The Access to Public Information

The Access to Public Information:

A Fundamental Right

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Cambridge
Scholars
Publishing

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This book first published 2024

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

ISBN: 978-1-0364-1521-1
ISBN (Ebook): 978-1-0364-1522-8

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PRESENTATION

How important is information for the human being that even God left the gift of prophecy for us to understand His designs. *To know* is inherent to the human *being* and the search for knowledge is equivalent to the historical development of humanity. All civilizations show a deep respect for the wisdom that constitutes a treasure that is jealously guarded, imparted to members of the same clan, shared with allies, and hidden from enemies. Alienating a community from the information that is vital to it is the same as reducing it to a herd that grazes in the fields until it is led to the slaughterhouse. An uninformed society is easily manipulated, it becomes a mere consumer of other people's ideas and, therefore, it ends up being deprived of its freedom of thought, of the ability to create and to decide about its own life and future. Political participation and social development depend, to a large extent, on having timely and quality information about the facts that interest its members. And this interest cannot be understood superficially: not only what the individual or the group finds *interesting* or *entertaining* is of interest to them, but everything that can influence their lives and those of future generations. Therefore, the decision on *what* to inform about should be made on a wide range of data and under the principle of good faith. Any restrictions to the dissemination of information may only be made on an exceptional basis.

An informed society is also a favorable scenario for social peace because the production of ideas calls for dialogue to resolve the conflicts inherent to coexistence, while secrecy and obscurity produce distrust and rejection, fostering resistance that can lead to intolerance and even sectarianism. Societies that value democracy more highly have promoted more open political-administrative systems, aware of the need for the people to call their governments to account. Thus, transparency ratifies that those who govern are at the service of society and not the other way around. An example of this openness is Argentina, a country which, after a bloody phase of military dictatorship and secrecy, is today striving for an open society where *accountability* is at the core of all public functions. Another example that can be cited is the impulse of the Nordic countries, with a marked tendency towards openness, far from the hermetism that authorities usually tend to, which advocated a Europe more open to its inhabitants through the

right of access to the documents of the European Parliament and the Council. As Rams Ramos (2008) recalls:

> The evolution of this right starts from its exclusive recognition for access to documents, understood in a very restrictive way, kept in historical archives, access that was also subject to very broad exclusions. It is, fundamentally, the strength of the Member States with a tradition of openness - such as Sweden, Denmark, the Netherlands and Finland - that will give a definitive impulse to the development and recognition of the right of access. [But] The open-minded countries could not impose their criteria on those more reticent about transparency, and the truth is (...) that it has taken a long time for the concept of access to information as a subjective right to become generalized in the domestic constitutional law of the States.

A society that is unwilling to confront its reality and to take action, cannot be considered truly free. Freedom, today, faces serious information challenges: we find ourselves in the overlapping dystopias of Aldous Huxley and George Orwell, in which we are constantly bombarded by so much news that it is difficult to discern the real and important from the fallacy and waste. Meanwhile, in this endless sea of data, entire governments –not only the official ones but also the de facto ones– sail armored, *appropriating* information and acting as a true *Thought Police,* controlling which and how much information is delivered to the people who are, for all intents and purposes, its true owners. To apprehend this reality is the first step to snatch the right to information and its main form of exercise: the access to it.

Access to information acts as a two-tiered right. On the one hand, access itself *is* a fundamental right because it constitutes a vindication of the power of the people, of their right to ownership of *public property* and of the right to *know* what the government does in their behalf. On the other hand, it is an intermediate or auxiliary tool to reach other fundamental rights, because it empowers the exercise of other prerogatives, from holding those in power accountable, to deciding how many children to have. Every decision is nourished by information and the quality of this information will increase the probability of success, that is, the probability of achieving the individual and common objectives proposed by a person, a family, a community or an entire nation. And although everything goes *through* information and is fed by it, it is the prerogative of its legitimate owner to use it or not in his or her favor, to use it *against* a certain person or situation, or to ignore it completely. But it is *their* choice. The right to information gives life to that *choice* and is therefore linked to personal freedom.

Although information -and its dissemination- is commonly associated with journalistic work, its impact on other areas of social life is decisive for social, scientific and technological progress and for improving standards in the exercise of human rights. Among others, information is particularly relevant for collective rights. One of the first groups to understand the intrinsic relationship between good quality and truthful information and the protection of other fundamental rights was that of consumers. Deceptive advertising has been controlled by states for decades, and the protection of consumers' rights to make an informed choice of the goods and services they purchase has become increasingly rigorous. Although it is not a finished issue and it is evident that there are still abuses of consumer rights, it cannot be denied that this relationship between the *choice* made and the information received by an individual is still incipient in other branches of law. Today, the parameters on production and dissemination of environmental information are a paradigm for ancestral communities and propose a point of balance and encounter (or break, depending on the approach adopted by peoples and governments) for public decision making on non-renewable natural resources and other productive activities.

