



COMPANIES AND THE RIGHT TO ACCESS PUBLIC INFORMATION

This publication is based on the round table that took place on April 26, 2007, in Buenos Aires, Argentina.

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Introduction

Why is the right to access public information essential to achieve inclusive governance? How is it a useful tool for companies? How does this right contribute to the development of a dependable and predictable business environment? Why is the private sector the one that exercises this right the least in Argentina? What is the situation in other countries in the region?

These issues were analyzed and discussed at the *Companies and the Right to Access Public Information* round table as part of the joint effort by the civil rights association Asociación por los Derechos Civiles (ADC) and the British Embassy to make the private sector aware of the right to access public information. The World Bank Institute and the Inter-American Investment Corporation also supported and participated in the event.

Among the attendees were international speakers Alfonso Hernández Valdez, former general research director at Mexico's Instituto Federal de Acceso a la Información Pública; Roumeen Islam, manager at the Poverty Reduction and Economic Management Division, World Bank Institute; Roderick Macdonell, a Canadian journalist and senior director, public information and education, at the Forum of Federations; and Thomas Susman, a US lawyer specialized in the right to information. Also present were representatives of companies that provide the government with water, sanitation, and financial services; representatives of privatized utility companies and chambers of industry and banking; corporate law firms; and Argentine government employees.

The following text is based on the presentations and the subsequent debate. It includes the issues, questions, challenges, and advantages related to the right to access public information. The full text with the speakers' presentations is available on the Asociación por los Derechos Civiles (ADC) Website, www.adc.org.ar.

We would like to especially thank Marcos Mendiburu from the World Bank Institute, Sylvia Szankay from the Inter-American Investment Corporation, and Eleanor Salmond from the British Embassy. Special thanks also go to Germán Stalker from the Subsecretaría para la Reforma Institucional y Fortalecimiento de la Democracia, Jefatura de Gobierno de la Nación; Steven Reed, Deputy General Manager, Inter-American Investment Corporation; José María Ghio, Senior Social Development and Civil Society Specialist for Argentina, Chile, Paraguay, and Uruguay, World Bank; and to all panelists and attendees. We would also like to thank the ADC team, who participated in the organization of this event.

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1. The Right to Access Public Information

The right to access public information refers to the right any person has to look for, request, and receive information held by the government. This right stems from the democratic system of government. Exercising it is fundamental to strengthening institutions, because having accurate and timely information is essential as a check on governmental power, leads to more transparency, and aids the fight against corruption.

Also, exercising this right is in itself a way to effectively exercise other constitutional rights, such as the right to health and education, the right to freedom of expression, and the protection of the environment.

The concept of the right to information began to emerge in the early 1960s, when various international treaties on human rights were formally ratified. While at that time it was basically viewed as a prerequisite for freedom of expression, the notion of the *right to know* later began to appear as a prerequisite to the everyday exercise of civil rights. The first movements to exercise this right came from environmentalist groups and consumer associations; it is therefore not unusual to find in the resulting regulations articles that guarantee the right to obtain complete, accurate, true, and timely information held by the government.

There are currently about seventy countries that have freedom of information laws. Among the first to enact them were Sweden, Finland, and the United States. In Latin America, however, the situation is different. While most constitutions in the region include provisions that guarantee this right, few countries have passed specific laws. Among the first to do so were Mexico, Peru, and the Dominican Republic, which passed laws between 2002 and 2004, while Argentina, Venezuela, Colombia, and Paraguay have not yet passed laws on the access to public information. The possibility of such legislation being enacted in the short term depends on various factors, including political trends, social needs, and even cultural issues.

It should be noted that there is certain information that is exempted from the general rule of access to public information, such as data that could compromise national security, sensitive personal data, and trade and industrial secrets. Such restrictions are valid as long as they are legal and reasonable. This is because rights are not absolute and there can be exceptions as long as there are justifiable grounds—such as the protection of an individual or national security—for limiting the broad exercise of the right to access information.

Consistent with the above, and in order to establish minimum standards for the basic requirements to exercise the right, stakeholders have established the following minimum requirements that each country must achieve, considering their political, economic, and social environments.

- Who can request information: Any person, regardless of status, has the right to request information; therefore, information can be requested by a businessperson, a foreigner, an individual, or a corporation.

- Who must provide information: The government as a whole is required to provide all requested information; so government agencies such as public universities, state-owned companies, and even recipients of public subsidies may be required to answer requests for public information.
- Disclosure as a guiding principle: Disclosure of government acts is part of the nature of democracies and must be a guiding principle for their actions.
- No need to present a motive or justification: In no case will the requestor have to explain why information is being requested or how the information sought will be used. Information is public and as such should be available to everyone with no need to justify the request.
- Free access to and speedy delivery of information: In order to guarantee that government information can be obtained, this right cannot be restricted by high fees. And speedy delivery ensures that information can actually be used by the requesting party.
- Simple legal and/or administrative recourse: The legal system in each country shall provide for mechanisms to file legal and administrative claims to appeal refusals to provide information.

