COMPARATIVE ANALYSIS

OF ACCESS TO PUBLIC INFORMATION IN LATIN AMERICAN

USAID
DEL PUEBLO DE LOS ESTADOS UNIDOS DE AMÉRICA

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AKNOWLEDGEMENTS

We thank Philippi, Prietocarrizosa DU & Uria from Peru and Colombia, Ritch Mueller from Mexico, Kla ADVOGADOS from Brasil, and Obrador Digital from Chile, who were part of this legal construction process, allowing us to have enough inputs and information to carry out this analysis of Latin American legal systems of access to public information. Finally, we would like to thank FERRERE Abogados for officiating as international coordinators.

1. BACKGROUND

Fundamedios recognized that freedom of expression and its related rights are in constant digital evolution, it was also identified the need to update the regulation of access to information and its protection. For this reason, they asked Trust Law to coordinate the compilation of local, regional and international best practices, as well as the risks identified in the application of laws on access to the public information.

Law firms were contacted in Brazil, Chile, Colombia, Mexico, and Peru, through Ferrere Abogados de Ecuador, who provide inputs for the elaboration of a Access to Public Information Law project.

Ferrere Abogados developed a questionnaire about the human right of access to public information and the processes related to it, which allowed the identification of the way in which each country protects this right, and the solutions that could be implemented in these countries.

Law firms in Brazil, Colombia, Chile, Mexico and Peru sent their responses to the questionnaire which will be set out in this report.

2. RESULTS OBTAINED

The questionnaire developed contained twenty questions about the recognition of the right of access to public information, the entities in charge of the custody and publication of this information, the processes to access it, penalties, identified problems, and good practices.


BRAZIL

2.1. BRAZIL

Access to public information is recognized as a constitutional right. Law n.12.527/ 2011 is the main legislation, however, there are other subsidiary legislations on the subject.

The hierarchically superior law prevails in case of conflicts of application. If they are hierarchically equal, the later subsequent law supersedes the prior law when prior law when explicitly stated, when it is incompatible or when it regulates the matter entirely.

The Law includes obligations of transparency and disclosure. The main mechanisms established are the dissemination of services on the websites of public agencies; information services for citizens; and specific procedures for requesting access to information, and the possibility of appeal in case of refusal.

It establishes as obligated entities to public organizations of direct administration, autarchies, foundations, public companies, joint ventures, non-profit entities that receive public funds, and other entities controlled by the State and Municipalities.

This law also establishes the obligation of organizations not related to the State to disclose information. These are considered as "improper taxpayers", for this reason it is analyzed whether the activity carried out by these entities corresponds to the public interest.

Obligated subjects must promote the disclosure of information of collective interest in an easily accessible place, within the extent of their resources.

Executive Order n. 7.724/2012 establishes as the Supervisory Authority, Office of Institutional Security of the Presidency of the Republic. In addition, the Federal Prosecutor's Office, the State Prosecutor's Office, the Federal Police and judicial bodies can act in defense of the interests of the State and the citizens.

This institution has its own budget and supervisory independence; however, the authority is designated by the President of the Republic which does not guarantee full independence nor does it avoid conflicts of interest. The other servers are admitted through public contest or designation in commissioned positions.

The regime of exceptions includes confidential information because it is essential for the security of citizens and the State; such as tax and banking information, operations and services in the capital market, commercial and industrial information, justice çsecrets and scientific or technological research and development projects. It also includes restrictions for information related to privacy, private life, honor and image, as it is considered personal information or information that may endanger the defense and national sovereignty or the integrity of the national territory; information that may compromise intelligence activities, as well as information from ongoing investigations related to the prosecution of infractions.

Other laws such as the Complementary Law n.105/2011 include exceptions such as bank secrecy; Law n.5172/66 establishes tax secrecy, industrial secrecy and those covered by the other legal assumptions of confidentiality.

The Access to Information Law and its Executive Order establish that, the request for access to information must be submitted in standard format, and should be available in electronic and physical mode on the website and in the Citizen Information Service of the agencies and entities. The response period begins on the date of submission of the application. Applications can also be submitted by any other legitimate means; such as telephone contact or e-mail as long as they meet the legal requirements.

The application for access to information must contain: applicant's name; document number; Specification, clear and precise, of the required information; and, physical or electronic address from the applicant, to receive communications or information required.

The protocol number of the application is sent to the applicant. In case of refusal of the request for access to information, the applicant may appeal against the decision, which must be addressed to the authority of the obligated entity.

The applicant may appeal the decision, within 10 (ten) days from its knowledge, and must be addressed to the authority of the entity that made the decision appealed, which must be answered within 05 (five) days.

If the application is rejected again, the applicant can appeal to the State General Auditor, who will deliberate within 05 (five) days. If the State General Auditor rejects the appeal, the applicant may submit, within 10 (ten) days from knowledge of the decision, an appeal to the Joint Commission on Revaluation of Information. The obligated subjects cannot justify the denial of response in cases where the information or documents related to human rights violations by public officials or by order of public authorities cannot be restricted.

An example of this is the case of the family of the former President João Goulart, who presented a court order to prevent the Secretary of Human Rights of the Presidency of the Republic, head of the National Commission for True, abstain from publishing photos

and images that refer to the exhumation and procedures carried out on the remains of the former president.

This exhumation was carried out to evaluate the real cause of death of the former president (heart attack or poisoning) and, if the last hypothesis is confirmed, the information could not be confidential because of human rights violations, according to Article 21 of the Information Access Law. The application of confidentiality of the photos and images made by the family of the former president was accepted.

Brazil's Access Law establishes minimum sanction for violations of the law, suspension of public and military agents. Among the most serious penalties are the responsibility for administrative irregularities.

The individual or private entity that holds public information, and does not follow the law, is subject to warning, fine, termination of contract, temporary suspension to participate in licitations and public contracts and declaration of incapacity.

Regarding the positive silence, it can be seen that there are no regulations in the Law of Access to Information (Law n. 12.527); in other words, there is no positive silence for the delivery of information in the Brazilian legislation.

