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ACCESS TO PUBLIC INFORMATION IN THE AMERICAS[1]

Interview with Dante M. Negro Alvarado[2]
Director of the Department of International Law of the Organization of American States (OAS) and Technical Secretary of the Inter-American Juridical Committee

Naiara Posenato[3]

Naiara Posenato (NP): We extend our gratitude once again for your presence and participation at the VII Meeting of the Jean Monnet Network BRIDGE, Rule of Law in Latin America and Europe. The primary objective of this interview is to provide you with an opportunity to elaborate on the general ideas presented in your paper, thereby creating a written record of the significant message you have imparted.

As is well-known, the Right to Access of Public Information and the transparency are fundamental to the maintenance of the Rule

1. N. Posenato, *Access to Public Information in the Americas: Interview with Dante M. Negro Alvarado, in Latin American Journal of European Studies*, v. 4, n. 1, 2024, p. 279 *et seq.*
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of law. These guarantees ensure that citizens are empowered to actively participate in their governance by providing them the necessary tools to scrutinize government actions and hold public officials accountable. Transparency in governmental operations fosters an environment where corruption is less likely to flourish, and decisions are made in the public interest. Access to Public information also reinforces legal frameworks by ensuring that laws are applied consistently and fairly, thus upholding the rule of law. In essence, they are not only pivotal in enhancing citizen engagement and trust in governmental institutions but are also critical in ensuring that power is exercised responsibly and ethically within a state.

Considering these premises, what is the recognized legal nature of the right to access information within the specific context of Latin American states?

Dante M. Negro Alvarado (DA): The right of access to public information has been recognized in most countries in our region, in some cases at the constitutional level. However, the status of the norm recognizing this right and the content, nature and scope of the right itself vary from country to country.

If we rather focus on the way in which access to public information has been treated or recognized within the Organization of American States (OAS), we must inevitably take as reference both the annual resolutions of the General Assembly, the highest organ of the system, and, in particular, the principles and model laws prepared by another organ of the Organization, the Inter-American Juridical Committee (CJI). The CJI is the advisory body of the OAS

on legal matters and has a high level of reputation as it is made up of eleven of the most renowned jurists in the region. Its purpose is the codification and progressive development of international law.

In that sense, we must begin by acknowledging that the OAS General Assembly never recognized access to public information as an autonomous right. In its first resolutions dating back to the beginning of this century, the General Assembly recognized that "everyone has the ***freedom*** to seek, receive, access and impart information" and that "States must respect and ensure respect for the access of all persons to public information."

Many years later, in 2016, the General Assembly still did not use the word "right". That year, it established that "both access to public information and the protection of personal data are ***fundamental values*** that must always work in harmony. A year later, in 2017, it pointed out that "access to public information and the protection of personal data work complementarily for effective citizen participation...." As we can see, the General Assembly has avoided over the years expressly considering access to public information as a right and rather, on some occasions, has qualified it as an ***indispensable requirement*** for the very functioning of democracy or also as an ***indispensable requirement*** for the full exercise of human rights.

It is the aforementioned CJI that, after some years of studying the issue, has come to qualify it as a ***fundamental human right.*** More recently, in the 2020 Inter-American Model Law 2.0 on Access to Public Information, it also referred to the multiple content of that right.

Thus, the Model Law provides that anyone who requests information has the following rights: to make requests anonymously and without justification; to be informed whether or not the public authority is in possession of the documents containing the requested information, or from which such information may be derived; to be provided with such information in an expeditious manner; to appeal the failure to deliver if such information is not provided; to obtain information free of charge or at a cost not exceeding that generated by the reproduction of the documents; and, to not be subject to discrimination based on the nature of the request.

We should add that, while it is true that the Inter-American Court of Human Rights, in the famous case of Claude Reyes v. Chile (2006), described access to public information as a fundamental human right derived from the right to freedom of expression, the Court is not an organ of the OAS, nor have all the Member States of the Organization ratified the American Convention on Human Rights, under which they can accept the contentious jurisdiction of the Court. Hence, the scope of its postulates cannot necessarily be applied to the entire region.

The above notwithstanding, the truth is that many countries of the continent have already recognized the right of access to public information in their domestic systems, and many of them have done so as a fundamental human right, precisely in light of the importance that was given to it as a legal institution within the Organization of American States.

