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Notes regarding transparency in the exercise of public functions and the right of accessto public information

Notas en relación con la transparencia en el ejercicio de las funciones públicas y el derecho de acceso a la información pública

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ABSTRACT: The objective of this paper is to present a series of elements that allow a conceptual and theoretical approach to be carried out on the principle of transparency as a guideline for the exercise of public function within the framework of a democratic system and the right of access to public information as a direct manifestation of this principle.

KEYWORDS: Transparency, advertising, public information, law, democracy.

RESUMEN: El objetivo del presente trabajo es exponer una serie de elementos que permitan llevar a cabo una aproximación conceptual y teórica del principio de transparencia como directriz del ejercicio de la función pública en el marco de un sistema democrático y al derecho de acceso a la información pública como manifestación directa de este principio.

PALABRAS CLAVES: Transparencia, publicidad, información pública, derecho, democracia.

INTRODUCTION

Access to public information implies in some way carrying out a democratisation process of the information held by the State and its organs. Access to information means "making it accessible to all, implies fragmenting the power position and shortening the distance between the State and society; However, it also has an amplifying effect of the power authority, insofar as it is interpreted by the inhabitants as a power that meets the requirements of the society it administers, by showing a real capacity to identify its needs and objectives in order to give them an answer". (Lavalle Cobo, 2009, p. 3)

The constitutional or legal recognition of the right of access to public information and its efficient operation is essential to improve the trust indexes between citizens and the State. A State that generates trust is endowed with a greater degree of legitimacy, which results in a strengthening of democracy and the protection of fundamental rights.

Specialized doctrine and various international instruments have expressly recognized the importance of the right of access to public information for the success of the democratic process. The Council of Europe (2009) has indicated that taking into consideration the importance of transparency in a democratic and pluralistic society, the right of access to documents provides a source of information for the public; helps you form an opinion about the state of society and public authorities; it fosters the integrity, effectiveness, efficiency and accountability of public authorities, thus helping to affirm their legitimacy.

The General Assembly of the Organization of American States (AG / OAS) has repeatedly affirmed the need to "reaffirm that everyone has the right to seek, receive, access and disseminate information, and that access to public information is a requirement indispensable for the strengthening of democracy "and to" urge the member states to respect and ensure respect for the access of all persons to public information and promote the adoption of the legislative or other provisions that may be necessary to ensure its recognition and effective enforcement ".

Informed decisions through due access to public information are an indispensable and inalienable requirement for the effective exercise of citizens' political rights. They, therefore, are an essential condition for the functioning of democracy and better and more stable governance of the political and social systems.

Once the paradigms of liberal democracy have been overcome, with a citizenry that increasingly demands greater participation in adopting major social decisions, the right of access to information is a fundamental presupposition for adequate citizen participation. The current democracy (demanded by more conscious and empowered citizenship) has overcome the logic of liberal representative democracy and complements the idea of participatory democracy to transform itself into a deliberative or dialogue democracy. This new way of understanding democracy results from the conjunction of several factors (Canales 2011, p. 21): globalization, multiculturalism, unstoppable urban growth and social, economic, technological and cultural complexity, among others.

This new scenario explains the appearance of different laws that recognize the right to access public information in Western democracies.

Also, the proper access to public information must be linked to democracy and political rights. Its recognition and effectiveness are related to the exercise of other fundamental rights insofar as it is configured as an assumption or instrument of facilitation.

The preceding is of utmost importance because the ultimate purpose of the State is and must be the human person, their protection, and the extent that the right to access public information has an absolute consecration, other fundamental rights will be better protected if this. Thus, that political system will enjoy greater citizen legitimacy.

Notwithstanding the preceding, transparency and access to public information constitute a critical tool to combat corruption. Although corruption is a complex social phenomenon, which response to many causes and factors that we will not address in this presentation, we believe that transparency and access to public information do contribute to confronting it (along with other institutional measures and cultural), either by inhibiting conduct that violates probity or by allowing control and thereby making the responsibilities of the rule of law effective.

The objective of this paper is to make available to readers a series of elements that allow carrying out a conceptual and theoretical approach to the principle of transparency as a guideline for the exercise of public function within the framework of a system democracy and the right of access to public information as a direct manifestation of this principle.

First of all, It will briefly address transparency, especially highlighting its importance to the development of democracy. Subsequently, the analysis will focus on the right to access public information, addressing the question of its legal nature and its intimate connection to the development of other fundamental rights.

Then, a proposal of the essential bases that any legislation that configures and develops this right should be recognized. In such a way that it can serve as a parameter to approach different access laws critically.

Finally, the present work concludes by delivering a concept of the right to access public information.

1. THE PRINCIPLE OF TRANSPARENCY IN THE EXERCISE OF PUBLIC SERVICE

According to the Dictionary of the Royal Academy of the Spanish Language transparency is "quality of transparent" and transparent is what "said of a body: through which objects can be seen clearly" (1), it also means "clear, evident, which is understood without doubt or ambiguity "(4).

Concerning the public function, transparency is an attribute or quality that allows us to have clear and precise information about a person or something, in this case, the State and its agencies, "which would increase our capacities for understanding, surveillance and communication "(Naessens, 2010, p. 2121) on the exercise of power.

The word transparency brings us to the idea of visibility. The transparent is visible. Furthermore, applied this characteristic to the exercise of a public function necessarily leads us to postulate that the actions of the State bodies must be visible to citizens and public opinion in general. The reasons for affirming that the exercise of the public function must be, by general regulation, always given the citizens, can be summarized in two:

i.- In the first place, the ownership of the sovereignty of the State does not belong to the rulers but to the ruled. Thus, it can be argued that between the people and the ruler, there is a

principal-agent relationship from which obligations of various kinds derive. Of course, the agent must adjust his duties to the principle of legality, adapt his actions to the ethical perceptions of the citizens to whom he owes his mandate and be always ready for his principal to take cognizance of the status of the matters in charge and to render accounts of its management. (Bustos Gisbert, 2010, pp. 79-84)

ii.- The agent handles power and power corrupts; therefore, starting from this basic premise of political philosophy, the demand for transparency is irrefutably justified.