For businesses, the right to access information varies from country to country. However, various organizations that belong to the Inter-American System of Human Rights, including the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, and the Office of the Special Rapporteur for Freedom of Expression of the Organization of American States (OAS) have all highlighted the importance and usefulness of this right. The OAS has stated that access to information *promotes the fight against corruption, decisively contributes to the establishment of transparency policies needed to strengthen democracies and respect for human rights, promotes stable economic markets and socioeconomic justice, and enables effective business practices.*¹ The right to access public information yields information related to regulations, decisions by government organizations and agencies (such as procurement plans, statistics, and market data), and other important trade information that many times only the government can generate. Exercising our right to know promotes economic development because it enables us to better plan business activities, favors legitimate competition, and reduces barriers to business operations, all of which in turn is beneficial for the country.

But, how do I obtain the information my company needs? The procedure is simple. Information requests must be submitted by means of a simple note that clearly and concisely states the requested data. The note must be submitted to the organization that has the desired information, be it the legislative, executive, or judicial branch of government, or an autonomous or decentralized agency, at the federal or local level. The information requested may be in any form: written documents, recorded material, and

¹ *Estudio Especial sobre el Derecho de Acceso a la Información*, August 2007, is available at <http://www.cidh.org/relatoria/section/Estudio%20Especial%20sobre%20el%20derecho%20de%20Acceso%20a%20la%20Informacion.pdf> . The OAS 2004 annual report mentioned that “information has a decisive impact on securities markets, bank loans, and interest rates, as well as a role in preventing crises.”

electronic files, among others. If the volume of requested information is significant, the requestor shall cover the costs of reproducing it.

While the degree of responsiveness depends on the government agency and the internal channels involved, **promoting the exercise of this right** through formal and preestablished channels will ensure that small and large companies alike have equal access to public information and will promote a better environment for exercising the right. Establishing the same procedure for everyone minimizes the typical asymmetries; just knowing that one can exercise the right constitutes a significant business advantage over those who do not know about it. This means that obtaining relevant public information through preestablished channels levels the playing field in the market and, as we shall see, also favors a dependable business environment that is conducive to good economic results.

The right to access public information is a cornerstone of the rule of law: it ensures participation in and checks on the body politic and favors the development of companies in the private sector, thereby laying the foundation for prosperity.

2. Companies and the Right to Access Public Information

As mentioned above, having access to public information is key to strengthening the business environment and controlling corruption.

This increases the transparency of business relationships between companies and the government, and of the government as regulator of the business sector.

This means that whether or not companies and the government engage in business, it is important to establish a framework where information flows equitably through formal channels. There will still be differences in the private sector's right to access public information, depending on the stage of development of this right in each country. A society's culture and the government agency involved will play a direct role in the exercise of the right to know.

- Use of Public Information by Companies

In many European countries and in the United States and Canada, the financial and business sectors exercise their right to access public information extensively. Roderick Macdonell states that "(...) for example in the U.S., the federal government responded to 769,986 FOIA requests in 2004, an estimated 450,000 of which were filed by businesses. In Canada in 2004 there were 25,207 access requests made to the federal government, of which 11,847, or 47 percent, came from business."² Having information can help in the following:

- Making important business decisions, such as increasing or reducing investments. For example, when deciding whether to establish a factory, a business, or an industrial plant in a certain area, having information on the area's population, the transportation system that serves the area, or the existing drinking water systems will be key for making a better business decision.
- Optimizing bids and contracts with the government. If a company wants to do business with the government, having the right to access public information will allow it to better follow up and analyze contracts that the government has entered into in the past. This will show, for example, any changes in the use of hospitals or whether the number of public servants has increased or decreased in the past five years. Having the right to access information also allows a company to know about a region's demographic changes, which makes writing effective bids easier.

² Roderick Macdonell *Access to Information: The Commercial Side*, presented in Buenos Aires, Argentina, on April 26, 2007, at the Companies and the Right to Access Public Information round table, available at www.adc.org.ar

- Preparing for defense in potential lawsuits and administrative claims filed by the government against companies.³ Government imposition of new security measures, tax laws, or contract renegotiation requirements could cause damage (closings, warnings, or fines) to a company if it doesn't comply, so it is very important to be well informed. In these cases, having access to accurate, complete public information on the adoption of new measures will allow for better legal protection and reduce potential losses.