NP: The relationship between the rule of law and democracy is also well-documented and has been the subject of analysis by some of the most eminent contemporary thinkers. In your view, what would be the relationship between the right to access public information and democracy?

DA: I believe that, in order to better understand the relationship between the right of access to public information and democracy, we must begin by explaining the relevance of representative democracy as a concept for the Inter-American System.

Article 2 of the Charter of the Organization of American States states that, in order to realize the principles on which it is founded and to comply with its regional obligations under the Charter of the United Nations, it establishes as one of its essential purposes the promotion and consolidation of representative democracy within the principle of non-intervention.

It is precisely this express limitation, that of the principle of non-intervention, that underscores the importance of consolidating the elements that make up democratic regimes and of doing so in a concerted manner, so that the Member States of the Organization feel part of this process of consolidation.

One of the legal instruments that achieve this purpose is the Inter-American Democratic Charter (CDI in Spanish). Despite its name, it is not a legally binding treaty that establishes hard-law obligations for States. Rather, it is a resolution of the OAS General Assembly. To a large extent, then, it is soft law, but with an inter-

esting feature: the CDI was adopted by consensus in 2001. Hence its relevance.

The CDI highlights several elements and values that can be achieved on the basis of an effective exercise of the right of access to public information. Thus, for example, the CDI establishes that representative democracy is reinforced and guaranteed with the permanent, ethical and responsible participation of citizens within a framework of legality in accordance with the respective constitutional order. It is evident that a tool that greatly facilitates such citizen participation is precisely access to public information.

The CDI also recognized a number of essential elements of representative democracy that are closely related to the right of access to public information, since this right guarantees the effective realization of those rights, namely, respect for human rights and fundamental freedoms; the exercise of power subject to the rule of law; and, the holding of regular, free and fair elections. The CDI also enshrines what are understood to be the fundamental components of the exercise of democracy, several of which can be crystallized through the effective exercise of the right of access to information, such as transparency of government activities, probity, the accountability of governments in public administration, and freedom of expression and of the press.

Finally, article 6 of the CDI provides that citizen participation in decisions concerning their own development is a right and a responsibility and that such citizen participation is a necessary condition for the full and effective exercise of democracy. The CDI noted that promoting and encouraging various forms of participa-

tion strengthened democracy. Indeed, access to public information facilitates and guarantees such participation.

I could point out innumerable advantages that the right of access to public information brings, which in turn are closely related to the promotion and consolidation of democracy. This right allows us to know the information held by the State, and allows us to know the functions, attributions and activities of public officials, as well as the way in which they administer the resources generated by our taxes. This increases the levels of transparency and responsibility through effective accountability, which in turn generates something very important: trust in public institutions. This, in turn, makes it possible to fight more effectively against corruption, one of the main threats to the economic and social development of our countries. Public officials, knowing that their management will eventually be evaluated and potentially held to public scrutiny, will have to maintain, almost spontaneously, an efficient system of public management, an indispensable factor for effective governance of the State. Access to public information can also be considered as a prerequisite for the exercise of other rights, such as our political rights. Thus, a well-informed citizenry will be able to make responsible and informed political decisions.

On the other hand, access to public information promotes open competition, investment and, therefore, economic growth in a country. In particular, information on public programs that impact the progress of societies allows for greater participation in both management and decision-making in a more technical and qualified way.

Finally, information empowers. Access to certain types of public information makes it possible to better promote the rights of certain sectors of the population such as women, indigenous peoples, persons with disabilities, migrants, among others. It also makes it easier for members of these groups to gain agency and stengthens their capacity for self help. With the development of this institution over the years, the concept of active transparency has been strengthened, which establishes the duty of public authorities to proactively disseminate certain types of information of particular interest to these sectors without having to mediate a specific request.

As we can see, then, the relationship between the right of access to public information and democracy is not only close, but also intrinsic. This means that, without an appropriate legal framework for access to public information, one of the fundamental components of democracy would be in jeopardy and we would not be able to speak of a full democracy.

NP: What are the initiatives that the OAS is developing in this area?

DA: The OAS has recently completed one of the most important chapters on the consolidation of the right of access to public information with the adoption of the Inter-American Model Law 2.0 on Access to Public Information.

But in order to understand how it got here and the magnitude of the result, we have to go back a few years to the earliest period of the recognition of this right.