Consequently, "the principle of transparency in official affairs and issues is, as has been repeatedly pointed out, inherent to contemporary democratic regimes. From a sociopolitical point of view, no one would probably dare to deny the profound substantive links that exist between the principle of publicity of government decisions - understood in its broadest sense - and the very foundations of democracy, since it is this a form of government that excludes, by principle, the concealment and secrecy of the measures and decisions that are produced to favour the general interests that it serves as a priority ". (Bermejo, 1988, pp. 17-27)

In this vein, our rulers are expected to be honest and not corrupt, but "probity cannot be considered if it is not associated with transparency, that is, the permanent will to decide on public matters openly and allowing citizens know the foundations and reasons for the decision, as well as how it is executed ". (Vivanco, 2008, p. 385)

According to the terms used in the Report of the Regional Meeting that took place in Santiago de Chile between December 3 and 5, 2004, sovereignty resides in the people, who delegate an essential part of their exercise to the authorities for them chosen. As delegates of the citizens, they fulfil a function at

the service of the common good, in an impersonal way, subject to laws and special responsibilities; These responsibilities include responding to their constituents, the citizens, giving an account of their management; Citizens can exercise, as constituents, a function of participation, supervision or supervision and control of state management, not only through periodic elections but at all times through the exercise of their rights of expression, association, demonstration and petition, among others; to allow all of the above, transparency of public information and management should be the general rule. (Zalaquett, 2005, p. 20)

The Inter-American Court of Human Rights (IACHR) (2006) has said that:

> 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 who are under its jurisdiction to exercise democratic control of State management, so that they can question, investigate and consider whether the adequate performance of public functions is taking place. (p. 86)

In the same sense, the Inter-American Democratic Charter of the General Assembly of the OAS (2001), in its article 4 expresses the importance of transparency for democracy, noting that this is a fundamental component for its exercise. The rule mentioned above reads as follows: "transparency of government activities, probity, the responsibility of governments in public management, respect for social rights and freedom of expression and the press are fundamental components of the exercise of democracy".

Thus, democracy is not only defined by the concurrence of universal, egalitarian and secret suffrage. It is also necessary that there is the legitimacy of exercise, which is achieved with transparency, probity and responsibility in the execution of

public functions, with a healthy respect for freedom of expression and other rights related to human sociability and rationality.

As Vivanco Martínez (2008, p. 385) has argued, the principle of transparency consists in respecting and safeguarding the publicity of the acts, resolutions, procedures and documents of the State administration, as well as their foundations, and in facilitating access to any person to this information, through the means and procedures established by law for this purpose. However, this concept must not only be limited to the administration of the State but also to all those who exercise public functions, be they executive, administrative, legislative, jurisdictional and comptroller.[1]

What is sought with the principle of transparency is that the organs of the State allow citizens to know why and how they act, and what decisions they adopt? Thus, it will be possible to directly evaluate and control whether the principle of probity is respected and, besides, participate in public management. (National Directorate of Civil Service, 2009, p. 23)

We have already pointed out how important transparency is for the Democratic Rule of Law. The existence of a "*culture of transparency*". In a society, it will generate the tendency to reduce occultism and secrecy to the maximum, thus making it familiar for public and some private actions of the authorities to be permanently exposed to the eyes and scrutiny of citizens and public opinion in general.

Definitely:

> The culture of transparency comprises a vast space of culture in a genre that consists of in-depth knowledge on the part of the ruler, of clarity, of the diaphanous, of the honest, of the excellent work, of the excellent work, of the delivery of results, of the rectitude of

1 In this sense, the right of access to public information must be impetrated concerning all State organs and not only before the State Administration.

> intention, to obtain a reasonable opinion and fame in favour of the public administration. (Cortés Ontiveros, 2005, p. 14)

According to the same author, all of the above "will be translated, by the governed, into broad citizen participation, respect for the established rules, trust in the institutions, a scenario that will gradually increase the improvement of its own culture of transparency". (Cortés Ontiveros, 2005, p. 14)

In short, the intimate and the secret that is perfectly valid in the private sphere of citizens, in the public sphere, where power is handled, and questions are decided based on the probability to affect us all, if it becomes a general rule, it is disastrous.

Closely linked to the principle of transparency and as an unavoidable consequence of it, it appears in the right of access to public information. "The right of access to government information is one of the sources of development and strengthening of representative democracy insofar as it allows citizens to analyze comprehensively, judge and evaluate the acts of their representatives and encourages transparency in government acts. and the Administration ". (Fuenmayor, 2004, pp. 9-20)

2. THE RIGHT OF ACCESS TO PUBLIC INFORMATION

2.1.- General ideas

Before developing the right of access to public information, we must take charge of a substantial question that supports us in this research: what is public information? Moreover, it is essential to do so because the right of access falls precisely on public information and not on private information and because on many occasions there may be important

information that can be classified as the public that is in the hands of individuals who will also have an obligation to deliver when it is required according to the legal system.

In general terms, we could say that public information is all that information that is available to public opinion, either due to its nature (the result of a match between Real Madrid and Barcelona) or due to acts carried out by private persons. With the express or tacit will that they are known by the rest of the community and by those made by the organs of the State and by the natural persons that integrate them in the exercise of their functions. However, this conceptual approach is not relevant to the objectives of this work.

The concept of public information for this research can be constructed in a broad and strict sense.

The concept of public information in a broad or broad sense accounts for the set of data produced or found within any State body, regardless of whether or not they were prepared or acquired in the exercise of their functions. It is the product of the public activity of the various organs of the State. Furthermore, the public information would cover all types of antecedents, whether or not those that are usually classified as reserved.

In a strict sense, public information is all that produced in the exercise of public function and that according to the respective legal system and the requirements of the democratic principle must be available to the entire community, individuals or the media, with the only exceptions established explicitly in the Constitution and the law.

