en la Función Pública, Ley 25.188 (1999) Art.2 (e).
- 3 E.g.: Acordada de la Corte Suprema de Justicia de la Nación No. 1/2004 Exp. 315/2004 Adm. Gral.
- 4 Constitución Nacional de la República Argentina (1994), Art.1. For text see: <http://pdba.georgetown.edu/Constitutions/Argentina/argen94.html#primerapartecap1>.
- 5 See: Corte Suprema de Justicia de La Nación, K.131.XXXIX, “Kook Weskott, Matías s/ abuso deshonesto. Causa No.963,” 28 July, 2005, para. 2.
- 6 Supra n. 3.
- 7 See: supra n. 5, supra n. 3, and Corte Suprema de Justicia de la Nación, S.622.XXXIII, “S.,V. c/ M., D.A. s/medidas precautorias,” 3 April, 2001, at 25.
- 8 Supra n. 7, “S.,V. c/ M., D.A. s/medidas precautorias,” at 26. See also, Convention on the Rights of the Child (1989) Art.16; for text see: www.unhcr.ch/html/menu2/6/crc/treaties/crc.htm.
- 9 International Covenant on Civil and Political Rights (1966), Article 14.1; for text see: www.ohchr.org/english/law/ccpr.htm.
- 10 Supra n. 3.
- 11 Acordada No.35/2003.
- 12 Supra n. 3, supra n. 11.
- 13 Acordada No.17/06 Exp. 2078/06.
- 14 Supra n. 2 Art. 10.
- 15 According to Article 114 of the Argentinean Constitution, the Consejo de la Magistratura (Magistrates’ Council) is in charge of the administrative management of the judicial branch. Its members are representatives of publicly-elected political bodies and the legal community (lawyers and judges). For text see supra n. 4.
- 16 Consejo de la Magistratura, Resolución No.562/05. Anexo: Reglamento de Presentación y Consulta de las Declaraciones Juradas Patrimoniales del Poder Judicial de La Nación, Art. 2.
- 17 Ibid.
- 18 Ibid., Art. 12. The Consejo de la Magistratura is in charge of the discipline of magistrates. (Supra n. 15). The Supreme Court had issued an acordada establishing that the judicial official should be informed of the requests of such reserved information. It has also determined that the General Administration Office of the Supreme Court (Administración General de la Corte Suprema) is in charge of keeping these declarations and for ensuring access to the public declaration. See: Acordada No. 30/05, 27 December 2005.
- 19 Supra n. 16 Art.15.

20 Ibid. Art.16.

21 Ibid.

22 Infra n.26. Art.8.

23 Ibid. Art.25.

24 Ibid. Art.26.5.

25 Reglamento de Audiencias Públicas dentro del Ámbito del Consejo de la Magistratura del Poder Judicial de la Nación.

26 Ley del Consejo de la Magistratura (1999) No. 24.937 as modified by the Law 24.939, Art. 15.

27 Reglamento de Concursos Públicos de Oposición y Antecedentes para la Designación de Magistrados del Poder Judicial de La Nación.

28 Ibid. Art. 5.

29 Ibid. Art. 18.

30 Ibid. Art. 43.

31 The Supreme Court justices are appointed by the president with the approval of the Senate.

32 Supreme Court of Justice, Decree 222/03.

33 Reglamento de las Contrataciones del Estado de la Ley de Contabilidad, Art. 61.27.

34 Ibid. 41 Art. 61.62.

35 Ibid. Art. 61.78.

36 Ley 13.064 Contratación de Obra Pública, Arts. 10-11 and 16.

37 See Reglamento para la Justicia Nacional, Art. 63, referred to by infra 53.

38 Supra n. 7, supra n. 5. See also, Ley No.20.056.

39 Ley No. 23.798.

40 Corte Suprema de Justicia de La Nación, Acordada 40/2006, Expte.3299/04. Reglamento de Violencia Doméstica, Art. 40.

41 The word in Spanish is “decoro,” which could also be translated as “decency.”

42 Código Procesal Civil y Comercial de La Nación, Art. 164.

43 Supra n. 5 para. 4 (author’s translation).

44 Ibid.

45 See: Reglamento para la Justicia Nacional, Art. 63, referred to by the Procuración General de la Nación, Ministerio Público, Res. PGN No. 15/07, March 7, 2007.

46 Ibid. Art. 66.

47 Código Procesal Penal, Art.204. See: Rodríguez Villafañe, Miguel Julio, “La Transparencia en el Poder Judicial de Argentina,” in Caballero Juárez, et al., *El Acceso a la Información Judicial en México: una vision comparada*, (Washington, UNAM-DPLF-IIJusticia-OSI, 2002), p. 22.

48 Corte Suprema de Justicia de la Nación, Acordada 28/2004.

49 Corte Suprema de Justicia de la Nación, Acordada 14/2006.

50 Villafañe, supra n. 47 at 23.

51 Supra n. 45. In its assessment, the Procuración nevertheless recognizes that the decisions from the Ministerio Público Fiscal are not being published, but only those of the Procuración General de la Nación, albeit through a not very well-maintained and organized database. At the moment of the assessment there was no way for the general public to gain access to those opinions, and only a limited number of them could be found on the Web site. The study also recognizes that, within the Procuración, there is no clarity among the employees on how to interpret the requirement to make the decisions accessible to the public.

52 Particularly, information that, if disseminated, may harm the rights of the child, interests of justice, decency, privacy, or relating to family matters or a criminal investigation. Supra n. 47 (no. 53).

CHILE¹

In 2005, an amendment to the Chilean Constitution was approved to include the principles of transparency and publicity of state acts and resolutions, as well as the reasoning for them.² The provision allows exceptions as long as they are established by a qualified law (a law requiring a higher number of votes to be approved), and only if disclosing information would have a negative effect on the functioning of the different bodies of the state, the rights of individuals, state security, or national interests.

Article 19, No. 12 of the Constitution provides for the freedom to express opinions and to inform, but, in contrast to other constitutional provisions in Latin America, the wording does not seem to include a “right to receive” information.³ However, this has not been an obstacle to interpreting this provision, as it enshrines freedom of opinion and information in general, and also encompasses access to information.⁴ Furthermore, the Court of Appeals of Valparaíso has recognized that the exercise of the rights encompassed in Article 19, No.12 of the Chilean constitution is the most efficient means for citizens to exercise control over judges’ duties.⁵ Therefore, it may be said that the constitutional provision also enshrines a right of information related to the judiciary. In addition, the constitution also provides for a right to petition, which in other jurisdictions has been considered as a means for ensuring access to information.⁶

According to Miguel González Pino, the Director of Communications of the Judicial Branch in Chile, the rights to life, privacy, and reputation have been considered, at least theoretically, to override, almost in an absolute manner, freedoms of opinion and information.⁷ Nevertheless, the Supreme Court of Chile has established that the right to inform, having constitutional grounding, overrides the protection of presumption of innocence, which has not been enshrined in the constitution, and has only statutory protection.⁸

At the time of drafting this report, Chile had not yet approved a freedom of information (FOI) law. In any case, the draft FOI legislation that is being considered in the Chilean legislative branch does not apply in full to the judicial branch, except for a provision requiring the judicial branch to publish updated information on its Web site related to administrative and organizational information.⁹

In the absence of an FOI law, the main legal instrument giving support to access to information is the Act on Administrative Probity,¹⁰ which establishes a basic mechanism for access to information, and enumerates the allowed reasons for denying disclosure. This law does not apply to the judiciary, however.¹¹

The Organizational Code of Tribunals (Código Orgánico de Tribunales) establishes that all acts of all tribunals are public, taking into account the exceptions established by law.¹² Despite such a clear provision, however, it has been admitted that Chilean tribunals do not always comply with it.¹³

Furthermore, there is no law establishing a mechanism for access to judicial information. With few exceptions,¹⁴ there are no procedures establishing deadlines, terms, appeals, or any other remedy to ensure access to information.

INFORMATION OF AN ADMINISTRATIVE NATURE

There are few provisions on access to administrative information that may apply to the judicial branch, since the Law on Administrative Probity does not include the judiciary. As stated before, the Organizational Code of Tribunals requires all acts of tribunals to be public, although the extent of such an obligation in terms of administrative information from the judiciary is not completely clear.

The president of the Supreme Court issues a public account of the judicial year, which is published in the Official Daily and on the judicial system's Web site. All judges and tribunals must also offer public accounts of the management of their courts.¹⁵ Every general regulation (*auto acordado*) should be published in the Official Daily.¹⁶

The Web site of the Chilean judicial branch includes information on vacancies, selection procedures, and appointments. The Web site includes information on short-listed candidates for high courts, the votes received, and their qualifications.¹⁷ There are few provisions on to what extent the appointment of judges should be public. The personnel files (known as the *hoja de vida*), which include the judicial officials' yearly evaluations, are private, and may only be accessed by the official him- or herself, the evaluation body, the President of the Republic, and the Ministry of Justice.¹⁸ In the case of the Constitutional Court, the Supreme Court appoints three of the ten constitutional judges, and the law requires this to

be done through a secret ballot.¹⁹

The judicial branch has been including and updating administrative information on its Web site, such as information regarding its organization, public contracts,²⁰ statistics, salary scale, and news, among many other topics.²¹

In the case of the Office of the Prosecutor, its law establishes that its public function will be transparent, in such a way as to allow and promote knowledge about its procedures and their content, as well as the reasoning for every decision.²² The law clearly establishes that the administrative information from this body, including background information, is deemed public. Access to such information may be denied if its secret character is established by law or statute, when publicity collides with the accomplishment of the office's functions, when the person affected by such disclosure requests it, when the dissemination affects the rights or interests of third parties, or when it affects national security or interests.²³ The regional prosecutors' offices are required to offer annual public accounts of the activities of their offices, including statistics, the use of funds, and problems.²⁴

INFORMATION FROM JUDICIAL PROCEEDINGS

The recently implemented Code of Criminal Procedure has enshrined the right to a public and oral trial.²⁵ Changes between the previous criminal procedure code and the one currently in place are reflected in wider access to files, hearings, and the parties' access to criminal investigations. In general, every judicial proceeding is carried out in a public hearing, except for criminal investigations.²⁶

Criminal investigation information cannot be accessed by parties not involved in the proceedings. Those charged, as well as any other person intervening in the criminal proceedings, may have access to the investigation files, but they are obliged, as are public officials, to remain silent about the inquiry.²⁷ Additionally, the prosecutor may declare a specific action as secret, even for the parties in the proceedings, for no more than 40 days.²⁸ However, this exception may not affect the suspect's declaration, actions in which the tribunal had participated, experts' reports on the suspect, or any other action to which the person charged has the right to have access. The decision establishing secrecy of a part of the investigation may be appealed.²⁹

It is forbidden for police officers to inform the media about the identity of detainees, victims, witnesses, or others involved in a crime.³⁰ In addition, judicial officials who reveal secrets from a trial may face criminal charges.³¹

While criminal investigations are deemed secret, the Valparaíso Court of Appeals established that judges may not prohibit the media from disseminating information on criminal inquiries that they may have accessed. Doing so, according to the court, would put a shield over judges' actions that would impede public control. The court clarified that this would not imply that criminal investigations should not be confidential, but that the responsibility to ensure confidentiality does not correspond to the media.³²

Whereas the aforementioned decision referred to cases under the previous criminal procedure code, the Supreme Court of Chile has upheld a similar argument in relation to cases following the new Code of Criminal Procedure. In a case in which the media published the identity of a suspect in a criminal investigation, the court established that the legal obligation to maintain secrecy in an investigation corresponds to public officials (police officials), who are the ones forbidden to reply to press inquiries, and not on the media.³³ Moreover, it has established that the confidentiality of criminal investigation files in relation to third parties may not be extended to the media, since they exercise an activity protected by the constitution, while subject to ulterior responsibilities.³⁴

The Code of Criminal Procedure establishes a series of provisions to ensure that detainees and persons charged know their rights and are given the information needed to exercise them, such as the charges filed against them and the reasons for their detention, and that their rights must be posted in detention centers.³⁵ Every lawyer has the right to request and receive information on whether a specific person is being held in a detention center.³⁶

After the investigation, those involved in a criminal proceeding would have access to the files. Even third parties would enjoy such access if the information is already public, unless the tribunal restricts access to protect the investigation or the presumption of innocence. In any case, the files would be public after five years from when the actions described in the files took place.³⁷ The prosecutor is required to give information to the victims related to their rights and the proceedings they may initiate.³⁸

With the exception of the investigation part, the general rule is that hearings of criminal proceedings are public.³⁹ The judge, though, has the possibility to restrict such publicity to protect the privacy, reputation, or security of any person intervening in the procedures, or to impede the

dissemination of a legally-protected secret.⁴⁰ The media has a right to photograph, film, record, and transmit parts of the hearing, unless the parties agree to restrict such possibility. If they disagree, the judge may decide.⁴¹ However, the judge may not impose prior censorship on the media, including to prohibit the use of the names of those involved in the proceedings.⁴² Nevertheless, there are exceptions to the latter, since, as a means to protect witnesses, experts, and others involved in a particular procedure, judges, under specific circumstances, may also restrict publicity, and impede the dissemination of their identities or addresses.⁴³ In procedures related to sexual offenses, the identity of the victim is considered confidential.⁴⁴

Whereas tribunals deliberate in private, the judgments are issued and read in a public hearing.⁴⁵ However, information from conviction records is not public and may only be accessed by judicial and police authorities.⁴⁶

Hearings at the appeals level are public.⁴⁷ In general, courts of appeals listen to the parties' cases publicly,⁴⁸ although the deliberations and decisions take place in private (unless there is a need to call for some judicial employees' assistance).⁴⁹

The secretaries of all of the tribunals or courts are required to provide information to anyone inquiring about the cases in their archives and about all acts of their offices unless the law establishes otherwise.⁵⁰ The restrictions include releasing decisions not yet signed by judges.⁵¹

According to González Pino, civil proceedings are mostly carried out in writing; therefore, access to information related to them would require access to the written files. Even witnesses' declarations are recorded in writing, since tribunals do not have the infrastructure needed for public hearings.⁵²

In relation to matters of family and children, the law requires the judge to guard the privacy of the parties, particularly of minors. It allows the judge to ban the dissemination of information or images referred to during trial or by the parties, or to declare some parts of the proceedings as confidential.⁵³ In cases of custody disputes and adoptions, the law establishes that the whole process is secret until a decision is issued.⁵⁴ According to the law, proceedings on marriage annulments and divorces are deemed confidential.⁵⁵ In any case, media are forbidden to disseminate the identity of minors involved in criminal matters, either as suspects, witnesses, or victims of specific crimes.⁵⁶

There is no norm requiring the publication of case law. However, according to González Pino, there are different means of disseminating the case law, including some private efforts and others from the judicial system.⁵⁷

The Web site also includes the schedule of the Supreme Court, appeals courts, and criminal tribunals, including cases to be heard each day by each court. When necessary, the information is divided by region. In the case of family tribunals, a password is required for access.⁵⁸ The Web site allows access to information on the latest movements of a specific case or file through a search engine on cases. Inquiries may be made by the “RUT” number (tax identification number), names, or the number of the case. The identities of minors, victims, and witnesses are excluded in searches done by name or RUT.⁵⁹

NOTES

- 1 The background information for this chapter was gathered by Nina Walch from Fundación ProAcceso.
- 2 Political Constitution of the Republic (1980), Article 8, modified in 2005, by the reform of the No.20.050 Act. For text see: www.senado.cl/prontus_senado/site/artic/20050516/pags/20050516221649.html.
- 3 Ibid. Art. 12.
- 4 González Pino, Miguel, “El acceso a la información judicial en Chile,” en Caballero y otros, *El acceso a la información judicial en México: una visión comparada* (DPLF-UNAM-IIjusticia-OSI, 2005), at 113.
- 5 Valparaíso Court of Appeals, 12010-98, July 30, 1998, para. 7.
- 6 Supra n. 2 Art. 19 No. 14.
- 7 Supra n. 4.
- 8 Supreme Court of Justice, 683-2004, February 26, 2004, para. 12.
- 9 Text of the draft legislation approved by the Chamber of Deputies, June 13, 2007. The provision states that the judicial branch through its administrative institutions shall publish information on its Web site about its organization; the functions, duties, and powers; the legal framework; personnel; contractors and their hours; public contracts on services and goods; resolutions; proceedings; subsidies and their beneficiaries; budgets and expenditures; and audit results.
- 10 Act DFL -1- 19.653 Law on Administrative Probity, Art.13.
- 11 The Act 19653 modified the Ley de Bases de la Administración del Estado, and because of this the Ley de Probidad Administrativa (Law on Administrative Probity) only applies to institutions of the Executive Branch.
- 12 Act No. 7.421 Código Orgánico de Tribunales, Art. 9.
- 13 Supra n. 4 at 114.
- 14 Such as the right of the parties to have access to parts of the criminal investigation declared secret.