The research contained in this book goes through the legislative advances of countries such as the United Kingdom, Argentina, Mexico and Ecuador, finding in each of them interesting characteristics for the protection of the right of access to public information, as well as important contrasts to form creative solutions to the conflicts it entails. The aim is not to exemplify but to provide a window into possibilities that might otherwise remain outside analysis. This is not to say that there are no highly valuable schemes for the development of this right in other legislations and societies: in Europe as well as in America, Asia and Africa, important progress has been made in achieving transparency, especially from the perspective of the fight against corruption. Sweden, the birthplace of Anders Chydenius, is the pioneer country in positivizing access to public information in the Freedom of the Press Act of 1766, and it has continued its tradition of openness to this day. Nor can the Freedom of Information Act of the United States, passed in 1966, be overlooked, with which the so-called "first wave" of legislations guaranteeing access to information began, mainly in the 1970s, and with which access as a *right* began to spread worldwide. In South Africa, the law on access to public information was a grain of sand to support the post-apartheid process, according to Pansy Tlakula, that country's Information Regulator, in 2022. And what not to say about Australia (one of the countries in Oceania with specific legislation on access to public information), which recognizes that information is "*a valuable*

national resource"[1] , a category that is very important to understand that its gathering and processing is subject to the achievement of public functions, and its property remains in *the people*.

This work also reflects some of the relevant rulings of the supranational courts of both Europe and the Americas, which reflect the legal culture of these two continents. At the same time, reports of the United Nations special rapporteurs, as well as the general observations of the specialized committees, are relevant instruments for interpreting and applying the rules on access, on the one side, and on secrecy and confidentiality in the opposithe shore, in a way that is compatible with the human rights catalog. All these instruments enrich the formation of opinions on this important subject, not only from the legal aspect –providing argumentative tools– but also from the social approach, since they allow consideration of the origins, trajectory and destiny toward which states are heading.

This book is dedicated to my father –once silenced and persecuted by the dictatorship– who devoted his youth to social communication and spent his life teaching me that information is power.

[1] Office of the Australian Information Commissioner 2011.

INTRODUCTION

The importance of information for citizens

- A mother is searching for her son who has apparently been swallowed by the earth.
- A widow demands to know the circumstances under which her husband died, since he had uncovered a corruption scheme prior to his decease.
- Three families are demanding that the violent murders of their daughters be clarified and that the perpetrators be punished.
- A non-governmental organization is concerned about the distribution of drugs introduced into the country without knowing for certain their safety for human health.
- An indigenous community claims to maintain ancestral possession of a territory while the public deeds of the same area prove the ownership of third parties.
- A company needs the public file that resulted in a large fine against it in order to challenge it and defend itself.

Each of these cases is real. In each of them, reliable and timely information was essential to achieve justice, to exercise other human rights, or to avoid an escalation of violence. In each of them, indispensable information was either unavailable or denied by the state.

Information has an immeasurable value for today's society. Although knowledge has had a great value for personal and collective development throughout the history of human beings, the truth is that in the digital era, the flow of information and the utility that everyone gives to it is becoming more and more concrete. Obtaining accurate and timely data can make a marked difference in the life of a person, a family, a neighborhood and even a generation. While this statement can be easily understood in the field of commerce, where multimillion-dollar transactions are made daily with data banks of various kinds, its recognition in the framework of fundamental rights has been a lengthy process, despite the increase in its social relevance. Strangely, it has even slowed down, with academic production and casuistry on this subject proving to be lower in 2024 than in the previous two decades.

As the world moves towards the information society, the correlation between truthful and easily accessible information and a higher level of exercise of rights becomes more evident. Although this relationship may not be obvious at first glance, it will be demonstrated throughout this research that information is indispensable for the exercise of other rights. Hence, access to information is classified as an instrumental one, without ignoring its end in itself, as will be explained later on. Information empowers each individual to foresee the repercussions of a decision. In contrast,

> Injecting uncertainty is a well-known control mechanism: if a population never knows what is going to happen to it, it is unlikely to pose a serious challenge to political power (Holmes 2008, 35).

That is why information becomes an element of the effective exercise of their ability to act according to their intimate convictions, and is inextricably linked to fundamental freedoms. In the absence of information, an individual becomes blind and in such a scenario, will eventually surrender his or her *freedom of choice* to whoever possesses the truth of the facts and has the authority to make decisions on behalf of others. This implies that each individual will see their own desires and interests substituted in favor of the entity or person who holds the power and the control of the information. No relinquishment of such powers can be considered deliberate if the person is not truly aware of the conditions and consequences of such a relinquishment. To put it simply: a citizen who is unaware of the effects and options on a given public decision will be practically obliged to let others – politicians, public authorities, corporations– make the decisions that affect him or her without having any say in it.

Whoever obtains information obtains power and control. The dynamics of information makes certain entities more likely to obtain and use such information: the press, academia and the state are, in fact, producers and compilers of information par excellence. This may involve public or private entities associated with information. But when the holder of information is vested with public authority, while, on the other hand, is acting in representation of others (the people), it is essential to regulate the activities it will carry out with the information it holds. It's a simple matter of regulating a potential but very likely-to-happen conflict of interests. As a result, in contemporary society, it is necessary that *access to public information* be understood as a fundamental human right derived from human freedom and dignity. Particularly in situations related to health and the environment, where timely and accurate information is needed for government officials and members of civil society to make informed

decisions, information can be the deciding factor even between life and death for specific individuals under certain circumstances.

