

## THE RIGHT OF ACCESS TO PUBLIC INFORMATION: AN ANALYSIS OF INTERNATIONAL CONVENTIONS

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The right of access to public information is one of the cornerstones of freedom of expression,<sup>1,2</sup> or the “free communication of ideas and opinions”, which is regarded as “one of humankind’s most valuable possessions” under the French Declaration of the Rights of Man and of the Citizen of August 26, 1789, itself the inspiration for international texts. The right of access to public information is also fundamental to the right to transparency, which is one of the key components of democracy and an open government.<sup>3</sup> This process has accelerated since Barack Obama’s Memorandum of 2009,<sup>4</sup> but its underpinnings existed in earlier texts.<sup>5</sup>

Analysis of international conventions is illuminating in view of the issues inherent to both freedom of information and the

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<sup>1</sup> Freedom of expression is essential in itself, but it also protects other rights that are derived. The right of access to public information is one of this.

In this regard, the European Court of Human Right considers that freedom of expression includes the right of the public to be adequately informed, in particular on matters of public interest (See Monica Macovei, *Freedom of expression. A guide to the implementation of Article 10 of the European Convention on Human Rights*, Human rights handbooks, No. 2, Council of Europe, 2004).

Likewise, the Inter-American Court of Human Rights has established that, according to the protection granted by the American Convention, the right to freedom of thought and expression includes “not only the right and freedom to express one’s own thoughts, but also the right and freedom to seek, receive and impart information and ideas of all kinds.” (Case of López Álvarez. Judgment of February 1, 2006. Series C No. 141, para. 163; Case of Palamara Iribarne, Judgment of November 22, 2005. Series C No. 135, para. 69; Case of Ricardo Canese, Judgment of August 31, 2004. Series C No. 111, paras. 77-80; Case of Herrera Ulloa, Judgment of July 2, 2004. Series C No. 107, paras. 108-111; Case of Ivcher Bronstein, Judgment of February 6, 2001. Series C No. 74, paras. 146-149; Case of “The Last Temptation of Christ” (Olmedo Bustos et al.), Judgment of February 5, 2001. Series C No. 73, paras. 64-67...).

This freedom of thought and expression includes the right for individuals to request access to State-held information. See Case of *Claude-Reyes et al. v. Chile*, Judgment of September 19, 2006, para 77.

<sup>2</sup> For an illustration, see, for instance, William Gilles, *Open Data, Democracy and Freedom of Expression in France*, in ANNA-SARA LIND, JANE REICHEL & INGER ÖSTERDAHL (eds), *INFORMATION AND LAW IN TRANSITION* (Liber, 2015).

<sup>3</sup> In this regard, Henri Labayle explains, for instance, that “the systematic nature of the triangle of openness/transparency/document access is outlined in the Treaty [on European Union]”. See HENRI LABAYLE, *OPENNESS, TRANSPARENCY AND ACCESS TO DOCUMENTS AND INFORMATION IN THE EUROPEAN UNION* (European Parliament, Directorate-General for Internal Policies, 2013).

<sup>4</sup> See Barack Obama, *Memorandum on Transparency and Open Government*, issued on January 21, 2009. See also, Peter R. Orszag, *Memorandum for the Heads of Executive Departments and Agencies on Open Government*, issued on December 8, 2009.

<sup>5</sup> See for instance, William Gilles, *From the Right to Transparency to the Right to Open Government in a Digital Era. A French Approach*, 2015 INTERNATIONAL JOURNAL OF OPEN GOVERNMENTS/ REVUE INTERNATIONALE DES GOUVERNEMENTS OUVERTS.

transparency on which government action should be founded. Indeed, these texts constitute a body of principles that help to build a common heritage of values and ideas aspiring to influence the laws of the Member States. While instituting measures for ensuring the right of access to public documents is the task of the Member States, the influence of international texts is considerable, particularly at a time when the growth of new information and communication technologies is eliminating borders and making it easier to provide public access to information.

In this new environment, information involves significant challenges for government agencies and citizens alike. While government agencies produce, hold and receive information, citizens demand access to it. Public information plays an essential role that needs to be taken into account in the relations established between government agencies and private citizens, that is to say, between the governing and the governed. Any attempt by the government to slow or hinder citizens' access to public information can become a sticking point in the relationship between the government and those it governs. If instead the government facilitates access to public information, it can help to improve the relations established between the governing and the governed. By assisting its citizens, a government imparts transparency and integrity to that relationship.