The Heads of State and Government of the Americas, meeting at the 2001 Summit of the Americas in Quebec City, Canada, declared on that occasion that access to information held by the State, with due respect for constitutional and legal norms, including those of privacy and confidentiality, was an indispensable condition for citizen participation and promotes effective respect for human rights. At the same time, they pledged to have the legal and regulatory frameworks, as well as the necessary structures and conditions to guarantee the citizens of the region the right of access to information. And it was from that moment that one of the richest and most dynamic processes of adoption of legal frameworks in the Americas began.

The General Assembly of the OAS began to adopt a series of resolutions on the subject in 2003. These resolutions included the substantive aspects that would later determine the legal nature and content of the right of access to information. These resolutions also included mandates for other organs of the Organization that would be responsible for setting broad standards of conduct for the region and that were gradually incorporated into the internal legal systems of the countries.

One of the first milestones that marked a before and after in the development of the subject was the Principles adopted by the CJI in 2008. These principles subsequently gave way to a more detailed document, namely, the 2010 Inter-American Model Law,

which was also adopted by that body. This instrument establishes very specific benchmarks so that States can, on the basis of these, adopt legislation on access to public information, modify and/or improve their legislation if they already have it, and constitute the respective Guarantor Bodies so that this right is promoted and exercised with all the necessary guarantees by citizens.

In 2016, it was the States themselves that decided to adopt an Inter-American Program on Access to Public Information. This Program adapted the content of the 2010 Model Law in such a away that it made possible to see the level of adaptation and progress of the domestic legislation of the countries according to the standards contained in the Model Law. Through this Programme, the States undertook to submit annual reports on very specific aspects such as, for example, the universe of subjects bound by the regime; the guarantees and facilities provided by the internal processes of requests for information from citizens; progress in the area of active transparency (referring to information that had to be proactively disseminated without the need for an individual to request it); the increasing limitation of the exception regime; the constitution and characteristics of the Guarantor Bodies in such a way as to ensure an adequate level of substantive and financial autonomy, among other aspects. The Inter-American Program was intended to ensure that the entire region moved forward as a whole, while allowing the sharing of good practices, best experiences, as well as the main challenges and difficulties that countries encountered in the implementation process.

Until the year 2000, that is, the year before the Québec Summit, only four countries on the continent had adopted laws on access to public information: Belize, Canada, Chile and the United States.

Between 2001 and 2008, that is, the period in which the OAS General Assembly began to incorporate the fundamental components of this right into its resolutions, thirteen more countries adopted their respective legislation on access to public information: Antigua and Barbuda, Ecuador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Dominican Republic, Saint Vincent and the Grenadines, Trinidad and Tobago and Uruguay.

Following the adoption of the 2010 Model Law by the CJI, between 2010 and 2016, six more countries joined this process: Argentina, Brazil, Colombia, El Salvador, Guyana and Paraguay. Subsequently, countries that had adopted legislation but whose content had become outdated made reforms to their regulations, namely Argentina, Colombia, Chile, El Salvador, Guatemala, Mexico and Peru. In 2022, Paraguay also began its reform process. It should be noted that, in most of these cases, the standards proposed by the OAS were the triggers for the initiation of these processes.

While it would be naïve to say that all these experiences have been a direct result of the efforts made within the framework of the OAS, we can affirm that most countries have recognized the influence and impact that these inter-American standards have had on the development of their domestic legal institutions and the use they have made of them to create or adapt their own legislation.

In 2020, and as a result of a mandate from the OAS General Assembly, which considered that the region needed a more ad-

vanced instrument in the field that would serve as a reference for the legislative reform processes that were taking place, the CJI approved a new model law, the so-called Inter-American Model Law 2.0 on Access to Public Information. Unlike the 2010 Model Law, this Model Law was not only adopted by the CJI, but was subsequently approved by the General Assembly itself, an expression of the importance that the supreme body gave to this matter.

The Model Law 2.0 is destined to become the reference instrument *par excellence* for countries wishing to revise their domestic legal system not only within the region but also beyond. I have always considered this to be one of the best legal export products that the OAS can make available to other regions and continents. An example of this was apparent when, shortly after its approval, the Inter-American Court of Human Rights mentioned Model Law 2.0, it in one of its judgments, namely, in the Flores Bedregal et al. v. Bolivia (2022). More recently, it rendered a decision in the case Viteri Ungaretti et al. v. Ecuador (2023), which also referred to the Model Law 2.0.