As stated above, information becomes indispensable for the exercise of, or access to, other fundamental rights or to activate their defense mechanisms. Hence the importance of having an open information system that guarantees, among other things, the quality and veracity of the information that will be made available to citizens. Likewise, the state must guarantee a solid institutional structure that promotes and protects this right effectively, as is the case with other transcendental rights. This is particularly evident in the protection of the environment, where the right of access to information is developed through a conglomerate of international treaties and declarations that have elevated this issue to the highest level, bringing the discussion to government representatives. In the European rights protection circuit, for example, the Aarhus Convention is a binding instrument that articulates the right of individuals to access environmental information and to be part of decision-making processes wherever human health or ecosystems may be at stake. The Convention also promotes access to environmental justice, i.e., the right of citizens to bring disputes involving the environment and public health to court. Similarly, in the Inter-American circuit, the Escazú Agreement is playing an increasingly relevant role in the democratization of decisions that impact the environment, productivity and development, not only in this but foreseeing consequences for future generations. Often, the tensions that arise around projects with high environmental impact generate disputes between state, corporate and citizen power. While *the law* is not the only way to bridge differences and produce solutions, states have certainly set themselves the task of generating binding instruments, both internationally and domestically, to regulate these relationships. In this context, access to environmental information has been one of the strong points of environmental regulations in general. This is a good example of how the world is moving towards a culture of public transparency and participation, at least in theory or as a *matter of course*. This places the burden on governments to ensure the production and dissemination of information and even involves private parties with an interest in the exploitation of a country's natural resources. The Inter-American Court of Human Rights ("IACrtHR") explained this relationship in the following terms:

> (...) the actions of the State must be governed by the principles of publicity and transparency in public management, which makes it possible for the people under its jurisdiction to exercise democratic control over the State's management, so that they can question, inquire and consider whether the State is adequately fulfilling its public functions. Access to information

> under the control of the State, which is of public interest, can allow participation in public management, through the social control that can be exercised with such access (Claude Reyes and Others v. Chile 2006, 46).

Not all information falls within the legal framework requiring it to be made available to the public. Information held by the state, or held by private parties on its behalf, must be accessible to the people. Cases of confidentiality and reserve are excepted, provided that such information has been expressly and previously classified, and that the classification protects the public interest and is carried out within the legal framework. All regional human rights systems have rules that regulate the handling of classified material, which should be considered as an exception to the rule of publicity (or *maximum disclosure*, as coined by the Inter-American Circuit). But this right is not limited to the possibility of requesting information and having it delivered. It is also mandatory that the information be provided with certain minimum characteristics that make it useful to citizens, in general terms, regardless of the purpose for which it is intended. This may seem a real challenge since the purpose of *seeking* information is subjective, while the standards for the dissemination of public information are objective and normative. These characteristics include truthfulness, clarity, updating of data, free of charge, among others, which will be further analyzed in the following chapters.

The concept of *public information* for its treatment as a fundamental right has developed over time and, as mentioned above, is based on the recognition of the freedom of expression (therefore classically associated with journalism), which encompasses several other prerogatives such as the possibility of seeking information, disseminating it and accessing its source. For example, the Ecuadorian Constitution[2] includes several rights related to information in the same article, including the possibility of accessing it:

- To seek.
- To receive.
- To produce.

[2] Article 18.- Every person, individually or collectively, has the right to:
1. Seek, receive, exchange, produce and disseminate truthful, verified, timely, contextualized, plural, uncensored information on facts, events and processes of general interest, and with the consequent responsibility.
2. Free access to information generated in public entities, or in private entities that handle State funds or perform public functions. There shall be no confidentiality of information except in cases expressly established by law. In case of violation of human rights, no public entity may deny information.

– To reach for the information generated by public entities or with state funds, free of charge.

This Constitution is one of the most comprehensive, covering several forms of exercise of this right. Having these rights recognized at the highest juridical –national Constitutions and supranational treaties– level is no minor conquest.

Without claiming to provide definitive or complete solutions, the regulations seek to guarantee a series of minimum parameters that prevent arbitrariness on the part of public officials. This is highly relevant since the information enables public scrutiny, so keeping minimum rules that facilitate the delivery could avoid systematic blockages by those officers who will, in turn, be the focus of public opinion.

However, compliance with the obligations deriving from the right of access to public information requires the fulfillment of formal and material obligations on the part of the state. The recognition of the legal right of peoples to public information implies that the norms of human rights in general, and of civil and political rights in particular, are materially applicable. Consequently, states are obliged to respect, protect, guarantee and promote this right (historically immersed within the freedom of expression or opinion), which, in most human rights catalogs, includes the right to *seek* information. Therefore, the standards of freedom of expression are also applicable to the right of access to public information: the prohibition of prior censorship and subject to subsequent accountability.

The following chapters will further analyze the limits of the concept of public information. For now, it is important to bear in mind that the right of access to public information does not necessarily overlap with private interests in which data may be subject to commercialization (provided that its commercialization is permitted by law) or involve a transcendental value for a business, especially if it is kept secret, as is the case with formulas, recipes, application models and others. Access to public information also does not interfere with personal data, which has specific regulations based on the recognition of the right to privacy, which is also a human right. As such, information is *deliverable* when it is held by public and private entities that provide public services or act on behalf of the state or state institutions, state-owned companies, federal and local governments *and* that does not conflict with other human rights. Having been produced with public funds and by mandate of the law, it is the property of the citizenry in accordance with international human rights treaties and the doctrine on the subject. Every other piece of information or data exceeds the scope of application of this right and, consequently, is not deemed deliverable to the public.