The prospect of open government is merely a possibility, because each State that is a party to the international conventions on access to public information must also take appropriate measures to ensure that citizens can actually exercise their right of access to public documents. The advent of the information society thus transforms the relationship between government agencies and citizens<sup>6</sup>. Citizens have a right of access to public information that member States must regulate to ensure it can be exercised. Once it has been incorporated into national legal systems, that right can be asserted and exercised by citizens. It can also be used, when needed, to provide recourse for citizens who may encounter obstacles in gaining access to public documents, obstacles that can sometimes render the right of access to public documents meaningless. The absence of a response of administrations or their late response is among the barriers that citizens still face in many countries when they decide to exercise their right to access. In this regard, Transparency International underlined in 2012 that “access to information laws are in place in all countries assessed apart from Spain, where a draft law [was] under consideration by parliament at

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<sup>6</sup> On that subject, *see*, for instance, Miriam Lips, *The Digital Citizen: New Directions for Citizen-centric Government and Democracy* (Tauris Academic Studies, 2013); DANIEL VEIT, JAN HUNTGEBURTH, *Foundations of Digital Government: Leading and Managing in the Digital Era* (Springer, 2014); William D. Eggers, Joel Bellman, *The Journey to Government's Digital Transformation, A Deloitte Digital global survey*, Deloitte University Press, 2015.

the time of writing.<sup>7</sup> However, in 20 of the 25 countries, implementation is found to be poor. Practical barriers to access include excessive fees (Ireland), long delays (the Czech Republic, Portugal, Slovenia, Sweden), low levels of public awareness of freedom of information laws (Germany, Portugal and Switzerland), lack of an independent oversight body (Bulgaria, Hungary and Latvia) and municipal authorities' failure and/or lack of capacity to comply with the rules (the Czech Republic and Romania).<sup>8</sup>

Any effective right of access to public documents thus also depends on the ability of citizens to successfully assert their rights in the courts. This assumes that the courts must be impartial, which is guaranteed in Europe, for example, by Article 6 para. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Various international conventions, including the one mentioned above, are designed to recognize or strengthen the right of access to public documents and make the States responsible for including appropriate measures in their national legal systems to ensure this right is effectively available. By committing to a stronger right of access to public documents, member States help to build a common legacy that can give this right broader support and a more solid foundation. It must be emphasized that this issue is growing increasingly critical in the era of the information society – an expression that suggests that information has become a defining element in the evolution of contemporary society.<sup>9</sup>

In light of international conventions, the right of access to public documents, which determines the public's right of access to information, is fundamental to democratic societies.<sup>10</sup> In addition, the rise of new information and communications technology contributes substantially to accelerating this process. Technological

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<sup>7</sup> Since then, Spain has adopted this law. See Emilio Guichot, *The New Spanish Transparency and Freedom of Information Act of 9<sup>th</sup> December 2013: Text and Context*, in IRÈNE BOUHADANA, WILLIAM GILLES, RUSSELL WEAVER (eds), *TRANSPARENCY IN THE OPEN GOVERNMENT ERA* (Les éditions Imodev, 2015).

<sup>8</sup> Transparency International, *Money, Politics, Power: Corruption Risks in Europe*, 2012.

<sup>9</sup> In this regard, see Claude E. Shannon, *A mathematical theory of communication*, BELL SYSTEM TECHNICAL JOURNAL, vol. 27, pp. 379-423 et 623-656, July and October 1948; Warren Weaver, *Recent Contributions to The Mathematical Theory of Communication*, 1949, available at: <http://sites.harvard.edu/fs/docs/icb.topic933672.files/Weaver%20Recent%20Contributions%20to%20the%20Mathematical%20Theory%20of%20Communication.pdf>.

<sup>10</sup> For instance, the Special rapporteur for freedom of expression of the Interamerican Commission on Human Rights has underlined that “the right of access to information is a critical tool for democratic participation, oversight of the State and public administration, and the monitoring of corruption. In democratic systems, in which the State's conduct is governed by publicity and transparency, the right of access to information in the State's possession is a fundamental requirement for ensuring democratic participation, good and transparent conduct of public affairs, and the oversight of government and its authorities by public opinion, as it enables civil society to scrutinize the actions of the authorities. Free access to information is a means for the citizens in a participatory and representative democracy to exercise their political rights. Indeed, the full exercise of the right to access to information is necessary to prevent abuses by public officials, promote accountability and transparency in government, and enable solid and informed public debate that ensures effective recourse against government abuse and prevents corruption.” See Special rapporteur for freedom of expression, Interamerican Commission on Human Rights, *Organization of American States Report 2009*.

advances make it possible to give citizens significantly easier access to the public information they need or that is intended for them. In this context, access to public documents is of vital interest, both to the governments that possess the information because they receive or produce it, and to the governed, who increasingly demand access to it.