> Therefore, any restriction to the right to information in the State of Law must be justified in principle by the protection of other assets and rights whose protection is required by those same rights, principles

> or constitutionally recognized rights. Thus, secrecy in some information is justified by the protection of the right to privacy or a prevailing public interest such as State security. (Balaguer Callejón, 2013, p. 9)

Also, as a starting point in the search for a concept of public information, we will point out that the extension that we must give to it should not be restricted but broad. Not understanding it this way could result in reducing too much the essential content of the right and with it its exercise. In this sense, of course, we have to point out that it is not correct to make the concept of public information synonymous with that of administrative documentation. "All the information in possession of a state office is public, which may or may not coincide with the administrative documentation, provided that its access is not prohibited by a limitation expressly established by law". (Lavalle Cobo, 2009, p. 9)

Nor does it correspond to make the concept of public information equivalent only to that which is in the power of the State administrative apparatus. Many laws on access to public information, including Chilean law, only recognize the right concerning the Administration and not concerning the other organs of the State.

We agree with Vial Solar (2010, p. 121) when he argues that the possible restrictive interpretations of the scope of the concept of public information should be rejected as inconsistent with the idea of a right of access to public information as a right of a constitutional nature within a democratic republic, which makes it inconceivable that the State, ab initio, except for justified reasons for reservation or secrecy, would argue that part of its activities is reserved.

It is also worth saying that the right of access to public information can be channelled in three ways, namely:

> The general systemic publication, individualized communication to those who may be interested, and communication in response to specific demand of the companies, including the possibility of reproducing the requested documents, with all appropriate guarantees of conservation of the source document, original or not. (Guachi Risso, 2012, p. 173)

For our research, we will stick with the third way of those mentioned above. That is, the right of access to information will be understood as a right that the whole legal system recognizes to every person to demand from any State body the delivery of information classified as public and to go before a competent court requesting the protection of its right when it has been unjustifiably denied by the body legally obliged to deliver it. In this sense, the legal obligation to deliver and release information corresponds to all organs of the State, even those that have constitutional recognition.

2.2.- On the legal nature of the right of access to public information

2.2.1.- The right of access to public information is part of freedom of expression

The right to freedom of expression can be considered from different perspectives. As a manifestation of the personal autonomy of the individual, from a collective point of view and the perspective of the recipients. In the latter sense:

> An alternative way of understanding freedom of expression is the one that considers that the protection of this right implies not only the protection of those who express themselves but also aims to ensure the recipients the possibility of appreciating the most diverse variety of points of view. possible around a specific topic, an objective that is pursued through the

protection of expression. (Saba, 2004, p. 153)

In its first aspect, freedom of expression corresponds to that fundamental right that each individual has by which he can express his ideas, opinions, points of view on different topics and in different ways. As can be seen from article 20 of the Spanish Constitution, we can consider that in broad sense freedom of expression would correspond to the so-called "rights of free communication", which although they are four different rights(Pérez Royo, 2005, p. 408), correspond to the actual content of this freedom of expression. It is about the right to express and disseminate thoughts freely, ideas and opinions through words, writing or any other means of reproduction; to literary, artistic, scientific and technical production and creation, to academic freedom and to freely communicate and receive truthful information by any means of dissemination.

Therefore, freedom of expression recognizes within its actual content, the so-called informational freedoms, within which the right of access to public information is contained. At the international level, the jurisprudence of the IACHR has established a doctrine that is practically not discussed in Latin America today.

The IACHR both in "*Claude Reyes and others against Chile*" As well as in "Gomes Lund and others against Brazil "has emphatically argued that according to the protection that the American Convention on Human Rights (ACHR) (2001) grants," freedom of thought and expression not only includes the right and the freedom to express their thoughts, but also the right and freedom to seek, receive and impart information and ideas of all kinds "and" like the American Convention, other international human rights instruments, such as the Universal Declaration of Rights Human Rights and the International Covenant on Civil and Political Rights, establish a positive right to seek and receive information ".

The IACHR has established that Article 13 of the ACHR (2001) by expressly stipulating the rights to seek and receive information, it protects the right of every person to request access to information under the control of the State, with the exceptions allowed under the restriction regime of the Convention.

> Consequently, said article protects the right of persons to receive said information and the positive obligation of the State to supply it, in such a way that the person can have access and know that information or receive a substantiated response when, for any reason permitted by the Convention, the State may limit access to it for the specific case. Said information must be delivered without the need to prove a direct interest to obtain it or personal involvement, except in cases where a legitimate restriction is applied. It is delivery to a person can, in turn, allow information to circulate in society so that they can know it, access it and value it. Thus, The right to freedom of thought and expression contemplates the protection of the right of access to information under the control of the State, which also clearly contains the two dimensions, individual and social, of the right to freedom of thought and freedom. expression, which must be guaranteed by the State simultaneously. (IACHR, 2010, p. 197)

2.2.2.- The right of access to public information is part of the fundamental right of petition

Although some authors consider that the right of access to public information is part of the fundamental right to petition[2], we consider that such a statement is not correct.

2 Lavalle Cobo (2009) says that "the right of access to public information is found in the right of petition and in those constitutions that expressly establish it, it is instituted as a refined, refined, modern and more democratic way, insofar as it limits and it implements a portion of it since

There is a notable difference between the right of access and the right of petition in that the latter, even when we understand it in a broad sense, does not recognize as part of its essential content the possibility of obtaining and seeing the respective request satisfied. Diez-Picazo (2005) points out that:

> The essential feature of the fundamental right to petition is that it is a right that is exhausted in the simple conduct of asking; That is, it does not involve the right to obtain any satisfaction, much less to have the request granted. (p. 400)

Notwithstanding the preceding, in a ruling of 2002, the Colombian Constitutional Court recognized, in light of the Fundamental Charter, that the right of access to information has an autonomous nature and that at the same time it is a concrete manifestation of the right to petition(Constitutional Court of Colombia, 2002). The Constitutional Court (2002) noted:

> Likewise, on repeated occasions, this Corporation has stated that although the right to access public documents is autonomous, it is also a concrete manifestation of the right to petition, as the primary purpose of these rights is to obtain information through a concrete answer.