In Brazil, there is case law regarding the public civil action filed by the Public Prosecutor's Office of the State of Santa Catarina requesting a court order against the Municipality of Capivari de Baixo, alleging that the constitutional and legal dispositions that provide for a policy of transparency and the right to information were neglected, by omission in the implementation, management and maintenance of the "Transparency Portal".

The Attorney General's Office determined that the defendant did not implement the "Transparency Portal", neither disseminated nor updated information of interest to population through the Internet. The decision imposed the duty to adapt to the Law of Transparency (Law Complementary n. 131/09) and the Law of Access to Information (Law n. 12.527 / 11).

There is a federal government website that deals with access to information (Electronic System of the Information Access Service). The application can be done digitally. It is also possible to make complaints about failures to obey the law (Regulation 1245/2015). In addition, Order 262/2005 deals with audit reports on the Internet.

Executive Order No. 9.690 of 23 January 2019 was criticized for increasing the number of people who can decide if a document can be made public, which diminishes the transparency of the previous Executive Order. The biggest problem with the law is precisely the subjectivity for the decision of what may or may not be disclosed.

In Brazil, one of the problems is the extent of the disclosure of information that can be authorized. It is proposed to reduce the number of people in charge of this authorization. The problems related to the Law of Access to Information are considered to be solved once the Data Protection Law is approved.

As Brazil is a very large country, with different realities, the implementation and effectiveness of the Access to Information Law varies greatly from one state to another.

Some locations continue to face more problems that could be solved simply by engaging municipalities to promote active transparency of their acts, actively make available, without request, information such as organizational structure, competencies, applicable legislation, main positions and their occupants, address and phone numbers of the units, hours of operation; programs, projects, actions, works and activities, with indication of the responsible unit, main objectives and results, results and impact indicators; transfers of financial resources; detailed budget and financial execution; and offers made and in progress, with notices, annexes and results, in addition to signed contracts and issued commitment notes.


COLOMBIA

2.2. COLOMBIA

Colombian law recognizes the right to access to information as a fundamental right. Its constitution recognizes that all persons have the right to access public documents except in the cases established by law.

Additionally, the Constitution provides other related provisions such as freedom of expression and to receive accurate and impartial information; the right to present respectful requests to the authorities and that these are responded immediately.

Law 1712 of 2014, is the law of transparency and the right of access to public information; as well as Executive Order 103 of 2015, which partially regulates Law 1712; Executive Order 103 of 2015; and Resolution 3564 of 2015, which partially regulates Executive Order 1081 of 2015.

Law 1712 of 2014 establishes that the obliged subjects must publish certain minimum information in their web portals such as availability of the information, differential criterion of accessibility, minimum obligatory information regarding the structure of the obliged subject, publicity of the contracting, minimum mandatory information regarding services, procedures and operation of the obligated subject, adoption of publication schemes, information asset registers, previously published information, document management program, information systems, reserved information index, partial disclosure and other rules.

In addition, Executive Order 103 of 2015, which regulates the Law 1712 of 2014 complements the Law 1712, adding the publication of the entity's procedures and services, publication of contractual information, publication of the execution of contracts, publication of procedures, guidelines and policies for procurement and purchases, publication of the Annual Plan of Acquisitions, and the publication of the information in open data.

The law includes the principles of maximum publicity, transparency, good faith, facilitation, non-discrimination, free of charge, speed, effectiveness, quality of information, proactive dissemination of information, and responsibility in the use of information apply.

Law 1712 of 2014 makes it mandatory to facilitate the exercise of the right of access to public information, and transparency is promoted in all entities of the three branches of public power of the national order, and the autonomous and independent control organs that are part of the State.

However, the law establishes that, in addition to these entities, natural and legal persons who exercise public functions, provide a public service or administer public resources, are also obliged to comply with the provisions of transparency and access to public information.

Political parties and significant movements of citizens are also involved in this process, and must comply with its dispositions in the same way the institutions previously mentioned.

The regulations developed for this purpose do not contemplate the obligations of the obligated entities in a specific article, which makes it difficult tracking these obligations. However, the text of the law states as obligations of these entities to respond to society's requests; to publish and to disclose documents and files that account for state activity; produce and capture public information.

Other obligations include the adoption of a documental management program in which are established the procedures and guidelines necessary for the production, distribution, organization, consultation and maintenance of the documentary. The program should follow the guidelines and recommendations that the General Files of the Nation and other competent entities issue.

The Political Constitution of Colombia establishes the Public Prosecutor's Office as the control body in terms of transparency. This is conducted by the Attorney General of the Nation, by the Ombudsman, by the Deputy Prosecutors and the agents of the public ministry before the jurisdictional authorities, by the municipal officials and by other authorities determined by law.

The Public Prosecutor's Office is responsible for the custody and promotion of human rights, protection of the public interest and monitoring the official conduct of who perform public functions, according to Article 277 of the Political Constitution of Colombia.

Article 23 of Law 1712 establishes the functions and powers of the Attorney General's Office. These include the obligation to ensure compliance with all the dispositions established in the Law, and other provisions related to prevention, promotion and punishment for non-compliance with the Law.

The Attorney General's Office is an autonomous and independent organ. The authority is elected by the Senate of the Republic for a period of 4 years, from the list of candidates of the President of the Republic, the Supreme Court of Justice and the Council of State (Political Constitution of Colombia of 1991, article 276). Resolution 138 of 2018 created the Office of the Delegated Procurator for the Defense of Public Patrimony, Transparency and Integrity with disciplinary, oversight and control functions.

The Colombian law states that natural and legal persons, public or private, that provide public services should only disclose information related to the provision of that public service; any natural person, legal entity or dependent legal service that performs a public function, only disclose information related to the performance of that function; political parties or movements and significant groups of citizens; and certain natural or legal persons who receive funds or territorial public benefits and are also obliged to transparent information.