We cannot fail to mention that Model Law 2.0 was the first inter-American instrument to incorporate a gender perspective from its design. This means that this instrument went well beyond the mere incorporation of inclusive language; it took care to identify with greater sensitivity the type of information that has the greatest impact on women's living conditions and development, and unfold its components meticulously, giving them greater visibility and a more focused purpose.

NP: The relationship between the right to access public information and the protection of personal data presents a complex and contentious legal landscape. On one hand, the right to access public information is crucial for ensuring transparency and accountability in governance, enabling citizens to be informed and to participate more effectively in democratic processes. On the other hand, this right must be carefully balanced against the need to protect individual privacy and personal data. What is your view about this topic and how it's being managed at OAS level?

DA: Both the right of access to public information and the right to the protection of personal data have been recognized as such in different countries in the region and the World. The question then arises as to whether they can conflict with each other and, if so, which of the two rights would have pre-eminence. This is the dialectic that is constantly presented in the legal field and that is resolved with the statement that "my right goes as far as it comes up against the right of the other". In this case, it could be said that the scope of the right of access to public information extends to the moment in which it comes up against the right to protect certain information whose content is related to personal data. But is this always the case? Could we say that there are exceptions in both cases?

At the inter-American level, standards have been developed on both subjects, that is, international benchmarks that are intended to serve as guidance for the domestic legal systems of the countries of the region in their processes of adoption or reform of

domestic laws or public policies, and even for the constitution and creation of the respective Guarantor Bodies. We could say that the Inter-American Model Law 2.0 on Access to Public Information is an extremely detailed and developed instrument compared to the Updated Principles on Privacy and Protection of Personal Data, which similarly were proposed by the CJI and approved by the General Assembly a year later, in 2022. However, it is worth emphasizing that both legal instruments, which are more of an indicative non-binding nature, constitute honorable exceptions in the Inter-American System, as most of the recent proposals of the CJI have been welcomed and recognized, but not approved by the highest organ of the Organization. This fact is not minor and rather underscores the importance of both issues for the OAS. That being the case, we should be able to specify what happens when these two rights, enshrined in such a *sui generis* way in the American region, enter into a possible conflict at the moment of recognition or application.

As a starting point, we must discard the idea that one right always takes precedence over another, a bold assertion that is often wielded by the most active defenders of both rights. It is true that the principle of maximum disclosure is clearly enshrined in the issue of access to public information, but it has been wrong to assert that, by virtue of this principle, all information is public, and exceptions would have to be proven in each case, always favouring the delivery of information. If this were the case, the right to the protection of personal data would always be at a significant disadvantage. The Model Law 2.0 itself provides us with the right

guidance by recognizing that, although the principle of maximum publicity is the central principle of the entire system of access to information, it has a specific content that in turn has a double dimension. In the first place, any public information in the hands of the subjects obliged to deliver such information must meet certain characteristics, namely that it must be complete, timely and accessible, a subject closely related to good records management. And, secondly, that such public information must be subject to a clear and precise regime of limited exceptions.

From the above, we can conclude that the regime of access to public information admits in itself the possibility of making exceptions when certain conditions are met. But, on the other hand, it can also be concluded that in order for certain types of information to be subject in all cases to the condition of delivery, it must first of all be public. And yet, we will see that there is information of a private nature (not public) that, because it has this characteristic, is outside the scope of application of the regime. Within this universe is all the information related to the privacy of individuals and the protection of their personal data. From this it follows that information containing personal data should not be considered an exception to the rule, i.e., being public information it is decided not to be delivered, but should be taken as a certain type of information that is totally outside the regime of access to public information, that is, that it belongs to another universe.

The Model Law 2.0 itself defines what is to be understood by "confidential" information and describes it as "private" information (which, again, should be understood as opposed to "public"

information) held by persons obliged to provide information, the public access or disclosure of which is prohibited by constitutional or legal mandate by reason of a legally protected personal interest, that is, when such access could harm certain private interests. Thus, confidential information is excluded (not exempted) from the regime applicable to access to public information. Among these legally protected personal interests, the Model Law 2.0 lists not only everything related to the right to privacy and personal data whose dissemination requires the consent of their owners, but also legitimate commercial and economic interests, as well as patents, copyrights and trade secrets.