The same Colombian Constitutional Court (2003) in the judgment T-1075-2003, when systematizing the constituent elements of the constitutional right to petition, understood that through these right other constitutional rights are guaranteed, such as the right to information, citizen political participation and freedom of expression.

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it establishes formal procedural channels for the presentation of requests for information when they are regulated by subsequent legislation ". (pp. 73-74)

We insist on the error of this position. The right of the petition does not recognize as part of its essential content the obtaining of a specific response, it only guarantees the possibility of addressing the authority, but not for it to respond, not even satisfactorily, instead of the right of access. The authority is obliged to release the requested information when there is no legal cause that authorizes its reservation or secrecy.

2.2.3.- The right of access to public information is an autonomous fundamental right and, in turn, the assumption for the exercise of other fundamental rights

2.2.3.1.- The autonomy of the fundamental right of access to public information

We consider that the right of access to public information is a fundamental right of an autonomous nature that derives from the democratic regime and the principles that comprise it. That is, without prejudice to the close relationships that exist between the right of access to public information and other fundamental rights, we believe that the right of access to information is a fundamental right that has its configuration with its particular characteristics and that is inserted within the requirement of democracy as the form of government most compatible with human dignity.

The Inter-American Juridical Committee (CJI) (2008) begins its catalogue of principles on the right of access to information by recognizing that this is "a fundamental human right that guarantees access to information controlled by public bodies, including, within a reasonable time, access to the historical archives".

The right of access to public information is not a mere derivation of other fundamental rights, although we cannot ignore that this doctrine has been instrumental in

achieving its recognition in those legal orders in which it is not expressly enshrined. For this reason, taking into consideration the undeniable vocation of those who exercise power to act under the shadow of secrecy, it has been necessary, not on a few occasions, to make intellectual efforts to build this right, primarily based on freedom of expression.

We propose that the right of access to public information is a fundamental right, not only essential for the construction of a democratic and participatory society but also the free development of the personality in front of the State and public powers.

> The human being has the right to know the actions of the powers, including the reasons for the decisions taken, and the use made of public funds. If the development of our own lives depends, as it is, on the democratic quality of the public powers - whose performance, we insist, directly or indirectly conditions our development - we have the right to know to what extent their performance is following the democratic mandate. (Piñar Mañas, 2015)

Now, the right of access to public information as an autonomous fundamental right can be directly configured as such by the constitutional order or be classified as an implicit fundamental right that emanates from the democratic system of government.

The implicit fundamental rights or also called "not listed" rights are those that, without being enshrined in explicit and direct terms in the complimentary national or international order, derive indisputably from human dignity or the democratic regime of government. Professor Nogueira Alcalá (2007) maintains, concerning the system for the defence of fundamental rights in America that these implicit or non-

enumerated rights are derived from Article 29 of the American Convention on Human Rights, literal c), which maintains that " no provision of the present Convention can be interpreted in the sense of excluding other rights and guarantees that are inherent to the human being, or that derive from the representative democratic form of government ". The rule of Article 29 of the American Convention in its literal c), "allows us to understand the binding effect of other rights that, even when they were not expressly included in international covenants or by the Constitution, they are implicitly guaranteed by the provision analyzed ". (p. 458)

2.2.3.2.- The right of access is essential for the exercise of the right of citizen participation

Citizen participation is a fundamental right that emanates from democracy as a form of government. We can define it as "that fundamental right through which people individually or collectively have a real and concrete possibility to participate in the adoption of major political, legal, economic and social decisions." This right of citizen participation is a right with a complex structure that is made up of several specific rights that aim to ensure the intervention of citizens in the exercise of political power. As Hoyos Vásquez (1997) maintains:

> Simplifying a lot, the discussions around participatory democracy highlight the following characteristics: it is the ultimate source of legitimacy insofar as it is the democratic genesis of the rule of law; it forms the pluralistic public space necessary for debate, learning and agreement; gives meaning to a policy of justice, equity, well-being and peace, committing each one of the citizens to a common destiny. (p. 84)

For example, the right to vote, the citizen's legal initiative, the referendum and other citizen consultations, and others. Indeed, citizen participation not only includes electoral rights but "also the possibility of getting involved in the processes that lead to decision-making on public policies, as well as control of the management of those responsible for executing them.". (Prats, 2011, p. 3)

Citizen participation can be understood "in an integrating sense consisting of "*Be part of*», That is, to receive benefits or have services" (Bañez Tello, 1999, p. 104) and in a much more active sense consisting of "to take part », which refers to the collective capacity to promote initiatives to stimulate social life, which implies a deepening of participatory practice ". (Bañez Tello, 1999, p. 104)

From the second of the indicated perspectives *supra* citizen participation must be present at least in the following manifestations of the exercise of power: i) processes in which the popular will is manifested at the polls; ii) control of the authorities whose positions are redirected directly or indirectly to the citizens and other career officials; and, iii) adoption of major social decisions. All these manifestations require a series of assumptions that must necessarily be present to speak of genuine citizen participation. The first assumption is, of course, democracy and the recognition of certain basic fundamental rights such as freedom of expression, the right of association, the right of assembly and demonstration, the right of petition and the right of access to public information that works in the power of the state apparatus.

Consequently, "the rights to information must be seen as essential parts of the basic rights of political participation, which they include but go beyond the right to freedom of expression". (Ackerman and Sandoval, 2005, p. 15). Without a doubt:

> The exercise of this right represents one of the highest values of democratic societies. In our times, an individual needs to have the knowledge that is more attached to the reality of what is happening in their environment since only in this way can they participate knowingly in the exercise of their political and civil rights. (Pérez Álvarez 2006, p. 612)

Citizen participation in the context of democracy is fundamental, especially for control over the exercise of power, therefore, for citizens, it should not only be conceived as a right or as a legitimate possibility but as an honourable duty.