Law 1712 of 2014 establishes in its regime of exceptions the confidential and reserved information; and defines them as follows; Classified public information: Information that being in the possession or custody of a liable subject belongs to a private or semi-private natural or legal person so their access may be denied or excepted, supported by legitimate and necessary circumstances according to the private rights granted to them by Law.

Reserved public information: Information that is in the possession or custody of an obligated subject is not publicly accessible for damage to public interests and under full compliance with the requirements established in the Law. Some of the reserved topics are: defense and national security; international relations; effective administration of justice; macroeconomic and financial stability; children and adolescents' rights; and, public health.

The information can be classified as reserved only for a period of 15 years. Limitations on access to classified information are unlimited, unless the owner of the information consents to its disclosure. When the information is classified or reserved, the obligated entity must present the constitutional and legal grounds for retaining the data it cannot disclose.

Obligated entities may strike out the classified or reserved sections of the document, anonymize, transliterate or edit the document to remove the classified information; open a new file with public information that can be disclosed; or resort to actions to fulfill their obligations to allow the access to all information that is not classified or reserved, taking into account the conservation of the information.

Reserved information includes the right of every person to privacy, under the limitations imposed by the obligations of public servant, according to Article 24 of Law 1437 of 2011; the right of every person to life, health or security; commercial, industrial and professional secrets, information that causes damage to public interests such as national defense and security, the public safety, international relations; prevention, investigation and prosecution of crimes and disciplinary offences, as long as the charges are made, as the case may be.

Documents containing opinions or points of view as part of the deliberative process of public servants, medical records, certificates of social benefits, qualifications or academic results, patents, records of databases of victims, studies on international agreements to be signed, investigations that are in prosecution, decisions of the Bank of the Republic until they become effective, military or police strategic plans.

These exceptions should not apply when the natural or legal person has consented to the disclosure of its personal or private data or when it is clear that the information was provided as part of that information that should be under the applicable publicity.

There are other laws, pronouncements and institutions that have established information as reserved and confidential, such as the Superintendence of Industry and Commerce that has addressed this issue in rulings on the violation of business secrecy.

Law 1266 of 2008, contains general provisions of habeas data and regulates the handling of information contained in personal databases, especially financial data, credit, commercial, service and the one coming from third countries. This law also defines the concepts of "Personal Data", "Semi-Private Data" and "Private Data".

Law 1581 of 2012 and Decree 1377 of 2013, which establish the personal data protection regime; Law 1755 of 2015, which regulates the fundamental right of petition, and also includes articles regarding reserved information, the right of petition is the main tool for requesting public information. This is also a fundamental right, established in Article 23 of the Constitution, and is regulated, by the Administrative Procedure and Litigation Code and Law 1755 of 2015. Additionally, Law 1166 of 2016 establishes the procedure for oral requests; Law 1712 of 2014 in its articles 26 ,24, 25 and 27 establishes the procedures to make effective public information requests.

Access to information may be protected by legal action. However, each process may be delayed depending on the response of the authority and the specific case. The constitutional action proceeds in other cases, for example, when there is no response to application, the answer is incomplete, evasive or unjustified, additional unjustified formalities are requested or excessive charges are made once the resource of replacement is finished.

Law 1712 of 2014, establishes that when the response to the request for information invokes the reserve of national security and defense or international relations, the applicant may appeal. If the appeal is denied, the applicant may use the insistence resource. The Administrative Court with jurisdiction in the place

where the documents are, national authorities, the Capital District of Bogotá, the administrative judge in the case of district and municipal authorities, will decide in sole instance whether to deny or accept, in whole or in part, the request made.

The resource of insistence must be decided within the 10 days after sending the request to the judge or administrative court. For its part, the action for protection must be resolved within 10 days in the first instance, and 20 days in second instance. However, the appeal of replacement does not have a time to decide, so this could delay the response time to the request.

There are also disciplinary sanctions, which are applied due to lack of attention to the requests and the terms to resolve. These disciplinary sanctions may involve dismissal, removal from office or financial penalties.

In Colombian legislation, administrative positive silence applies to cases where the authorities do not respond to requests for access to documents held in public offices and obtain copies of them.

Ruling C 274 of 2013, analyzed the draft statutory law number 228 of 2012, which creates the Law of Transparency and the right of access to public information, and recognizes that this right meets at least three essential functions. First of all, ensure democratic participation and political rights; secondly, allows the exercise of other constitutional rights; and, finally guarantees the transparency of the public administration.