- 15 Supra n. 12 Art. 23.
- 16 Supra n. 4 at 115.
- 17 Information provided by ProAcceso, in the framework of another project with DPLF.
- 18 Supra n. 12 Art. 274 and supra n. 64 at 123.
- 19 Supra n. 2 Art. 92(c).
- 20 The Web site was modified in April 2007. This information was included.
- 21 See: www.poderjudicial.cl.
- 22 Ley 19640, Organizational Law of the Office of the Prosecutor (Ley Orgánica del Ministerio Público) Art. 8.
- 23 Ibid. Art. 8.
- 24 Ibid. Art. 36.
- 25 Ley 19.696 Criminal Procedural Code, Art.1.
- 26 See, for example: Ibid. Art. 132 on the first appearance of detained suspects; Art. 229, on the hearing in which the prosecutor files charges; Art. 237, on the hearing where the prosecutor and the suspect request that the trial be suspended and that an alternative punishment of a more reparative nature be imposed; Art. 249, where the prosecutor argues the innocence of the suspect; Art. 260, on the hearing where the suspect is informed of the charges against him.
- 27 Supra n. 25 Art. 182.
- 28 However, in the case of investigation for drug trafficking there may be the possibility to declare the investigation as secret until it is finished. See Act 20000, Punishing Drug Trafficking, Art. 36.
- 29 Supra n. 25 Art. 182. The norms of the Office of the Prosecutor establish that publicity would be determined according to criminal procedure norms, see supra n. 22 Art. 8.
- 30 Supra n. 25 Art. 92.
- 31 Criminal Code, Art. 224.
- 32 Supra n. 5 para. 10.
- 33 Supreme Court of Justice, 183-2004, January 22, 2004.
- 34 Ibid.
- 35 Supra n. 25 Arts. 93, 135, and 137.
- 36 Ibid. Art. 96.
- 37 Ibid. Art. 44.
- 38 Ibid. Art. 78, a) and c).
- 39 Supra n. 4 at 119.
- 40 Supra n. 25 Art. 289. The judge may request some specific persons, or the public, to leave the courtroom for specific procedures, or order the prosecutor, parties, or anyone intervening not to provide information or statements to the media. The media may take photographs or transmit those parts of the hearing allowed by the judge.

- 41 Supra n. 25 Art. 289. See also, Supreme Court of Justice, 2913-2004, July 29, 2004.
- 42 Supra n. 8.
- 43 Supra n. 28 Art. 31, supra n. 22 Art. 307, and Law 18.314 on the Effective Repentance of Terrorists, Art. 16.
- 44 Supra n. 4 at 121.
- 45 Supra n. 25 Arts. 339, 343 and 346. One particular exception is in the case of Law 18.314 on the Effective Repentance of Terrorists. In the cases regulated by this law, the judges' decisions are secret. See supra n. 64 at 122.
- 46 DL No. 645, Registry on Convictions.
- 47 Supra n. 25 Art. 358.
- 48 Act. 1552 Code of Civil Procedure, Art. 223.
- 49 Supra n. 2 Art. 81.
- 50 Ibid. Art. 380. See also, supra n. 4 at 114.
- 51 Supra n. 2 Art. 375.
- 52 Supra n. 4 at 123.
- 53 Act No. 19.968 that establishes Family Courts, Art. 15.
- 54 Civil Code, Art. 197 and supra n. 4 at 122.
- 55 Civil Procedure Code, Art. 756, see also supra n. 4 at 122.
- 56 Act. 19733, Press Law Art. 33.
- 57 Supra n. 64 at 124. The Web page with the case law of the Supreme Court was under construction at the time of writing, see: www.poderjudicial.cl/index.php?pagina1=blank.php&pagina2=sentencias.php.
- 58 See: www.poderjudicial.cl/index2.php?pagina1=salas_suprema.php.
- 59 See: www.poderjudicial.cl/index2.php?pagina1=estados_causas.php.

COLOMBIA¹

The Colombian constitution enshrines a right to impart and receive truthful and timely information along with a right to access public documents, except according to legally-established exceptions.² These provisions may be interpreted as encompassing judicial information. The constitution also recognizes the right of every individual to request, update, or clarify personal information kept in public or private databases or archives.³ It further establishes that judicial actions are public, except when the law provides otherwise.⁴

Act 57 of 1985⁵ establishes a right to have access to public documents, as long as they are not classified as confidential according to the constitution or specific laws, and they are not related to national security.⁶ However, the judicial branch is not included among the institutions regulated by the act.⁷

Act 594 of 2000, which applies to the judicial branch,⁸ recognizes the right to access documents held in public archives⁹ as long as they are not considered confidential according to the law and the constitution. This statute requires public authorities to guarantee the privacy and reputation of individuals.¹⁰ The Administrative Chamber of the Superior Council of the Judiciary, which is the administrative body of the judiciary,¹¹ issued a resolution establishing the regulations for the handling of documents in the judicial branch. This resolution provides that the judicial branch will allow parties, judicial officials, and any other individual access to administrative files and documents, as long as they are not considered reserved.¹²

There are numerous decisions from the Constitutional Court that refer to access to information and its exceptions. It is relevant that the Constitutional Court has established a link between the right of access to information and the rights of victims to truth, reparations, and justice.¹³

Moreover, the Constitutional Court established that, in a democratic society, the general rule is to allow access to all public documents, and that public authorities have a duty to

provide clear, complete, timely, truthful, and updated information about any state activity. Every public body should also have a policy to maintain documents, particularly those related to serious and systematic human rights and humanitarian law violations.¹⁴

The Constitutional Court has determined that exceptions to the general principle of disclosure should be exceptional and established by a legislative act.¹⁵ They should aim at protecting another legitimate purpose according to the constitution, such as ensuring fundamental rights (e.g. the right to life or the right to privacy) or safeguarding national security.¹⁶ The restrictions should also be reasonable and proportional to that objective, in the context of a democratic society.¹⁷ For a restriction to be allowed, it should be established that the rights or good to be protected would be affected if the information is made public.¹⁸

INFORMATION OF AN ADMINISTRATIVE NATURE

In 2002, the Administrative Chamber of the Superior Council of the Judiciary established a regulation on the content of the Web page of the judicial branch (www.ramajudicial.gov.co).¹⁹ According to this edict, the Web page should include information on procurement procedures, the judicial career, and auditing, among many other topics.²⁰ There are general provisions requiring information on the judges and functions of the Constitutional Court, the Council of the State, the Supreme Court, and the Superior Council of the Judiciary.²¹ The Web site also includes statistical information, the organizational chart (Atlas Judicial), publications, the National Lawyers' Registry, and legislation.²²

The Administrative Chamber of the Superior Council of the Judiciary established that the case law of the Council of State and the Disciplinary Chamber, in addition to its own decisions, should be made public through the Web site of the judicial branch.²³ As a consequence, these decisions are published and systemized.

The records of the meetings of collegiate bodies of an administrative nature, such as the Administrative Chamber, are public.²⁴

In relation to appointment procedures, the Web site includes vacancy announcements, results of the selection process, and results of the annual evaluation, among other information.²⁵ The procedure starts with a public announcement of the vacancy, published in a

national newspaper, detailing the requirements, the procedure, and the evaluation parameters.²⁶ The results of each phase of the selection process are public.²⁷

Every judge is required to present a declaration of assets,²⁸ and a declaration of economic activities.²⁹ These are added to the candidate's résumé. The declaration of economic activities may only be used (and accessed) for issues relating to public service. Apart from that restriction, according to Lucía Arbeláez de Tobón, a member of the Administrative Chamber of the Superior Council, there is no reason why these declarations should not be considered public.³⁰ However, the Constitutional Court has established that the résumés, while kept in public archives, are not deemed public, unless the individual authorizes its disclosure.³¹ Moreover, some specific information about public officials, such as the results of their psychological tests, should be kept private, according to the tribunal.³²

A law passed in 1995³³ put an end to the full disclosure of disciplinary procedures and administrative inquiries.³⁴ This act established a system in which only the final decision was public. The inquiry and allegations in the file were confidential.³⁵ The Constitutional Court declared such a broad confidentiality rule unconstitutional, and established that the restriction should end after the inquiry was concluded.³⁶ The Disciplinary Code of 2002 is consistent with this interpretation.³⁷ Nevertheless, the records of the debate during the meeting of the disciplinary body may only be accessed by the parties to the dispute.³⁸

The Administrative Chamber of the Superior Council of the Judiciary issued a decree in 2002 establishing that sanctions³⁹ and the case law of the Disciplinary Chamber are to be published on the Internet.⁴⁰

Before the disciplinary decision has been issued, judicial officials may not publish or disclose information related to disciplinary matters discovered through the exercise of their duties.⁴¹

INFORMATION FROM JUDICIAL PROCEEDINGS

The Colombian Constitution establishes that anyone who faces criminal charges has a right to due process and public proceedings.⁴² The Criminal Procedure Code of 2004 establishes that all procedural activity should be public, for the parties, the media, and society in general. However, the judge may put limits on this publicity, if it puts the jury, victims,

witnesses, experts, or other individuals participating in the proceedings in danger. Information may be classified as confidential if there is a national security risk, if it is needed to protect minors, or if publicity may jeopardize due process or the success of an investigation.⁴³ Nevertheless, in some regions, the previous criminal procedure code is still in place, which establishes that only the trial phase is public, and access to information on the criminal investigation is limited to the parties.⁴⁴ Nevertheless, journalists have a right to publish the information they may have obtained relating to the criminal investigation.⁴⁵

Despite the aforementioned provisions, before charges have been filed, judicial officials may not publish or disclose information related to criminal matters made available to them through the exercise of their duties—a provision that certainly limits access.⁴⁶

The Code of Infancy and Adolescence establishes the confidentiality of information on criminal proceedings against juveniles; even the hearings are closed to the public.⁴⁷ Adoption records are also reserved.⁴⁸

In relation to case law, the general rule is that decisions are deemed public.⁴⁹ The president of a tribunal is in charge of making a decision public. The Statute of the Administration of Justice clearly establishes that the decisions may be requested at the offices of the tribunals, unless there is some restriction upon them, and everyone may have access to the files on judicial proceedings.⁵⁰ Nevertheless, while the general rule is full access to the jurisprudence, names might be concealed to protect the privacy of those involved.⁵¹

The case law of high courts is mostly published on compact disc, but also through the internet.⁵² In the case of the Constitutional Court, the law also requires the establishment of a search engine.⁵³

The Administrative Chamber of the Superior Council of the Judiciary established that the case law of the Constitutional Court and the Supreme Court of Justice should be made public through the Web site of the judicial branch.⁵⁴

The Center of Socio-Legal Documentation of the Judicial Branch (CENDOJ) is the office in charge of establishing the system that allows access to socio-legal information, such as the high courts' case law.⁵⁵ There are local digital records of case law in the main cities, and there is a project to extend such mechanisms nationwide.⁵⁶

Apart from general access to case law, everyone has access to other judicial orders issued during the course of a case, as long as they have been executed and there is no legal provi-

sion to the contrary.⁵⁷ Nevertheless, the possibility to review judicial files is limited to the parties, lawyers and their assistants, and public officials in the exercise of their duties.⁵⁸

According to Lucía Arbeláez de Tobón, member of the Administrative Chamber of the Superior Council of the Judiciary, the law also requires the disclosure of records from meetings of judicial organs when such meetings issue decisions on general matters, such as the legal order, enforcement of laws, or the protection of collective rights from the actions or omissions of public authorities. When the records concern individual matters, they may only be accessed by the parties to the dispute.⁵⁹

In the specific case of the Constitutional Court, preliminary, non-official drafts of rulings are deemed public five years from the issuance of the official decision, but the Court's deliberations are private.⁶⁰

NOTES

- 1 The background information for this section was gathered by Natalia Carolina Sandoval and Diana Esther Guzmán, researchers from DeJusticia.
- 2 Political Constitution of Colombia (1991, with changes of 2005), Arts. 20 and 74. For text see: www.secretariassenado.gov.co/leyes/CONS_P91.htm.
- 3 Ibid. 121 Art. 15.
- 4 Ibid. Art. 228.
- 5 While we acknowledge that Act 57 has been considered as a freedom of information act by many organizations because it includes the essential guarantees required, we do not consider it to be an FOI law because it was enacted much before the other Latin American laws and may need to be updated, particularly because none of its provisions may be extended to the judiciary.
- 6 Act 57 (1985) ordering the publicity of acts and public documents, Art. 12.
- 7 Ibid. Art. 14.
- 8 Act 594 (2000), General Law on Archives Art. 9.
- 9 Constitutional Court No. T-473/92.
- 10 Supra n. 8 Art. 27.
- 11 As an administrative body, this Council does not issue administrative decisions.
- 12 Administrative Chamber of the Superior Council of the Judiciary, Agreement No. 1746 of 2003, Art. 3.7.

13 Constitutional Court, C-872/03.

14 Ibid. and Constitutional Court, T-227/03.

15 Supra n. 14. Nevertheless, the Constitutional Court considered that the establishment of exceptions to the right of access to information do not necessarily require a particular majority, but they may be established by a simple majority of the Congress.

16 Ibid. See also, Constitutional Court, T-227/03.

17 Constitutional Court, C-038/96, and supra n. 13.

18 Supra n. 13.

19 Administrative Chamber of the Superior Council of the Judiciary, Agreement No. 1445 of 2002.

20 Ibid. The information available on the Web site includes, for example, the names of the candidates of the main bodies of the judiciary, vacancies, and announcements of preparation courses. See: www.ramajudicial.gov.co/csj_portal/jsp/frames/index.jsp?idsitio=6&idseccion=1288.

21 Supra n. 19.

22 Arbeláez de Tobón, Lucía, “Acceso a la información y transparencia en el Poder Judicial de Colombia,” in: Caballero et al, *El acceso a la información judicial en México: una vision comparada* (UNAM-DPLF-IIJ-OSI, Mexico, 2005), at 92.

23 Supra n. 19 and see supra n. 22 at 68.

24 Act 270 (1996) Statute on the Administration of Justice, Art. 57.

25 Supra n. 22 at 92.

26 Ibid. at 97.

27 Ibid. at 97–98.

28 Ibid. at 98.

29 Act 190 (1995), Anti-Corruption Statute, Art. 15.

30 Supra n. 22 at 98.

31 Supra n. 17.

32 Constitutional Court, T-073A/96.

33 Act 190 of 1995, Art. 33.

34 Act 57 clearly established that disciplinary inquiries are not deemed reserved. If one document was considered reserved, the restrictions would apply to those documents only. See supra n. 6 Art. 19.