In this regard, the right of access to public information or public documents has become a major factor in the development of democracy. Indeed, access to public information is an important factor in the relationship between the governing and the governed. The degree of access to public information and documents thus becomes a standard for evaluating the responsibility, or even the legitimacy, of governments. This development is noteworthy for at least two reasons. First, it may help to remedy the crisis in political representation, the effects of which are apparent worldwide, with consequences that can be easily seen with each new election. Second, this development is fully aligned with the goals of open governments, which are closely linked to improved access to public documents and information.

### **§ 1 – Promoting a Broader Right of Access to Public Information Thanks to a Broad View of the Concept of Government Bodies**

International texts show a gradual expansion of the right of access to public information. This trend is reflected in a broad understanding of concepts that are closely linked to the right of access to public information. In view of this, we first need to understand what is meant by the concept of government bodies (or public authorities). This is indeed essential, since it concerns those who hold public information. This is an important precondition for broadening and strengthening the right of access. Our first source on this subject is the Aarhus Convention of June 25, 1998, in which “public authorities” are defined as executive agencies. This text specifies clearly, however, that the definition of public authorities “does not include bodies or institutions acting in a judicial or legislative capacity”.<sup>11</sup> This exclusion of the legislature and the judiciary limits the scope of application of the right of access to public information.

The Council of Europe Convention of November 27, 2008, bridged this gap by taking a broader view of the concept of public authorities. The definition used in the Council of Europe Convention is based on the one used in the Aarhus Convention, but it also includes legislative and judicial bodies<sup>12</sup>. This development is crucial, since it gives greater consistency to the right to public information. Legislative and judicial bodies are indeed valuable sources of information for the public. Laws and legislative

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<sup>11</sup> See Article 2 of the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, done at Aarhus, June 25, 1998.

<sup>12</sup> See Article 1 of the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, done at Aarhus, June 25, 1998.

activity as a whole give citizens access to the texts that serve as the legal basis for policymaking. The judicial bodies interpret those texts, a task that has important implications for their implementation. By including these bodies in the definition of public authorities, the right of access to public documents becomes both more consistent and more coherent. This inclusion is in keeping with a broader right of access to public documents.

The trend towards enlarging this right continued with the Declaration on Parliamentary Openness<sup>13</sup>, adopted in Rome on the International Day of Democracy, September 15, 2012. In its Preamble, this Declaration underlines that “parliamentary openness empowers citizens to engage in the legislative process [...]”.<sup>14</sup> Moreover, in order to promote a culture of openness, this text claims that “Parliamentary information belongs to the public”.<sup>15</sup> This principle implies “the obligation of public institutions to proactively disclose information. According to Access info and the Open Knowledge Foundation, “for members of the public, the automatic availability of information means timely access to information and hence reduces the need to file information requests.”<sup>16</sup>

This statement ties in fully with the Open Government movement that was launched by Barack Obama in 2009 but can be traced back even earlier both in the United States and in other countries. This process is intended to go beyond mere transparency, by aiming to engage civil society in the legislative process – in other words, in the drafting of public policy. To do this, it is clearly necessary, as the Declaration states, to provide the public with greater access to parliamentary information. With this advance, we can see that the inclusion of parliamentary institutions among the public authorities holding public information or public documents is only a preliminary, but necessary, step in the process of Open Government. For any lasting commitment to this process, it is also important to work not only towards greater access to information, but also towards greater accessibility: information that is more intelligible, more complete and more up to date.

For the government bodies that hold public information, the requirement is, in a way, twofold. On the one hand, they must allow greater access to public information. They must therefore make public information available to citizens, and thereby expand its scope, by, among other things, recognizing a wider array of government organizations as potential sources of public information for citizens. On the other hand, it is important for those government bodies to facilitate this access by ensuring that the public can easily understand and use such documents and

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<sup>13</sup> On this subject, see Irène Bouhadana, *Opening Parliaments in The Open Government Era. Comment on the Declaration on Parliamentary Openness*, in Irène Bouhadana, William Gilles, Iris Nguyen-Duy, *PARLIAMENT IN THE OPEN GOVERNMENT ERA* (Les Éditions Imodev, 2016, forthcoming).

<sup>14</sup> See the *Declaration on Parliamentary Openness*.

<sup>15</sup> *Ibidem*.