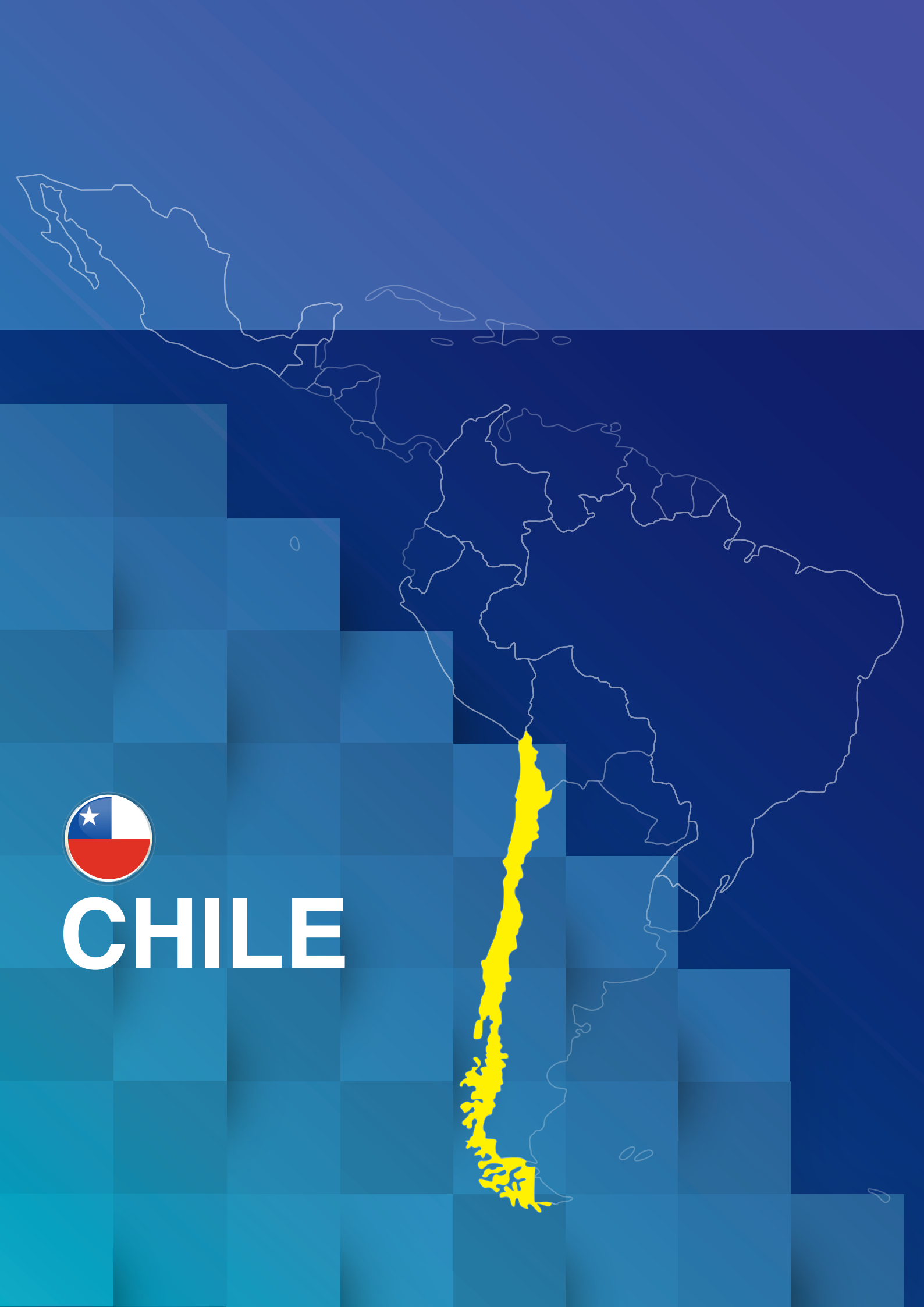
In terms of technological advances, the regulations bring dispositions that facilitate access to information by developing an electronic information request with standard format for publication.

The obligated subjects in their respective web pages should include the following information, methods of contact; information of interest; organic structure; regulations; budget; planning; contracting; procedures and services; data management of the public information.

The electronic application form allows the citizen to receive acknowledgement, follow their application online, and even apply under reserved identity; the citizen will be able to access the electronic application form on the entity's website, through which you can submit applications for public information. This format must respect the rules on protection of personal data.

Although Colombia implemented the law of access to public information and transparency in 2014, not all state entities comply with their obligations to publish information on their websites, many citizens do not have the means to virtually access the pages of the entities, and although the entities have the obligation to publish certain minimum information, it is not enough to fight and prevent corruption.

Among the problems identified, it is established that there is no real guarantee of transparency because not all citizens have access to Internet so you can't check the information contained in the portals. A solution can be provide better training and demand more proactivity by officials.


CHILE

2.3. CHILE

The Political Constitution recognizes the right to submit petitions to the authority over any matter of public or private interest, with no other limitation than to proceed in respectful and convenient terms.

Parliamentary Motion No. 3773-06, establishes the right to free access to public sources of information so that citizens take note of the acts of the administration of the state and the documentation that supports such acts.

As for secondary legislation, there is the General Rules of Law 20.285, which point to the principle of transparency of the public service and access to information by organs of the State Administration.

The Council for Transparency, is the body in charge of making effective the fulfillment of these laws; it is an autonomous corporation of public law, with legal personality and its own resources; its functions are supervision, punishment, collaboration and intermediation between public bodies and users who require the information.

In the educational field, we have the EDUCA TRANSPARENCY network. This online platform allows people to be certified for their knowledge of transparency and access to information. Its purpose is to promote the construction of knowledge and values of Transparency as a strengthening to the right of information in Chile.

The faculties of interpretation and application of Law 20.285 of the Council for Transparency are currently under discussion. This debate will make it possible to determine the limits of the administrative acts issued by this organ and to adapt them to new technologies.

The Council for Transparency is an independent, autonomous corporation under public law. The Council's management is made up of four directors appointed by the President of the Republic, with the acceptance of the Senate. The Council is a new institution, with only 12 years of service.

The Comptroller General of the Republic is the entity in charge of establishing responsibilities to the officials who do not respect the regulations established in the Law.

The General Comptroller of the Republic is a superior organ of control of the State Administration. It is independent from the other public bodies of the Executive Branch. Its members are elected through public selection processes, while its authority is designated by the President of the Republic, with the acceptance of the senators in office. Its position lasts 8 years.

Information requests can be made by any Chilean citizen through the website of the corresponding administrative body, by filling out a form. The obligated subjects are public entities or organs and services that are part of the Public Administration of the State of Chile. For example, the Ministry of Education, the Department of Labor, municipalities, etc.

The law establishes the obligations of the entities in access to information which are, to ensure compliance with the rules of transparency, without prejudice to the powers and functions that the law entrusts to the Council and the Comptroller General of the Republic; to respond for the failure to comply with their obligations, and the obligation to inform through printed and digital media available on the internet.

Exceptions to the disclosure of information include the protection of interests of third parties; acts classified by law as secret or reserved, until a law of the same hierarchy leaves it without that qualification; military or strategic planning, which, if that information is disclosed, it could affect the national security.

The Chilean legal system has a special category called the Quorum Law. This law deals with matters established in the Constitution itself that require approval, modification or derogation by an absolute majority of sitting deputies and senators. Reservations or secrets of acts are included in these categories.

It is considered confidential information the documents or records that contain information that may affect the rights of third parties, authority, administrative headquarters or service of the state administration and information that includes the sphere of private, commercial or health.