The key element is that the production of information in the administrative context is made possible through state resources (including funding, but not limited to it) and is intended to meet the needs and requirements of the population in a democratic society. Therefore, the state and its officials, as administrators of the *res publica*, are mere possessors of such information and hold it on behalf of the people as per the basic principle of democracy: power resides in the *people; information is power.* The legislations of numerous countries have developed this right through legal parameters to guarantee the prompt delivery of data and reducing restrictions to the minimum necessary. As Rojo (2010) explains, a government that promotes access to information is axiomatically aligned with the basic values of democracy:

> (...) Those who abide by the generalization of cultural conditions where the quality of democracy is a primordial value must pay special attention to the unrestricted exercise of access to timely and sufficient information by every human being and who are fully aware that the slightest violation of this right is, at the very least, a very serious situation with multiple and dire consequences (Rojo 2010, 42-43).

However, individual rights are not the only issue at stake when it comes to public information. Democracy, transparency and accountability functionally depend on the public's ability to understand the actions of their representatives, and whether they are aligned with the values of their constituents (not only the voters, but of the population in its entirety). This verification can be achieved in various ways, but there are two that prove to lead directly to the objective: firstly, the exposure of the people to the management of public resources by state officials (which implies an active role of those officials in producing information and making it available to citizens[3]) and, secondly, the ability of civil society to require information of their particular interest, assimilate it and act (or react) on the basis that it provides. Both ways of obtaining information are covered by the right of access to public information. That is to say, the citizenry can play an active role in seeking information, investigating, requesting and demanding that it be delivered to them. But even if they don't, the laws provide that certain minimum information, which is of interest to the population, is disseminated in such a way that the citizenry possesses it even without requesting it in

[3] In the context of this study, the terms "citizen" and "citizenship" do not imply the political connection of a person to a territory, but rather a person entitled to fundamental rights in a specific context, regardless of nationality, i.e., a *person* entitled to rights and obligations.

order to benefit from it even at a potential level, something like *the dew that showers the garden every morning*.

The right to petition (recognized as an independent political right in certain legal frameworks, such as Ecuador's), on the one hand, and the right to an efficient, effective and transparent public administration, on the other, also provide for access to information produced –or to be produced– in official entities. Accountability depends to a large extent on the material possibility of acquiring information that supports public activities and decisions that are relevant to the community. Thereupon, several legal standards even require that certain personal information of government authorities be known to all, such as the incoming and outgoing assets of a senior official in public office[4]. In any case, the right of access to information is supported by the obligation of the state to respond to all requests for information in a timely manner, even if it is to deny access[5].

In the Americas, the Committee on Juridical and Political Affairs of the Organization of American State ("OAS") Permanent Council appointed a group of experts, including members of civil society, to draft a model law that develops the right of access to public information and the legal principles that inform it. This model law contains the minimum standards with which states must align themselves to adequately guarantee this supra-legal right. In this model, the Commission noted the intimate relationship between access to public information, democracy and accountability. This model presents a set of important standards that are analyzed throughout this book.

Information is linked to human dignity in the sense that it is related to the right to make free decisions. Free decisions enable the exercise of the right to a good standard of living, as well as the exercise of certain political rights, including holding public authorities accountable, the transparent administration of public resources in democratic societies, the right to a healthy environment, and responsibility for the sustainability and survival of future generations. As can be seen, information covers a wide range of aspects of life in society. Concomitantly, access to public information is applicable under the principles of equality, interdependence, indivisibility and equal hierarchy of all fundamental human rights. In addition, it is necessary to take into account cross-cutting norms such as non-discrimination, gender and age-based approaches, as well as the collective rights of different minorities. In general terms, states are responsible for

[4] In some countries, including Ecuador, the obligation to disclose assets before, during and after the exercise of a public function applies to all officials of each branch of government.

[5] Del Solar 2008, 130.

ensuring that every individual is truly able to exercise the right to be informed.

The importance of this right has been explained by the United Nations ("UN") Human Rights Committee, which, once again, focuses on the importance of the availability of information and the democratic system, considering freedom of expression and opinion as *cornerstones* of freedom and democracy:

> They are the cornerstone of any free and democratic society. The two freedoms are closely related, and freedom of expression is the vehicle for the exchange and development of opinions. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability which, in turn, are essential for the promotion and protection of human rights.

This right is particularly important for the exercise and protection of certain collective rights, such as those held by ethnic minorities. The ability to acquire material information effectively leads to the possibility of exercising other rights. The International Labor Organization ("ILO") Convention 169 of 1989 on Indigenous and Tribal Peoples has become very important for involving ancestral peoples in public decisions that in some way affect their territory, culture and ways of life. Article 6 of this Convention requires that the peoples be consulted prior to the adoption of any administrative decision that may directly affect them. This means that the state has the obligation to inform them in advance and in a timely manner, as derived from the standard of good faith proclaimed therein:

> 1. In applying the provisions of this Convention, Governments shall:
> (a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
> (b) establish means by which these peoples can freely participate, at least to the same extent as other sectors of the population, at all levels of decision-making in elective institutions and in administrative and other bodies responsible for policies and programs which concern them;
> c) Establish the means for the full development of these peoples' own institutions and initiatives and, in appropriate cases, provide the necessary resources for this purpose.
> 2. Consultations under this Convention shall be conducted in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

This essential instrument for indigenous and tribal peoples translates into the state's obligation to include these communities in any decision-making process that may affect them. Participation in the process is part of the norm, and the objective of *seeking to reach* an agreement or consensus (however subjective it may be in practice) is imposed on public actors. However, it is the principle of good faith that relates the collective right to be consulted with broad access to information regarding the decision to be made, such that even highly technical information must be didactic to ensure that the community understands the importance, benefits and risks of such a decision. This paradigm can be interpreted as a shift from representative democracy to direct democracy, in which consensus between public authorities and the people is desirable, although not mandatory. Accompanying this right, the Escazú Agreement (available to all communities at the signatory states, in the context of environmental information) establishes the parameters under which states must make information accessible to the population to enable informed decision-making. The sum of these instruments –plus a series of jurisprudential precedents on the right to be consulted– have strengthened the institution of access to information for the well-being of ancestral communities and for environmental protection.