35 Supra n. 17.

36 Ibid.

37 Act 734 of 2002, Disciplinary Code, Art. 95.

38 Supra n. 24.

39 At the time of writing, sanctions were not yet included on the Web site, www.ramajudicial.gov.co:7777/csj_portal/jsp/frames/index.jsp?idsitio=211.

- 40 Administrative Chamber of the Superior Council of the Judiciary, Agreement No. 1445 of 2002.
- 41 Supra n. 24 Art. 64, and Constitutional Court, C-037-96.
- 42 Supra n. 22 Art. 29.
- 43 Criminal Procedure Code (2004) Art. 18.
- 44 Criminal Procedure Code (2000) Art. 14.
- 45 Constitutional Court, C-038/96.
- 46 Supra n. 41.
- 47 Act 1098 (2006) Code of Infancy and Adolescence, Arts. 147, 153.
- 48 Ibid. Art. 114.
- 49 Ibid. at 64.
- 50 Law 270 (1996) Statute on the Administration of Justice, Art. 64.
- 51 Constitutional Court, T-337/1999, For the relevant text see: 22 n. 141 at 74.
- 52 Supra n. 1 and see: www.ramajudicial.gov.co:7777/csj_portal/jsp/frames/index.jsp?idsitio=2.
- 53 Ley Estatutaria de la Administración de Justicia (Ley 279 de 1996), Art. 47.
- 54 Supra n. 19. Originally, some case law was published in hard copy, in *La Gaceta de la Corte Constitucional* and *La Gaceta Judicial*, but due to financial reasons, these publications are not released anymore and were replaced by compact discs. Supra n. 22 at 68.
- 55 Supra n. 22.
- 56 Ibid. at 68.
- 57 Ibid. at 69.
- 58 Arts. 26 and 27, of the Statute of the Legal Profession (decree 196 of 1971) and supra n. 22 at 69.
- 59 Supra n. 22 at 70.
- 60 Decree 2067 of 1991, Art. 19.

DOMINICAN REPUBLIC¹

The constitution of the Dominican Republic does not explicitly guarantee freedom of information. It recognizes, however, a right of news media to have free access to all sources of information, whether public or private, as long as such access does not jeopardize the *ordre public* or national security.² In relation to judicial proceedings, it establishes that hearings should be public, and any exception should be established by law and only when it is required to protect the *ordre public* or public customs.³

In 2004, the Freedom of Information Act (FOIA) was enacted. This act recognizes a right to request and to receive comprehensive, truthful, adequate, and timely information from any state institution and from any private company in which the state owns shares.⁴ The law clearly establishes that its provisions apply to the judicial branch, but only in relation to its administrative information.⁵

The FOIA regulations require all institutions to interpret the act, and any other law regulating access to information, in a manner that respects the principle of publicity and the right of access to information.⁶

The FOIA establishes a detailed and restricted list of exceptions to the rule of publicity, many of which may apply to judicial information. Apart from the typical exclusions, such as information on national security and international relations, the law allows for the denial of information that, if disclosed, may jeopardize the state's legal strategy in judicial or administrative procedures; the right to privacy of others, or their life or safety; public health and security; the environment; or the public interest.⁷ In relation to these categories of information, some of them may be accessed if the person or institution whose data is being protected authorizes it.⁸ In any case, the restrictions on access to these kinds of information are only valid for five years.⁹

At this writing, there was no known case law specifically addressing issues related to access to judicial information, but there is case law in which other access to information issues were addressed.¹⁰

The Dominican FOIA sets up a mechanism to request information of national authorities, which, in the case of the judicial system, would apply for any request for administrative information.¹¹ While this mechanism requires the petitioner to state the reasons for his or her request,¹² the regulations permit “any simple interest,” and access may not be denied on this basis.¹³

The act establishes a limit of fifteen working days for the institution to answer the request. In certain circumstances, this term may be extended for ten more working days.¹⁴ The information may be released in different ways, including e-mail.¹⁵

Failing to respond in a timely fashion, and limiting or impeding access to public information, are considered serious breaches of a public official’s duties.¹⁶ In some cases, public officials may be punished with a prison sentence for arbitrary denials of access.¹⁷

There are procedures for administrative and judicial appeals against a denial of access to public information.

INFORMATION OF AN ADMINISTRATIVE NATURE

The FOIA explicitly requires the judicial branch to publicize information related to its administration.¹⁸ It particularly demands that every institution establish a mechanism to make available to the public information related to the following: budgets; programs and projects; procurement and public contracts; names, incomes, and duties of all judges and judicial officials, as well as asset information, if they are required to declare it; beneficiaries of social programs; subsidies; scholarships; retirement funds; statistics; and any other relevant information.¹⁹

The law also requires all state institutions—and thus the judicial branch—to ensure that official Web sites include information on structure, staff, norms, projects, management, and databases.²⁰ The FOIA’s implementing regulations also require Web sites to contain information on budgets and expenditure; procurement; contracts; and all personnel, including their salaries and declarations of assets, if required.²¹ The Web site must also enable citizens to file complaints, make suggestions, and ask questions, as well as to initiate particular procedures or transactions.²²

The FOIA and its implementing regulations require the judicial branch to appoint a person responsible for ensuring access to information (known as an “RAI”) and to organize an Office for Access to Information²³ (OAI, or OAIP for the specific case of the judicial branch), as well as to make the RAI’s contact information available on the Web site and through other media.²⁴ The OAIP is the office that, among other things, deals with the procedures of access to information and offers information on budgets and expenditures, programs, projects, procurement, judicial officials, and other administrative information from the judicial branch.²⁵ The RAI has several duties, such as coordinating information with other state bodies, requesting particular documents, and ensuring that procedures are efficient.²⁶

The law provides for the right to gain access to records of meetings and files of the public administration, as well as to be informed periodically of public activities, unless the dissemination of and access to such information may affect national security, *ordre public*, public or moral health, the privacy right of a third party, or the reputation of others.²⁷ This provision does not provide access to drafts or documents that are not part of an administrative proceeding.²⁸ The law, in its Article 6, states that the “information” that should be made public includes any financial information related to budgets, or official meetings.²⁹ Considering the first paragraph of this article and Article 1 of the law,³⁰ this may include any meeting in which administrative issues are discussed.

The regulations establish that denials of access should meet the following three-part test:

1. The information requested is closely related to any of the exceptions established by the FOIA,
2. The publication of the information would jeopardize or cause substantial damage to what the exceptions seek to protect, and
3. The damage caused by the publication would override the public interest in accessing the information.³¹

Under FOIA, information may only be considered as reserved for five years.³² Personal data is to be considered confidential.³³

The Secretary of the National Council of the Judiciary, the body in charge of appointing the members of the Supreme Court, is in charge of providing copies of the meeting records of this body to any person requesting it, as long as the request is approved by the council.³⁴ The candidates may be called to a public hearing if the council considers it necessary.³⁵

The law requires transparency to be a criterion in the daily work of the Office of the Public Prosecutor. Its statute requires its administrative acts to be public, except for exceptions established by law, or information related to its investigations.³⁶

INFORMATION FROM JUDICIAL PROCEEDINGS

Hearings of all tribunals are public, unless there is a law providing otherwise. In every case, the judgment must be delivered in a public hearing.³⁷ Many legal provisions require the Supreme Court to publish its decisions, and those of its chambers, in the official bulletin.³⁸

Only the parties and their representatives have access to information regarding criminal investigations.³⁹ The parties, public officials, and any other person who, for any reason, had access to such information, is obliged to remain silent on the issue. The exception to this rule is when there is a case against a public official or in relation to the public patrimony. In these situations, the media may have access to the information that the Office of the Prosecutor considers appropriate, provided such information does not affect the rights of the person charged, or the investigation itself.⁴⁰

The Criminal Procedure Code establishes that a trial is public unless the tribunal decides to declare it private. The trial may be closed to the public if it directly affects the privacy or the physical integrity of anyone involved, or if it may reveal state secrets established by law, or commercial or industrial secrets. However, once the reasons for such an exception cease to exist, the tribunal must allow the public back.⁴¹ Members of the media are permitted in the courtroom, but they are not permitted to record images or sound.⁴² The tribunal may limit the number of public attendees for space and order concerns. Uniformed military and police officers may not enter the court room where a trial is being held unless they are carrying out security duties. People with union or political party insignia are also prohibited from entering. Children below twelve years old may not enter, unless accompanied by an adult.⁴³

The law also includes a broad prohibition against making public, in any way, information concerning juvenile offenders or victims.⁴⁴ Any public officials disclosing images or identifying information related to children and adolescents in a situation of risk, danger, or particularly difficult circumstances are subject to penalties.⁴⁵ When such a disclosure is

done through the media, judges may also order up to two days' suspension of broadcasting media, or two editions of printed media.⁴⁶

The National Office of Public Defense is required to maintain the confidentiality of information on its cases, except for statistics.⁴⁷

NOTES

- 1 Carlos Pimentel, from the organization Participación Ciudadana, assisted in the collection of information for this report.
- 2 Ibid. Art. 8.10.
- 3 Constitución de la República Dominicana (2002), Art. 8.j.
- 4 Ley General de Libre Acceso a la Información Pública No.200-04 (2004), Art. 1.
- 5 Ibid. Art. 1 h).
- 6 Reglamento de la Ley General de Libre Acceso a la Información Pública (2005) Arts. 2 and 5.
- 7 Supra n. 4 Art. 17.
- 8 Supra n. 4. Art. 19.
- 9 Ibid. Art. 21.
- 10 See: Supreme Court of Justice, Decision of December 16, 2005, (Plaintiff: Marino Vinicio Rodríguez) No.91; and Decision of May 4, 2005, (Plaintiff, Arturo Francisco).
- 11 Supra n. 4 Chapter II.
- 12 Ibid. Art. 7.1.
- 13 Supra n. 6 Chapter III.
- 14 Supra n. 4 Art. 8.
- 15 Ibid. Art. 11.
- 16 Ibid. Art. 9.
- 17 Ibid. Art. 30.
- 18 Ibid. Art. 3.
- 19 Ibid. Art. 3.
- 20 Ibid. Art. 5.
- 21 Supra n. 6 Art. 21.
- 22 Supra n. 4 Art. 5.

23 Supra n. 6 Art. 6.

24 Ibid. Art. 7. See also: www.suprema.gov.do/infpub/infmarjur.htm.

25 See: www.suprema.gov.do/infpub/infmarjur.htm.

26 For the duties of the RAI and OAI, see supra n. 6 Chapter II.

27 Supra n. 4 Art. 2.

28 Ibid.

29 Ibid. Art.6 para.1

30 Which establishes that the law applies to administrative information from the judicial branch.

31 Supra n. 6 Art. 24.

32 Ibid. Art. 31.

33 Ibid. Art. 33.

34 Ley Orgánica del Consejo de la Magistratura (act establishing the organizational and procedural norms of the Council of the Judiciary), Art. 5.

35 Ibid. Art. 15.

36 Statute of the Office of the Public Prosecutor, Art. 14.

37 Ley de Organización Judicial, Art. 17.

38 Ley Orgánica de la Suprema Corte de Justicia, which is the act establishing the main organizational and procedural norms of the Court, Art. 26; supra n. 37 Arts. 13, 26.

39 Procedural Criminal Code, Art. 290.

40 Ibid. Art. 290.

41 Ibid. Art. 308.

42 Ibid. Art. 309.

43 Ibid. Art. 310.

44 Code for the Protection of Children and Adolescents, Art. 237.

45 Ibid. Art. 347 para. 1.

46 Ibid. Art. 347 para. 2.

47 Act 277-04 National Service of Public Defense, Art. 8.

ECUADOR¹

The constitution of Ecuador provides for a right to access information sources, as well as a right to seek, receive, know, and disseminate objective, truthful, plural, timely, and uncensored information on events of public interest. The constitutional provision gives particular relevance to the enjoyment of this right by journalists and communications professionals.² The constitutional text also establishes that information from public archives should not be reserved, except when national security or other laws so provide.³

In 2004, the Transparency and Access to Public Information Act was enacted. Article 1 of the law establishes the principle of disclosure that applies to all information held or produced by public institutions, except when subject to exclusions established by law.⁴ According to the constitution, judicial bodies are considered public institutions.⁵ The provisions of the Transparency and Access to Public Information Act, therefore, apply to the judicial branch.⁶

The act includes provisions that establish the principle of disclosure regarding public duties, and requires transparency of public information in such a way as to ensure participation of citizens in the decision-making process, and accountability of authorities who exercise public duties.⁷

The act establishes the legal grounds for non-disclosure. On the one hand, it lists the cases when national security may justify non-disclosure, such as plans and orders relating to the national defense, and intelligence reports. However, with respect to all other information it states that restrictions established by other laws would apply.⁸ Therefore, in non-military matters, the law is not as detailed, and public officials and anyone requesting access to public information must refer to a vast number of laws in order to determine the scope of restrictions.⁹ The restriction would end when the reasons for its establishment ended, and may never be extended past 15 years. In any case, a restriction on access to information may only be invoked when its establishment precedes the request.¹⁰

The act's definition of confidential information covers all public information of a personal character. The law links this confidentiality to the guarantees for the exercise of fundamental rights, as established in Article 23 of the constitution, and the guarantees of due process.¹¹

This act relies on the Office of the Ombudsman to promote, oversee, and guarantee its compliance.¹² It establishes a reporting mechanism by which the authorities must submit a yearly report to the Office of the Ombudsman on their compliance, including requests received and responses issued. It also establishes the obligation to present, every semester, a list of information classified as confidential.¹³ The Office of the Ombudsman is also responsible for resolving claims based on lack of clarity of the information provided.¹⁴ There is an administrative process to request information from each public institution,¹⁵ and denials may be appealed in a court of first instance, with a final appeal to the Constitutional Court.¹⁶ Public officials who unduly deny access to public information are subject to penalties.¹⁷

At the time of this writing, there was no case law on access to judicial information. However, there was a case on access to judicial budgets pending at the Constitutional Court.

INFORMATION OF AN ADMINISTRATIVE NATURE

The Transparency and Access to Public Information Act requires all public institutions—including the judicial branch—to provide a minimum set of information on their Web sites. This information includes, among other information::

- the organization’s basic information, such as its structure, its functions, its basic laws, internal proceedings, the goals and objectives of its departments, the services it provides, its hours, forms, and any other information necessary for exercising rights;
- its directory and staff;
- its staff’s income;
- its annual budget, income, expenses, and other financial information, as well as detailed and complete information on public contracts, procurement, purchases, leasing, etc., along with a list of companies and individuals who have breached contracts with that institution;
- internal and governmental audits, as well as the institution’s plans and programs;
- details on any foreign and national loans, as well as the source of the resources to repay these loans;
- accountability mechanisms;
- per-diems and reports on and reasons for approval of travel by national and international authorities, heads of state, and public officials.