2.2.3.3.- The right of access to public information as an assumption for the exercise of other fundamental rights

Without prejudice to understanding that the right of access to public information is a fundamental right that emanates from the democratic regime and whose owner is the people who develop their lives in it, we must not ignore that this right is a basic assumption for the exercise of others Fundamental rights.

In some way, we consider that the right of access to public information is configured as an essential assumption for the exercise of other fundamental rights, to the extent that "between the public power and the citizens, the generation of an important information flow that operates in a double direction: from citizens to public powers and from public powers to citizens". (Moretón Torquero, 2014, p. 7). The State manages essential flows of information that it obtains from citizens and civil society. Knowing the information that the State handles is essential for the development of the social life of people and their intermediate groups, both to maintain an area of protection of private life and to acquire tools for the exercise of rights that are related either to one's personality, freedom of expression or freedom of entrepreneurship among others.

About the flow that occurs from citizens to public powers, "it is found that the latter, in the exercise of their functions, handle a significant volume of information that is integrated, not only by what they produce but also by the one they collect from citizens". (Moretón Torquero, 2014, p. 7) in the exercise of their activities and functions. Now, concerning the flow that comes from the public sector to the citizens:

The transparency of public powers refers to their visibility, and not only affects their operation or way of proceeding but also, in its fullest form, reaches a good part of the content it produces, which, in turn, usually they incorporate part of the information collected from citizens. (Moretón Torquero, 2014, p. 7)

However, besides, this flow of information not only operates in the indicated double sense:

Nevertheless, also with third parties not directly affected but who participate in the public interest of the information whose obtaining is implemented, either through the publicity offered directly by the Administration or through the response to their information request. (Moretón Torquero, 2014, p. 7)

Just as an example of the close relationships that exist between the right of access to public information and the exercise of other fundamental rights, the IACHR has indicated that access to information is an essential assumption for the realization of the right to know the It is proper that it helps the relatives of victims of dictatorships. The IACHR (2010):

It has established that in cases of human rights violations, state authorities cannot rely on mechanisms such as state secrecy or confidentiality of information, or for reasons of public interest or national security, to stop providing the information required by the judicial or administrative authorities in charge of the pending investigation or process.

2.3.- Bases for adequate regulation of the right of access to public information

Despite the eventual constitutional recognition that is made of the right of access, either expressly or as an implicit category, it is essential to have a law on access to information that establishes with utter clarity everything related to its practical realization, establishing mainly the requirements that must be met for its exercise and above all the grounds that must concur in denying it, under the essential assumption that this right is not absolute.

In the following pages, we will refer to those minimum contents that a law on access to public information must have in order for it to be consistent with the principles on which it is based and with its ius fundamental nature.

2.3.1.- The principle of presumption of publicity and maximum disclosure

Any legislation that recognizes and regulates the right of access to public information must rest based on the principle of presumption of publicity. According to this, in principle, all information that has State bodies is public and therefore must be accessed by citizens.

The principle of full disclosure:

It presupposes that all information held by public entities must be subject to disclosure, a premise that can only be overcome when there is a greater risk of damage to a legitimate public or private interest; Under the preceding, for the doctrine the scope of this access must be as broad as the range of information and respective entities, as well as the individuals who may claim the right. (Sanz Salguero, 2016, p. 332)

The CJI (2008) expressly recognizes that all information is accessible in principle, therefore:

Access to information is a fundamental human right that establishes that everyone can access information in possession of public bodies, subject only to a limited regime of exceptions, consistent with a democratic society and proportional to the interest that justifies them.

Besides, we believe that the regulation of the right of access to public information should not ignore that not only the State has this type of information in its possession, but also private ones that provide public services or receive public financial resources. For example, an electric company or a private university that receives public funds.

For its part, the Office of the Special Rapporteur for Freedom of Expression (2009) indicates that "the principle of maximum disclosure orders the design of a legal regime in which transparency and the right of access to information are the general rules subject to strict and limited exceptions." In this sense, the Model Inter-American Law on Access to Information (2010) provides "that the right of access to information is based on the principle of maximum disclosure of information" and "that exception to the right of access to information must be clearly and specifically established by law".

Significant consequences arise from the principle of presumption of publicity and full disclosure. Thus (-) the right of access to information must be subject to a limited regime of exceptions, which must be interpreted in a restrictive way, in such a way that an adequate exercise of the right is favoured; (-) any adverse decision must be motivated and, in this sense, the State has the burden of proving that the information cannot be relieved; and (-) in the event of doubt or legal gap, the right of access must always prevail.

2.3.2.- A broad active legitimation

Regarding the active legitimacy to exercise the right of access to public information, there are several possibilities. In a restricted sense, the right is recognized to those citizens who demonstrate that they have a legitimate interest concerning the information requested; in a less broad sense, the right of access to any citizen can be recognized even if he or she does not have a legitimate interest that justifies him/her to know the required information; and, in a broad sense, it is understood that the active legitimacy to request public information belongs to any person, whether or not they are citizens and whether or not they have a legitimate and direct interest in the matter.

The Council of Europe Convention on Access to Public Documents also adheres to broad ownership of the right of access by stating in its article 2.1 that each State Party "shall guarantee the right of anyone, without discrimination of any kind, to access, upon request, to public documents in possession of public authorities".

> For its part, the GA / OEA (2008) has said that:
> In the case of access to information, everyone is the owner of it because it is a human right, regardless, for example, of their immigration status or any other distinction". This same breadth "requires that the applicant not be required to prove a direct interest or personal involvement to obtain the required information."

2.3.3.- Lack of motivation

Adequate regulation of the right of access to public information must recognize the absence of the need on the part of the citizen to motivate the access request. If we understand that access to information held by the state authority is a

fundamental right, its exercise does not have to be motivated. Moreover, the requirement of motivation could give rise to power of weight on the part of the authority in order to decide whether the information is delivered or not, in the sense that it could consider that the motivation used by the citizen is not sufficiently powerful enough to justify the requested delivery.