When international instruments and local legal frameworks recognize people as owners of public information, the domain of this asset shifts from traditional actors (the state, companies, political and economic groups) to individuals and minorities. This shift of ownership is reflected in the legal bodies that generally begin with the discernment of this point: the *ownership* and *possession* of information. In the United Kingdom, the Freedom of Information Act 2000 is a rather meticulous law that recognizes the obligation of public bodies to disclose the information they hold as required by an individual, except for the statutory exemptions provided for in the same law, regulating in detail the method of accessing such data. The preamble of this norm states:

> An Act to provide for the disclosure of information held by public authorities or persons providing services to them and to amend the Data Protection Act 1998 and the Public Records Act 1958; and for connected purposes.

Another remarkable contribution of the United Kingdom government to the development of this right –as simple as it may seem– is the practicality with which it has made this norm available to the people, through an easy to navigate website, which provides an index and the different modifications of this legal norm throughout time. This implementation is not available in other countries, where the legal network is the only way to approach the norm and its mechanisms, and the exercise of this right that necessarily

confronts a citizen with bureaucracy, will surely require the work of a lawyer for an effective result, which can become a barrier to exercise. On the contrary, the ease with which the norm can be understood by an ordinary citizen is an advantage for the exercise of the right.

The development of international instruments and local laws implies, not only the acknowledgement of its ownership by the people, but also a change of power dynamics over the information produced in the public sphere. This signifies a historical milestone that seems not yet to have been understood in its real dimension –as it happens when one looks closely into a fact–. Therefore, the recognition of this fundamental right by individuals is key to its wider exercise and to take advantage of its virtues by the legitimate rights holders: the citizens. This shift in power dynamics challenges traditional structures and forces a reevaluation of the balance between individual rights and societal interests. It is crucial for individuals to be aware of their rights in order to actively participate in shaping the future of information governance.

Lack of access to relevant information generates an environment of distrust in the authority. People feel insecure about the decisions they must make in a context governed by a legal framework that is generally perceived as sophisticated, intricate and alien. As a result, individuals distrust the system and its administrators, and a gradual loss of confidence in public administration is triggered. This sense of uncertainty is at least partially the result of the lack of availability of quality and sufficient public information. Usually, the less transparent systems present, at the same time, other factors that generate uncertainty, such as high levels of corruption, social inequality, authoritarianism, and others. If we add up the facts and cases, we can see how the absence or poor availability of information can contribute decisively to social chaos, in which the obscurity and ambiguity of the legal climate hinder a true rule of law because uncertainty is incompatible with a democratic structure. On the contrary, "*access to public information is the backbone of transparency*"[6]. This means that transparency is important, not only for civil society, but also for strengthening the legal capacities of political actors: authorities and law enforcement officials, who may encounter less resistance in their interactions with citizens when the latter are well informed. Public policies and guidelines to improve the culture of transparency, fight corruption and optimize citizens' access to public information, we insist, are closely related to a higher level of democracy and justice. This criterion has also been developed by Tanzi (2008) who analyzed the relationship between transparency and corruption, concluding that discretionality and lack of controls encourage corruption because it

[6] Del Solar 2008, 95.

relies on secrecy to operate. The author even provides examples of activities of authorities, with important economic effects, which deserve to be known and scrutinized by the citizens:

> There are other decisions where the discretion given to a public official, in particular, combined with the value that such decisions have for the beneficiaries of such decisions, create conditions that, in the absence of effective controls, often lead to acts of corruption. (...)
>
> Today these include (a) Decisions made by public officials in the case of legal land use, in accordance with zoning laws. Hello in these cases. Officials have the power to determine when a given piece of land can be designated for uses of low comma value, such as agriculture, or can be designated for residential use or high-rise apartments. Obviously, legal classification can dramatically change the market value of a given piece of land; (b) resolutions authorizing investments by foreign companies; (c) decisions on the sale of public assets; (d) resolutions granting monopoly powers over specific activities, such as the importation of medicines to certain individuals; (e) decisions granting amnesty to individuals or companies for obvious violations of laws; (f) determinations by which banks may receive on deposit funds from pension funds, public companies, ministries or other public institutions. There is empirical evidence that governments often leave large deposits in non-interest bearing accounts. This implies a large subsidy for the financial institutions that hold these funds. The value of these decisions, often made for private agents, can be very high, which can lead to the temptation of illegal payments.

In 2009, the Special Rapporteur appointed by the Human Rights Council, Frank La Rue, mentioned the intrinsic connection between corruption and secrecy, and advocated the observance of the principle of maximum disclosure, which allows "*governments and public institutions* to *be more accountable to the public at large*". As part of his conclusions and recommendations, he stated:

> Governments may not be in a position to systematically disseminate information to the public or may not be inclined to such transparency due to high levels of corruption. The Special Rapporteur recommends that, in such cases, support for media in times of conflict and deregulation of the communications and media environment be considered as mechanisms to increase plurality and diversity of information flows in poor and conflict-prone countries. (United Nations Human Rights Council, 2009).