The most current case is that of the Ministry of Health, which began an investigation into the leaking of personal data of infected persons by the COVID19 virus in the Maule Region (south of Chile), where it was spread on social networks, a list with full names, rout, address and phone number of patients who presented symptoms. This leak led to the harassment of these people, so the Prosecutor's Office initiated the investigation of these events.

Nor can acts, resolutions, or procedures that may affect the fulfillment of state obligations or the privacy of the individual be considered public information.

If the request for information is denied, the petitioner can make the claim for protection on the website of the Council for Transparency. This entity will initiate the corresponding investigation. The applicant has 15 days to make the claim through the website; this was one of the measures taken from the COVID19 virus.
The Council for Transparency has 5 days to resolve the complaint. The complaint must indicate the

infraction committed and the facts that configure it, with the evidence that the case demands.

The denial of information made without foundation generates the following sanctions, fines of %20 to %50 of their remuneration, that can increase in the cases in which the error is not corrected, or suspension of the charge for 5 days.

Chilean legislation does not contemplate administrative silence; that is, the agency has the obligation to respond in the event that it cannot deliver that information, it must invoke a legal cause under Law 20.285.

The Supreme Court ruling Rol 1.824-2019 establishes that the Council for Transparency has stated that e-mails replace administrative acts, assuming the non-existent power to qualify that it is or is not an administrative act, transgressing the privacy of the public official.

It also points out that access to information includes the request and delivery of information through acts, resolutions and procedures that have three requirements: information, information prepared by the administration and information financed by the state budget. In this sense, e-mails cannot be requested.

However, the Supreme Court pointed out that the e-mails requested from public servants are not under a cause of reserve or secrecy, therefore communication between officials is public information, because it is information issued through institutional channels.

Emails are part of the public information service, i.e. they are part of the administrative act. Therefore, their conservation and request are part of the entity.

In Chile, problems such as the lack of digitalization of information have been identified. It is important that more effective progress can be made in digitalization as a result of COVID19.

Finally, the law on the protection of personal data is under discussion, which establishes the competence of the Council for Transparency as the governing body of oversight. It also establishes transparency obligations to the constitutional autonomous bodies.


MEXICO

2.3. MEXICO

The Political Constitution of the United Mexican States recognizes the right of access to information, without the need to prove a legal interest of any kind.

The National Institute of Transparency, Access to Information and Protection of Personal Data is the governing body in matters of transparency. It is an autonomous and independent entity responsible for monitoring the free exercise and enforcement of this right.

The General Law of Transparency and Access to Public Information, the Federal Law of Transparency, Access to Public Information and Accountability of Mexico City, are secondary rules that regulate this right. There are also norms, official standards, guidelines and other legal documents.

The difference between a federal law and a general law refers to its field of competence and its hierarchy. Federal laws regulate the powers of organs at the federal level. General laws affect all legal systems. This is supported by the isolated argument number 172739 of the ninth epoch.

Contradictions in regulations must be resolved by a judge based on the hierarchy of norms established by the legislation itself. That is: Political Constitution of the United Mexican States, Laws of the Congress of the Union, International Treaties, local constitutions and laws.

The right to information is a constitutional guarantee enshrined in the Political Constitution of the United Mexican States. Its application is federal and applies to both the public and private sectors.

INAI has the competence to monitor compliance with the regulations, for which there are mechanisms such as enforcement measures and sanctions. The Federal Law of Transparency and Access to Public Information respectively regulate the effective compliance with these obligations.

INAI has a National Platform of Transparency, through which citizens may request all public information of the Federation.

The administrative sanctions for public servants who do not comply with the obligations regarding access to public government information are established in the Federal Law of Transparency and Access to Public Information and the General Law of Transparency and Access to Public Information, respectively. These administrative sanctions do not prevent the generation of civil or criminal penalties.

The General Law of Transparency and Access to Public Information implements the National System of Transparency, Access to Information and Protection of Personal Data, as well as a series of programs to ensure transparency of information.

The 2019 work report indicates the requests from individuals to access certain federal government information, resolutions and verification of compliance by the authority.

INAI is the body specialized in the right of access to information and protection of personal data. It is conformed by 7 commissioners, of which one commissioner president is appointed.

These commissioners are nominated by the Senate of the Republic.

The Supreme Court of Justice of the Nation issued various criteria issued by the Supreme Court of Justice of the Nation, regarding the scrutiny to which INAI's resolutions are subject by the constitutional judges.

INAI has autonomy of management, which implies the opening of administrative files against public servants who do not observe the law, so that they can make it effective. Likewise, in response to requests from individuals to access or receive public information they can order the sharing of this information with the applicant.

The Congress of the Union is the body in charge of issuing and approving laws of the legal system. INAI cannot issue laws on access to information and protection of personal data, it is only responsible for ensuring and guaranteeing their compliance.

In October 2019, the Forum Advances and Challenges of INAI was held, in which the following challenges were noted: 1. public pedagogy to make known, at all levels of society, the work of the body on access to information, transparency and the protection of personal data; 2. to shield the institution from any political interference, 3. to maintain its autonomy, 4. to ensure that the obliged subjects, especially the trade unions, comply with the right of access to information, 5. consider the needs of applicants and citizens, 6. greater dissemination and simpler search engines on the platforms that allow immediate access to information, 7. promote the growth of the Open Government in the population through social networks, this will allow for surveillance and monitoring of the actions of the public administration with a focus on combating corruption, 8. invest public resources in control institutions.

The legislation establishes that the public information generated, obtained, acquired, transformed or in possession of the obligated subjects is public and

accessible to any person, for this reason it is necessary to enable all the means, actions and efforts available in the terms and conditions established by the General Law, Federal Law and the corresponding federal entities.

The subjects obliged to be transparent and allow access to public information are the entities of the executive, legislative and judicial branches, autonomous bodies, political parties, trusts and public funds, any individual, corporation or union that receives and uses public resources or performs acts of authority in federal, state and municipal areas.

