
# MEMORANDUM

on

# THE DRAFT ACCESS TO GOVERNMENT-HELD INFORMATION BILL OF CHILE

July 2007

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# 1. INTRODUCTION

ARTICLE 19 welcomes the move to introduce legislation on the right to freedom of information in Chile. Access to information is a fundamental human right, crucial to the functioning of a democracy and key to the enforcement of other rights. The right to access information has been codified both in international human rights law as well as in anti-corruption conventions signed and ratified by Chile. Moreover, the recent holding of the Inter-American Court of Human Rights in *Claude Reyes et. al. v. Chile*,[1] has directed Chile to adopt necessary measures to ensure the right of access to State-held information. The government of Chile is therefore under a binding legal obligation to enact effective legislation to create a strong foundation for a progressive access to information regime.

The Access to Government-held Information bill ["draft Law"] contains a number of positive elements, including the recognition of a right to appeal a refusal of a request for information. We further welcome the establishment of the Transparency Board to hear such appeals and act as an independent oversight body to ensure that the principle of transparency is duly upheld and to guarantee the right of access to information to all. At the same time, the draft Law suffers from a number of significant weaknesses, including an unduly broad regime of exceptions that confers an excessive degree of discretion to officials and weak provisions for proactive disclosure. Moreover, we find it troubling that the draft Law does not take precedence over secrecy laws as this could effectively undermine the access to information regime. This Memorandum sets out our main concerns with the draft Law.[2]

Our analysis of the draft is based on international law and best practice in the field of access to information, as crystallised in two key ARTICLE 19 documents: *The Public's Right to Know: Principles on Freedom of Information Legislation* (ARTICLE 19 FOI Principles)[3] and *A Model Freedom of Information Law* (ARTICLE 19 Model FOI Law).[4] Both publications represent broad international consensus on best practice in this area and have been used to analyse freedom of information legislation from countries around the world. Part 2 contains the substantive analysis of the draft Law, while the Appendix provides an overview of international law on access to information, including Chile's obligations under international law in this regard.

# 2. ANALYSIS OF THE DRAFT LAW

## 2.1. Scope and application of the draft Law

[1] Case No. 12.108.

[2] We note with some caution – there is a substantial number of amendments annexed to the draft Law, whose status needs to be confirmed. We have included our comments on these amendments, on the basis that this text does not alter the numbering or structure of the main body of the draft Law.

[3] (London: June 1999). This has been endorsed by, among others, the OAS Special Rapporteur on Freedom of Expression. See Annual Report of the Inter-American Commission on Human Rights, 1999, Volume III, Report of the Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II.106, Doc. 3 rev., April 13, 2000, Chapter II, Part III, Freedom of Information.

[4] (London: July 2001).

Public bodies subject to the access to information regime

The public bodies required to submit to the full scope of the draft Law are outlined in s 2. This provides a list of government bodies subject to the law, with some notable omissions such as the legislative and judicial bodies, public corporations and private companies performing public functions.

We note with concern that it is proposed in suggested amendments to the draft Law that legislative and judicial bodies as well as state-owned corporations acting in their public function are only required to undertake some form of proactive disclosure, through posting some general information on their websites. It is proposed that the Central Bank will operate a restricted request-based access scheme, subject to heavy confidentiality restrictions and side-stepping the administrative appeal to the Transparency Board. Private companies performing public functions are omitted entirely from any transparency obligations.

We do not believe that this departure from the general rule of maximum openness can be justified and strongly recommend that the definition of "public bodies" is revised in order to ensure that the access to information regime applies to all bodies exercising a public function, as is required by international law. We are concerned the omissions from the definition of "public bodies" may indicate an attempt to minimise the implementation of the access to information regime, in contradiction to the stated commitment to the principle of maximum disclosure in s 11(d) of the draft Law.

This definition of "public bodies" should focus on the function performed by the body rather than its formal designation. So, if the function performed is a public one, the body should be included, to the extent of its public function., rather than a selective list, to ensure uniform coverage over all bodies that perform public functions.. An exhaustive definition would also enable the access to information regime to be dynamic – to respond to any changes in government structure or the creation of new government agencies. Examples of an exhaustive definition of "public bodies" abound in modern freedom of information legislation around the world, and the ARTICLE 19 Model FOI Law provides a benchmark provision:

> (1) For purposes of this Act, a public body includes any body: –
> (a) established by or under the Constitution;
> (b) established by statute;
> (c) which forms part of any level or branch of Government;
> (d) owned, controlled or substantially financed by funds provided by Government or the State; or
> (e) carrying out a statutory or public function,
> provided that the bodies indicated in sub-section (1)(e) are public bodies only to the extent of their statutory or public functions.[5]

Definition of "information"

[5] Note 4, s 6(1).

"Information" is defined through a number of provisions in the draft Law, rather than relying upon one operative definition. Section 5(1) stipulates that the "actions and determinations by the State Administration," along with supporting documentation and implemented procedures "are of a public nature", with the broad exemption of exceptions established under the draft Law and "under other laws requiring a qualified quorum".[6] Section 5(2) further provides that "any information held by the bodies of the Administration...regardless of its format, support, date of creation, origin, classification or processing" shall be deemed "public", unless subject to an exception within the draft Law. Section 10 provides a list of documents which are subject to the request-based access to information regime, including "information contained in actions, orders, minutes, files, contracts and agreements, as well as any information prepared with public funds regardless of its format or support", although subject to statutory exceptions.

It would be far more preferable to have one single clear definition of "information" in the draft Law,[7] rather than separate definitions in different Parts of the draft Law, with uncertain scope of application. There is significant potential for conflicting interpretations or application, particularly as s 10 significantly narrows the broad definitions outlined in s 5.

We are also concerned that Section 5 provides a wide 'carve out' for information which is protected under other laws. We discuss this problem in greater depth in Part 2.4 of this Memorandum. Section 10 outlines a non-exhaustive list of types of documents which are subject to the operation of the draft Law, rather than providing a descriptive definition which would apply to information contained in documents or records of any type.

Accordingly we recommend that ss 5 and 10 are replaced by an exhaustive definition in the following terms: "all information *held* by public bodies, in any form or medium and irrespective of origin". This is similar to the definition in s 5(2), removing the 'carve out' for information protected under other laws. Alternatively, at a minimum, s 5(2) without the 'carve out' could be used as the operative definition for the draft Law, applying across all Parts of the draft Law. The 'carve out' is simply inconsistent with the objectives of a freedom of information law and it is also inconsistent with the principles outlined in s 11 of the draft Law. In the interest of upholding the principle of maximum disclosure, all information should fall within the scope of the draft Law and be subject to case-by-case evaluation to determine whether they fall within the very limited exceptions outlined in s 21.