However, the mere establishment of public policies on transparency is insufficient to achieve the highest possible level of transparency nor of

exercise of human rights. Effectiveness requires educating people about the *ownership* of public data; it is essential to implant this notion among the population and to achieve the political commitment it entails. Training is of utmost importance for this purpose. To this day, despite decades of development of the right of access to public information in the legal scenario, the general population is not aware of its right. Not only members of civil society, but also public officials who are subject to a set of rules and obligations relating to this right are trapped in a system of access that, in a large number of countries, is still alien to them. In general terms, this system is composed of guidelines, proactive duties of disclosure, specialized institutions and officials, as well as specific complaint mechanisms and sanction regimes that can even lead to the removal from office of those obliged subjects who fail to comply with the duty to inform and provide information. This implies serious challenges for the fulfillment of the obligations derived from this right and from the international instruments that contemplate them.

The above is also interrelated with the institutional strategic objectives of the entities with the role of monitoring the level of execution of the obligations derived from the right. In some countries, this duty falls to specialized entities exclusively in charge of the right to information (see, for example, Mexico's National Transparency Institute, in charge of monitoring compliance with its respective transparency and personal data protection legislation). In other countries, this is one of the many tasks of the Ombudsman or national human rights institutions (as in Ecuador, where the Ombudsman is the legal supervisor of compliance with the obligations of state entities in relation to transparency, but also on other human rights). This is an uphill struggle if one takes into account the hundreds of central government institutions, decentralized, autonomous, federal or local governments (depending on the political structure of each country) and entities of other branches, including state-owned enterprises, which are subject to similar transparency standards. To this end, various methods are implemented, such as monitoring programs, publication schemes and templates, and periodic reporting systems. However, according to the models implemented in certain countries, the state oversight and control agency must be specialized in the subject in order to give life to the standard and, therefore, to the right of access to public information. The subject to be monitored is too broad for a generic institution to handle it on its own.

Another important issue is funding. Since state bodies will be subject to the control of this Ombudsman (specialized or generic), the tendency is to maintain a reduced budget for them, especially in countries where the level of transparency and respect for human rights is lower, which are generally

also the countries with lower democratic standards… and diminished public resources. In the United Kingdom, the public body responsible for overseeing this right is the Information Commissioner's Office ("ICO"), sponsored by the Department of Science, Innovation and Technology, which reports to the English Parliament. Its mission is to "*uphold information rights in the public interest, promoting openness of public bodies and data privacy for individuals*"[7]. According to its website, it is funded almost entirely by the data protection levy required of bodies handling personal data. The ICO is responsible for the protection of private data and the dissemination of public information and makes available different resources for both purposes.

As a corollary, the higher the levels of public information dissemination, the higher the democratic standards. A government's openness in this regard is a good symptom of its commitment to democracy and the fight against corruption. On the contrary, the tendency to withhold information –either to protect certain privileged interests or to avoid public control–, is a symptom of an unreliable resource management. The legitimacy of political authority today depends to a large extent on the provision of quality data. There is no loss of power when important information is shared in a healthy democracy and egalitarian society: when information is available, everyone wins. But this idea raises two major hurdles to overcome: public cost and political tensions.

The State and the right of access to public information

The purpose of the *principle of publicity* in public administration is to guarantee transparent, reliable processes, respectful of legal and ethical standards in the management of public resources. It does not only cover economic resources, but all those that, due to their social relevance, become resources of public interest because they can massively affect various aspects of the life of society. This includes information management, which is an important public resource. According to Fernández (2006, 149), the principle of publicity consists of the transparency with which governments must act, make decisions and undertake procedures, being agents of the law at the service of the people. In the author's words, this principle implies:

> ... that the acts of the agencies of the State, the grounds on which they are based and the procedures according to which they are adopted are notorious, patent or manifest and not secret, reserved, hidden or concealed, that is, that any person may have access to such information as a result of which, in the

[7] Information Commissioner's Office "ICO", 2023.

> Democratic and Constitutional Rule of Law, it must always act with transparency that allows and promotes that the people know those acts, their foundations and the procedures followed to adopt them.

Therefore, in case of doubt, the authorities must opt for access to information and comply with the state's duty to promote the rights enshrined in international human rights treaties that are adopted in the exercise of each country's sovereignty. And, if there are no other human rights in collision with a specific request for access to information (as may be the case of secrecy of correspondence, personal beliefs, personal data, national security or others), state officials are obliged to provide the information in accordance with the legal standards established by the legislation of each country. This means that the principle of publicity articulates freedom of information, embodied in the right of everyone to access public information. This is known as the principle of maximum disclosure, a standard that establishes a presumption of publicity of information in favor of its release.

The state is responsible for promoting, guaranteeing and respecting the right of access to public information, as mentioned above. The right to information requires more than communicating acts of public power; it involves printing transparency in the decisions of government authorities and facilitating their recognition by the population (Lavalle Cobo, 2009). Even more: for modern democracies, the active participation of the population in the adoption of public decisions has become a democratic standard. The mechanisms of direct democracy are enabled through the provision of timely information for a real participation of the population. To this end, domestic and international law have established a series of instruments that bind governments and oblige them to carry out certain activities and to refrain from others that impede the enjoyment and exercise of this right. The consensus on a regime of exceptions also derives from these instruments, considering them acceptable to the extent that they serve the general interest, i.e., the protection and defense of the interests represented by the high values of the international instruments and constitutional law in each country. This reflects that the right of access to information is under a higher level of protection. In sum, what the state must guarantee is greater access to information that promotes a culture of transparency as opposed to the secrecy of public administration, and that allows for greater public scrutiny, informed decisions by citizens, legal certainty and the full application of the democratic principle, since uncertainty that is built on improper information or rumors prevents timely and true political participation.