The Obligated Subjects also have responsibilities regarding administrative, civil and criminal sanctions, in cases where the obligations of transparency mentioned are not observed.

The regime of exceptions considers reserved information and confidential information. Confidential information is any information that contains personal data of an identified or identifiable individual; bank, trust, industrial, commercial, tax, stock market and postal secrets, whose ownership corresponds to individuals, subjects of international law or obliged subjects when they do not use public resources. Confidential information is not subject to any temporality and may only have access to it the owners of the same, their representatives and the empowered Public Servants to do so.

The Federal Economic Competition Commission defines confidential information as any information that, when disclosed, may cause damage or harm to the competition of the person who provides it, contains personal data that may endanger the safety of a person, or information that by legal provision cannot be disclosed.

The General and the Federal Law of Transparency and Access to Public Information establish as reserved information any information that protects national security, public safety or national defense, undermines Mexico's international relations, damages its monetary stability, endangers the life, safety or health of any person or causes serious damage in the activities of verification of fulfillment of the law.

In cases of serious human rights violations or crimes against humanity, or in the case of information related to acts of corruption, the reservation of information may not be claimed, in accordance with applicable laws. In addition, any information found in public records or publicly accessible sources may not be classified as confidential.

An example of a corruption case in which the reservation of information couldn't be claimed occurred when the Tax Administration Service published a list and data of tax payers that allegedly issued vouchers without having the assets, infrastructure or material capacity, to provide their services or produce market or deliver the merchandises covered by this vouchers.

Request for information can be made in the following ways: attending personally to the Transparency Unit of the obligated entity, by the National Transparency Platform, by email, post, courier, telegraph, verbally or by any other means approved by the National System, at the offices designated for that purpose.

To access public information in possession of the obligated entities, citizens can request this information through the Requesting Access to Information Format found on the website of the INAI.

The obligated entities must provide the citizens the necessary tools regarding access to their personal data. In addition, individuals may exercise their rights of access, rectification, cancellation or opposition in accordance with the dispositions of the Federal Law on the Protection of Personal Data.

In case of unfounded refusal of access to public information request, the applicant can appeal for review to the Plenary of INAI. The applicant hast 15 days to present this appeal, and INAI has 40 days to decide on it. These 40 days are extendable up until 20 more days on a single occasion. When the public administration remains silent, the request is understood to have been denied.

In the field of data protection, both the General and Federal Law provide the obligation of confidentiality of the information related to personal data held by third parties, this obligation will continue even after the person in charge doesn't have any labor relationship with the obligated entity. Similarly, the law established that federal public servants are obligated to keep the information they learn about the services they provide, confidential.

Ruling number 169574 establishes that the exercise of the right of access to information guarantees other rights. The General Law of Regulatory Improvement that contemplates the File for Procedures and Services seeks to prevent government agencies from requiring additional information issued by another authority from persons requesting a procedure or service. The citizens authorize the use of the information in their file to the agencies and so they consult the information to carry out the procedure.

The Advanced Electronic Signature Law contemplates the use of electronic signatures and the expedition of digital certificates to natural persons. It also establishes that the authorities must ensure the confidentiality, integrity and security of the personal data of digital certificate owners.

Other regulations such as NOM-024-SSA3-2010 establish the objectives and criteria to be observed by the Electronic Clinical Record and include the secure exchange of data. NMX-I-27018-NYCE2016 on the other hand refers to personal data protection measures for public cloud service providers.

The Federal Police's Specialized Center in Response to Cybernetic Incidents (CERT-MX) attends to citizen complaints related to crimes committed through the Internet. The Senate is currently debating a project of Executive Order in which several dispositions of the Federal Law of Protection of Personal Data in Possession of Individuals are modified with respect to cyber-attacks.

The rules establish that personal data must be kept by reliable mechanisms of security, availability, integrity, authenticity, confidentiality and custody. These can be, mainly data messages and electronic documents (in some cases encrypted).

The problems in Mexico have been in the area of cyber-attacks resulting from lack of control by those responsible for personal data. This has resulted in unjustified and uncontrolled access to people's personal data. INAI has sanctioned this type of violation of the Law to financial and insurance companies. There are also improper practices such as the sale of expired bank portfolios and the traffic of databases in the black market, as mentioned by INAI.

The proposed amendments to the Federal Law on the Protection of Personal Data include the obligation to notify the owner of the data, and INAI, of the security incident so that immediate action can be taken to protect this data.

Another reform contemplates conferring INAI the faculty to verify the security incident, as well as to impose sanctions on those responsible for data protection, for actions, omissions or negligence.


PERU

2.4. PERU

The Political Constitution of Peru recognizes the right to request, without express reason, the information required and to receive it from any public entity, within the legal period, with the cost involved. Information that affects personal privacy, or that affects national security is excluded by law.

There is special legislation regulating access to the public information that establishes the obligation of public entities to publish the information to through its web portals (Transparency Portal) as well as the procedure for the application for access to public information. Responsibilities and sanctions are also established for officials who fail to comply with the provisions set forth in the Law.

The obligated entities are: the Ministries and Public Organisms of the Executive, Legislative, Judicial, Regional and Local Governments, the Organisms to which the Constitution of Peru and the laws confer autonomy, other entities, organisms, special projects, and state programs that carry out activities by virtue of administrative powers, and the juridical persons under the private regime and, the private juridical persons that provide public services or exercise administrative functions, by virtue of concession, State delegation or authorization, in accordance with the regulations on the subject.

The officers responsible for ensuring compliance will be the immediate head in the first instance and the Head of Human Resources in the second instance.

The Directorate General for Transparency, Access to Public Information and Personal Data Protection will guarantee compliance by private legal entities.

It is necessary to have a special body in charge of ensuring compliance with the regulations on access to public information that does not depend on the Ministry of Justice, in order to guarantee independence and impartiality in decisions.

Legal entities that provide public services must have mechanisms for access to public information. Non-compliance with these dispositions generates economic sanctions determined in administrative procedures and, in addition, criminal sanctions for the commission of the crime of abuse of authority.