2.3.4.- Amplitude of the information that can be requested and not only that found in the State Administration

This point is of particular relevance to understanding the meaning and scope of the right of access since there are not few cases in which passive legitimation in this right only extends to the organs of the State Administration. It is more. The general rule is that the various legal systems that have legislated on the right of access to information, as is the Chilean case, only extend it, in its passive face, to the administrative function of the State. However, we consider that correct regulation of the law requires that it be extended to all State bodies and even to those private that manage public resources (for example, a private university) and provide public services (for example, an electricity company). The exercise of power is not only carried out by the State Administration, so it is not acceptable that only it is in principle, obliged to provide information at the request of the citizen.

Instead, the specialized doctrine is in favour of this broad passive legitimation. This is how the Office of the Special Rapporteur for Freedom of Expression of the OAS(2012) has been categorical in stating "that the right of access to information creates obligations for all public authorities of all branches of power and autonomous bodies, at all levels of government." However, besides this international body maintains that "this right also binds those who perform public functions, provide public services or execute, on behalf of the State, public resources." (OAS, 2012)

In this same direction, a few years ago the GA / OEA in the document called "Recommendations on Access to Information" (2008) pointed out that the passive legitimacy for the delivery of information must be broad and it:

It implies that the duty to provide the required information must encompass all types of public bodies and authorities. Besides, at this point, it should be taken into account that for the actual existence of a broad right of access to information also private companies, international organizations, intergovernmental and non-governmental organizations that provide public services, use public funds or handle information In the public interest they must respond to requests for information and make the principles of publicity and transparency a matter of course for their actions.

The Inter-American Juridical Committee in its "Principles on the Right of Access to Information" (2008) has indicated that:

The right of access to information extends to all public bodies at all levels of government, including those belonging to the executive, legislative and judicial powers, bodies created by the constitutions and other laws, property bodies or controlled by the government, and organizations that operate with public funds or carry out public functions.

We fully agree with what is expressed in the "Declaration of Atlanta and plan of action for the advancement of the right of access to information" where it is stated that the right of access to information "also applies to non-state actors: who receive public funds or benefits (directly or indirectly); carry out public functions, such as the provision of public services, exploit public resources, including natural resources ", even in this same instrument it is stated that" any person should have the right of access to information held by large

corporations for profit, when said information is necessary for the exercise or protection of any human right, following the Universal Declaration of Human Rights ".

2.3.5.- Access to copies in any medium

In strict relation to the principle of facilitating the delivery of public information, adequate regulation of the right of access to public information must be extended to any medium or format in which the information is contained, whether printed or electronic. Moreover, today with the incorporation of the media to the exercise of public function, it is becoming more and more common to find public information stored in databases that are in the hands of State bodies.

The Inter-American Juridical Committee (2008) declares that "the right of access to information refers to all significant information, whose definition must be broad, including all that is controlled and archived in any format or medium."

2.3.6.- A clear and precise procedure, with short deadlines. Absence of discrimination

The recognition of the right of access to public information must be carried out in light of the principle of facilitation, since in no case would it be tolerable to recognize the right and at the same time obstruct its exercise. Within this context, the procedure by which the citizen exercises his right must be reasonable, clear and precise and with short deadlines that do not make the right illusory. The Inter-American Law on Access to Public Information (2010), in its preamble, categorically indicates that "the process for requesting information should be governed by fair and non-discriminatory rules that establish clear and reasonable deadlines, that assist those who request the information, that ensure free access or with a cost that does not exceed the cost of reproduction of the documents and that

impose on public bodies the justification for the rejection of an access request, giving the specific reasons for the refusal ".

Within this same scheme, and also in light of the principle of facilitation that must inform any regulation made of the right of access to information "the burden of proof to justify any refusal of access to information must fall on the body to whom the information was requested". (CJI, 2008) and not in the citizen who requires the information.

2.3.7.- Taxation in the causes that allow denying the requested information

A regulation on access to public information must start from an intractable assumption: the general rule is advertising and that the exception is secrecy. Consequently, the norms that contemplate reasons for reservation or secrecy are of strict law, and concerning them, there is no analogy.

On this point the Court of Justice of the European Union (2012, fund. 66) has been categorical in indicating, regarding the delivery of the required information to the Commission of the European Communities, that it is appropriate:

Remember that exceptions in access to documents must be interpreted and applied restrictively so that the application of the general principle consisting of granting the public the maximum possible access to documents held by the Commission is not frustrating.

Also, the grounds for secrecy or secrecy must be exclusively handed over to the legislator (in this case the principle of the legal reserve must be strictly applied) or to the Constitution. Nevertheless, this requirement alone is not enough, since the grounds for reservation or secrecy established in the law must respond to specific reasons that prevent

legislating in order to restrict the exercise of the right. Indeed, the temptation to act protected under a cloak that prevents the visibility of actions will always be present in those who exercise power (possibly one of the direct consequences of the exercise of sovereignty). Therefore the reasons for secrecy or secrecy must be justified only in the democratic principle and in the rights of the people.

In strict accordance with what has been stated, the Council of Europe Convention on access to public documents in its article 3 establishes the possibility of placing limits on access to information to the extent that these limits are provided in the law, are necessary for a democratic society and pursue specific objectives such as national security, defence and international relations, public security, prevention, investigation and prosecution of criminal activities, disciplinary investigations, inspection, control and supervision by public authorities, privacy and other legitimate private interests, economic and commercial interests, state policies of currency exchange, monetary and economic, the equality of the parties in judicial procedures and the effective administration of justice, the environment or deliberations within or between public authorities regarding the examination of a matter. The GA / OAS in its "Recommendations on Access to Information" (2008) has stated that:

In this way, the strict requirements for the State to be able to prove a legitimate limitation represent a turning point to avoid the arbitrariness that implies in practice that the decisions of the reasons why the information is denied are in the hands of the State and of each one of the authorities that is resorted to in pursuit of the same.