The right to information is an unfinished institution due to its character as a social and historical fact that guarantees its constant evolution and

dynamism. Likewise, it is impossible to claim a homogeneous application in the different countries of the planet –culturally, there is not even uniformity within countries–. However, the norms must aim at equal treatment, considering that each state has its own social, political and legal characteristics, but that the right to equality is transversal. Therefore, since it is recognized as a right derived from human dignity, it must have specific characteristics that allow its universal exercise by individuals and groups throughout the world.

Returning to the conceptualization of information as an asset, its categorization must be meticulously considered to avoid conflicts with private interests that may impede collective access. A parallel can be drawn with other basic goods that were once in the hands of the public and today, due to the transformation of the way of life and the economic pressures that this implies, people's ability to appropriate such goods has been reduced. Water, wind and sunlight are concepts that were historically understood as public domain goods. Traditionally, it is taught in schools that these elements are *free goods* of humanity. However, the privatization of water sources and the production of energy through wind and sunlight have changed this concept and people are being charged for the transformation that allows the daily use of these elements. This is the present and the future of information. Because of its importance, data appropriation is related to business activities and decisions about where or how to invest and what this means for the transformation of the way of life of communities. However, *public information* is understood as part of the public heritage and as such should be managed by governments.

The following chapters will address this issue from the perspective of international human rights law, constitutional law and the development of judicial precedents of international courts in Europe and America. Useful contributions of certain directives and legislation of the European Union and particularly of the United Kingdom are also addressed, without leaving aside the casuistry on the subject. In addition, this study will be supported by developments in the following Latin American countries that present some interesting developments: Argentina, Ecuador and Mexico. The study will focus on the jurisprudence of these regions, since, to a large extent, it is through the jurisdictional bodies with supranational competence that the elements of this fundamental right have developed, that is, through the practice of law and the interaction between governments, journalists, human rights defenders and ordinary citizens.

INFORMATION IN THE CONTEXT OF FUNDAMENTAL RIGHTS

Historical recognition

The scope and content of the right of access to public information is a recent development compared to other political rights. It is associated with freedom of the press and opinion, and although this has been an important anchor for its recognition as a fundamental right, it has been emerging as a right in its own, interdependent but with its own characteristics. Access to information *was* not *born* at some point in history to endow human beings with a new capacity. On the contrary, it is inherent to the human condition and to individual freedom, and, at the same time, it derives from the democratic and republican principles. In this sense, the fact that it is not provided for in a legal norm does not hinder its exercise, because it is part of humanity and is universal. The law only recognizes this reality and regulates its scope and limits to guarantee its enjoyment and exercise. Thus, the essence of the right of access to public information was somehow *hidden* in the freedom of opinion, as can be seen in the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on December 16, 1966, whose article 19 states:

> Everyone has the right to hold opinions without interference.
> Everyone shall have the right to freedom of expression; *this right shall include freedom to seek*, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this Article entails special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> a) Out of respect for the rights or reputation of others;
> b) For the protection of national security or of public order, or of public health or morals.

Montero (2020), in her short but essential analysis of this right, gives a historical account that summarizes quite accurately the trajectory of access

to information in the UN. As shown by her research, this process begun rather late compared to the development of freedom of expression.

> Special mention should be made of the role of the UN Commission on Human Rights in creating, in 1993, the Special Rapporteur on Freedom of Opinion and Expression (Resolution 1993/45 of March 5, 1993), which in 1998 published a report in which it noted "the positive obligation of States to ensure access to information, particularly with respect to information held by the Government" (Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. U.N. DOC. Doc. E/CN. 4/1998/40, 28 January 1998). Similarly, but taking a leap forward, the 2000 report qualified, for the first time, access to information as a "fundamental right" (Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. U.N. DOC. Doc. E/CN. 4/2000/63, 18 January 2000).

Access to information was not considered a subjective right for a long time. In Europe, this condition was evident and, given the existence of internal and community rules that promoted secrecy, access permission was considered to be a "*matter of internal organization*"[8], practically a rule of administrative orderliness. In this regard, there is an extensive debate in the Court of Justice of the European Community, in the case of the Netherlands v. Council of the European Union (cited by Rams Ramos 2008). There, the Netherlands argued that the right of access comes from and *is* the realization of the democratic principle and that, thus understood, it does not require a norm that positivizes it. It took many years for the right of access to be configured as such and to be implemented through norms that provide specific obligations to the states of the Union.

Article 10 of the European Convention on Human Rights guarantees freedom of expression, developed through the case law of the European Court of Human Rights ("ECrtHR"), which has stated that it includes the right to *receive* information and ideas.

> Freedom of expression
> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to *receive and impart information and ideas* without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television, or motion picture enterprises.
> 2. The exercise of these freedoms, insofar as it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic

[8] Rams Ramos 2008, 86.

> society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of confidential information, or for maintaining the authority and impartiality of the judiciary.