In order to develop a business strategy, establish a new business, or even successfully continue with a business, it is necessary to have access to information that in many occasions is held exclusively by the government. Exercising the right to access public information allows companies to define business strategies and minimize business risks.

- Transparency and Dependable Markets

Having access to public information is also key to achieving government transparency; it fosters compliance with the law, prevents corruption, and increases confidence in government, all of which generates more business security and legal predictability. This in turn benefits the development of dependable markets with clear rules.

The active participation of the private sector in ensuring transparency contributes to the government's adoption of and compliance with specific measures. As companies get involved in this democratic control of transparency in public contracts, the State is required to take measures such as establishing equal channels to access information, adopting appropriate legislation, and providing the necessary resources to cover this demand.

In this way, the equitable right to access public information on a timely basis helps businesses be more profitable, lowers costs for the government, and, in the case of services, lowers expenses for consumers because, armed with information, regulated industries can compete better, as is the case in the United States and Canada. Unequal access to information results in asymmetries that, in turn, leave more room for abusive measures. Government intervention to reverse this behavior will create a sense of security in the business sector. Markets are dependable when rules and results are transparent and when anyone can access public information, which must be equally available to everyone.

- Government-generated Business Information

Another important issue is the fact that governments have key information for the business sector. This information will be useful to a company seeking to work with the government or a company that will operate under official regulations. Data related to regulations, contracts, license concessions, and subsidies are, in many occasions, exclusively generated by the government, thus making the government the most

³ Thomas M. Susman & Harry A. Hammitt, Business Uses of the Freedom Information Act, 14-3rd C.P.S. (BNA).

important source of information. It is very important that governments have offices dedicated to generating and systematizing information in order to implement appropriate public policies. Some examples of government-generated information are:

- Procurement and contract schedules and procedures. Good management practices require that the government plan its own procurement and contracting needs and terms; having this information is useful for the business sector.
- Consumer data and statistics, price indexes, and demographic growth information provided by the government are useful for updating costs and determining strategy.
- Information on the environment (the government has information on environmental impact evaluations, radio antenna location maps, and ground water surveys). This information will be very useful when deciding whether or not to establish a company.

- How to Address the “Culture of Secrecy”

The culture of secrecy usually restricts the right to access information and is therefore one of the challenges for the future. Because of certain cultural traits, citizens and public servants may consider that information does not belong to society as a whole. This restricts the flow of information through society. In many cases, companies and other civil society stakeholders are unaware that they have the right to obtain information from the government.

While in these cases it is necessary to work together, the government must take the lead by adopting measures to change the culture of secrecy. Among them are the following:

- Conducting promotion and awareness campaigns about how to access public information by informing about the right, related cases, and requirements, so that all stakeholders are aware of the tool and know how to use it.
- Adapting the legal framework to provide simple procedures and minimum requirements for the right to access public information. While adopting regulations does not always change cultural practices, they are a necessary step to achieve change and guarantee rights.
- Implementing and providing concrete and effective resources in the appropriate areas of government. The more developed a country is, the more complete and timely information will be, because systematizing, managing, and organizing information is costly.
- Promoting the use of new technology to make information available and reduce the gap between users and the government.

It is impossible to change the culture of secrecy without the government’s active participation in the process. Such measures are the responsibility of governments, which must take an active role. Government action on this front makes for more efficient, transparent government.

3. Case Studies and Experiences

The following case studies show why businesses should exercise the right to access public information and what advantages making use of this right can bring.

MEXICO – More Competitive in Telecommunications⁴

Mexico is one of the first countries in the region to pass legislation on access to information. There is a federal agency dedicated to the issue (Instituto Federal de Acceso a la Información, or IFAI).

Since it was passed in 2003, Mexico's Federal Transparency and Access to Government Public Information Act has been extensively used, among others, by the business sector.

A study showed that telecommunications companies taking advantage of the act specifically benefited from it and improved their negotiating leverage when signing local connection contracts with the market's leading telecom licensees. Specifically, negotiations were streamlined and interconnection fees improved. Knowing more about regulations and procedures and strengthening the authority of the federal public administration (Administración Pública Federal, or APF) over telecommunications have eliminated structural barriers within the sector.

In June 2006, the IFAI conducted a study on the information requests submitted to the APF by the telecommunications sector. Ninety-four percent of the requests had a direct economic impact. This means that the requests were related to activities, procedures, or decisions that had clear economic consequences for the party requesting or using the information, another party, or both. The most sought-after information was related to licenses and permits, followed by economic data and series, regulations, contracts, suppliers, and implementation of regulations.

UNITED STATES - Opportunities in the Pharmaceutical Industry⁵

In the United States and Canada, pharmaceutical companies are among the widest users of the laws on access to information, usually for drug research or information about regulation. According to the Food and Drug Administration (FDA), the agency responsible for regulation in the U.S., 70% of information requests were business-related.