In addition, we find the modifier "created using public funds" in s 10(2) to be problematic as it introduces the complex element of determining funding which can easily be abused to deny access. It should also be noted that regardless of whether the information was produced

[6] Section 1 of the Transitional Provisions of the draft Law states that the "qualified quorum provision is met by laws currently in force and passed prior to the enactment of Law No. 20,050 that establish the secrecy or confidentiality of certain actions or documents."

[7] This is the approach recommended in ARTICLE 19's principles (Principle 1), see note 3, and is the method adopted in many FOI Acts globally.

by public or private funds, the relevant consideration is that any information held by a public body should be subject to the freedom of information regime.

**Recommendations:**

- The current definition of "public bodies" in s 2, which specifies bodies covered by the draft Law, should be amended with a broader definition that covers all bodies, including legislative and judicial bodies, as well as public corporations and private bodies that perform public functions.
- The various definitions of "information" in ss 5 and 10 should be consolidated into one broad definition that covers all information held by public bodies.
- The classification of information created "using public funds" in s 10(2) should be removed. All information held by public bodies should come within the ambit of the draft Law.

## 2.2. Active Transparency

The draft Law provides for a system of proactive publication by public bodies (s 7) and further, makes it a duty of the relevant authorities of public bodies to provide "necessary administrative measures" (s 8) and ensure compliance with the provisions of the draft Law (s 9). Failure to comply with the proactive disclosure obligations of s 7 is punishable by a fine imposed by the Transparency Board (s 47).

While we welcome the establishment of a proactive disclosure system – which is a critically important component of a freedom of information regime – the draft Law provides for only the most basic level of proactive disclosure. A much stronger mechanism is required to ensure the establishment of a culture of openness within government agencies[8]

Proactive Publication

Section 7 provides an overview of the types of information that public bodies are required to "make available to the public, on a permanent basis and through their websites." While the list provides a detailed summary of required information, it omits some key information, such as the types and form of information held by the body and important background material for its actions and determinations. Such omissions are precisely the information that the public requires in order to ensure it can access the information it needs on the functioning of the public body, and also to facilitate making requests for further information. Moreover, it is not sufficient that the public bodies "make available" the information, but should be obligated to "publish and disseminate widely." (Principle 2 of the ARTICLE 19 Principles)[9] We submit that simply publishing the information on its

[8]Note 3, Principle 3

[9] Principle 2 of the ARTICLE 19's Principles on Freedom of Information Legislation, see note 3 suggest that public bodies should be obligated to publish the following categories of information, at a minimum:

> • operational information about how the public body functions, including costs, objectives, audited accounts, standards, achievements and so on, particularly where the body provides direct services to the public;

website does not satisfy this latter obligation. Information should be made available through hardcopy publications distributed to the public and be easily accessible at the public body's offices.

Training of government officials

Section 8 requires public bodies to provide for the "necessary administrative measures" to ensure compliance with the draft Law. While this is a broad, overarching obligation which should contribute to the implementation of the freedom of information regime, there should also be a positive obligation on public bodies to train public officials on the implementation of the draft Law. Presently, s 8 is the only provision in the draft Law which could be construed as imposing such an obligation. Section 33(j) obligates the Transparency Board to provide training for officials, but there should be a corresponding obligation on public bodies to ensure that training by the Transparency Board and other organisation is done in a comprehensive and effective manner. The training of public officials is one of the key factors in the implementation of the draft Law and effectively establishing a culture of openness. It is frequently cited as the reason why a freedom of information law either succeeds or fails.[10] In addition, Chile has clearly been directed by the Inter-American Court of Human Rights in its holding of *Claude Reyes et. al. v. Chile* that it "must adopt the necessary measures to guarantee the protection of the right of access to State-held information...which is administered by duly trained officials".[11] This direction reflected the Court's concern that "public officials do not respond effectively to requests for information." (C.4(164)) Government officials are effectively the gatekeepers of information held by the public body and it is essential to a progressive access to information regime that they are duly trained to comply with the provisions of the draft Law.

The content of this training obligation is outlined in ARTICLE 19's Principles. Principle 3 requires public bodies to provide training for their employees that addresses the importance and scope of freedom of information, procedural mechanisms for accessing information, how to maintain and access records efficiently, the scope of whistleblower protection, and what sort of information a body is required to publish.

We therefore strongly recommend that s 8 is amended to include a provision for the proactive training of officials.

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- information on any requests, complaints or other direct actions which members of the public may take in relation to the public body;
- guidance on processes by which members of the public may provide input into major policy or legislative proposals;
- the types of information which the body holds and the form in which this information is held; and
- the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.

[10] See for example, Transparency International, *Using the Right to Information as an Anti-Corruption Tool*, 2006, available online at http://www.transparency.org/publications/publications/right2know.
[11] Note 1, para 163.

**Recommendations:**

- Section 7 should be amended to include the types and form of information held by the body; and important background material for its actions and determinations.
- Further, a general obligation should be established to publish and disseminate key documents widely, without restricting the means to the internet.
- Section 8 should be expanded to clearly obligate public bodies to provide training for relevant authorities and agents on the laws and regulations governing the right to access.

## 2.3. Procedural Rules

Requests for information

Part 4 of the draft Law sets out comprehensive and detailed procedural rules for requesting information from public bodies. Section 12 outlines the requirements for a request for access to information; s 14 requires the public body to provide the requested information within 10 days or seek an extension in exceptional cases; s 17 outlines the form in which the information is to be provided; s 18 stipulates that in principle requests for access to information are without charge although some practical fees may be levied; and s 20 concerns notification of third parties when a request for information may impact upon the rights of that third party and grants a right to object.

There are many commendable aspects of the request-based access system established by the draft Law. The draft Law seeks to establish a request system which will operate within an efficient time frame, one which is low cost, and where the mechanisms for the delivery of requested information are clearly outlined. There is, however, a notable exception from the request system, and a number of the restrictions outlined in ss 12 - 20 are illegitimately broad.

The notable exception from the request system is that public bodies are not under an obligation to assist applicants making a request to access information. Such an obligation is common in freedom of information regimes across the world, and is an important provision for making the right to freedom of information accessible to all and ensuring public confidence. Indeed, the draft Law appears to endorse the importance of assistance in s 11(e) which states that the "facilitation of access" is one of the main principles underpinning the right of access to information held by public bodies. To give effect to s 11(e) and to bring the draft Law in line with best international practice, we recommend that an obligation to provide assistance is added to the draft Law. Of course, such an obligation would depend upon the public officials having received all of the necessary training in order to navigate the request system, as outlined above at Part 2.2.

The importance of incorporating an obligation to assist in the draft Law is also highlighted by the reversal of the onus in s 12 - if a requester does not remedy any errors in the request within 5 days then the request is deemed withdrawn. This provision fails to take into account the difficulty of precisely requesting information when it may not be known in which form the information is held or where it is likely to be situated. The tight time frame in which the requester's remedying is required is also unnecessary and over-

burdensome. We therefore recommend that the obligation to assist should replace the current obligation on the requester in s 12.