The National Judiciary Council (Consejo Nacional de la Judicatura) is in charge of the judicial career.¹⁸ Vacancies are announced on its Web site,¹⁹ and names of candidates are listed for a week so that the public may present any objections based on their integrity.²⁰ However, the regulations on judge evaluations establishes that the results of these evaluations are confidential. This information shall not be disclosed to third parties, unless there is a judicial order.²¹

INFORMATION FROM JUDICIAL PROCEEDINGS

The constitution guarantees the right of detainees to be informed of the reason for their detention, as well as the identities of the authority who ordered it, the officers who enforce it, and the interrogators.²²

Although crime reports are considered public information,²³ the initial inquiries are considered confidential. However, this information is disclosed in the formal investigation phase (*instrucción*). Prosecutors, police officers, detectives, judges, and any other official may be subject to penalties if they disclose any confidential information.²⁴ The alleged victim has the right to be informed on initial inquiries and the formal investigation.²⁵ The Transparency and Access to Public Information Act establishes that, except for the confidentiality of initial inquiries, information on investigations for violations of rights guaranteed by the constitution, international instruments, and domestic laws is not confidential.²⁶

The constitution also guarantees the right to a public trial, except when the law expressly provides otherwise. The court's deliberations are confidential, however.²⁷ Additionally, the constitutional provisions clearly state that the recording of judicial proceedings by the media or by persons other than the parties and their councilors is prohibited, as is the transmission by the media of recordings obtained in this manner.²⁸ These provisions are restated in the Code of Criminal Procedure.²⁹

The officials responsible for judicial archives may show anyone –as long as they are in the archives office– files, documents, and catalogs.³⁰ In the case of criminal proceedings, once the prosecutor has filed charges against the suspect, the file should be made available to the defendant and the victim.³¹

The Child and Adolescent Code prohibits the dissemination of information related to children who are victims of mistreatment, abuse, or other crimes, as well as the names of children charged or sentenced.³² Criminal records of juveniles cannot be disclosed.³³

The Transparency and Access to Public Information Act requires the judicial system, the Constitutional Court, and the court dealing with claims involving the state on administrative matters (Tribunal de lo Contencioso Administrativo) to publish the texts in full of all of their judgments.³⁴

NOTES

- 1 The background information for writing this section was provided by Christian Bahamonde.
- 2 Political Constitution of Ecuador, Decreto Legislativo No. 000 RO/1, August 11, 1998, Art. 81.
- 3 Ibid. Art. 81.
- 4 Transparency and Access to Information Act, Official Registry Supplement 337, May 18, 2004.
- 5 Ibid. Art. 118.
- 6 Supra n. 4 Art. 3 (a).
- 7 Ibid. Art. 4. (c) and (e).
- 8 Ibid. Art. 17.
- 9 Christian Bahamonde comments, supra n. 1.
- 10 Supra n. 1.
- 11 Supra n. 2 Art. 24 and supra n. 230 Art. 6.
- 12 Supra n. 4 Art. 11.
- 13 Ibid. Art. 12.
- 14 Ibid. Art. 13.
- 15 Ibid. Art. 19.
- 16 Ibid. Art. 22.
- 17 Ibid. Art. 23.
- 18 Caballero, Díaz and Villanueva, *Derecho de Acceso a la Información en el Poder Judicial*, (Lima-Konrad Adenauer-Porrúa, Mexico, 2006) at 109.
- 19 See: www.cnj.gov.ec/.
- 20 Ibid.

- 21 Regulations on the Evaluation of the Judicial Function, National Judiciary Council Resolution, 3, RO 67, April 23, 2003, Art. 93.
- 22 Supra n. 2 Art. 24.4.
- 23 Code of Criminal Procedure (2000), Law No. 0000 RO/Sup 360 of January 13, 2000, Art.44.
- 24 Ibid. Art. 215. This provision refers to what is known in Spanish as “indagación previa.”
- 25 Ibid. Art. 69.2.
- 26 Supra n. 4 Art. 6.
- 27 Supra n. 2 Art. 195.
- 28 Ibid.
- 29 Supra n. 23 Art. 255.
- 30 Law on the Judicial Function, supra n. 18 at 107.
- 31 Supra n. 23 Art. 227. Also in supra n. 18 at 108.
- 32 Code on Infancy and Adolescence, (2002), Art. 52, for text see: supra n. 18 at 108.
- 33 Supra n. 32 Art. 54.
- 34 Supra n. 4 Art. 7 (p) and (t).

HONDURAS¹

There is no constitutional provision specifically providing for a right of access to information in Honduras, and certainly not access to judicial information. The constitution does recognize the right to express, freely and without censorship, one's thoughts by any means.² It also guarantees the right to petition.³

In 2006, the Honduran Congress approved the Transparency and Access to Information Act, which entered into force on January 20, 2007. This law is binding upon the judicial system.⁴ Through it, the congress created the Institute on Access to Public Information in charge of promoting and facilitating access to public information.⁵ However, at the time of the writing of this report, the five commissioners of the institute had not been appointed, and the regulations for its implementations were not yet issued. Nevertheless, the provisions of the Transparency and Access to Information Act already constitute a legitimate mandate to public institutions, and, therefore, they are cited throughout this section.

The act establishes a long list of exceptions, and some of them are extremely broad; indeed, information that does not fall under one of such exceptions may be difficult to find. According to the statute, information may only be classified as confidential or secret when the damages caused by its disclosure override the public interest served by making this information available. However, the law then adds a long list of situations in which information should also be classified. In addition to the traditional exceptions on national security and international relations, the information may also be classified when its disclosure would affect the life, security, or health of an individual; humanitarian assistance; the legally-protected rights of a child or any other person; or the rights protected by *habeas data* proceedings. The classification would also be justified if the disclosure may jeopardize investigations related to prevention or prosecution of crimes or may affect the interests of justice. Additionally, information may be classified if its dissemination would jeopardize interests protected by the constitution and the law, the nation's economic or financial stability, or the country's governance.⁶

To establish the classification of information as confidential or secret, the maximum authority of any public institution may issue a declaration, which should express the reasons for such classification. The Institute on Access to Public Information may review this decision. The classification will be maintained until the cause for its enactment ceases, or, “apart from that fact” after 10 years. However, after a decade it may be reclassified by a judicial decision to allow access by the affected individual only.

The law also distinguishes between personal confidential data and confidential information “in general.” The former includes personal data such as ethnic or racial origin; moral, physical, or emotional characteristics; address, phone number, or personal e-mail address; political, religious, or philosophical beliefs; health information; personal or family property; or any other information that may be relevant to one’s reputation, as well as personal or family privacy.⁷ Confidential information “in general” encompasses any information classified as such by law.⁸

The Transparency and Access to Information Act establishes a procedure to access public information. This mechanism provides for an appeal procedure at the Institute on Access to Public Information. This procedure shall also be applicable to access to judicial information. The decision of the institute may only be subject to *amparo*, a special remedy for the protection of fundamental rights.⁹

At the time of this writing, there was no information on case law on access to judicial information. The Electronic Documentation Center of the Honduran Judicial System does not provide this information either.¹⁰

INFORMATION OF AN ADMINISTRATIVE NATURE

The Transparency and Access to Information Act requires every institution—and thus the judicial branch—to disseminate, by electronic means if possible, basic administrative information, including information on its organization, regulations, policies, salaries, and budgets, among many other items.¹¹ The basic organizational information that should be made public includes the services the judicial system provides; its laws, regulations, and internal decisions; and its projects and programs.¹² In terms of financial information, the judicial branch is required to disseminate its financial reports, budgets and expenditures,

and information regarding any public contract and procurement process.¹³ The act also requires the disclosure of judicial officials' monthly income.¹⁴

The Law on State Contracts, which applies to contracts from the judicial system,¹⁵ establishes provisions to make contract procedures public, such as information regarding purchase procedures.¹⁶ The Transparency and Access to Information Act specifically provides that offers by companies that participate in procurement proceedings are confidential until the moment that they are made public.¹⁷ In any event, all public contracts and selection of offers will be published on the Web site of the Normative Body of Contracts and Acquisitions (Oficina Normativa de Contratación y Adquisiciones).¹⁸

There is a law on the judicial career in Honduras.¹⁹ This law requires that, before the exam process, the Director of Judicial Careers shall publicize the requirements for candidates in national printed media.²⁰ Apart from a brief description of judicial careers, there is no information available on the judicial branch's Web site on appointments or disciplinary proceedings.

The Honduran judicial Web site provides basic organizational information regarding the judicial branch, including members of the Supreme Court. It also offers information on judicial services.²¹ Finally, it provides a link to information on the state's purchases of goods and services.²²

On July 16, 2003, the Supreme Court decided to create the Electronic Documentation and Judicial Information Center, which offers information on judicial statistics, as well as general regulations (*autos acordados*) and laws.²³

INFORMATION FROM JUDICIAL PROCEEDINGS

Under the Transparency and Access to Information Act, the Attorney General's office is required to publish a list of all proceedings in which public institutions are involved, as well as the final decisions on those cases.²⁴ Local governments are required to do the same in relation to their own legal proceedings.²⁵

The Code of Criminal Procedure provides for the right to an oral and public trial.²⁶ Hearings are therefore public. However, the judge, *motu proprio* or at the parties' request, may

decide to hold the hearing in private if publicity would compromise the reputation or privacy of victims or witnesses; threaten the life or personal integrity of the judges, the parties, or anyone else participating in the trial; jeopardize an official or personal secret that deserves to be protected; or prejudice the *ordre public* or the wellbeing of a minor.²⁷

During the initial criminal investigation, the Code of Criminal Procedure allows a judge to declare some inquiries as confidential. Such a decision shall be explained, including why publicity would affect the investigation.²⁸

Article 82 of the constitution, which guarantees the right to defense, has been interpreted to convey the right of parties to access judicial files. While there is no specific provision on this matter, in practice, the parties, their lawyers, and journalists have been able to access files.²⁹

The Transparency and Access to Information Act places a specific obligation upon the judicial branch to publish its case law, while recognizing a right of the parties to withhold their personal information.³⁰ The Code of Criminal Procedure establishes that judgments shall be read orally, in a public hearing.³¹ Therefore, it may be deduced that judgments are deemed public from the moment they are read. Case law from the Supreme Court may be accessed through the Electronic Documentation and Judicial Information Center.³²

NOTES

- 1 The information for drafting this report was provided by ACI-Participa.
- 2 Political Constitution of Honduras (1982, reformed), Art. 72. For text see: www.honduras.net/honduras_constitution2.html
- 3 Ibid. Art. 80.
- 4 Transparency and Access to Information Act (2006) Art. 3.4.
- 5 Ibid. Art.8.
- 6 Ibid. Art. 17.
- 7 Ibid. Art. 3.7.
- 8 Ibid Art. 3.9.
- 9 Ibid. Arts. 20, 26.
- 10 Supra n. 1.

- 11 Supra n. 4 Art. 13.
- 12 Ibid. Arts. 13.1-13.3.
- 13 Ibid. Arts. 13.3 and 13.8-13.9.
- 14 Ibid. Art. 13.7.
- 15 Law on State Contracts (Ley de Contratación del Estado) (2001), Art. 1.
- 16 Ibid. Art. 46.
- 17 Supra n. 4 Art. 3.9.
- 18 Ibid. Art. 4.
- 19 Information provided by ACI-Participa.
- 20 Judicial Career Act, Art. 27, in Caballero, Díaz and Villanueva, *Derecho de acceso a la información en el Poder Judicial*, (Lima-Konrad Adenawuer and Porrúa, 2006, México) at 113.
- 21 See: www.poderjudicial.gob.hn/.
- 22 See: www.honducompras.gob.hn/.
- 23 See: www.poderjudicial.gob.hn/ejes/institucional/organizacion/dependencias/cedij/.
- 24 Supra n. 4 Art. 13.16.
- 25 Ibid. Art. 13.17.
- 26 Code of Criminal Procedure (2002), Arts. 1, 4.
- 27 Ibid. Art. 308.
- 28 Ibid. Art. 225, and Caballero, Díaz and Villanueva, supra n. 20 at 112.
- 29 Information provided by ACI-Participa.
- 30 Supra n. 4 Art. 13.14.
- 31 Supra n. 26 Art. 340 and 343.
- 32 See: www.poderjudicial.gob.hn/juris/.

MEXICO¹

Since 1977, the Mexican Constitution has established an obligation upon the federal government to guarantee access to information.² It also provides for a right of petition.³ Interpretations by the Supreme Court of the Nation has established that this provision is closely linked to the guarantee to truth, understood as a right that ensures that society will be provided truthful information to enhance its participation in the decision-making process. In this sense, the Supreme Court has established that authorities that provide manipulated or incomplete information, or information that is biased towards particular interests, and that limits informed participation in public matters, affect constitutional rights.⁴

In 2002, the Transparency and Access to Public Governmental Information Federal Act (hereinafter Transparency and Access to Information Act) was enacted in Mexico, which is binding upon the Federal Judicial Branch and the Federal Judiciary Council.⁵ However, the jurisdiction of the Federal Institute on Access to Information (Instituto Federal de Acceso a la Información, IFAI), the agency charged with hearing appeals on denials and promoting compliance, does not include access to information held by the Federal Judiciary. Nevertheless, the Federal Judicial Branch was required to issue its own regulations on the criteria and procedure for access to information, referring to the regulations established by the Transparency and Access to Information Act.⁶ The judiciary issued regulations and some other internal rules for the implementation of the Act.

In relation to case law, there have been isolated opinions (*tesis aisladas*) on access to information in general, but the system requires at least five *tesis* to create binding jurisprudence. Some of the *tesis* that have been issued have addressed specific issues related to access to judicial information.⁷ At the time of this writing, binding jurisprudence has only been established as relates to access to electoral information.

The provisions on restrictions to access to information in the Transparency and Access to Information Act do apply to data from the judiciary, and distinguish between restrictions for “reserved information” and “confidential information.”

Article 13 of the Act establishes that information may be classified as reserved when its dissemination would jeopardize security or national defense; diminish international negotiations; damage the financial, economic, or monetary stability of the country; or endanger anyone's life, security, or health. This article specifically establishes that information would be reserved if its dissemination might seriously damage the state's ability to verify compliance with laws, prevent or prosecute crimes, administer justice, collect taxes, control migration, or carry out legal strategies in judicial or administrative proceedings still in process.⁸ The initial inquiries in an investigation, as well as the judicial files, are also considered reserved while the proceedings are ongoing, and once the reason for the reserve ceases to exist, the documents are considered public with any confidential information they may contain redacted.⁹ Information would have a reserved character when another law establishes its confidentiality or reserve or when it is related to commercial, industrial, bank, fiscal, or any other kind of official secret.¹⁰ Any public official's disciplinary hearing is considered reserved until a decision is reached.¹¹ Deliberations would be reserved while there is no final decision.¹² However, the reserve would not apply in the case of gross violations of fundamental rights or crimes against humanity.¹³ These reserves may only be maintained for 12 years, and such a character would cease when the reasons for its establishment end. If the reasons for reserve remain after the end of the reserve period, then, as an exceptional rule, the reserve may be extended.¹⁴

The Supreme Court of the Nation, in an opinion issued in 2000, established that some limitations to access to information are allowed in order to protect national defense and social interests. Information on criminal investigations may be included in the latter, and therefore its reserve would be justified.¹⁵

The Transparency and Access to Information Act states that information is confidential if companies or individuals provide information to public institutions that may be considered as confidential, or reserved, or commercially reserved, or if it includes personal information that may require authorization for its dissemination. However, information in public archives or open sources would not be considered confidential.¹⁶

The law establishes a series of rules on how the obligated bodies, including the judiciary,¹⁷ may disseminate information. Particularly, the law establishes that public agencies may not disseminate, distribute, or commercialize personal data unless there is express permission from those to whom the information refers.¹⁸ There are exceptions to this rule, such as when the law acknowledges the existence of a public interest that requires dissemination, and when a court order demands its dissemination.¹⁹ However, the infor-

mation should be treated in such a way that personal data may not lead to the identification of the person in question.