Peruvian law limits access to confidential information containing advice, recommendations or opinions produced as part of the deliberative process prior to government decision-making, unless such information is public; information protected by bank, tax, commercial, industrial, technological and stock exchange secrecy; information related to investigations in process referring to the exercise of the sanctioning power of the Public Administration; information obtained by legal advisors of the Public Administration entities, which could reveal the strategy to be adopted in the processing or defense in an administrative or judicial process; information related to personal data; and those established in the Constitution or by Law approved by Congress.

Another restriction is reserved information, which includes information that may cause a risk to the territorial integrity and/or the subsistence of the democratic system, to the security and territorial integrity and to the national defense.

In case of violation of human rights, or cases under the 1949 Geneva Conventions, the reservation of information cannot be invoked. There are some limits to the exceptions to access to information, such as cases where the cause for classifying the information as reserved is extinguished.

The exception of access to confidential information in an administrative sanctioning procedure ends when the resolution is executed or when more than six months have passed since the start of the administrative sanctioning procedure. Nor does the exception of confidential information for personal data operate if the Superintendence of Banking, Insurance and Pension Fund Administrators requires information about a public official.

Nor can entities invoke exceptions of access to information when only part of the requested information is confidential or reserved, and it is possible to grant the requested information by deleting the non-public part.

Legislative Decree N 1353 establishes that entities have 5 working days to provide the requested information, including extension. The National Authority of Transparency and Access to Public Information is the specialized organ competent to know the appeals.

Applicants may lodge an appeal against the total or partial denial of requests for access to information, to the obliged entity or to the Transparency and Access to Public Information Court. The Court has 10 days to resolve these appeals. This Court was created in 2018 and has currently ruled in a fast manner and in accordance with the fundamental rights of citizens.

The Law establishes that public officials must be constantly trained to make decisions regarding access to public information, in accordance with technological advances.

The Law also establishes the application of sanctions to entities and public officials or servants who fail to

comply with their obligations. These sanctions can be criminal, administrative, and civil; and range from suspension of 121 days to 180 days, to dismissal and disqualification from office for up to 2 years, as decided in the administrative sanctioning procedure.

The Law and the regulations set forth negative administrative silence to deny requests for information. However, the internal regulations of the National Superintendence of Public Registries establish the application of positive silence to deliver information, if the entity has not made a statement within 7 working days.

Resolution N010300022020° of 01.02.2020, issued by the Court of Transparency and Access to Public Information, indicates that entities may not refuse to deliver public information that is requested in a given medium, as long as the applicant assumes the corresponding cost.

Resolution N010308742019° of December 2019 ,11, on the other hand, establishes that when information containing personal data is requested, such data will be removed in order to guarantee access to public information.

The Constitutional Court and the Court of Transparency and Access to Public Information have cited Ruling No. 1797-2002HD/TC to specify the extent of access to public information, since one of the main problems is that the information provided is often incomplete or outdated.

In Resolution N° 010300772020, the Transparency Court established as a precedent that "the right of access to public information includes not only the possibility of obtaining information generated by the institution itself, but also information that is not in its possession."

For its part, in STC 1797-2002-HD/TC, the Constitutional Court established that "the right of access to information imposes on public administration bodies the duty to inform, and requires that the information provided is not false, incomplete, fragmentary, indicative or confusing".

The Law, the Regulations, as well as other special rules such as the Protection of Personal Data Law (and its Regulations) or the System National Archives Law have taken into consideration the technological progress and the progressive upgrading of the resources of State entities, in order to ensure that all public information, regardless of the means or support, be accessible to the citizens.

The legislation considers that technology allows the information provided to applicants to be as accurate, fluid, secure and up-to-date as possible; it also considers that public information in digital formats such as web pages or e-mails allows for a reduction in the resources invested and in some cases guarantees its existence and integrity.

Currently, many requests for information are answered via e-mail to indicate the costs that would be involved in reproducing public information, the extent of the information that the entity or the public official may possess, to send the information digitally, or to inform the date when the applicant may withdraw the information.

Nowadays peoples personal data are usually obtained massively via telephone or electronic means, the regulations of the Personal Data Protection Law establish that computer systems handling personal data banks must have security measures for the treatment of digital information.

Every entity has digital files regarding new information they collect, as well as physical documentation that can be progressively digitized. Each Public entity, as well as private entities are responsible for their respective personal data banks, in various media such as physical, magnetic, digital.

Before various legislative reforms access to public information was much more limited and there was more abuse by public officials and servants who denied or delayed request for access to public information in an unmotivated manner, discouraging citizens from trusting the public administration.

This reforms have make it easier for citizens to found the information needed on transparency portal. Various internal dispositions and protocols, are allowing some public entities to be able to continue to provide access to information to citizens remotely, despite the fact that their offices may be closed in case of majeure force, however, these improvements will take several years to systematize the information in the hands of the State. The security of the systems is being internally improved due to the fact that the main problem is the commission of computer crimes.

3. COMPARATIVE ANALYIS

Recognition of the right of access to the information as a constitutional right.

All countries recognize access to information as a constitutional right that allows to request information and receive it within a defined period of time. In addition, they all mention the exceptions and the link with other rights such as the of freedom of expression.

Exclusive legislation for access to information.

In each of the countries consulted there is, at least a legal body dedicated exclusively to access to public information. Most of them are developed by secondary legislation specificities of information management and its publication.

The main differences concern the forms of government, so the regulations apply according to its territorial ordering. In addition, it is noted a distinction in the way main legislation regulates the law, since in Chile there is an importance to international standards and in the other countries are solved by regulations and executive orders.

General and/or specific provisions that regulate the right of access to information and mechanisms that allow for its effective compliance.

The answers to this question have a common point in which they refer to the identification of obligated entities and the extent of their responsibilities. In addition, sanctions are used as a method of ensuring the compliance and allow the activation of the civil and criminal sanctions.

The differences lie in the existence of control entities and the way in which they are created and the way they activate the mechanisms to make the application of the dispositions effective.