Notice of refusal of request for information

Section 16 states that a refusal of a request must be given in writing, and that it must include the reasons for the refusal and the legal basis for the denial. In order to ensure procedural fairness, we recommend that the notice issued under s 16 also advises the requester of his or her right to appeal the refusal to the Transparency Board (s 24) and the time limits within which to do so.

Fees for the provision of information

Section 18 implements the principle of gratuity outlined in s 11(j). Section 18 provides that the right of access to information is free of charge, except for payment of duplication charges and any other fees that may be charged for the delivery of certain documents as authorised by law. Further, s 17 provides that the requested information shall be delivered in the manner sought provided that this does not involve excessive costs or an expense not provided for in the institutional budget.

We welcome the inclusion of a presumption of free access, albeit limited in some regards. We recommend strengthening this presumption further by including a subsection to s 18 providing that the first 50 pages are to be provided free of charge. It is common practice in many jurisdictions to provide a nominal amount of information free of charge. This strikes an appropriate balance between giving effect to the right of access to information and the internal budgetary arrangements of a public body. Indeed, the administrative cost of charging and collecting fees for a nominal amount of information can in fact exceed the amount received for duplication costs.

Protection of the rights of third parties

Section 20 stipulates that a third party must be notified of a request which "may affect" the rights of the third party, and that third party has a right to object to the disclosure of the information within 3 working days. No basis is required for the objection. If an objection is received, then the request for access to information is to be denied.

Section 20 is an extremely concerning provision in the draft Law, as it effectively enables a concerned third party to veto the release of information. This is not recognised as legitimate by international law. The determination of a request for information should not be made by a third party; it is the responsibility of the public body. Furthermore, all determinations on whether to grant access should be made on the basis of the criteria clearly laid down in the regime of exceptions. There already is more than adequate protection of third party interests in the regime of exceptions outlined in ss 21 and 22 of the draft Law, with the result that s 20 is unnecessary and inappropriate. We recommend in the strongest terms that it is removed from the draft Law.[12]

[12] See further the comments about the overbroad protection of the right of third parties in the exceptions regime in Part 2.4.

**Recommendations:**

- Section 12 should be deleted from the draft Law. It should be replaced by a provision that requires the relevant official to render reasonable assistance as may be necessary to enable the request to comply with the requirements.
- Section 16 should be amended to include notification of the requester of his or her right to appeal a refusal to the Transparency Board and the time limits within which to do so.
- Section 18 should be amended to insert a subsection providing that the first 50 pages of a request for information are provided free of charge.
- Section 20 should be deleted from the draft Law, as there is no justification for giving a third party a right of objection in respect of a request for access to information.

## 2.4. Exceptions Regime

Test for Exceptions

Section 21 of the draft Law establishes a two-tier regime of exceptions to the right of access to publicly held information. The first tier regime incorporates the four exceptions outlined in Article 8 of the Constitution of Chile to the principle of probity. The second tier of the exceptions regime is formed by grouping further interests within the framework of the four exceptions in Article 8. A further fifth exception is added. The content of s 21 is as follows (emphasis added):

> s 21(1): where disclosure would **materially affect the performance of the duties of the public body**, including:
>
> (a) it may be detrimental to the enforcement of laws, particularly in respect of crime prevention, investigation and prosecution;
> (b) it involves the transaction of business at meetings of public bodies, prioir to the adoption of a resolution, measure or policy, notwithstanding later disclosure of the adoption of that resolution, measure or policy.
>
> s 21(2): where disclosure **affects the rights of persons**, including:
>
> (a) it may affect personal privacy of a person, including health or medical records;
> (b) it may harm commercial other other economic rights, public or private;
> (c) it may involve a risk to the life, safety or health of a person.
> (d) where the information has been obtained from a third party on the basis of confidentiality.
>
> s 21(3): where disclosure would **affect the security of the nation**, including the following cases:
>
> (a) it may affect national security;
> (b) it may affect national defence;
> (c) it may affect public order or public security.
>
> s 21(4):where disclosure would **affect national interests**, including:
>
> (a)it may affect national public health;
> (b) it may affect the international relations of Chile;
> (c) it may affect the economic interests of Chile.
>
> Additionally, s 21(5) creates an exception for **information declared to be confidential or secret by a law requiring a qualified quorum**, in accordance with the grounds set forth under s 8 of the Constitution of Chile.

The test for exceptions outlined in s 21 of the draft Law presents serious inconsistencies with the requirements of international law, and we consider this to be most concerning aspect of the draft Law, one which is in need of urgent and considered review. We draw particular attention to the non-exhaustive nature of the regime of exceptions. Each of the subsections of s 21 are listed merely as examples of interests which could be protected under ss 21(1) to 21(4). This gives rise to the prospect of requests for information being refused on grounds which are not specified in the draft Law - a significant prospect of abuse of the draft Law through unjustified use. Section 21(4) is particularly concerning in this regard – the scope of exceptions under 'national interest' is potentially limitless. This is a gravely concerning issue, undermining the basic requirements of the rule of law, namely the ability to know what the law is. Aside from the prospect of inconsistency with Chile's obligations under international law, such a provision could, in all probability, be unconstitutional.

Overall, the regime of exceptions fails to adhere to the fundamental 3-part test for exceptions outlined in international law for access to information:

- the information must relate to a legitimate aim listed in the law;
- disclosure must threaten to cause substantial harm to that aim; and
- the harm to the aim must be greater than the public interest in having the information.

While some elements of this test are reflected in the draft Law, many of the elements do not meet the standard of the test at international law. For example, some of the interests protected are not legitimate aims recognised by international law; the harm test for the protection of interests frequently falls far below the threshold of substantial harm; and the emphasis of the public interest 'override' contained in s 22 is misplaced and fails to correspond to the substantial harm requirement. These concerns are outlined in more detail below.

Definition of Legitimate Aims in draft Law

As outlined above in the Appendix, the scope of legitimate aims which justify a refusal for information are clearly outlined in international law.[13] There are some interests contained in s 21 which are not recognised by international law and thus contravene the standards for the right to access information. These are the economic interests of Chile (s 21(4)(c)); and information declared to be secret by a law requiring qualified quorum (s 21(5)).

In respect of s 21(4)(c), the economic interests of a State are not recognised as a legitimate basis on which to refuse disclosure in international law. Indeed, this issue was clearly highlighted in the Inter-American Court of Human Rights judgment in *Claude*

[13] See, in particular, the Council of Europe's Recommendation on Access to Official Documents (Recommendation No. R(2002)2, adopted 21 February 2002), Principle IV; and Principle 4 of the ARTICLE 19 FOI Principles, note 3.