While the IFAI does not have jurisdiction to ensure compliance with the law by the judiciary, the latter has established a series of bodies, at the Supreme Court and the Federal Judiciary Council, with the purpose of implementing, overseeing, and ensuring access to information. First, there is a Commission for Transparency and Access to Public Information at the Supreme Court and another one at the Council, in charge of overseeing compliance with the law and internal regulations.²⁰ These commissions must present to the Federal Congress an annual report on measures taken to ensure access to judicial information, a copy of which must be sent to the IFAI.²¹ Second, the Supreme Court and the Federal Judiciary Council also have Committees on Access to Information, which coordinate measures needed to ensure disclosure.²² Finally, there are the Liaison Units, which serve as a bridge between the person requesting information and the Supreme Court, the Federal Judiciary Council, and other judicial entities.²³

The procedure for accessing judicial information contemplates a time limit of 10 days,²⁴ while the Transparency and Access to Information Act establishes 20 days for answering a request for information. Denials should be approved by the committee of the Supreme Court or the Federal Judiciary Council.²⁵ The commissions may review the decision.²⁶

A request for access to information may be rejected if: the request is offensive; the information requested is outside the competence of the Court; substantially identical information has already been provided to the same person; or the information is reserved for any reason allowed by the constitution, the law, or the internal regulations of the judiciary.²⁷

Public officials are subject to penalties if they do not comply with the provisions of the Transparency and Access to Information Act.²⁸

INFORMATION OF AN ADMINISTRATIVE NATURE

The provisions of the Transparency and Access to Information Act require that the judicial branch make available information related to its organization, management, and administration.²⁹ This information would be provided through electronic means (e-mail or Web sites), and the judiciary should offer the use of computers so that the public may access such information.³⁰

The following information shall be published on the Web site:³¹

- organizational structure;
- duties of and services provided by each administrative unit;
- directory of public officials and their monthly incomes;
- location of the unit that provides access to information;
- goals and objectives of the administrative units;
- proceedings, requirements, and forms;
- information on budget allocations and expenditures;
- audits;
- subsidy programs and beneficiaries of social programs;
- concessions, permits, and authorizations;
- public contracts, including their destination (infrastructure, goods purchased or leased, services required), the price, the contractor, and the contract terms;
- the relevant legal framework;
- the reports required by law;
- citizen participation mechanisms; and
- any other information relevant to answering the most frequent questions asked by the public.

The judiciary shall also present to the public any information related to public funds transferred, as well as all reports in relation to the use of those funds.³²

The Federal Judiciary Council is in charge of the judicial career, disciplinary proceedings, as well as the administration of the federal judicial system, excluding the Supreme Court and the Electoral Tribunal.³³ When the Council considers that its regulations and resolutions constitute matters of public interest, they must be published in the Official Federal Daily (*Diario Oficial de la Federación*).³⁴ However, the Council's deliberations are private.³⁵

The appointment procedure requires disclosure at a few points in the process. For example, the announcement of the opening of a selection procedure (*oposición*) should be published once in the Official Federal Daily and twice in one of the main newspapers; candidates must also take a public oral exam.³⁶

As stated earlier, the Transparency and Access to Information Act categorizes disciplinary proceedings of public officials as reserved, but the wording of the article suggests that once the decision is issued, the results may be disclosed.³⁷

INFORMATION FROM JUDICIAL PROCEEDINGS

A defendant, according to the Mexican Constitution, has a right to be provided with all information from the proceedings required to establish a legal defense;³⁸ particularly, the defendant should be informed of his or her rights.³⁹ The Mexican Constitution also states that, in criminal proceedings, the defendant must be informed in a public hearing of the name of his/her accuser and the charges, so he/she can prepare a defense, and this must be done in the 48 hours following the indictment (*consignación*).⁴⁰ The defendant also has a constitutional right to be tried in a public hearing.⁴¹

As for the victims of crimes, according to the Constitution, they are entitled to information about their constitutional rights and developments in the case.⁴²

As mentioned at the beginning of this section, restrictions established under the Transparency and Access to Information Act apply to judicial information, much of which is linked to judicial proceedings, such as the initial inquiries and judicial files on ongoing proceedings. However, all parties in criminal proceedings, including the victims, are guaranteed access to this information.⁴³ Furthermore, these restrictions do not apply in cases of violations of fundamental rights and crimes against humanity.

The Federal Code of Civil Procedure establishes that hearings should be public, except when the tribunal decides otherwise.⁴⁴ The same is established in the Code of Criminal Procedure.⁴⁵ However, the media must abstain from publishing the identities of juveniles involved in any proceedings.⁴⁶ Hearings and sessions of the chambers of the Supreme Court are also public. In exceptional cases, they may be declared reserved when public interest or morals so demand.⁴⁷ In fact, the sessions of the Supreme Court are transmitted through the Internet.⁴⁸

In relation to files, once a final judgment has been issued, they are deemed public. Anyone may have access to them during working hours at the offices of the courts. Documents contained in files may be considered reserved only if they have been ruled reserved during trial according to an international treaty, or a national or state law.⁴⁹ In this kind of situation, access to a redacted electronic version may be given.⁵⁰ Only the president of the Supreme Court or the president of one of its chambers may establish the reserved nature of a file once the judgment has been issued.⁵¹

As for case law, the Transparency and Access to Information Act establishes that the Federal Judicial Branch must make its case law available, but the parties may oppose the dissemi-

nation of their personal data.⁵² The right of the parties to oppose publication of personal information may only be exercised by individuals and not by companies.⁵³ Furthermore, according to the Supreme Court, the petition to conceal information may not be translated into an automatic suppression of personal data. The judge will analyze whether the information may be considered confidential in light of the exceptions established in the Act, and if not, the decision may be published without concealing any information.⁵⁴ The full text of the information may also be published if the judge considers that by concealing data, the information may be misleading or unclear.⁵⁵ Guidelines established to redact reserved information⁵⁶ indicate that reserved information should be substituted by asterisks.⁵⁷

NOTES

- 1 The background information for drafting this report was gathered by Diana Hernández, from LIMAC. This report focuses only on federal provisions.
- 2 Political Constitution of the United States of Mexico, Art. 6. This article was included in a reform published December 6, 1977.
- 3 Ibid. Art.8.
- 4 *Semanario Judicial de la Federación y su Gaceta, Novena Época, Pleno III*, June 1996, tesis: P. LXXXIX/96; IUS: 200111.
- 5 Transparency and Access to Public Governmental Information Federal Act, Art.3., XIV, c).
- 6 Ibid. Art. 61.
- 7 For a list of case law see: www.scjn.gob.mx/PortalSCJN/Transparencia.
- 8 Ibid. Art. 13.
- 9 Ibid. Arts. 14, III and IV.
- 10 Ibid. Art. 14.
- 11 Ibid. Art. 14, V.
- 12 Ibid. Art. 14, VI.
- 13 Ibid. Art. 14.
- 14 Ibid. Art. 15.
- 15 *Semanario Judicial de la Federación y su Gaceta, Novena Época, Pleno, XI*, abril de 2000, p.74: P. LX/2000; IUS: 191967.
- 16 *Supra* n. 5 Arts. 18 and 19.
- 17 See: Ibid. Chapter IV of the law.

- 18 Ibid. Art. 21.
- 19 Ibid. Art. 21 II and IV.
- 20 Supreme Court of Justice, Accord 09-2003, Art. 5.
- 21 Supra n. 5 Art. 62.
- 22 Supra n. 20 Art. 8.
- 23 Regulations of the Supreme Court of Justice and the Federal Judiciary Council for the implementation of the Transparency and Access to Public Governmental Information Federal Act (2004), Arts. 12-19.
- 24 Ibid. Art. 36.
- 25 Ibid. Art. 30.
- 26 Ibid. Art. 37.
- 27 Supra n. 20 Art. 20.
- 28 See: Supra n. 5 Art. 63.
- 29 See: Ibid. Arts. 7 and 9.
- 30 Ibid. Art. 9.
- 31 Ibid. Art. 7.
- 32 Supra n. 2 Art. 7.
- 33 Organizational Act of the Judicial Branch (1995) (*Ley Orgánica del Poder Judicial*), Art.68 and 81.
See also: Caballero, Díaz, Villanueva, *Derecho de Acceso a la Información en el Poder Judicial* (Limac-Konrad Adenauer- Porrúa, Mexico, 2006), at 132.
- 34 Ibid. Art. 72.
- 35 Ibid. Art. 75.
- 36 Ibid. Art. 114.
- 37 Supra n. 5 Art. 14., V.
- 38 Supra n. 2 Art.20.A.VII.
- 39 Ibid. Art.20.A.IX.
- 40 Ibid. Art.20.A.III.
- 41 Ibid. Art.20.A.VI.
- 42 Ibid. Art.20.B.I.
- 43 Federal Code of Criminal Procedure, (1994) Art. 16. See: Caballero, Díaz, Villanueva, supra n. 33 at 118.
- 44 Ibid. Art. 274.
- 45 Supra n. 43 Art. 86.
- 46 Law for the Treatment of Juvenile Offenders, Art.123, in: Caballero, Díaz, Villanueva, supra n.33 at 120.

47 Supra n. 23 Arts. 15 and 16.

48 See: www.scjn.gob.mx/PortalSCJN/Transparencia.

49 Supra n. 23 Art. 6.

50 Supra n. 23 Art. 7.

51 Supra n. 23 Art. 14.

52 Supra n. 5 Art 8.

53 *Semanario Judicial de la Federación y su Gaceta, Novena Época, Tribunales Colegiados de Circuito, XXIII*, enero de 2006, p. 2518, tesis: XIII.3o.12a; IUS:176077.

54 *Semanario Judicial de la Federación y su Gaceta, Novena Época, Tribunales Colegiados de Circuito, XXI*, May 2005, p. 1583, tesis: IV.2º.A.137 IUS:178271.

55 *Semanario Judicial de la Federación y su Gaceta, Novena Época, Tribunales Colegiados de Circuito, XXI*, May 2005, p.1585, Tesis: IV.2º.A.139 A; IUS: 178270.

56 Guidelines for the public versions of judgments of the Plenary and the Chambers of the Supreme Court of Justice of the Nation. (Lineamientos para la elaboración de versiones públicas de las sentencias del pleno y de las salas de la Suprema Corte de Justicia de la Nación).

57 *Ibid.* Art. 4.

PANAMA¹

The constitution of Panama was amended in 2004 to provide for the right to access information held by the state or by private companies involved in work of a public nature. It allows that such a right might be limited, but only by written law.² The constitutional provisions also guarantee judicial remedies to ensure the exercise of the right of access to information, along with *habeas data* procedures.³

Before the constitutional amendment, Panama enacted its freedom of information (FOI) law in January 2002,⁴ which clearly states that its provisions are applicable to the Judicial Branch and the Office of the Prosecutor.⁵ It defines the right to freedom of information as the right of any individual to obtain information on matters being processed, information held in files and archives, documents, and administrative decisions, as well as any statement of any nature held by institutions specified in the law.⁶ Therefore, such a definition clearly includes a right of access to information held by the judicial branch. Pursuant to this law, then, the judiciary should also be transparent and accountable.⁷

In describing the right of access to information, the law provides that anyone is entitled to request and to receive information held by state authorities, as well as any institution specified by the law—thus including the judicial branch, particularly when the request relates to personal information.⁸ State institutions have an obligation to give information related to their activities and functioning, except when the request relates to confidential or restricted information.⁹

There is no specific case law on access to judicial information. Nevertheless, there are administrative interpretations that could be applied to the judicial branch.

The FOI law regulates an administrative procedure to request public information from the institution keeping the data.¹⁰ This mechanism may be used to access information governed by the FOI law that is held by the judicial branch.

Habeas data is a judicial recourse that may also be invoked in relation to judicial information. This procedure has two uses under Panamanian law. First, it can be conceived as a

judicial appeal for a denial of public information of any kind. Second, it is also a judicial appeal for denial of access to personal information held in public files. This procedure is carried out in the high courts that have jurisdiction to hear *amparo* petitions (constitutional claims to ensure respect for fundamental rights), or by the Supreme Court itself, depending on the authority that denied access to the information in the first place.¹¹

The FOI law also establishes sanctions for public officials who do not comply with a *habeas data* decision, and fines for those who interfere with the exercise of the right to access information.¹²

INFORMATION OF AN ADMINISTRATIVE NATURE

Administrative information concerning Panama's judicial branch, such as budgets and personnel, is subject to the general regulations of the FOI law, since it is not described in any of the law's exceptions.

The FOI law requires state institutions to make information available to the public through different media, including the Internet.¹³ It particularly requires the publication of information related to the institution's internal regulations (*reglamento interno actualizado de la institución*), general policies, procedural manuals, organizational structure, recordkeeping and filing practices, and personnel in charge of the information.¹⁴

The law clearly establishes an obligation for the state to provide information to anyone inquiring about the functioning of the institution, its decisions, programs, budget, and statistics, as well as public contracts.¹⁵

The Supreme Court issued a decree in 2002, establishing the Judicial Statistics Center.¹⁶ This center releases information that is published as soon as it is produced. It also prepares information in response to specific requests. While those requests may be filed by any individual, they have to be written and addressed to the President of the Supreme Court. The center releases information on case dockets, the movements of files among the judges, and statistics on decisions.¹⁷

The FOI law also establishes the public character of information related to appointments, emoluments, and travel costs of any public official. Nevertheless, it also defines as confi-

dential any information concerning public officials kept in individual records and human resources files.¹⁸ These provisions, which may seem contradictory, were later clarified by the Administration Public Attorney (Procuradora de la Administración). In response to an inquiry from the director of a public health facility, the attorney emphasized that, to ensure accountability, the FOI law requires the state to disclose the reasoning behind any decision. Therefore, while the documents containing personal data (such as medical and educational records) are to be treated as restricted, any document containing information relating to appointment decisions and criteria should be deemed public.¹⁹

A similar opinion was also issued by the Administration Public Attorney in relation to access to data on the salaries of public officials. According to the Attorney, as the information on salaries is not included in the personal files of each public official, the restriction established on individual files does not apply to such data. The opinion established that the general institutional expenses for salaries (*planillas*) are public, including data on salaries for each specific position. Access to such information is considered necessary to ensure accountability to the public.²⁰

INFORMATION FROM JUDICIAL PROCEEDINGS

The Panamanian FOI law establishes some exceptions in relation to information from judicial proceedings, particularly with regard to confidential and restricted information.

When confidential information is involved in a judicial proceeding, the law requires judicial authorities to make all necessary arrangements to ensure that such information can only be viewed by the parties to the process.²¹ The law defines as “confidential information” any information held by state agents or institutions that is related to medical and psychological records, the private life of individuals (including family, marital activities, and sexual orientation), criminal records, correspondence, telephone communications, and relevant information on minors.²² There is no time limit for the restrictions on accessing this type of information.

The law also defines a category of information as “restricted access,” which is defined as information that is meant to circulate among a restricted group of public officials.²³ Access to this category of information can only be restricted for a decade. It can be disclosed

earlier, if the reasons for the restriction are no longer valid. If the authorities consider that it is necessary to extend the term of the restrictions, they can declare an extension of up to ten more years. Information related to judicial procedures held by the public prosecutor or the judicial branch may be restricted until a final decision is issued. This information is nevertheless accessible to the parties. Restricted data also may include information gathered through investigations conducted by the prosecutor and the police, as well as the information, files, and records provided by other countries for criminal investigation purposes.²⁴

The FOI law refers to the Judicial Code for the regulation on access to judicial and prosecution files. The Judicial Code provides that such files can only be viewed by the parties; registered lawyers and their authorized assistants; those who are involved in the case, such as experts; law students; and any other individual authorized by the judge. Judicial officials who allow an unauthorized person to access such files are subject to disciplinary measures.²⁵ In relation to the investigation, the Judicial Code establishes that the parties, their lawyers, and the authorized lawyers' assistants will have access to the investigation at any time.²⁶

In relation to the hearings in criminal proceedings, the Judicial Code requires them to be public. Nevertheless, the judge may declare them private for reasons of morality, *ordre public*, and due respect to victims, when the circumstances so require.²⁷

The Panamanian FOI law recognizes criminal records as confidential information.²⁸ Act 66 of December 19, 2001 is more specific in this regard. It establishes that criminal records can only be requested by specific public authorities for the sole purpose of establishing criminal recidivism, behavior, and professionalism in criminal activities, as regulated in the Criminal Code.²⁹ This act forbids such requests for any other use.³⁰ According to the Administration Public Attorney, public authorities may request criminal records from public officials facing administrative (disciplinary) or judicial investigations, for the purposes established in Act 66. Such information, however, may not be requested to confirm a candidate's employment qualifications. Nevertheless, any individual may request his own criminal record.³¹

NOTES

- 1 The data for writing this section was gathered by Andrés Pizarro Sotomayor, consultant of DPLF in Panama.
- 2 Constitución Política de la República de Panamá, Art.43.