2.3.8.- Effective sanctions for those who violate the right

The right of access to information is inserted, in most of the political-legal systems in which it operates, in a context of the almost natural rejection of transparency. Indeed, its consecration precisely seeks, among other purposes, to contribute to the establishment and strengthening of a culture that allows banishing secrecy in the exercise of public function. Therefore, the positivization of effective sanctions to officials who unjustifiably refuse to deliver the information duly requested becomes necessary for the effective operation of the right.

The Model Inter-American Law on Access to Public Information (2010) in its preamble establishes that "any person who intentionally denies or obstructs access to information by violating the rules established in this law must be subject to sanction."

Regarding the nature and magnitude of the sanctions, these will be determined by each particular legal system. However, they must be severe enough so that, on the one hand, a disincentive to the transgression of the right can be established and, another, the responsibility of the offending official is made effective in an efficient manner.

2.3.9.- Effective judicial recourse in the event of the refusal to deliver the information

Within the framework of a fair and rational procedure that must inform the due process, the existence of challenge mechanisms or appeals, whether in administrative or jurisdictional headquarters, also constitute an essential requirement of any regulation of the right of access to public information. If the final decision to deliver or not, the requested public information was delivered to the required public body. The law would be operationally bland. The preamble to the

Model Inter-American Law on Access to Public Information (2010) provides that "everyone must have the right to appeal any refusal or obstruction of access to information before an administrative body and to appeal the decisions of this administrative body before the courts of justice."

2.3.10.- Suitable monitoring mechanisms to verify compliance with the regulations that recognize the right of access to public information

Effective regulation of the right of access to information must provide mechanisms that allow the authority in charge of ensuring compliance with its regulations to monitor how the taxpayers of the same are acting concerning it.

This monitoring allows, among other things, to make effective the corresponding sanctions and responsibilities in the event of a possible violation of the respective legal provisions and, on the other hand, to achieve permanent feedback that allows the system of access to information to be improved and perfected, as well as to banish bad practices and socializing the good ones to make the exercise of the right more effective and to get closer and closer to installing a real culture of transparency.

The Model Inter-American Law on Access to Public Information (2010) requires the different public authorities subject to the law to submit to the body in charge of its implementation an annual report that must at least contain: the number of requests for information received, granted in whole or in part, and of the requests denied; which sections of the law were invoked to deny, in whole or in part, requests for information and how often they were invoked; Appeals filed against the refusal to communicate information; its activities aimed at publishing information; its activities aimed at document maintenance; the activities carried out to public officials in order to train them; information on the number of

requests answered within the legal deadlines; information on the number of requests answered outside the deadlines established by law, including statistics on any delay in answering; and any other information that is useful for the purposes of evaluating compliance with the law by public authorities.

On the other hand, the body in charge of ensuring compliance with the regulations on access to information, in the case of the Model Law (2010), the Information Commission, upholds article 63.2:

It must present annual reports on the operation of the Commission and the operation of the law. This report will include at least all information it receives from public authorities in compliance with the right of access, the number of appeals filed with the Commission, including a breakdown of the number of appeals from the various public authorities and the results and status of themselves.

2.3.11.- Existence of an autonomous and independent body in charge of ensuring compliance with the regulations on access to information

This requirement is fundamental in any political-legal system that wants to advance in these matters seriously. Without a body endowed with these characteristics, the right of access to information will ultimately end up being subjugated by political-partisan interests of the government in power.

The Model Inter-American Law on Access to Public Information (2010) proposes the creation of an "Information Commission" that will be in charge of "promoting the effective implementation of this law". This Commission "must have full legal personality, including powers to acquire and dispose of property and the power to sue and be sued", in addition to this body must be recognized "operational autonomy, budget

and decision" and will correspond to the Legislative Power "Approve the budget of the Information Commission, which should be sufficient for the Information Commission to be able to fulfil its powers adequately."

For their part, the members of this body must be designated transparently, with the intervention of both the executive and the legislature, in a process in which previously the instance is given to listening to civil and citizen organizations.

In order to increase public confidence in the institution, both the executive and the legislature should participate in the selection process; that any decision of the legislature is by a qualified majority sufficient to guarantee bipartisan or multiparty support (e.g., 60% or two-thirds); that the public has the opportunity to participate in the nomination process, and that the process is transparent. (Model Law, 2010)

Finally, the members of this body must receive a remuneration that allows them to dedicate themselves full time to this function, be immovable for political reasons and not eligible for another period as a guarantee of maintaining the necessary independence that a position of this nature requires.

2.4.- The reserve or secrecy as an exception to the general rule of access to public information

According to the Dictionary of the Royal Academy of the Spanish Language, the word secret has several meanings. Thus, she gives an account of "a thing that is carefully preserved and hidden", Of an attitude of" reserve or secrecy ", and so on. However, when we think of the word secret for this investigation, we are thinking of the information that within a democratic regime, it is legitimate to reserve to the State.

Transparency, publicity and access to public information must be understood in the context of the democratic system. In the words of the teacher Revenga Sánchez (1996) state secrets or in general (for this work) the grounds for secrecy or secrecy that legitimately allow not to deliver requested public information, "only pose problems that are not easy to solve in the context of companies that, for want of a better name, we can call it "open" and whose political systems respond to the minimum marks of democratic organizations". (p. 20)

However:

> Democracy, precisely insofar as it is situated in the sphere of politics, that is, of public affairs, would have as general rule transparency, the principle of publicity, and only exceptionally can secrecy be allowed. In contrast, secrecy it would be the rule in the order of the private. (De Lucas Martín, 1990, p. 134)
>
> Indeed, in democratic systems, the State secret must necessarily be considered as a "suspicious category, besieged by procedural precautions and where the burden of proof of the legitimate nature of the secret falls on the person who invokes it". (Revenga Sánchez, 1996, p. 20)

As it holds De Lucas Martín (1990):

> The conclusion seems obvious: there is no real representation, no possible representation, nor, ultimately, democratic legitimacy, without the principle of publicity, because, on the other hand, there is no control where there is no transparency, and without adequate control of power there is no room for democracy. (p. 134)

We can conclude that:

> The generality in a democracy is that access to information is free, but it is necessary to clarify that this access to sources may be exceptionally restricted in certain circumstances. Therefore, the right to information is configured as a non-absolute fundamental right. (Torres Ventosa 1998, p. 364)

The Chilean Constitutional Court has said (2012, cons. 26) that:

> The mysterious or secret nature of a matter is not something perverse, reprehensible or suspicious in itself. The Constitution contemplates the possibility that the law directly or the Administration, based on certain specific legal grounds, declare something as secret or reserved.