⁴ Hernández Valdez, Alfonso *El impacto económico de la Ley Federal de Transparencia en México* Presented in Buenos Aires, Argentina, on April 26, 2007, at the Companies and the Right to Access Public Information round table, available at www.adc.org.ar

⁵ Roderick Macdonell *Access to Information: The Commercial Side* presented in Buenos Aires, Argentina, on April 26, 2007, at the Companies and the Right to Access Public Information round table, available at www.adc.org.ar

The FDA experience proves how useful a freedom of information law is for companies—the information it has disclosed is essential for the pharmaceutical industry. The law can be used to find out the results of an FDA inspection; this allows another company to better prepare to pass an inspection when FDA inspectors come knocking at its laboratory door. Information is so important for this industry that large sums of money are paid to hire research companies to submit information requests to government agencies. These research companies know how to submit such requests so that they are not rejected and how to obtain specific documentation, maintaining their clients' privacy. Pharmaceutical companies wait months to obtain public reports on FDA inspections of their competitors' business activities; they know that waiting for such information can boost their competitiveness.

Other Experiences - Companies in the United States, Mexico, and Chile

Nowadays most users of the law on access to information in the United States are businesses, but this has not always been the case. It took about four years after passage of the law in the 1960s before companies started to use it. This happened for various reasons: mistrust, red tape, and lack of awareness of the benefits.

In Mexico, however, the business community and civil society pushed to get the law passed and began using it shortly afterwards.

In Chile companies make very little use of the procedure for accessing information. However, a businessman recently used this tool for the first time and went to court, which ruled in his favor and recognized his right to access public information. The case was "Casas Cordero vs. Customs Services," which was settled in August 2007 by Chile's Constitutional Court. The appeal arose from a request for information on dumping practices allegedly being carried out by the competition. When this information request was denied, Casas Cordero requested to have access to the ruling, based on the right to access public information; this led to a lawsuit. This was a landmark case for the Chilean business community because it defined the limits of public and private information, and, consequently, regulators' scope of action.

4. The Situation in Argentina

In Argentina the right to access public information is provided for in the constitution and, while there is no law at the national level,⁶ there are currently twelve provinces that do have laws to regulate the access to public information in general or in relation to specific issues, such as the environment.⁷ This shows that there is a trend toward ensuring this right by establishing clear and simple procedures that favor the requestor. In turn, these practices are laying a solid foundation until legislation can be enacted at the national level.

In 2003 the executive branch of the national government approved Decree 1172, which shows its interest in these issues. The decree guarantees the right of any individual or corporation to request, pursue, and receive information from the executive branch, its ministries, secretariats, undersecretariats, and national agencies, as well as from state-owned companies, public utility companies, and any other agency under the national executive branch.

However, statistics provided by the relevant authorities show that the business sector still does not use the procedure extensively. Contrary to what happens in the United States, Canada, and Mexico, in Argentina (according to executive branch reports) companies submit only 2.18% of the requests for information, while individuals submit 69% of the requests.⁸ There are several reasons for this underuse. For cultural reasons, stakeholders might be unaware of this right. And companies can obtain information through informal channels, which often makes it unnecessary to go through official channels to exercise the right to access information.

This shows that businesses must be encouraged to do their part in monitoring government activity related to the private sector and be taught about the potential business benefits that the right to access public information can offer the private sector.

⁶ For almost five years, civil society, strongly supported by the private sector, worked towards passing a specific law on the issue. But the bill died in 2006 (see www.adc.org.ar).

⁷ There is also legislation related to the right to information, for instance on environmental issues or consumer rights.

⁸ Source: www.mejordemocracia.gov.ar

5. Conclusions

The right to access public information can be good for business and promote the creation of favorable market conditions. It also fosters participation in and monitoring of government operations.

Experience shows that other countries in Europe, North America, and the region are aware of how important it is for the business sector to exercise this right. The resulting improvements in the business environment can be seen in a wide variety of countries and cultures with differing governmental structures, although access to accurate, complete, and true information is not always equitable. It is obvious, then, that access to pertinent information held by the government makes it easier for businesses to set strategies and plan investments.

Laws that properly regulate the exercise of the right to access public information establish a more favorable environment for using that right. There is much more to be done in Argentina. Strategies must target both the requestors of information and the government. Work must be done to increase the demand for information within the private sector, adopt measures to make it easier to file a request, and pass appropriate legislation to encourage the exercise of this right.

A joint effort is thus required to make more information available, in order to promote economic development.

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Graphic Design: Liebre de Marzo
1,000 Copies

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February 2008
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