General and/or specific provisions to ensure, encourage, regulate and guarantee transparency in public administration.

Each country took a different approach to ensuring transparency. In Chile, the Council for Transparency was created and the use of a technological platform to train citizens in transparency issues.

In Colombia there is express regulations concerning the information that is must publish on web portals. In Brazil the legislation refers explicitly to active and passive transparency.

In Peru there are economic sanctions for Failure to comply with transparency obligations. While in Mexico there is a tendency towards incentives and creation of programs to ensure the transparency.

Normative contradiction and interpretative mechanisms used.

The hierarchy of norms is the mechanism used in case of normative contradictions. If they have the same hierarchy, the organ considers the application of principles of administrative and constitutional law for the exercise of the right of access to public information.

Field of application of the legislation.

All States establish that the field of application concerns the public sector and the agencies in charge of public management.

The difference lies in the fact that certain legislations make a list of the different entities in charge of public information, while others establish it in a general way.

Control body for compliance of legislation.

In Mexico and Chile, entities were created for ensuring the compliance of the objectives and other dispositions of the legislation, these entities are autonomous and have the power to issue resolutions, however, its execution depends on other state entities.

In other countries the Ministry of Justice, the General Comptroller of the State or the General Attorney's Office are the entities in charge of controlling access to public information.

In other words, there is a choice between creating an independent organ or expanding the functions of existing state entities.

Exceptions to the field of application, including non-state entities that can handle public information.

The countries noted that the field of application is focused on public functions, actions of interest and management of public funds. Most of legislations make a clear frame of what should be understood as public information in the private field, however, there is a gap in terms of adaptation to the new technologies and personal data.

Definition of confidential information

All the legislations frame it in the respective personal data, that if its disclose may result in a damage to the privacy or private life of the individual. Certain legislations also provide the protection of financial data through secrecy banking and tax. There are also lists that of what not should be considered as confidential

information and what would be the exceptions for its distribution should be.

Protection of confidential information.

In the consulted countries the reserved information generally refers to security and national defense. In some countries it includes international relations information, macroeconomics and childhood management.

Each State has a list of reserved information according to its legislation, which can be extended by control organs disposition. The only thing that is not very clear is the field of the exceptions to the reservation.

Legal processes for requesting information.

All countries respect the right of request of public information and the legitimacy to do it is held by any person. The differences are identified on the structure of the obligated entity whether there is a central entity for the access to public information, a committee within entities or an information officer.

Additionally, there are legislations that take digital systems to receive the request of access to public information. There are also differences in the way to appeal denied information and if it is done before an administrative or judicial body.

Causes for which the exception of confidential or reserved information cannot be used.

The exception of confidential or reserved information cannot be used in these countries in cases of human rights violations. In each country varies to gravity and includes issues such as temporary reserve and partial disclosure or identity protection.

Causes for the exception of confidential or reserved information.

The confidential information applies when the disclosure affects the rights to life, health and intimacy. While the reserved information is applied to protect the national interest, which includes security issues and protection of priority groups.

The problem lies in the confrontation of rights when disclosure and non-disclosure could cause damage, for example, to health data.

Obligations of Public Information Custodians.

It is common to all the consulted States that the custodians are obligated to transparency, collecting, compiling and disclosing public information, as well as give response to access requests.

Depending on the information handled there are more precise obligations in order to be able to precaution the compliance with reservation and confidentiality, as well as proactivity in publishing. The failure to comply with such obligations has administrative, civil and even penalties.

One of the problems encountered is that the obligations are usually determined by law and do not give the opportunity to adapt to new systems of custody information.

Legal procedures in case of refusal of access by the custodians.

The refusal of access to information can be appealed to the higher administrative authority between 10 and 15 working days. The process is similar in every States, with the variation that the higher authority may be within the same entity or be an autonomous control entity as in the case of Mexico and Chile.

And there is also the option of appealing to the administrative litigation and follow the judicial process.

Sanctions for denying the right of access to public information.

There administrative sanctions can be the suspension or dismissal of the public official. Additionally, in case of deleting information without justification or disappearance of documents, there could exist criminal responsibility with a custodial sentence.

Positive silence for delivery.

In Mexico and Peru, the figure of positive administrative silence does not operate, so in case the deadline has passed, the application is considered rejected.

For Brazil and Colombia there is no specific mention to access to public information,

However, requests or claims are understood as positively answered with the expiration of the term.

Finally, in Chile the request is understood to be answered in a positive way and should be executed, when it is not possible to deliver the information, the reasons should be justified. In this question we found the biggest variations.

Recent jurisprudence concerning the interpretation of the right of access to information.

The cases help to have a perspective of the recent problems regarding the application of the regulations concerning access to the public information.

It is interesting to note that the cases are related mainly with access to information as a right that is affected, and that evolves as technology changes. In this sense, it is understood that there is complete jurisprudence on the subject.

Regulations that adapt to digital evolution.

In the countries consulted there is progress towards technological systems, especially for the files of information and for the reception of access requests. What refers to digital evolution is not contemplated directly in the access to information law but it is found in the legal system in specific rules for data handling.

The advances they mention are related to the electronic signature and review of digital messages.

Brief description of problems caused by the absence of rules, the existence of rules anachronisms or the incorrect application of legislation. Corrections implemented or to be taken in the process of implementation.

Among the most serious problems are the cyber-attacks that have resulted in the sale of personal information, especially financial and black market banking.

There are also problems in the lack of attention of the requests either by physical means, ignoring the digital ones; lack of compliance with active transparency dispositions.

In the solutions proposed it has been considered reforms to the different legislations regarding security incidents and increased training to public officials.

CONCLUSION.

From the information gathered, it is clear that the Legal systems in Latin America are similar in terms of recognition of the right of access to public information, the human rights regime, and exceptions, publication schemes, warranties and sanctions. We can, however, make visible small differences in terms of control organs regarding their independence and autonomy; as well as the differences in the problems that are generated in each country, which vary by reasons of technological advances or politic wills.

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