UNESCO, in its comprehensive study of the legal standards for the freedom of expression and access to information, considers that freedom of expression is integrated by the legal feasibility of *seeking* information and disseminating it, which contemplates the same guarantees as the right to express an opinion. To seek information will necessarily ensure access to public sources. In other words, the production of ideas and their communication to others would be truncated if the search for information is restricted or limited because that restricted information will feed the opinion to be disseminated. Therefore, in order to form an opinion, it is only natural to have access to information gathered or produced of others in the first place. This is not to deny the possibility of a spontaneous and creative production of ideas, but there is nothing new under the sun: as a general rule, knowledge is based on something that existed previously.

> Thus, there are three principles at the core of the right to freedom of expression:
> - The right to hold opinions without interference;
> - The right to seek and receive information;
> - The right to disseminate information of any kind by any means, regardless of frontiers UNESCO (2021, 23).

Without dismissing the interdependence between the right of access to information and the fundamental freedom to form and express an opinion, provided for in the aforementioned continental and international instruments, it is essential to recognize the nature of this right as a prerogative in itself that will not necessarily be exercised in consonance with those or other rights[9]. In simple terms, the right of access to public information is a right in itself, and this, today, is undeniable, having achieved supranational legal recognition and legislative and jurisprudential development in most countries.

Within the European region, the recognition of the right of access to public information experienced a nuanced trajectory, culminating in its

[9] Often, the right of access to public information is the prelude to the exercise of other fundamental rights, since it has an instrumental facet. Therefore, it must be recognized in its dimensions of right-means and right-ends that complement each other.

formal recognition by the European Parliament and, more broadly, in the paradigmatic transition from a culture of secrecy, characterized by strict restrictions on disclosure, to a code emphasizing maximum publicity. This was not only an administrative practice; secrecy of information was the norm and dissemination the exception. According to Rams Ramos (2008), before the 1980s, making an administrative document available to the public was rare as secrecy was mandatory.

> (...) access to the writings contained in historical archives was only recognized, and only after thirty years from their production, until the current definition given by Regulation No. 1049-2001. (...)
>
> Until the 1990s, when the Member States took into account the need to establish a system of access to documents and information held by the European institutions - with the approval of the Maastricth Treaty and, above all, due to the problems of its ratification and, subsequently, of the Amsterdam Treaty (...)
>
> It is mainly the strength of Member States with a tradition of openness – such as Sweden, Denmark, the Netherlands and Finland – that gave a definite impetus to the development and recognition of the right of access. (Rams Ramos, 2008, 74-75).

In 2001, the European Parliament enacted Regulation No. 1049/2001 regarding public access to European Parliament, Council and Commission documents. The Regulation entitles any citizen or resident of the European Union to access those documents produced by that supranational legislative body, under a regime of exceptions that take into account public interests and private rights, including commercial protection. Its issuance achieved, at a high level, people's access to documents held or produced by those organisms. A true change of paradigm.

Relying on the European Convention on Human Rights, in 1996 the ECrtHR ruled on a case in which a United Kingdom judge required a journalist to disclose a source who had shared information about a local company's business plan. Through this judgment (and other similar ones), the European Court confirmed that "*freedom of expression constitutes one of the essential foundations of a democratic society and that the guarantees to be afforded to the press are of particular importance*." Moreover, the protection of journalists and their sources to ensure an informed society is part of the obligations of the contracting states under the European Convention. Consequently, avoiding harassment of media workers and their informants becomes a negative obligation of all public authorities, and the Court explains why:

> The applicant and the Commission were of the view that Article 10 of the Convention required that any obligation imposed on a journalist to disclose his or her source should be limited to exceptional circumstances where vital public or individual interests were at stake (...) In any event, the degree of public interest in the information could not be a test of whether there was a pressing social need to order disclosure of the source. A source may provide information of little value one day and of great value the next; what mattered was that the relationship between the journalist and the source generated the kind of information that had legitimate newsworthiness potential. (Goodwin v. United Kingdom, 1996).

Similarly, in one of the landmark cases on the protection of the right to information (Társaság a Szabadságjogokért (TASZ) v. Hungary 2005), the ECrtHR stated that the protection of the press in the search for the truth was a matter of public interest and therefore subject to a higher level of scrutiny when imposing barriers by representatives of the state:

> In any event, the Court notes that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him" (*Leander*, *op. cit.*, § 74). It considers that the present case essentially concerns an interference – by virtue of the censorial power of an information monopoly – with the exercise of the functions of a social watchdog, like the press, rather than a denial of a general right of access to official documents. In this connection, a comparison can be drawn with the Court's previous concerns that preliminary obstacles created by the authorities in the way of press functions call for the most careful scrutiny.

The cited case became a milestone for the protection of this right in the region. But the case also demonstrates the tension between the state and the citizenry in advancing the battle line for their own interests. The conflict concerned a denial of access by the Hungarian Constitutional Court, later upheld by the Budapest Regional Court, to a constitutional file, despite having a law allowing access to information, the "Protection of Personal Data and the Public Nature of Data of Public Interest". The state argued that the requested file was not considered *public data under* the aforementioned law. At that time, the ECtHR struggled with the concept of open access to administrative information, and was able to set a precedent in this regard:

> The Court recalls at the outset that "Article 10 does not ... confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual" (*Leander v. Sweden*, 26 March 1987, § 74 *in fine*, Series A no. 116) and that "it is difficult to derive from