*Reyes v Chile*. It is highly concerning that one of the key issues in the judgment may not be being complied with.[14]

In respect of s 21(5), as we have stated earlier, it is essential that all requests for information are assessed on the basis of a clear regime of exceptions, including a test measuring the risk of harm and the public interest in disclosure. By categorically exempting information from the operation of the draft Law, the right to access information is denied without due justification.

There are also some interests which are stated too broadly to correspond with the protection of legitimate interests in international law. Firstly, in respect of s 21(1)(a), the enforcement of laws is restricted to the prevention, detection and prosecution of criminal activities, and the assessment and collection of taxes, not all laws generally.[15]

Secondly, s 21(1)(b) is also drafted far too broadly. The 'internal deliberations' exception ought to be restricted to two categories: (1) serious prejudice to the current or future formulation of policy or decisions, including the free and frank provision of advice; and (2) frustration of the success of the policy or decision in question through premature disclosure. Factual information must not be included in the exception. A categorical exemption of all information involved in deliberations does not strike the right balance between protection of legitimate interests and promoting a culture of openness and governmental accountability.

Thirdly, s 21(2)(b) also encompasses a far broader scope of information than is necessary. ARTICLE 19 has provided guidance on balancing protecting personal information of a third party in its Model FOI Law:

> 25(2) [the exception for personal information] does not apply if:
>
> (a) the third party has effectively consented to the disclosure of the information;
>
> (b) the person making the request is the guardian of the third party, or the next in kin or the executor of the will of a deceased third party;
>
> (c) the third party has been deceased for more than 20 years; or
>
> (d) the individual is or was an official of a public body and the information relates to his or her function as a public official.

As will be understood from the above recommended drafting, it is critically important that public officials are not able to deflect scrutiny or criticism on the basis of invoking privacy. It is imperative that this, and the other recommended caveats, are outlined in s 21(2)(b).

Fourthly, ss 21(2)(b) and (d) should be limited to the specific harms it seeks to avoid - protecting confidentiality in situations in which this is legitimate (as outlined immediately above), and preventing unfair changes to a competitive position. The protection given to confidentiality and commercial interests must be balanced with a

[14] Note 1, paras 88-93; and 98.
[15] See, for example note 4, s 29.

safeguard that basic information relating to a public procurement will be open. We have two drafting recommendations in this regard:

For the amendment of s 21(2)(b): "the legitimate competitive interests of a public or private entity, insofar as this is compatible with the need for public scrutiny of procurement processes." [16]

And for the amendment of s 21(1)(d), we refer to ARTICLE 19's Model FOI Law:

> 27. A body may refuse to communicate information if:
>
> (a) the information was obtained from a third party and to communicate it would constitute an actionable breach of confidence;
>
> (b) the information was obtained in confidence from a third party and: -
>
> i. it contains a trade secret; or
>
> ii. to communicate it would, or would be likely to, seriously prejudice the commercial or financial interest of that third party;

In addition to the regime of interests outlined in s 21, the draft Law also seeks to provide wide protection for any rights of third parties in s 20.[17] International law makes it clear that only a discrete list of identifiable interests of a person or body can be protected – such as privacy, confidentiality and protection of commercial interests. Furthermore, the protection of these interests must also be subjected to a balancing test, to assess the risk of harm against the public interest in the disclosure of the information. We reiterate our recommendation that s 20 is removed from the draft Law.

Substantial Harm Test

This second limb of the 3-part test is critical to ensuring that a balance is struck between the protection of legitimate interests and the right to access information. Only information which is established as posing a risk of substantial harm should be withheld by a public body. Contrary to this standard, Section 21 of the draft Law only includes a very limited harm component in its subsections.

All of the provisions of s 21 rank far below the required threshold of substantial harm. The provisions only require a possibility of affecting, or involving a risk, to a legitimate interest. Affecting interests is not a harm test – it is possible to affect an interest without there being any harm whatsoever. Further, ss 21(1)(b), 21(2)(d) do not require no risk of harm whatsoever – in respect of the former, it is sufficient that the information is of the nature of an internal deliberation; and in respect of the latter, it is sufficient that the information is of a nature that is alleged to be confidential.

Failing to incorporate the substantial harm test prescribed by international law has serious ramifications for the promotion of government accountability and transparency, both of which are stated objectives of the draft Law. The result is an exceptions regime which is

[16] See Briefing regarding the elaboration of a Council of Europe treaty on access to official documents, ARTICLE19, Open Society Justice Initiative, Access Info Europe, November 2006
[17] See Part 2.3 above.

excessively overbroad. Under s 21(1) for example, instances of serious maladministration within an institution, could be denied on the basis of constituting information "materially affect[ing] the performance of duties" of public bodies. It is in the public interest that such information is in fact brought to light, particularly where measures are not being taken to address the issue.

For this reason, we strongly recommend that the harm component built into each subsection of s 21 is raised to meet the threshold of posing a risk of causing substantial harm.

Public Interest 'override'

The draft Law makes provision for a public interest override in the designation of information as secret or confidential in s 22: information may only be so designated if "the risk of danger outweighs the public interest promoting the transparency and disclosure of actions and documents of the Administration or held by he Administration."

We welcome the inclusion of a public interest override in the draft Law, which gives effect to the fundamental principle of maximum disclosure and builds a culture of openness and accountability. However, we would recommend that the requirement is formulated in more clearly, so as to ensure that the purpose of the public interest override is given effect. We recommend the following drafting:

> 22. Notwithstanding any provision in this Part, a body may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure.[18]

Partial Disclosure

Sections 21 and 22 state that a request for information may be denied in whole or in part". Accordingly, the draft Law provides for 'severability' – the provision of documents with only that portion which is confidential removed, and the remainder of the document disclosed.

This is a commendable aspect of the draft Law, giving effect to the principle of maximum disclosure contained in s 11(d) and assisting to ensure that the test for exceptions is limited to its appropriate scope. In order to give clearer effect to this legislative intention, we would recommend alternative drafting, as the present wording of ss 21 and 22 suggests that the severability requirement is only a discretionary one.

We recommend utilising the language of the EC Recommendation 1049 of 2001, which applies to the European Parliament, Council and Commission.[19] Article 4(6) of that Recommendation states:

[18] Note 4, s 22.
[19] Regulation (EC) No 1049/2001 of the European Parliament and of the Council concerning public access to European Parliament, Council and Commission documents, http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_145/l_14520010531en00430048.pdf.

> If only parts of the requested document are covered by any of the exceptions in [Article 4], the remaining parts of the document shall be released.

We consider this language is appropriate to the draft Law and would appropriately establish an obligation of partial disclosure on public bodies.