- 3 Ibid. Arts. 42 and 44.
- 4 “Ley No. 6 Que dicta normas para la transparencia en la gestión pública, establece la acción de *habeas data* y dicta otras disposiciones.”
- 5 Ibid. Art. 1.8.
- 6 Ibid. Art. 1.2.
- 7 Ibid. Art. 1.12 and 1.13.
- 8 Ibid. Art. 1.10.
- 9 Ibid. Art. 8.
- 10 Ibid. Chapter II.
- 11 Ibid. Chapter V.
- 12 Ibid. Arts. 20-23.
- 13 Ibid. Art. 1.11.
- 14 Ibid. Art. 9.
- 15 Ibid. Art. 10.
- 16 Corte Suprema de Justicia de Panamá, Acuerdo No. 363, October 3, 2002.
- 17 Information gathered by Andrés Pizarro, see supra n. 1.
- 18 Supra n. 4 Art. 1.5.
- 19 Ministerio Público, Procuradora de la Administración, Dictámen, C-253, December 23, 2003.
- 20 Ministerio Público, Procuradora de la Administración, Dictámen C-128, April 19, 2002.
- 21 Supra n. 4 Art. 13.
- 22 Ibid. Art. 1.5.
- 23 Ibid. Art. 1.7.
- 24 Ibid. Art.14.
- 25 Código Judicial de la República de Panamá, Art. 496.
- 26 Ibid. Art. 2067.
- 27 Ibid. Art. 2231.
- 28 Supra n. 4 Art. 1.5
- 29 Law 66 of December 19, 2001, Art. 38.
- 30 Ibid. Art.6.
- 31 Ministerio Público, Procuradora de la Administración, Dictámen C-103, May 24, 2004 and Dictámen C-285, September 18, 2002.

PERU¹

In Peru, the right to public information is protected under Section 5 of Article 2 of the 1993 Peruvian constitution.² Under this section, any person³ has the right to request, without stating a specific cause, information from a government entity except for that expressly prohibited by law or the constitution, such as personal or private information or information pertaining to national security. There are limits to these exceptions such as the absolute limit of Article 96 that guarantees any member of congress the right to request from public officials any reports that he or she deems necessary, including those considered to be of a confidential nature.⁴

Peru's Tribunal of Constitutional Guarantees has interpreted Article 2 as a fundamental right attributed to all persons as well as a foundational right underlying the ability of individuals to exercise other rights provided for in the constitution and statutory authority.⁵ In order to fulfill this constitutional mandate, the Tribunal has held that government entities must provide information that is "complete, precise, correct, current, timely, and truthful."⁶

While Section 5 demonstrates the intent to promote open and transparent government as the basis for a democratic society,⁷ the second half of the section protects against the unlawful disclosure of private or personal information. This protection is not unlimited, however. The Tribunal of Constitutional Guarantees has held that private information can become public when it is requested and subsequently possessed and used⁸ by an administrative entity.

Apart from a general right to public information, the constitution's authors also contemplated the need to enumerate specific rights to information regarding public functionaries. For example, Article 40⁹ requires the periodic publication of the income earned by government officials in relation to their offices and Article 41¹⁰ requires all public officials, including those who administer or manage government funds or organizations, to provide a sworn statement as to their income or assets acquired during their terms of service.

The Congress of the Republic of Peru promulgated Law 27806 on Transparency and Access to Public Information (hereinafter Law on Transparency and Access to Information).¹¹ This statute was enacted with the goal of "promoting transparency in the acts of the State and regulating

the fundamental right to access of information that is enshrined in Section 5 of Article 2 of the Political Constitution of Peru.”¹² Under the statute, all administrative entities,¹³ including the judiciary, are obligated to comply with the Law on Transparency and Access to Information’s requirements for transparent government. These requirements fall into two general categories: the publication of agency-related information on the Internet¹⁴ and the provision of public information through procedures outlined in the statute,¹⁵ as well as forms of redress should a petition be denied.¹⁶ Upon exhaustion of all administrative avenues for relief,¹⁷ individuals can also chose to file a petition for *habeas data*¹⁸ within the Peruvian court system in order to seek redress against any “action or omission by an administrative official that violates or threatens [the right of access to information as defined in] the Constitution.”¹⁹ Individuals may use this process to seek access to information “generated, produced, processed, or possessed”²⁰ by an administrative entity, including court rulings and opinions.

Petitions for *habeas data* may be denied for a variety of reasons including meeting one of the requirements for dismissal found in Article 5 of the Constitutional Procedure Code²¹ or a violation of the procedures found within Article 62 of the same statutory text.²² Petitions may also be denied due to requests for information that the constitution²³ or congress²⁴ has expressly declared to be confidential.²⁵ Even if congress has spoken, however, the Tribunal of Constitutional Guarantees has determined that a congressional mandate in itself is not constitutionally sufficient to provide for confidentiality in all cases. The tribunal reasoned that this is because statutory legitimacy stems from its agreement with and support of fundamental rights based in the constitution, not the other way around. As a result, statutes that conflict with fundamental rights expressed within the constitutional text must provide an equally constitutionally valid reason²⁶ for restricting the full exercise of said fundamental right, as well as proof that this path is exclusively necessary.²⁷ The tribunal has also established a strict scrutiny test for when government officials can withhold information that it is generally constitutionally required to provide to the public. Under this test, the denial of a legitimate request is considered *prima facie* unconstitutional unless the government can demonstrate that it has an imperative public interest to protect by withholding the requested information.²⁸

INFORMATION OF AN ADMINISTRATIVE NATURE

Congress enacted Law 26397, the Law of the National Judiciary Council, to govern the actions of the National Judiciary Council (Consejo Nacional de la Magistratura), which is

charged with overseeing the selection, nomination, reconfirmation, and dismissal processes of all levels of judges and public prosecutors except for those elected to office.²⁹

Articles 28 and 43 of the Law of the National Judiciary Council regulate access to information regarding the council's competencies. Under this statute, Article 28 prohibits the sharing of information regarding the selection and nomination process of potential candidates while Article 43 prohibits the publication of information contained within the registry except for requests from congress.

The limitations on the provision of public information created by these two articles are not absolute. As stated above, the Tribunal of Constitutional Guarantees has held that the withholding of government-held information must be based on the government's assertion that its actions are required to preserve another constitutionally-protected right. Regarding Articles 28 and 43, the Tribunal has examined the legislative history of the two provisions and determined that they were included in the text of the Law of the National Judiciary Council to preserve the right to privacy asserted in Article 2, Section 5 of the Constitution. The assertion of this protection is not an absolute barrier, however, and cannot be used to prohibit individuals from accessing information pertaining specifically to their own nomination processes.³⁰

As stated above, the Law on Transparency and Access to Information requires administrative entities to publicize a list of specific information on their Web sites. Specifically, Article 5 of the statute requires that administrative entities, in accordance with their budgetary restrictions,³¹ provide Internet access to the following information:³²

1. general information about the administrative entity, including its communications and administrative orders, organizational structure, procedures, and its legal framework and any corresponding administrative procedures act;
2. budgetary information, including data on all expenses, investment projects, salaries, raises, and benefits of all employees, including high-level officials;
3. information on any purchases of goods or services (the publication of this information will include details on allocated resources, suppliers, and the quantity and quality of any acquired goods and services);
4. past or planned official activities of high-level officials of each administrative entity, the titles of those in charge of said activities, as well as their superiors; and
5. any additional information deemed pertinent.³³

The Judicial Branch Web site has complied with most of the above-enumerated requirements except for information regarding the legal framework of the institution, detailed

information regarding specific investment projects, and information on the activities of high-level judicial officials.

INFORMATION FROM JUDICIAL PROCEEDINGS

Article 139 of the Peruvian constitution lays out general principles that govern the administration of justice in the country, including the judiciary's constitutional obligation to provide information concerning its judicial procedures.³⁴ In conjunction with this constitutionally-mandated obligation, Peruvian law³⁵ allows for individuals, their legal representatives, and their lawyers to have access to their case files at any time during the legal proceeding except for according to those limitations proscribed by law.³⁶ For example, access to information is limited by those exceptions pertaining to personal or private information or that which is pertinent to national security as found under Section 5 of Article 2 of the constitution.³⁷ At no time can these files be removed from the court. In civil cases, individuals can take notes of information contained in case files³⁸ or request copies of case file documents for a fee.³⁹ Individuals can also request the court to provide certified copies of documents found within the file, also for a fee.⁴⁰ At the conclusion of a civil case, any individual may request certified copies of a particular case. This request may be denied due to the personal nature of the information contained in the case file.⁴¹

Due to their sensitive nature, access to criminal case information is more restricted, in particular during the investigative phase of the legal proceedings. While defense attorneys are generally permitted to examine the results of the criminal investigations in the judge's office, congress has granted judges the ability to keep investigation information confidential for a limited time period⁴² if it is deemed that knowledge of the proceedings will harm the investigation in any way.⁴³ The Tribunal of Constitutional Guarantees has determined that this restriction should not be considered as conveying expansive powers to the court to limit access to information, but instead should be implemented in exceptional circumstances only for a definite time period so as not to restrict the rights protected in the Law on Transparency and Access to Information⁴⁴ or the defendant's right to mount a legal defense.⁴⁵

Access to information regarding criminal cases is also restricted by acts of congress, specifically when minors are involved,⁴⁶ for cases concerning sexual offenses,⁴⁷ or when the publication of information about witnesses may put their lives at risk.⁴⁸

Formal judicial hearings are generally public for both civil⁴⁹ and criminal proceedings.⁵⁰ Exceptions may be made, however, particularly during criminal cases. For example, criminal hearings focused on national security concerns, such as cases pertaining to terrorism, may be held in private.⁵¹ Congress has also required that hearings discussing the details of sexual crime cases be held in private.⁵² As a general rule, minors are prohibited from all public hearings except under special circumstances, such as for law students.⁵³ In contrast to the aforementioned restrictions, the constitution mandates that judicial hearings concerning the actions of public officials, crimes committed through the press, or those referring to constitutional rights be held in public.⁵⁴

Finally, as stated above, both the congress and the judiciary provide or intend to provide access to all opinions of the specialized courts of the Supreme Court, as well as the legal principles that they establish. Access to these opinions will assist in the public's ability to ensure the accountability of the judicial branch through the analysis and critique of its decisions.⁵⁵

NOTES

- 1 The information for this section was gathered by the Instituto de Prensa y Sociedad, and it was drafted by Kristina Aiello, J.D., M.L.A.S. and collaborator of DPLF.
- 2 Constitución Política del Perú 1993, Art. 2 para. 5.
- 3 "Person" includes corporate entities. Sentencia del Tribunal Constitucional, Exp. No. 0644-2004. Oct. 17, 2005. For text see: www.tc.gob.pe/jurisprudencia/2005/00644-2004-HD.html.
- 4 Supra. n. 2 Art. 96.
- 5 Sentencia del Tribunal Constitucional, Exp. No. 1797-2002 HD/TC, Jan. 29, 2003, 10. For text see: www.tc.gob.pe/jurisprudencia/2003/01797-2002-HD.html. Estado actual de la pagina web del Poder Judicial de acuerdo con la Ley de Transparencia y Acceso a la Información, Informe del Consorcio Justicia Viva.
- 6 Sentencia del Tribunal Constitucional, Exp. No. 0959-2004-HD/TC, Nov. 19, 2004, para. 6. For text see: www.tc.gob.pe/jurisprudencia/2005/00959-2004-HD.html.
- 7 Supra. n. 5. The idea that access to information is the foundation for an authentic democratic society is based on the notion of a collective right of a nation's citizens to receive indispensable and timely public information in order to develop a free and informed public opinion about government activities. This collective right to information is essential to ensure the government's accountability to the citizens that it serves. Sentencia del Tribunal Constitucional, Exp. No. 2579-2003-HD/TC, Apr. 6, 2005, para. 5. For text see: www.justiciaviva.org.pe/jurispu/estado/sentencia_arellano.doc.

- 8 Sentencia del Tribunal Constitucional, Exp. No. 0644-2004 HD/TC, Oct. 17, 2005, para. 5. For text see: www.tc.gob.pe/jurisprudencia/2005/00644-2004-HD.html.
- 9 Supra. n. 2 Art. 40.
- 10 Ibid. at Art. 41.
- 11 Law No. 27806 (Texto Único Ordenado de la Ley No. 27806, Ley de Transparencia y Acceso a la Información Pública, Decreto Supremo No. 043-2003-PCM), July 13, 2002. For text see: www.pcm.gob.pe/Transparencia/Ley_de_Transparencia_y_Acceso_a_la_InformacionPublica.pdf.
- 12 Ibid. at Art. 1.
- 13 Ibid. at Art. 2 (as modified by Law No. 27927, which was published on Feb. 4, 2003) provides that the administrative agencies are listed under Article 1 of the First Title of Law No. 27444 (Ley del Procedimiento Administrativo General), published March 9, 2004. For text of Law No. 27444 see: www.mtc.gob.pe/indice/normas.asp and search for 27444. The March 2004 modification in Law No. 27927 can be found there as well.
- 14 Supra. n. 11 Art. 5.
- 15 Ibid. at Art.11.
- 16 Ibid.
- 17 The Constitutional Tribunal has applied Art. 27 and 28 of Law No. 23506 (Ley de Habeas Corpus y Amparo) as a supplemental statute for interpreting the exhaustion of all administrative remedies for a petition for *habeas data*. For text of statute see: www.uc3m.es/uc3m/inst/MGP/JCI/02-peru-leyhabeascorpusyamparo.htm. See also the Sentencia del Tribunal Constitucional, Exp. No. 400-96-HD/TC, June 11, 1998. For text of case law see: www.tc.gob.pe/jurisprudencia/1998/00400-1996-HD.html.
- 18 In accordance with Art. 200 of the Peruvian Constitution, Title IV of Law 28237 (Código Procesal Constitucional) published in the official daily bulletin *El Peruano* on May 31, 2004, provides for the constitutional remedy known as the petition for *habeas data*. For text of statute see: www.cajpe.org.pe/rij/bases/legisla/PERU/CPC.PDF.
- 19 Supra. n. 2 Art. 200.
- 20 Supra. n. 18 Art. 61. The Constitutional Tribunal has held that Article 61 of Law 28237 requires that the administrative entity physically possess the requested information. Resolución del Tribunal Constitucional, Exp. No. 3140-2006-HD/TC. For text see: www.tc.gob.pe/jurisprudencia/2007/03140-2006-HD%20Resolucion.html. See also: Sentencia del Tribunal Constitucional, Exp. No. 0959-2004-HD/TC. For text see: www.tc.gob.pe/jurisprudencia/2005/00959-2004-HD.html.
- 21 Ibid. at Art. 5 (with section 8 of Art. 5 being modified by Law 28642, published Dec. 8, 2006). The requirements for dismissal are as follows: (1) The facts and the petition of the cause of action do not directly refer specifically to a right protected in the constitution; (2) There exists an equally satisfactory procedure for the protection of the constitutional right that is threatened, except for the process of *habeas corpus*; (3) The case has already been presented in another constitutional judicial procedure; (4) All administrative procedures have not been exhausted; (5) At the presentation of the cause of action, the threat to or violation of a constitutional right has ceased or the harm is now irreparable;