In other words, "it is not a question of disqualifying secrecy in the public sphere as something incompatible with democratic reason" says Professor Revenga Sánchez (1998, p. 60), for the same reason, both state secrets and Other grounds for reservation can only be tolerated when they concur "in strictly exceptional terms and linked to the defence of a manifest public interest." (Revenga Sánchez, 1998, p. 60)

The secret or reserved nature of an act, of a document, of a foundation, is not immunity or absence of control. There are other forms of control, such as the administrative procedure, administrative resources, the exercise of the powers of the Comptroller General of the Republic, the debate in the National Congress, and others. (Revenga Sánchez 1998, p. 60)

Along the same lines of argument, the warning that:

Revenga Sánchez (1998, p. 61) raises, on the occasion of the judicial control of State secrets within democratic societies, is enlightening and which is otherwise fully applicable to any cause of reservation or limit to the publicity of the acts of the State or the exercise of the right of access to public information, namely:

The State secret cannot be raised as a barrier that prevents the Judicial Power from looking into any area of the public space in the performance of its tasks. Whatever is said, the constitutional State is founded today on an increasingly internationalized reason of rights, against which the rule of law cannot be valid, however democratic it pretends to be, violating a minimum content of safeguards.

In any case, the same author is in charge of clarifying that behind the word «lean out», there is no invitation to go beyond the limits of the separation of functions of the State, but rather to verify that "secrecy is not invoked with spurious purposes, that is, diverted from the public interest for whose defence the possibility of invoking it is contemplated ". (Revenga Sánchez 1998, p. 61)

Also, the secret or reserved nature of an act can create a space to protect other legal rights that the Constitution considers as relevant as publicity. In the language of the Constitution, the rights of the people, the security of the Nation, the national interest, or the due fulfilment of the functions of the organs, are at this level. For this reason, they must be respected and considered. (Revenga Sánchez 1998, p. 61)

We agree in order to accept that the right of access to information is not absolute, but may be subject to some limitations. In any case, these limitations must respect at least specific requirements, adequately formulated by the IACHR, which are related to the fact that the reservation or secrecy

must consist of a real exception, must have a legal and never regulatory consecration, must set legitimate objectives, be necessary and strictly proportional. (IACHR, 2006)

The reserve or secrecy is a strict matter of legal reserve. The CJI (2008) has repeatedly argued that "exceptions to the right of access to information must be established by law, they must be clear and limited."

It seems to us that the guarantee of the legal reserve is essential to avoid any violation by public bodies and officials that have traditionally shown a deep reluctance to transparency and publicity of their actions.

2.5.- Final proposal of a concept of the right of access to public information

The right of access to public information can be considered in a broad sense, in a less broad sense and a restricted sense.

In a broad sense, the right of access can be understood as "the power of individuals and legal entities to request official documentation and information that is in the hands of the State, to consult it, become aware of it and obtain its reproduction.". (Lavalle Cobo, 2009, p. 33)

As can be seen, in the definition that we have just transcribed, public information can be requested in general terms from the State, that is, from the different bodies in charge of the various state functions, not only those that carry out the administrative function.

In a less broad sense, the right of access to public information recognizes the power to demand documentation and information, consult it and reproduce it from the executive body, especially the State Administration.

In a restricted sense, this right would refer to the power to demand access to administrative documents and not to any information that has the State Administration.

We consider that the right of access to public information should be considered from the first of the indicated perspectives, that is, in a broad sense, also highlighting its nature ius fundamental.

The right of access to public information implies the prerogative or faculty that a person has to access and know the information that is in the power of the State bodies and of the private persons that manage public resources or provide public services, with their exceptions that are exhaustively established by the Constitution or the law and that are necessary for the success of the democratic process or guarantee the fundamental rights of the people.

Behind the right of access to public information are fundamental objectives: to make the public function transparent and thereby reduce the scope of corruption and its adverse effects; strengthen confidence in the democratic political system and thereby protect democracy from political instabilities that can be used by people who want to achieve power; provide people, either individually or collectively, a useful tool to enhance the quality of their rights, especially political rights, and improve their quality of life.

Therefore, the right of access is a subjective right of a fundamental legal nature to the extent that it constitutes or should constitute part of the necessary legal status of every citizen as a consequence of its connection with the democratic principle. Its content can be formulated based on doctrinal constructions and approved international legal documents on the subject.

It is a right that, however, is not usually recognized at the constitutional level. Alternatively, if it is, it is partially due to its connection with other rights, but without acquiring the autonomy that corresponds to it due to the democratic nature of its justification. It means that as such a right (unless it is included in any other of those recognized constitutional rights) it does not have the guarantees of the subjective public rights expressly recognized in the constitutional texts, but only those included in the development legislation. In this sense, the fundamental right of access would not be a right of constitutional rank, but of legal rank.

CONCLUSIONS

In conclusion, the right of access to information held by State bodies or any entity that manages public resources and funds is a fundamental right that must be part of the legal status of a citizen in any democratic society, however, usually does not have constitutional status and therefore lacks the typical protection of these rights. It is usually recognized legal rank. Given the above, in the absence of the constitutional guarantees derived from respect for the actual content and its privileged jurisdictional protection, the legislator has a wide margin of manoeuvre in determining its content, scope, limits and protection, circumscribing most of it. Sometimes to an impenetrable right only concerning the State Administration and not of all public powers.

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