Relationship with Other Laws

Section 21(5) permits a public body to refuse disclosure "in the case of documents, data or information declared to be confidential or secret by a law requiring a qualified quorum, in accordance with the grounds set forth under s 8 of the Political Constitution", repeating the 'carve out' in s 5. In addition, as noted above, s 21(5) is not subject to an overriding public interest test set out in s 22.

The accommodation of previous secrecy laws is a seriously concerning aspect of the draft Law. It is wholly inconsistent with the principle of maximum disclosure and undermines the fundamental premise of an access to information regime, namely the presumption that all information is public and a refusal is only justified on a limited scope of exceptions which incorporate both a substantial harm test and a public interest override. The Inter-American Court held in *Claude Reyes v Chile* that guaranteeing the right of access to information "involves the elimination of norms and practices of any type that result in violations of the guarantees established in the [American Convention on Human Rights]."[20] Additionally, ARTICLE 19 FOI Principle 8 sets forth the requirement that pre-existing laws which are inconsistent with an access to information regime are repealed.

We strongly recommend that s 21(5) is repealed and the concerned laws are harmonised with the access to information regime established by the draft Law. In the instance that repeal does not occur at this time, we recommend the establishment of an internal review mechanism by an official qualified to sight the classified information. That official should be required to assess whether it is justified that the information is still withheld – assessed on the basis of the exceptions regime in the draft Law. This would provide a partial measure to strike a better balance between secrecy and disclosure. In this way, it would also bring s 21(5) into line with the test in s 22(1) which is applicable to ss 21(1) – (4), namely that information may only be kept as secret or confidential so long as the threat of danger that triggered such designation still exists. Where it is considered that the threat of danger does not still exist – assessed on a substantial harm test and in accordance with the public interest override – then the information should be permanently de-classified.

Time limits

As noted above, s 22(1) sets out an expiry of classification of "information" as confidential, limiting it to the duration of the threat of danger that triggered the designation and in any event, to a maximum period of 10 years. Section 22(3) states that "actions" can be secret or confidential for up to a twenty-year period, which may be extended. As a preliminary consideration, we note that this distinction between "information" and "actions" arises from the conflicting definitions of "information" in

[20] Note 1, para 163.

the draft Law, which has a problematic impact on the functioning of the access to information regime, as we have discussed above in Part 2.1.

We are concerned that this categorical approach perpetuates the prior system of categorising information as secret or confidential for lengthy periods of time, without an independent review mechanism to assess whether such designation is truly necessary and strikes the right balance between disclosure and protection of legitimate interests. We have outlined our concerns above regarding the maintenance of secrecy laws which should instead be brought into line with an overarching access to information regime. Section 22 presents serious similar concerns. It is fundamental to the functioning of a true access to information regime – and one which is consistent with the judgment in *Claude Reyes v Chile*[21] – that the disclosure of information is assessed on case-by-case basis, rather than categorically exempting information for up to ten or twenty years in response to a request for information. We recognise that there will be information that will need to be withheld in order to protect legitimate interests - but the current structure of the draft Law weighs far too heavily in favour withholding information. Designating information to be secret or confidential prevents the public interest override from operating in individual cases and removes the time-sensitivity from the protection of legitimate interests which, in many cases, will only be very short periods of time.

We recommend that s 22 is amended so that information is not subjected to a classification system, at least to the extent that further requests for previously denied information are re-considered each time in line with the test for exceptions (as amended as per our recommendations). Section 22 should be restricted to requiring that a consideration of the request for information involves balancing any substantial harm done to a legitimate protected interest against the public interest in disclosure, and that if the request is refused, the decision must be "duly justified" and setting out written reasons for doing so. Ideally, we recommend that the classification component of s 22 is removed in its entirety; including the remaining provisions relating to classification in ss 22 and 23.

**Recommendation:**

- Section 21 should be amended to ensure that an exhaustive list of exceptions, stated in precise and narrowly-drawn terms, is outlined in the draft Law.
- Two of the interests listed in s 21 are not interests recognised as legitimate by international law and should be removed from the draft Law. These provisions are s 21(4)(c) [the economic interests of Chile]; and s 21(5) [information declared to be secret or confidential by a law requiring qualified quorum].
- Five of the interests listed in s 21 are drafted too broadly to be consistent with international law and we outline our recommended changes above. These provisions are s 21(1)(a) [the enforcement of laws]; s 21(2)(a) [personal privacy]; s 21(1)(b) [the internal deliberations of a public body]; s 21(2)(b) [commercial and economic rights]; and s 21(2)(d) [confidential information from a third party].

[21] Note 1, paras 92, 101, 163.

- Each of the subsections of s 21 should be amended to incorporate the 'substantial harm' test required by the 3-part test at international law for exceptions.
- To ensure partial disclosure, the following provision should be inserted to complement ss 21 and 22: "If only parts of the requested document are covered by any of the exceptions in s 21, the remaining parts of the document shall be released."
- Section 21(5) should be repealed to make it clear that information may be withheld only pursuant to the terms of the draft Law, overriding any secrecy laws.
- The 'public interest' override contained in s 22 should be amended to refer to the public interest in the disclosure of specific information.
- Sections 22 and 23 should also be amended to remove the classification system for information which is considered exempt in response to a request for access. If the classification system is retained, s 22 should be amended to require further requests for previously denied information are assessed individually in line with the test for exceptions (including a substantial harm component and the public interest override).

## 2.5. Appeals

Where a request is refused, or where the 10 working days time period has expired without a response, the applicant can appeal to the Transparency Board within 10 days of the determination or expiry of the time period for a response (s 24). The respondent public body, and third party in the case of a s 20 refusal, is granted 10 working days to file a defence and objections (s 25(2)). The respondent public body is entitled to request a hearing, which must be held within 5 working days of that request (s 25(3)). The Transparency Board is required to make a determination on the applicant's appeal within 5 working days, after the 10 working days period for the submission of defences and objections has expired (s 27). If the respondent public body requests a hearing, the 5 working days for the Transparency Board's determination runs from the conclusion of the hearing (s 27).

A limited appeal lies from a determination of the Transparency Board to the regional Appellate Court (s 28). The appeal must be filed within 5 working days from the date of notification of determination (s 28(3)). A claimant is restricted to the grounds of illegality or challenging the confirmation of a refusal on the basis of s 20 (ss 28(1),(3)). The respondent public body is prohibited from appealing disclosure of information under s 21(1)(1), or s 21(5) concerning the due performance of its duties. 10 working days is permitted for the filing of defences and objections (s 30(1)). No new evidence may be introduced in the Appellate Court (s 30(2)), although the Court may order the opening of an evidentiary period (s 30(3)). The Court will issue judgment within a further 10 day working period (s 30(4)). No appeal lies from the judgment of the Appellate Court (s 30(4)).