- (6) The case involves a challenge of a final resolution from another constitutional process or pending case; (7) The case involves a definitive resolution of the National Judiciary Council in terms of the dismissal and ratification of judges and prosecuting attorneys; (8) The case concerns resolutions of the Jurado Nacional de Elecciones (JNE) concerning election materials, referendums, or other types of popular consultations under the JNE's responsibility; (9) The cause of action concerns conflicts between entities of internal public law. Constitutional conflicts that arise among said entities, powers of the state, bodies of the same level or constitutional relevancy, or local or regional governments, will be resolved by their corresponding procedural paths; (10) The statute of limitations for filing a cause of action has passed with the exception of the process of *habeas corpus*.
- 22 Ibid. at Art. 62.
- 23 For example, see Art. 2, para. 5 of the Constitución Política del Perú 1993, which protects personal information and that pertaining to national security. The latter is also supported by Art. 163 of the same document, which requires all persons to provide for the nation's defense.
- 24 For example, see the information congress has expressly stated should be kept confidential in Article 15, 15-A, 15-B, and the regulation of said exceptions as determined under 15-C of Law 27806, as modified by Law 27927 supra. n. 18 and Art. 64 of Law 28237.
- 25 Supra n. 11. Article 19 of Law 27806 provides for the provision of redacted documents.
- 26 It appears as if most statutes restricting access to information will pass constitutional muster if they are enacted to fulfill the mandates of other constitutional articles. For example, much of the information contained in the exceptions of Article 15 of Law 27806 refers to the need to protect national security in agreement with the requirements of Art. 163 (National Defense System) of the Constitución Política del Perú 1993. There are other statutes enacted to protect the identity of victims of certain crimes in agreement with Art. 2 para. 5 of the same text.
- 27 Sentencia del Tribunal Constitucional, Exp. No. 2579-2003-HD/TC, Apr. 6, 2005, para. 14. For text see: www.justiciaviva.org.pe/jurispu/estado/sentencia_arellano.doc.
- 28 Ibid. at para. 9. Generally speaking, the public interest should be supported by another right provided for in the constitution.
- 29 Law 26397 (Ley Orgánica del Consejo Nacional de la Magistratura), Art. 2, presented to the President on Dec. 6, 1994. For text see: www.cajpe.org.pe/RIJ/bases/legisla/peru/rejupe8.HTM.
- 30 Supra n. 27 at paras. 14-15.
- 31 Congressional failure to allocate resources or other budgetary shortfalls could create de facto barriers to access to public information under this statute.
- 32 The enumerated list of required information does preclude any obligations to publish financial information as provided for under Title IV of the same law. Resolución Administrativa de Presidencia No. 198-2001-P-CS, Dec. 19, 2001, requires that all government Web sites must identify the individual in charge of their management. For more information on the duties and obligations of the Web site manager, see Article 8 of the same law.
- 33 Supra n. 11 Art. 5.
- 34 Supra n. 2 Art. 139, para. 4.
- 35 See Article 160 of Law 27444 (Ley del procedimiento administrativo general), published Mar. 9,

2004. For text see: www.mtc.gob.pe/indice/normas.asp and search for 27444. Also, Article 171 of the Organic Law of the Judiciary (Texto Único Ordenado de la Ley Orgánica del Poder Judicial TUO, D.S. 017-93-JUS), published June 3, 1993. For text see: www.justiciaviva.org.pe/normas/loj.doc.
- 36 For example, see supra n. 35.
- 37 Organic Law of the Judiciary (Texto Único Ordenado de la Ley Orgánica del Poder Judicial TUO, D.S. 017-93-JUS), Art. 171, published June 3, 1993. For text see: www.justiciaviva.org.pe/normas/loj.doc.
- 38 Civil Procedure Code (Texto Único Ordenado del Código Procesal Civil, Resolución Ministerial No. 010-93-JUS), Art. 138, published Apr. 23, 1993. For text see: www.acnur.org/biblioteca/pdf/01164.pdf.
- 39 Supra. n. 11 Art.17 (requiring that individuals requesting information only pay for the costs of reproduction).
- 40 Supra. n. 38 at Art. 139.
- 41 Ibid.
- 42 The ability of a judge to keep investigation information confidential ceases when that judge complies with the mandatory obligation of providing all investigation materials to the defense for a three-day period upon the conclusion of the investigation phase of the judicial proceeding. Law 9024 (Código de Procedimientos Penales), Art. 73. For text see: www.cajpe.org.pe/RIJ/bases/legisla/peru/ley2.htm.
- 43 An example would be that a potential witness or accomplice would leave the area if he or she knew of the investigation or its direction. Sentencia del Tribunal Constitucional, Exp. No. 2262-2004-HC/TC, Oct. 17, 2005, para. 22. For text see: www.tc.gob.pe/jurisprudencia/2006/02262-2004-HC.html. This prohibition includes oral communications during the investigative phase as well as throughout the other components of the judicial process. In keeping with the need to balance constitutional interests as described above, the Tribunal has established a three-part proportionality test for judges to follow prior to making a determination of whether or not to suppress the speech of an individual about a specific legal proceeding. Under the test, a judge has to be able to weigh: 1) The loss to society if the information is suppressed in the sense of a public that is less informed on the workings of the judiciary, 2) the judge's motivation for making the decision to suppress, and 3) the value of suppressing the information. Ibid. at paras. 26-32. Judicial officials are also limited in terms of their speech. In particular, the rights of judges to their own opinions regarding a particular case are limited by their obligations to administer justice to protect constitutional rights. One of these obligations is the need to demonstrate impartiality. If a judge's words conflict with this obligation, the Constitutional Tribunal has held that a judge's speech can be limited. Sentencia del Tribunal Constitucional, Exp. 2465-2004-AA/TC, Oct. 11, 2004. For text see: www.justiciaviva.org.pe/jurispu/deberdereserva/barreto/sentencia.htm.
- 44 Sentencia del Tribunal Constitucional, Exp. No. 1561-2006-PHD/TC, Mar. 6, 2007. For text see: <http://tc.gob.pe/jurisprudencia/2007/01561-2006-HD.html>.
- 45 Supra. n. 2 Art. 139, para. 14. This section also requires that all persons detained by government officials will be immediately informed of the reason for their detention. Individuals also have the right

- to communicate personally with a defense attorney of their choosing.
- 46 Law 27337 (Código de los Niños y Adolescentes), Art. 6, published Aug. 2, 2000. For text see: www.mimdes.gob.pe/dgnna/Ley27337.html#TituloPreliminar. When minors are involved as either victims or actors in a criminal case, their identities and images shall remain confidential.
- 47 Law 27115 (Ley que establece la acción penal publica en los delitos contra la libertad sexual), Art. 3, Apr. 26, 1999. For text see: www.cajpe.org.pe/rij/bases/legisla/peru/pen46.htm. The identity of victims of sexual crimes shall remain confidential during the entire judicial proceeding.
- 48 Law 27398 (Ley que establece beneficios por colaboración eficaz en delitos de criminalidad organizada) Art. 22, Dec. 20, 2000. For text see: www.oas.org/juridico/spanish/mesicic2_per_ley_27378_sp.pdf. A judge can order that the personal information of an individual collaborating in a case against organized crime be kept confidential. This order cannot damage the accused's right to a defense.
- 49 Supra n. 8 Art. 206. Evidentiary hearings are public. They still may be held in private should the nature of the case so require.
- 50 Supra n. 42 Art. 207 and Art. 215.
- 51 Supra n. 2 Art. 2, para. 5 & Art. 163.
- 52 Supra n. 42 Art. 218.
- 53 Supra n. 37 Art. 137.
- 54 Supra n. 2 Art. 139, para. 4.
- 55 Supra n. 37 Art. 10. The Tribunal has acknowledged a collective right to information where an informed public serves as the foundation for a democratic society in which all participate in the process of elaboration, search, selection, and promulgation of public information. Supra n. 7 at para. 9.

URUGUAY¹

Although recognizing the right to communicate thoughts without prior censorship, the Uruguayan constitution remains silent in relation to the specific right of access to information.² It enshrines, however, a right of petition.³ The constitution also includes an open-ended provision establishing that the catalogue of rights, duties, and guarantees included in the constitution shall not be interpreted as excluding any other right or guarantee inherent in a republican form of government.⁴ The extent to which this provision might be interpreted as encompassing freedom of information, and particularly a right to access judicial information, remains unexplored in legislation and case law.

There is no law ensuring access to information in general. However, the principle of publicity is recognized by law.⁵

In a decision of 2002, a court of appeals ordered the executive branch to release information related to an arrest request by Argentina concerning two former members of the military and an ex-policeman for alleged human rights abuses. The information included reports of the Public Prosecutor and the Attorney General. In its reasoning, the court recalls international human rights provisions, the importance of freedom of information as a means to build public opinion, and the essential character of public opinion in a democratic society. The decision also establishes that exceptions on access to information shall be clearly stated.⁶

INFORMATION OF AN ADMINISTRATIVE NATURE

There is no law requiring the judicial branch to publish information on its administrative matters. Some information is published as a service to the public.⁷

The Web site of the Uruguayan judicial branch includes basic information such as its structure, its plans, and its modernization process. It includes the salary scale⁸ and benefits of its

personnel.⁹ It also makes public the general regulations established by the Supreme Court, such as its *acordadas* and *circulares* from 2004 until 2007. The section on the modernization of the Uruguayan judicial system includes the current budget.¹⁰

The site also offers information on procurement, including the announcement of a new procedure calling for offers and conditions, but the site does not include the Court's decisions on these issues.¹¹

Statistical information may also be accessed through the Web site. This includes not only judicial statistics (such as length of proceedings), but also statistics of administrative offices.¹²

The Web site includes some information on the disciplinary suspension of lawyers or other officials; voluntary suspensions are also addressed. Apart from this, there is no further information on disciplinary proceedings.¹³ There are announcements on appointment procedures for judges and other judicial officials.¹⁴

INFORMATION FROM JUDICIAL PROCEEDINGS

The General Code of Procedures establishes that judicial proceedings are deemed public, unless the law provides otherwise for reasons of security and morality, or to protect a party's individual rights.¹⁵

This rule of publicity clearly applies to judicial files. The law establishes that such files shall remain in the court's office, so the parties and anyone having interest in them may review them. One may present an oral claim to the court when a secretary of a tribunal denies access. The court shall make a decision in the light of the principle of publicity.¹⁶

In 2006, the Supreme Court authorized access to files through the Internet. This decision reminds judicial officials that they shall comply "strictly" with the legal restrictions on disclosure established on files or proceedings, and that these officials are responsible for the effects that transparency may have on someone's rights.¹⁷ As a consequence of this decision, files may be accessed through the Internet, but the search engine requires the number of the file (IUE, *identificación única de expediente*).¹⁸ In a communication released by the Director General of Administrative Services, the progressive incorporation of all files in Uruguay was announced.¹⁹

In relation to hearings, the general regulations under the General Code of Procedures do not offer any details on how the principle of publicity set out in Article 7 of the General Code of Procedures would apply.²⁰ Nevertheless, since this principle applies to judicial files, it seems quite reasonable that it would also apply to hearings. The same could be said in relation to judicial decisions.

However, the Supreme Court, in a regulation (*acordada*) of 2006, established that there was a need to find a balance between access to information and privacy protection. The regulation focused on the “complete” protection of personal data, including sensitive information kept in databases, including case law databases.²¹ The *acordada* established a list of personal information concerning parties, third parties, witnesses, or any other person intervening in the proceedings, which had to be concealed, including identity, profession, date of birth, and civil status.²² Racial and ethnic origin, political preferences, religious, moral and philosophical beliefs, union affiliation, and information on health and sexual behavior would also be concealed unless related to the matter under dispute.²³ For example, last names had to be replaced by capital letters, but they could not coincide with the initials of the names.²⁴ The implementation of these requirements raised many difficulties and problems in their interpretation; as a result, the Supreme Court had to issue another *acordada* suspending the first, while designating a commission to study how to balance the principles, rights, and interests involved.²⁵ For the time being, there is open access to the case law.

Criminal investigations are confidential until the investigation file is sent to the archive. Once sent to the archive, it becomes public. Nevertheless, a judge may maintain the confidentiality of a file if he or she considers that the case may be reopened.²⁶

On criminal matters, a 1987 law established the Judicial Information Service on Criminal and Juvenile Matters.²⁷ The Supreme Court regulates this legislation. The purpose of this service is to provide more informal support, such as information and guidance needed for exercising rights related to police or judicial proceedings. To have access to these services, a “legitimate interest” is required. The two lawyers in charge may request information of the judges, who must respond to their requests, unless they requested confidential information or information that, if disseminated, could jeopardize any criminal investigation.²⁸ The judges are required to respond to the requests promptly and with clarity. The use of this service is free and no formal presentation of the claim or complaint is required. Oral complaints can also be presented.²⁹

NOTES

- 1 The background information for this section was gathered by Martin Prats of the Instituto de Estudios Legales y Sociales del Uruguay (IELSUR).
- 2 Constitution of the Oriental Republic of Uruguay (1967 with reforms of 2004), Art. 29. For text see: <http://pdba.georgetown.edu/Constitutions/Uruguay/uruguay04.html>.
- 3 Ibid. Art. 30.
- 4 Ibid. Art.72.
- 5 Supra n. 1.
- 6 A. Alsina c. Estado, March 4, 2002, para. XVIII to XX.
- 7 Supra n. 1.
- 8 See: www.poderjudicial.gub.uy/pls/portal30/docs/folder/pjudicial/or/oree01/escala+enero+con+tas+a+al+4.pdf.
- 9 See: www.poderjudicial.gub.uy/pls/portal30/docs/folder/pjudicial/or/oree01/escala+julio+2004+p+ara+web+bs.pdf.
- 10 See: www.poderjudicial.gub.uy, section Modernización del Sistema de Justicia/Programa de Fortalecimiento del Sistema Judicial Uruguayo.
- 11 See: www.poderjudicial.gub.uy, section Licitaciones.
- 12 See: www.poderjudicial.gob.uy, section Modernización del Sistema de Justicia/Programa de Fortalecimiento del Sistema Judicial Uruguayo .
- 13 See: www.poderjudicial.gob.uy, section Licitaciones/Licitaciones en Trámite.
- 14 See: www.poderjudicial.gob.uy, section Estadísticas.
- 15 See: www.poderjudicial.gob.uy, section Profesionales Suspendidos.
- 16 See: www.poderjudicial.gob.uy, section Novedades.
- 17 Resolution SCJ No. 547-06, November 1, 2006.
- 18 See: www.poderjudicial.gub.uy, section Identificación Única de Expedientes.
- 19 Circular No. 108/2006, October 9, 2006.
- 20 See: www.poderjudicial.gob.uy, section Identificación Única de Expedientes.
- 21 Acordada 7564, para. 1, February 10, 2006.
- 22 Supra n. 19 paras. 2 and 5.
- 23 Ibid. para. 3.
- 24 Ibid. para. 6.
- 25 Acordada 7578, October 30, 2006.
- 26 Act. 15032, Criminal Procedure Code, Art. 113.
- 27 Act. 15.903, November 10, 1987.
- 28 Acordada 6.976, April 25, 1988, Arts.1-2.
- 29 Supra n. 26 Art. 4 and 8.

PART II Findings and Conclusions



DIFFERENT SCHEMES OF REGULATION CONCERNING ACCESS TO JUDICIAL INFORMATION

This report encompasses legal texts from two sets of countries: those where freedom of information (FOI) laws have been enacted, and those lacking such norms. In the latter group we include those countries, such as Chile, that have no laws like those enacted since 2002 in Panama, Mexico, Dominican Republic, Peru, Ecuador, and Honduras (although there may exist laws or even constitutional provisions that provide for some transparency). This by no means implies that there were no important previous developments. Colombia, for instance, enacted a law in 1985 that, while it might need some revision and updating, was ahead of its time in establishing some guarantees of access to information, requiring authorities to explain the reasons for denials of information and establishing a mechanism to request information with a time limit to provide information. Unfortunately, though, the Colombian law does not apply to information held by the judicial branch.