<sup>16</sup> See *Declaration on Parliamentary Openness*, Provision Commentary.



information. In 2005, some freedom of information activists celebrate an International Right to Know Day during which they adopted ‘10 Principles on the Right to Know’. According to the principle 9, “public bodies should proactively publish core information”. This principle means that public information “should be current, clear, and in plain language”.<sup>17</sup>

Ambitious, the requirement to make the public information understandable lends meaning to the desire for transparency enshrined as the first aim of the Open Government process. If the transparency that results from broader public access to government information does not lead to greater public participation in the legislative process, its usefulness is negligible, and even counterproductive. This reduces transparency to a mere formality, namely the need for governments to provide the public with information that the latter cannot necessarily understand and use. Transparency is then no longer a vehicle for democracy; it becomes, rather, a tool for authoritarian regimes to wield as they wish.

If, on the contrary, transparency is meant truly to allow the public to engage in the legislative process, it must meet the criteria cited above regarding the quality of the information made accessible to the public, and it must seamlessly into the process for the development of democracy. All of this leads to a new organization of governmental authority, whose purpose is to restore to citizens the public information that was previously held by governments. Open Government is part of this movement. For their part, government bodies have the task of implementing this process of opening up public information. As a result, they bear greater responsibility in this area, as shown in the aforementioned international texts.

## **§ 2 – Promoting a Broader Right of Access to Public Information Thanks to a Broad Interpretation of the Concept of Public Information**

The logic we have just applied to the notion of government bodies may also be used when defining public documents, or more broadly, public information. This is the corollary to the definition of government bodies, since it is they who hold the public information to which citizens want access. This growing demand presents many challenges in the era of the information society, so the concept must be properly grasped.

The international texts on which this analysis is based give an increasingly broad definition of public information. The Aarhus Convention, which mainly concerns documents relating to the environment, is consistent with this trend. This text refers to “any

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<sup>17</sup> *10 Principles on the Right to Know*, adopted on the International Right to Know Day, September 28, 2005, available at: [https://www.oas.org/dil/access\\_to\\_information\\_human\\_Policy\\_Recommendations\\_10\\_Principles\\_on\\_the\\_Right\\_to\\_Know.pdf](https://www.oas.org/dil/access_to_information_human_Policy_Recommendations_10_Principles_on_the_Right_to_Know.pdf).

information in written, visual, aural, electronic or any other material form”.<sup>18</sup>

The Council of Europe Convention concerns more general access to public documents that go beyond information on the environment. Indeed, the definition of public documents given by this text includes “official documents means all information recorded in any form, drawn up or received and held by public authorities”.<sup>19</sup>

The definitions given in these texts are supported by a number of ideas and principles that help to reinforce the right of access to public information. In this regard, the aforementioned international texts suggest significant advances. In its preamble, the Council of Europe Convention highlights a key idea, explicitly linking the right of access to public documents to a right to information, on which democracy is founded. This text highlights that “the right to access to official documents provides a source of information for the public and helps the public to form an opinion on the state of society and on public authorities”.<sup>20</sup>

The Declaration on Parliamentary Openness takes the same viewpoint, calling on Parliament to foster an environment that guarantees to the public the right to governmental and parliamentary information. This Declaration states that “parliamentary information belongs to the public”.<sup>21</sup> The aim is clearly to promote a culture of openness, and even a culture of Open Government. In this regard, “the public’s right to information held by governing institutions [...] is the organizing principle of the Open Government Partnership (OGP). OGP recognizes that “Openness with respect to government-produced information is part of the right of the public to access any output of taxpayer funding”.<sup>22</sup>

Broadening the scope of the right of access to public information builds on this foundation. Therefore, the Council of Europe Convention states that “all official documents are in principle public and can be withheld subject only to the protection of other rights and legitimate interests”. Although the wording of this text suggests there may be exceptions to this rule, the broadening of the scope of the right of access to public information enshrined in the text should be noted. This change seems significant, since all public information held by government bodies is now intended to be open, i.e., accessible to the public. In other words, governments are no longer merely responsible for maintaining public information that is in the public interest. They now have the task of ensuring open access to this public information in the public interest, as a prerequisite for citizens to be able to take part in the decision-making process. We can easily see how this evolution is fully consistent with the idea of Open Government, which is intended

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<sup>18</sup> See Article 2 of the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, done at Aarhus, June 25, 1998.

<sup>19</sup> See Section 1, Article 1 of the *Council of Europe Convention on Access to Public Documents*.

<sup>20</sup> See the Preamble of the *Council of Europe Convention on Access to Public Documents*.

<sup>21</sup> See the *Declaration on Parliamentary Openness*.