Our predominant concerns are with the restrictions on appeals to the Appellate Court, namely the shortness of time in which to appeal, the restricted grounds of appeal for the

claimant, the prohibition on the introduction of new evidence, the granting of standing to third parties and the prohibition on appealing the decision of the Appellate Court.

Given that the claimant will need to assess whether his or her case is appropriate for judicial review, and prepare the case on the basis of the Transparency Board's decision, we recommend that a greater period of time is granted to the claimant. This is potentially a complex process, involving a greater range of considerations than the initial appeal, and one which is likely to require the obtaining of legal advice. A period of 5 days is wholly inadequate and would greatly constrain the right to appeal. We recommend s 28(3) is amended to allow one calendar month for a claimant to appeal.

The restricted grounds of appeal are also potentially a matter of significant concern. We note that it is critically important that matters of procedural fairness can be raised on appeal. If such matters are not encompassed within 'illegality', we recommend that the grounds of appeal are broadened.

The prohibition on new evidence is particularly concerning. The inclusion of an appeal to the Appellate Court in the draft Law ensures that judicial review of an administrative decision is available, and this should be available in the fullest regard. For example, in order to ensure that the claimant's rights are duly protected, it is essential that not only the request for information is reviewed by the Appellate Court, but also the process by which the Transparency Board reached its decision to affirm the refusal. Further, new evidence which is pertinent to the determination of the request may have become available since the determination of the Transparency Board, such as a further communication from the public body or a third party. It may even include further evidence which was previously available but which the claimant had not yet located. The prohibition on new evidence, presumably to ensure that the Appellate Court's decision is able to be reached as quickly as possible, is not sufficiently justified to defeat the claimant's right to due process. We recommend s 30(2) is amended accordingly.

In respect of third parties, we reiterate our comments concerning the overly wide latitude granted to third party interests in the draft Law. It is our firm view that there is no reason why a third party should have standing to intervene in the appeal to the Appellate Court and we recommend s 28(3) is amended accordingly. Any relevant evidence concerning the third party can be tendered by the respondent public body. It is critical that the process is consistently cognisant of the public nature of a request for information – it is solely a matter between the claimant and the public body, who holds the information on behalf of the people.

Finally, the prohibition of an appeal from the Appellate Court's decision is highly significant in that it prevents the opportunity for a provision of the draft Law, or the operation of pre-existing laws governing secrecy and confidentiality, from being struck down as unconstitutional. While we appreciate the desire to provide a degree of judicial review without the process becoming overly drawn out, we recommend that s 30(4) is modified to allow appeals on constitutional grounds.

**Recommendations:**

- s 28(3) should be amended to allow one calendar month for a claimant to file an appeal to a regional Appellate Court.
- Consideration should be given as to whether s 28(1) allows a claimant to appeal on procedural fairness grounds. If not, s 28(1) should be amended accordingly.
- s 28(3) should be amended to remove a third party's right of standing in respect of a s 20 appeal.
- s 30(2) should be amended to remove the prohibition on the tendering of new evidence.
- s 30(4) should be amended to allow appeals from the Appellate Court's judgment on constitutional grounds.

## 2.6. Oversight Body

Autonomy of the oversight body

Section 31 of the draft Law provides for the creation of the Transparency Board as an autonomous body, with legal personality and property of its own. The draft Law seeks to entrench the autonomy of the Transparency Board through the appointment procedure of its members. The President of the Republic appoints the members of the Transparency Board, upon the confirmation of two-thirds of the incumbent members of the Senate (s 37).

We fully support the creation of the Transparency Board and the legislative measures taken to entrench the autonomy of the body. We do believe that these measures ought to be expanded upon to provide an effective guarantee of autonomy for the Transparency Board.

Firstly, we strongly recommend that a short-list should be prepared through a process of public consultation and submitted to the President of the Republic, rather than leaving this as a matter of discretion of the President (s 37).[22] Similarly, the President of the Republic should not be able to directly select a replacement for a retiring or removed member of the Transparency Board (s 38(3)). We recommend that the remaining members prepare a shortlist of nominees to the President for consideration. Also, it is not usual practice in access to information regimes to require the independent appeals body to seek the approval of the Executive for its by-laws (s 40(2)). We recommend that this provision is removed or at least made subject to the approval of Parliament to reduce the risk of political interference. All of these measures will significantly reduce the prospect of political appointments to the Transparency Board which in turn will enhance public confidence in its operations.

Secondly, in a related matter, we consider it critically important that the terms of directors are only renewable twice (s 36).[23] This will assist in ensuring that the Transparency Board operates without undue political interference.

[22] See, for example, note 4, s 34.
[23] *Ibid*, s 34.

Thirdly, we recommend that the position of director is made a full-time position, at least during the first term. This matter could be reviewed after the completion of the first term of office to evaluate whether it should continue on a full-time or part-time basis (s 39). The establishment of a new body with the mandate to establish a new access to information regime, conduct training of public officials, issue guidelines, establish by-laws and hearing complaints is an ambitious task, which requires fulltime members to ensure that it succeeds.

Accountability Mechanisms for the Transparency Board

Section 33(l) already requires the Board to "prepare statistics and reports on transparency and access to information of public bodies and on compliance herewith." We recommend expanding this obligation to require the Transparency Board to:

- Report on a bi-annual basis to Parliament on its activities, the status of implementation and compliance with the access to information regime by public bodies, along with any recommendations on amendment of the Bill or on best practice to be followed by public bodies;
- Require public bodies to submit annual reports to the Transparency Board on their progressive compliance status;
- To issue annual reports on the Transparency Board's activities and policies, and to disseminate these reports widely to the public.

In our view, this would greatly facilitate the Board's role of guaranteeing the right to access of information as well as be consistent with the well established practices of oversight bodies in other countries.

**Recommendations:**

- s 37 should be amended to require the preparation of a short-list of candidates through a process of public consultation, which should then be submitted to the President of the Republic.
- s 38(3) should be amended so that the President is not able to directly appoint a replacement for a member of the Transparency Board. We recommend that the remaining members of the Transparency Board prepare a short-list of candidates to be submitted to the President.
- s 40(2) should be amended so that the Executive is not responsible for approving the by-laws of the Transparency Board. Either the by-laws should not need to be approved or the Parliament is the oversight body for their approval.
- s 36 should be amended so that members are restricted to serving two terms.
- The Transparency Board should be required to engage in more reporting activities and the draft Law should be amended accordingly. These reporting activities are outlined above.

## 2.7. Miscellaneous

Records Management

The draft Law is limited to requiring relevant bodies to index and retain confidential documents for a 10-year period (ss 22, 23). Access to information systems can only be effective where public bodies employ effective record keeping systems. Where records are not maintained, access is undermined. The draft Law should clearly provide minimum standards for the maintenance and preservation of all records by public bodies.