In analyzing the information for this report, a difference between the two sets of countries was soon apparent: while FOI laws always served to provide at least some reference for developing a legal framework on access to judicial information, the same task in countries lacking such laws had to be done in a fragmentary fashion. It could be said that, in the absence of FOI laws, compiling the legal framework is like solving a jigsaw puzzle with no idea of how the completed picture is supposed to look. An FOI law, even where it does not apply fully to the judicial system, offers a general scheme composed of principles and allowable restrictions that make it easier to find the corners and the borders, and to group the different sets of information.

This lack of clarity has an impact that goes beyond this study: Clarity in principles and procedures is necessary for transparency efforts to be effective, to ensure clearer interaction between the citizens and the judiciary, and by doing so, to enhance public control over the judicial work as well as its legitimacy. Above all, clarity in such principles is required to ensure conditions for the exercise of numerous rights, such as those of due process, including equality of arms, and access to remedies.

The differences between the countries with FOI laws and those without by no means ensures that those with FOI laws are free of concerns and challenges, or that guarantees will always be broader where FOI laws exist. For example, the Honduran FOI law offers many fewer guarantees than those established by case law in Argentina. The recent Honduran law establishes a very broad list of restrictions for accessing data, including some that can be very loosely interpreted. The Argentinean case law, on the other hand, has interpreted restrictions in a much more limited way than many FOI laws would allow, and enshrines public control as a citizen guarantee applicable to the judicial system—a revolutionary idea for many judicial systems.

Between countries with FOI laws and without, however, there are differences in how provisions and legal norms on transparency would apply to the judicial system, as analyzed below.

A. COUNTRIES WITH FOI LAWS

While inspired by the same international standards, the provisions in freedom of information laws in Latin America may vary significantly from country to country. These variations are evident, for example, in the mechanisms used to ensure compliance with access to information provisions.

It could be said that there are two main models for compliance. Countries following the first model rely on one institution created by the FOI law, such as in the cases of Mexico and Honduras. These institutions are in charge of resolving appeals at the administrative level, and overseeing compliance with freedom of information regulations. In the second, “diffuse,” model, followed by the Dominican Republic, Panama, and Peru, administrative appeals are not centralized and rely fully on internal proceedings and judicial appeals. This model establishes, however, an obligation for each institution to create internal mechanisms of compliance. Ecuador offers a mixed model—the FOI law does not create a new body, but instead relies on the Office of the Ombudsman to exercise those promotion and oversight duties that would have pertained to a separate institute. It also establishes a particular procedure within the institution, apart from the judicial appeal. These different models do not apply equally to the judicial branch, as will be explained below.

Overall, access to administrative information from the judicial system is much clearer where there is an FOI law. All FOI laws oblige judicial systems to make administrative informa-

tion available to the public, particularly through their Web sites, such as the information related to the use of public funds and basic information on the organization of the judicial branch.

This clarity is also offered by the establishment of restrictions, which always include some kind of information related to judicial proceedings. Restrictions on judicial information will depend on the scope of the FOI law itself. For example, in the Dominican Republic, where the FOI law only applies to administrative information from the judicial system, the restrictions it may establish are limited by this factor.

Access to information from judicial proceedings may also be enhanced by FOI laws, which, for example, tend to require the judicial system to make its case law available to the public. In relation to restrictions, they tend to be in line with procedural codes, which should always be consulted to ensure a complete understanding of the rules governing such information.

Three main models have emerged concerning the treatment of judicial information in Latin American FOI laws: a) where the provisions fully apply to the judiciary, b) where the judicial system has autonomy in defining the regulations, and c) where the application of FOI provisions is limited to a particular set of information.

i. Full application of FOI provisions to the judicial branch

This has been the most common model for regulating access to information from the judiciary, used in Panama, Honduras, Ecuador, and Peru. Both substantive norms that establish clear duties regarding transparency and access to information and provisions for establishing control and access mechanisms fully apply to the judiciary. However, in countries where the substantive norms of FOI laws apply fully to judicial information, the restrictions on access to judicial information tend to be more detailed, particularly in relation to criminal prosecutions.

ii. Autonomy in the regulation of the judicial system

In Mexico, the substantive provisions that establish obligations of transparency, specify what information is to be published, and indicate permitted restrictions apply fully to information from the judiciary. Therefore, this FOI law also details the exceptions allowed in

relation to judicial proceedings, particularly criminal proceedings.

However, the mechanisms established to access information from the federal executive branch, particularly the appeals procedure to the Federal Institute of Access to Information, do not apply to information from the judicial branch. Nevertheless, the FOI law requires the judiciary to establish its own regulations on proceedings, bodies, and criteria to ensure access to information, following a few parameters provided in the law.¹

It is important to underscore that leaving the judiciary with the obligation to formulate its own regulations for an FOI law may also be problematic. The lesson learned from the Mexican case should be taken into account. As soon as the Mexican FOI law was enacted, the Supreme Court of Mexico passed two general agreements (9/2003 and 30/2003) that were considered a setback for transparency in the judiciary. Fortunately, thanks to the pressure generated by civil society and the media, the Supreme Court approved general rules in 2004 that modified the agreements.²

iii. Limited application to specific judicial information

The third way FOI laws deal with access to judicial information is by limiting their application to a specific set of information. This is the case in the Dominican Republic, where the FOI law applies fully to information related to administrative matters of the judiciary, but it does not apply to information from judicial proceedings.

B. COUNTRIES WITHOUT FOI LAWS

Countries lacking access to information laws have norms requiring transparency from public institutions, but most of the time these norms do not apply to the judicial system.

In the absence of FOI provisions applicable to the judiciary, access to judicial information relies on a variety of regulations—most of the time non-specific—or on the will of judicial authorities. For example, FOI laws establish clearly that access to information on budgets from the judiciary should be provided; where there is no such law, this depends on whether there has been an internal decision to provide such information as a service to the public, but not as an obligation. Nevertheless, the four countries included in this category (Chile,

Argentina, Colombia,³ and Uruguay) currently offer administrative information on their Web sites, such as the structure and organization of the judiciary and information on public contracts (although the amount and extent of information varies).

However, Argentina offers a quite interesting example. The Supreme Court of the Nation, through internal regulations (*acordadas*) and case law, has ensured that administrative information and case law will be provided to the public, in a similar or sometimes better way than some FOI laws would provide. Nevertheless, these decisions from the Supreme Court, while consistent, are isolated. In general, one should look into a number of legal texts, not all of them consistent with each other in terms of principles and extent of access. For example, the sort of publicity provided for in the *acordadas*, based on the idea of transparency and democratic public control, is not the same publicity established in some provisions of the Law on Public Contracts, which seeks more to enhance equality among competitors than to facilitate public control over state institutions.

In Colombia, the Administrative Chamber of the Superior Council of the Judiciary has issued some very comprehensive regulations on which administrative information should be made public.

Access to information from judicial proceedings remains regulated by procedural codes.

NOTES

1 See Transparency and Access to Public Governmental Information Act (2002), Art. 61.

2 Jorge Islas Lopez, "Información que Garantice Justicia Imparcial" in: Islas Lopez, Jorge (ed.), *La Transparencia en la Impartición de Justicia* (UNAM, Mexico, 2004) at 205.

3 While we acknowledge that Act 57 (1985) from Colombia has been considered as a freedom of information act by many organizations because it includes the essential guarantees required, we do not consider it to be an FOI law because it was enacted much before the other Latin American laws and may need to be updated, particularly because none of its provisions may be extended to the judiciary.

KEY TOPICS ON THE REGULATION OF ACCESS TO JUDICIAL INFORMATION IN LATIN AMERICA

A. ACCESS TO INFORMATION FROM JUDICIAL PROCEEDINGS

Laws on access to information consider some specific aspects of judicial proceedings such as files, criminal investigations, and case law, particularly to establish restrictions allowed. However, most of the regulations are still found in procedural norms, such as those relating to access to files and hearings. This applies to criminal cases but especially to civil cases.

The above leads to an important realization: while FOI laws may have had an important role in improving access to information from judicial proceedings, in the specific case of criminal proceedings, it is undeniable that the procedural reforms have played an important role in ensuring access to information, not only by the parties, but also by the public, with the introduction of oral proceedings. Judicial reforms fall outside the scope of this report and further analysis may be required to determine the extent of such an effect.

Access to criminal investigations is usually allowed by the parties only. However, there are exceptions and nuances in each country. For example, there are situations in which a Peruvian judge or a Chilean prosecutor is allowed to declare part of an investigation fully confidential for a limited time. In Ecuador, crime reports are public but not the investigation that may follow them.

In relation to files, the general rule is that, while the procedure is ongoing, only the parties may have access to them. Once the final judgment is issued, a series of different rules may apply. In some countries, such as Ecuador or Mexico, norms provide that files will become public once the decision is issued. In the case of Argentina, journalists will have access to files once the decision is issued. However, access to files is not always clear; in Uruguay, a Supreme Court decision mandated that files should be accessible on the Internet. Meanwhile, public officials must “strictly” comply with legal restrictions on the disclosure of information, and they are responsible for the effects any disclosures may have on someone’s rights.

Currently, case law is usually made available through the Internet in almost all of the countries analyzed in this report. However, some FOI laws, such as those in Honduras and Mexico, obligate the judicial system to publish its case law. Nevertheless, it has been considered that such publicity may jeopardize the right to privacy, and there are different schemes to deal with such a conflict. In Argentina, for example, the case law of the Supreme Court has established that personal information may be included in the obligation of full disclosure, except when, for example, the rights of children are jeopardized. The other extreme was in Uruguay, where the Supreme Court intended to establish such a tight protection of privacy that the measures for such protection could not be implemented and had to be withdrawn. And Mexico allows parties to petition the judge to order that some personal data not be released.

As for hearings, criminal trials are considered public, in line with Article 14 of the International Covenant on Civil and Political Rights (ICCPR). However, judges may impose some restrictions upon the public—for example, to protect someone’s privacy (particularly in cases of juvenile victims and offenders), or to protect national security secrets. Some individuals do not have access to hearings, such as unaccompanied minors and intoxicated people. Hearings in civil proceedings are usually considered public.

The most contentious issue related to exceptions for granting access to information may concern the protection of privacy, as suggested by the aforementioned situation in relation to case law. This exception may be invoked in relation to hearings and files as well as for decision. Limitations on access to information for the protection of privacy of juvenile victims and offenders are allowed in all systems, particularly in relation to crimes of a sexual nature.

The protection of national defense may also justify limitations on access to information in files and hearings. Most of the laws mention this reason—in general terms—as a possible limitation. In Ecuador, the law specifically mentions what information should be considered to be “national defense” secrets (although it is not specific in any other restriction).

Some other restrictions may be invoked by judges to limit access to hearings, such as *ordre public* and morality. Probably the most specific restriction, however, is the one imposed on criminal investigations, in that if made public, the interests of justice may be jeopardized. However, the interests of justice should be understood as encompassing the principle of equality of arms, the rights of the accused to a defense, and the guarantees for victims’ participation; therefore, restrictions on the parties’ access to an investigation’s files are usually temporary.

B. ACCESS TO JUDICIAL INFORMATION OF AN ADMINISTRATIVE NATURE

As stated before, the rules on access to administrative judicial information are much clearer where an FOI law has been enacted. Budgets, public contracts, and personnel, as well as basic information on the organization such as its duties and organizational chart, and the basic legal documents, are the most common information that the judicial system should make available to the public according to these laws. Some countries' laws include the obligation to disclose judicial officials' monthly incomes, and some of them also require disclosure of their assets.

While it is less apparent which norms apply to the disclosure of administrative information in countries without FOI laws, in practice such countries have posted information on official Web sites similar to that published by countries with FOI laws, such as data on budgets, public contracts, organization, procurement, and pay scales, among other general information. However, the extent of such information varies. Where the supreme court or high administrative bodies have issued more comprehensive decisions on the disclosure of administrative information, as in Argentina and Colombia, the legal framework is clearer.

There is a wider variety of norms in relation to the publication of specific information on judicial officials or candidates for vacancies. In relation to appointments, there is much less consistency in what is to be published. While most judicial Web sites publish vacancies and selection procedures, the names of candidates are usually not disclosed, much less their résumés. There are some exceptions, of course, such as in Ecuador, where the names are published for at least one week so the public may present any objections with regard to a candidate's integrity. In Colombia, decisions in each phase of the selection process are public, but résumés are considered confidential. In Argentina, the list of candidates for appointments to be made by the Council of the Judiciary (*Consejo de la Magistratura*) is required to be published, and interviews are to be public. The Argentinean law reveals that, in many cases, the provisions of appointments laws are intended to ensure the integrity of the appointment process by guaranteeing access to information among participants—which is legitimate and necessary—but they are silent with respect to the means for access to information by others.

In relation to disciplinary procedures, the extent of information provided varies. In Argentina, it has been stated that all disciplinary proceedings at the *Consejo de la Magistratura* will be public. In Colombia and Mexico, information on ongoing disciplinary proceedings is confidential.

ABOUT DPLF

The Due Process of Law Foundation (DPLF) is a non-profit, non-governmental organization based in Washington, D.C., that promotes the reform and modernization of national justice systems in the Western Hemisphere to ensure that the rule of law becomes the hallmark of these justice systems.

DPLF was founded in 1998 by Professor Thomas Buergenthal, currently a judge on the International Court of Justice, and his former colleagues of the United Nations Truth Commission for El Salvador, who became acutely aware that the failures of the Salvadoran justice system were replicated in other countries of the region.

DPLF began its activities in late 1998 with a major conference in Washington, D.C., to assess criminal justice reform in the Americas. The organization currently places special emphasis upon:

- strengthening the independence, impartiality, and transparency of the judiciary;
- improving the training and selection of judges, police, and other authorities;
- familiarizing lawyers and judges with regional and international human rights principles and institutions;
- providing opportunities to share experiences about the implementation of judicial reforms among experts, academics, civil society groups, and government officials;
- supporting civil society endeavors to propose, implement, and monitor justice sector reforms; and
- facilitating dialogue between governmental and non-governmental actors.

In addition, DPLF publicizes and promotes the activities, recommendations, and judgments of the inter-American human rights institutions, particularly the Inter-American Commission and Court of Human Rights.

DPLF sponsors and organizes seminars, conferences, and training programs. In close partnership with local and regional non-governmental organizations, DPLF carries out

training activities and collaborative research efforts to build the capacity of civil society organizations, effectuate justice reform and implement international and regional human rights standards.

DPLF provides opportunities for learning and exchange among individuals and institutions confronting similar issues in distinct countries. DPLF also undertakes research and produces publications to encourage debate on relevant human rights topics.

DPLF's programmatic areas include:

Equal Access to Justice, focusing upon the following groups:

- Indigenous communities
- Detainees
- Women victimized by violence
- The poor and disadvantaged

Judicial Accountability & Transparency, focusing upon:

- Judicial independence
- Transparency in the judicial sector
- Access to judicial information
- Judicial corruption
- Appointment, evaluation, and dismissal procedures for judges
- Institutional control mechanisms
- Civil society monitoring

International Justice, focusing upon:

- National implementation of international treaties, judgments, and recommendations
- National implementation of the Rome Statute
- National reforms necessary for the effective investigation of human rights violations
- Truth and reconciliation commissions

DPLF publications and further information may be found at www.dplf.org.

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The Judicial Accountability and Transparency program seeks to strengthen independence of justice systems, covering topics such as transparency and access to information in judicial systems, the fight against judicial corruption, the appointment, evaluation and dismissal of judges, internal mechanisms of institutional control, and civil society monitoring.

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