<sup>22</sup> See *Declaration on Parliamentary Openness*, Provision Commentary.

to allow civil society to participate in decision-making. Therefore, it is important to guarantee the effectiveness of the right of access to public information. It is the duty of government bodies holding public information to take steps to facilitate this access and thereby make public information more open. The Council of Europe Convention, therefore, provides for access to government-held public documents by any applicant without discrimination. In this way, the Convention incorporates and broadens the Aarhus Convention's definition of the public for whom the information held by governments is intended.

The Council of Europe Convention also addresses other measures that lend greater substance to the right of access to public information by tasking the government with assisting the public in this area. Government bodies must, as much as possible, help the public access the information it wants by enabling members of the public to identify that information or by directing them to the government body empowered to fulfill their requests. Under these two conventions, government agencies must also meet fixed deadlines specified in advance for processing requests. This is meant to ensure that the right of access to public information does not become meaningless through being hindered by long delays.

Similarly, there are restrictions on refusing requests for access. The government is required to notify the applicant when any request for access to a public document is rejected in whole or in part. The applicant also has the right to know the reasons for the refusal, so as to be able to appeal the decision before an impartial court established by law. Thus we can see how placing restrictions on any denial of access to public records is part of this evolution towards more open public information.

The Declaration on Parliamentary Openness embraces the legacy of the Aarhus and Council of Europe Conventions, in particular by stating that parliamentary institutions are responsible for ensuring true public access to parliamentary information. The Declaration goes one step further with regard to more open public information, by encouraging the use of tools that facilitate the right of access. Here we refer to facilitating access to information via the media and using clear language that applicants can understand, so that access is not hindered by obstacles related to legal or overly technical jargon. The Declaration on Parliamentary Openness also aims to take technological advances into account by promoting access to information through electronic communications tools.<sup>23</sup>

These media help to reduce geographical barriers in order to facilitate access to information, while they also provide easier access to online databases or other parliamentary information contained on websites. The goal is in some way to bring Parliament into "the modern, interconnected world" in the words of the Declaration. The text is anxious to take note of that major

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<sup>23</sup> See Irène Bouhadana, *Opening Parliaments in The Open Government Era. Comment on the Declaration on Parliamentary Openness, op. cit.*



development and its impact on providing for more open public information. To that end, its Preamble explicitly states that the advent of the digital age has fostered the emergence of a new environment, in which the public can more easily access and reuse parliamentary information. In the Declaration's view, the desired objective is to develop good governance, best practices and representative democracy. The Aarhus and Council of Europe Conventions had begun to envision that development as well, providing for access to public information in electronic form or through public telecommunications networks.

In view of all this and as noted above, it is apparent that in the era of digital technology and the information society, strengthening democracy involves not only providing more open access to public information, but also giving the ability of citizens to reuse that information. For that purpose, the public must be able to rely on the assistance that governments are expected to give them to ensure they can exercise that right. Government bodies therefore bear the responsibility for implementing each citizen's right to access and reuse public information. In this respect the Council of Europe Convention on Access to Official Documents claims from its Preamble that the right to access to official documents "fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their legitimacy."<sup>24</sup>

In other words, precisely because of their duty to assist the public in accessing public information, government bodies bear responsibility for strengthening democracy in all countries governed by the rule of law.

Finally, in order to take note of this trend towards a broader right of access to public information, we must note the restrictions to which it may be subject. In addition to the restrictions on refusals that we have just mentioned, the above-cited Conventions clearly establish limits on the right of access to public information. These limits derive in part from the territorial application of those conventions. They must also meet certain requirements; namely, they "shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protection."<sup>25</sup>

In sum, the right of access to public information now plays a central role in the organization of political power, the development of the democratic process and the strengthening of human rights. It is therefore both the vehicle for a new social contract and one of the cornerstones of a common heritage of values and principles shared by pluralist democracies. And even "in countries still emerging from authoritarian regimes or where corruption is widespread, proactive disclosure permits anonymous access and so gives some protection to applicants from weaker segments of

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<sup>24</sup> On this subject, *see* for example IRÈNE BOUHADANA, WILLIAM GILLES, RUSSEL WEAVER (eds.), *TRANSPARENCY IN THE OPEN GOVERNMENT ERA*, Les Éditions Imodev, March, 2015.

<sup>25</sup> Article 3 of the Council of Europe Convention on Access to Official Documents.

society who might not feel comfortable writing to government bodies to ask for information for fear of repercussions.”<sup>26</sup>

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<sup>26</sup> See *Declaration on Parliamentary Openness*, Provision Commentary.