Restrictions placed on use of information obtained under the draft Law

Section 19(1) provides that the requested information will be copied and delivered without restrictions on the use of the copies, "except for such conditions or restrictions as are expressly established by law." This provision potentially introduces a significant qualifying restriction on the use of information obtained from a public body, for example for commercial use of information. Such a practice is not common in other countries' access to information regimes, nor is it consistent with the underlying principle that the State does not own information but holds it on behalf of the public. There is no justification for the State to restrict how individuals use information which the State has held on their behalf and we strongly recommend that s 19 is amended accordingly.

Section 19(2) seeks to hold a requester of information liable if he or she discloses any information received affecting the rights of third parties. This restriction offends the basic reasoning of confidentiality – if information is disclosed to another person, then confidentiality can no longer be claimed. It is unjustifiable in law to seek to compel a requester to maintain confidentiality when the information has been disclosed. Accordingly we recommend that s 19(2) is removed from the draft Law.

**Recommendations:**

- A provision should be inserted into the draft Law to ensure that minimum standards for the maintenance and preservation of all records held by public bodies should be clearly provided for in the draft Law.
- s 19 should be removed from the draft Law.

# APPENDIX: CHILE'S OBLIGATIONS UNDER INTERNATIONAL LAW AND INTERNATIONAL STANDARDS ON FREE EXPRESSION

## 1. The importance of access to information

The right to access information held by public bodies, often referred to as 'freedom of information' or the 'right to information', is a fundamental human right recognised in international law. It is crucial as a right in its own regard as well as central to the functioning of democracy and the enforcement of other rights. Without a right to information, State authorities can control the flow of information, 'hiding' material that is damaging to the government and selectively releasing 'good news'. In such a climate, corruption thrives and human rights violations can remain unchecked.

In the earlier international human rights instruments, the right to information was not set out separately but included as part of the fundamental right to freedom of expression, which includes the right to seek, receive and impart information. Article 19 of the *Universal Declaration on Human Rights* (UDHR), adopted as a United Nations General Assembly resolution in 1948,[24] states:

> Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

While the UDHR is not directly binding on States, parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law.[25] Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR), a formally binding legal treaty ratified by Chile on 10 February 1972,[26] ensures the right to freedom of expression and information in terms similar to the UDHR.

Chile has also ratified the *American Convention on Human Rights* (ACHR),[27] which guarantees the right to freedom of expression at Article 13(1), as follows:

[24] UN General Assembly Resolution 217A (III), adopted 10 December 1948.
[25] For judicial opinions on human rights guarantees in customary international law, see *Barcelona Traction, Light and Power Company Limited Case* (Belgium v. Spain) (Second Phase), ICJ Rep. 1970 3 (International Court of Justice); *Namibia Opinion*, ICJ Rep. 1971 16, Separate Opinion, Judge Ammoun (International Court of Justice); *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd Circuit). For an academic critique, see M.S. McDougal, H.D. Lasswell and L.C. Chen, *Human Rights and World Public Order*, (Yale University Press: 1980), pp. 273-74, 325-27. See also United Nations General Assembly Resolution 59 (1), 1946.
[26] UN General Assembly Resolution 2200A (XXI), adopted 16 December 1966, in force 23 March 1976. The figure for ratifications is as of November 2006. Nepal acceded to the ICCPR in May 1991.
[27] Adopted at San José, Costa Rica, 22 November 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978. Argentina ratified the Convention on 14 August 1984.

> Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

These provisions are increasingly seen as imposing an obligation on States to enact right to information laws. Most recently, Chile was party to a landmark case before the *Inter-American Court of Human Rights* (IACHR), *Marcel Claude Reyes, et al. v. Chile*, Case No. 12.108. The ensuing judgment was the first time that an international tribunal recognised that the right of access to information held by government was a basic human right. Moreover, the Court instructed Chile to adopt the necessary measures to guarantee the protection of the right of access to State-held information.

There is now little doubt that there is growing international recognition of a general right of access to information as well as of the importance of adopting the legislative and other measures necessary to make this right effective. The United Nations Special Rapporteur on Freedom of Opinion and Expression,[28] for example, has repeatedly called on all States to adopt and implement right to information legislation.[29] In 1995, the UN Special Rapporteur stated:

> The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large … is to be strongly checked.[30]

His comments were welcomed by the UN Commission on Human Rights, which called on the Special Rapporteur to "develop further his commentary on the right to seek and receive information and to expand on his observations and recommendations arising from communications".[31] In his 1998 Annual Report, the Special Rapporteur reaffirmed that the right to information includes the right to access information held by the State:

> [T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems…."[32]

The UN Special Rapporteur was joined in his call for legal recognition of the right to information by his regional counterparts – the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and the Special Rapporteur

[28] The Office of the Special Rapporteur on of Opinion and Expression was established by the UN Commission on Human Rights, the most authoritative UN human rights body, in 1993: Resolution 1993/45, 5 March 1993.
[29] See, for example, the Concluding Observations of the Human Rights Committee in relation to Trinidad and Tobago, UN Doc. No. CCPR/CO/70/TTO/Add.1, 15 January 2001. 14. The comments of the UN Special Rapporteur on freedom of Opinion and Expression are discussed at length below.
[30] Report of the Special Rapporteur, 4 February 1997, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1997/31.
[31] Resolution 1997/27, 11 April 1997. 12(d).
[32] Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40. 14.

on Freedom of Expression of the Organisation of American States – in a Joint Declaration issued in November 1999. The three reiterated their call in December 2004, stating:

> The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.[33]

The right to information has also been explicitly recognised in all three regional systems for the protection of human rights. Within the Inter-American system, the Inter-American Commission on Human Rights approved the *Inter-American Declaration of Principles on Freedom of Expression* in October 2000.[34] The Principles unequivocally recognise a right to access information held by the State, as both an aspect of freedom of expression and a fundamental right on its own:

> 3. Every person has the right to access information about himself or herself or his/her assets expeditiously and not onerously, whether it be contained in databases or public or private registries, and if necessary to update it, correct it and/or amend it.
>
> 4. Access to information held by the state is a fundamental right of every individual. States have obligations 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.

Shortly after the adoption of these Principles, a group of experts met in Lima, Peru and adopted the *Lima Principles*.[35] These Principles elaborate in greater detail on the content of the right to freedom of information in the context of the Americas. Two years later, in November 2003, a major international conference on freedom of information was again held in Peru, bringing together a wide range of civil society experts, as well as officials and politicians. The conference adopted the *Declaration of the SOCIUS Peru 2003: Access to Information Seminar*, which states, among other things:

> We recommend that Governments Adopt and implement access to information laws based on the underlying principle of openness, as elaborated in the attached "Guidelines on Access to Information Legislation".[36]

The Guidelines set out in some detail the standards to which freedom of information legislation should conform.[37]

These standards are confirmed by a Resolution of the General Assembly of the Organisation of American States adopted in 2003, stating:

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[33] 6 December 2004. Available at: http://www.cidh.org/Relatoria/showarticle.asp?artID=319&lID=1.
[34] 108th Regular Session, 19 October 2000.
[35] Adopted in Lima, 16 November 2000.
[36] 28 November 2003.
[37] Available at: http://www.britishcouncil.org/socius/english/declaration.pdf.

> 2. To reiterate that states are obliged to respect and promote respect for everyone's access to public information and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application.[38]

The General Assembly followed this up in 2004 with a Resolution calling on Member States to adopt and implement legislation ensuring "broad access to public information".[39] In 2005, reaffirming the previous two resolutions, the General Assembly urged States to provide for civil society participation in the drafting of access to information laws, and also urged States to include in their laws "clear and transparency exception criteria."[40]

Regional human rights bodies in other parts of the world have also recognised access to information as a human right. The African Commission on Human and Peoples' Rights recently adopted a *Declaration of Principles on Freedom of Expression in Africa*,[41] Principle IV of which states, in part:

> 1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.
> 2. The right to information shall be guaranteed by law in accordance with the following principles:
>    - everyone has the right to access information held by public bodies;
>    - everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
>    - any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
>    - public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
>    - no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
>    - secrecy laws shall be amended as necessary to comply with freedom of information principles.

Within Europe, the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents in 2002.[42] Principle III provides generally:

> Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

[38] AG/RES. 1932 (XXXIII-O/03), of 10 June 2003.
[39] AG/RES. 2058 (XXXIV-O/04), of 8 June 2004.
[40] AG/RES. 2121 (XXXV-O/05), of 26 May 2005.
[41] Adopted at the 32nd Session, 17-23 October 2002.
[42] Recommendation No. R(2002)2, adopted 21 February 2002.

The rest of the Recommendation goes on to elaborate in some detail the principles which should apply to this right. The Council of Europe is presently engaged in preparing a binding treaty on the right to information.[43]

The Commonwealth has also recognised the fundamental importance of the right to information, and has taken a number of significant steps to elaborate on the content of that right.[44]

Implementation of the right to access to information is also a key requirement imposed on States parties to the UN Convention against Corruption. Chile ratified this Convention on 13 September 2006.[45] Article 13 of the Convention requires that States should "[ensure] that the public has effective access to information".

The right of access to information is not guaranteed by the Constitution in Chile, but Chapter I, Article 8 establishes the principle of publicity:

> 8. Those who hold public office must strictly adhere to the principle of probity in all of their actions. The actions and decisions of government entities are of public record, as are the foundations and the procedures thereof. However, only a qualified quorum law (i.e., a law passed by absolute majority) can declare that a given record is classified or confidential, when publicity would compromise the duties of such an entity, individual rights, national security, or the national interest.

National right to information laws have been adopted in record numbers over the past ten years, in countries which include India, Israel, Jamaica, Japan, Mexico, Pakistan, Peru, South Africa, South Korea, Thailand, Trinidad and Tobago, and the United Kingdom, as well as most of East and Central Europe. These nations join a number of other countries which enacted such laws some time ago, such as Sweden, the United States, Finland, the Netherlands, Australia and Canada, bringing the total number of States with right to information laws to nearly 70. A growing number of inter-governmental bodies, such as the European Union, the UNDP, the World Bank and the Asian Development Bank, have also adopted policies on the right to information. With the adoption of a strong right to information law, Chile would join a long list of nations which have already taken this important step towards guaranteeing this fundamental right.

## 2. The content of the right to information

A survey of international law and best practice shows that, to be effective, right to information legislation should be based on a number of general principles. Most important is the principle of *maximum disclosure*: any information held by a public body should in principle be openly accessible, in recognition of the fact that public bodies hold information not for themselves but for the public good. Furthermore, access to information may be refused only in narrowly defined circumstances, when necessary to

[43] The Group of Specialists on Access to Official Documents is responsible for this work.
[44] See the *Communiqué*, Meeting of Commonwealth Law Ministers (Port of Spain: 10 May 1999).
[45] See http://www.unodc.org/pdf/crime/convention_corruption/cosp/session1/V0658021e.pdf.

protect a legitimate interest. Finally, access procedures should be simple and easily accessible, and persons who are refused access should have a means of challenging the refusal before an independent body.[46]

In his 2000 Annual Report to the UN Human Rights Commission, the UN Special Rapporteur endorsed ARTICLE 19's overview of the state of international law on the right to information as set out in the ARTICLE 19 Principles and called on Governments to revise their domestic laws to give effect to this right. He particularly directed States' attention to nine areas of importance:

> [T]he Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:
>
> - Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
>
> - Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
>
> - As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also provide for a number of mechanisms to address the problem of a culture of secrecy within Government;
>
> - A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;
>
> - All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);
>
> - The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;
>
> - The law should establish a presumption that all meetings of governing bodies are open to the public;
>
> - The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;

[46] See note.3.

- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.[47]

This constitutes strong and persuasive guidance to States on the content of right to information legislation.

## 3. Limits to the right to information

One of the key issues in a right to information law is defining when a public body can refuse to disclose information. Under international law, restrictions on the right to information must meet the requirements stipulated in Article 19(3) of the ICCPR:

> The exercise of the rights [to freedom of expression and information] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The requirements of Article 19(3) translate into a three-part test, whereby a public body must disclose any information which it holds and is asked for, unless:

1. The information concerns a legitimate protected interest listed in the law;
2. Disclosure threatens substantial harm to that interest; and
3. The harm to the protected interest is greater than the public interest in having the information.[48]

The same approach is reflected in Principle IV of the Council of Europe Recommendation on this issue, which states:

> **IV. Possible limitations to access to official documents**
>
> 1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
>
> i. national security, defence and international relations;
>
> ii. public safety;
>
> iii. the prevention, investigation and prosecution of criminal activities;
>
> iv. privacy and other legitimate private interests;
>
> v. commercial and other economic interests, be they private or public;
>
> vi. the equality of parties concerning court proceedings;
>
> vii. nature;
>
> viii. inspection, control and supervision by public authorities;
>
> ix. the economic, monetary and exchange rate policies of the state;
>
> x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

[47] *Ibid*., para. 44.
[48] See note 3, at Principle 4.

> 2. Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.[49]

This incorporates a clear list of legitimate protected interests, and permits information to be withheld only where disclosure would harm the interest and where this harm is greater than the public interest in disclosure.

Cumulatively, the three-part test is designed to guarantee that information is only withheld when it is in the overall public interest. If applied properly, this test would rule out all blanket exclusions and class exceptions as well as any provisions whose real aim is to protect the government from harassment, to prevent the exposure of wrongdoing, to avoid the concealment information from the public or to preclude entrenching a particular ideology.

[49] Note 42.