While the Model Law 2.0 sets out cases in which this type of information, despite personal or private interest, does not constitute confidential information, such as the case of the existence of a court order requesting or authorizing its publication for reasons of national security or general health, these are only exceptions to confidentiality that confirm the rule. There are also exceptions to the release of information, such as when such release puts the life, human dignity, safety or health of any person at risk, or when it affects due process rights or violates the conduct of judicial proceedings, among others.

The OAS General Assembly itself has taken a position on this matter in resolutions approved in 2016 and 2017. In the first case, as we say before, it established that both access to information and the protection of personal data are fundamental values that must always work in harmony. And in the second, it pointed out that access to public information and the protection of personal data

work together for effective citizen participation, which contributes to the strengthening of public institutions, equality, and the full validity of the rule of law.

To a large extent, therefore, we cannot maintain that access to public information and the protection of personal data are antagonistic rights, but rather that they are called upon to work in harmony to contribute to the strengthening of democratic societies, for which both are important factors. Nor can we point out a priori that one right prevails over the other. The latter will have to be assessed and decided in the light of the importance of the values to be protected in concrete and specific situations. It is here that both the Guarantor Bodies established for the promotion and protection of these rights (in some countries even the Guarantor Body itself is in charge of the proper implementation of both rights, which is not a minor fact), as well as the judicial powers, will have to make very good use of their discretion and sensitivity in the face of complex situations that may arise in reality.

NP: To finish our discussion**,** in your opinion, what elements can be highlighted in the scope of the Inter-American Model Law 2.0 on Access to Public Information?

DA: This is an important question which forces me make subjective appreciations. Having established that all the elements that make up the text of the Model Law 2.0 can be considered equally important, not only because of their significance, but also because they must be applied in a complementary manner to ensure the

success of the regime, I would venture to point out a couple of issues that, because of the impact they may generate, should be highlighted here.

First, I would like to refer to three types of information specifically mentioned in the Model Law 2.0 that relate to the exception regime.

The first relates to human rights. The Model Law 2.0 provides that the regime of exceptions contained in its articles may not be applied in cases of serious human rights violations or in cases of crimes against humanity. That is to say, in cases involving this type of crime, information relating to them may not, under any circumstances, be denied. In effect, it is established that information related to human rights violations is subject to a high presumption of disclosure and in no case may it be classified on grounds of national security. In addition, the Model Law states that the competent authority to classify certain acts as violating human rights must be the Guarantor Body, which will also have the competence to protect the right to privacy of the victims.

The second type of information has to do with acts of corruption. Briefly, the Model Law 2.0 establishes that exceptions to disclosure may not be invoked in the case of information related to acts of corruption by public officials, as defined in the laws in force and in the Inter-American Convention against Corruption (1996). In addition, the Model Law indicates that the competent authority to classify information as related to acts of corruption must be the Guarantor Body, which is intended to ensure full independence in the decision of the case.

The third type of information to which I would like to refer to was developed by the Model Law in greater detail given the importance and role it has played in the content of the exception regimes for access to public information in many countries of our region. I'm talking about defense and national security. The OAS General Assembly had previously stated in one of its annual resolutions that States should bear in mind the principles of access to information when drafting and adapting their national security legislation. But the Model Law 2.0 goes much further in this area. First, it recognizes that the judiciary and legislature, as well as heads of state and government, supervisory institutions, intelligence services, armed forces, police and other security forces, may restrict the public's right to access information for reasons of national security. However, this will only be permitted when such restrictions comply with all the provisions established in the law (referring to the conditions that must be met by any regime of exceptions) and when the information falls within one of the categories indicated in its articles in a list that is otherwise closed.

This list includes ongoing defense plans and operations and capability issues, but only during the period when the information is operationally useful. It also includes information relating to the production, capabilities or use of weapons systems and other military systems, including communications systems. Reference is also made to information on specific measures aimed at protecting the territory of the State, critical infrastructure and key national institutions against threats, use of force or sabotage and the effectiveness of which depends on their restriction of disclosure.

On the other hand, it refers to information relating to intelligence operations, sources and methods, but only when they relate to national security matters. Finally, it covers information on matters of national security provided by a foreign State or an intergovernmental body when it has an express expectation of confidentiality, as well as other diplomatic communications as long as they have to do with matters relating to national security.

Consequently, the Model Law 2.0 considers it a good practice for national laws to establish exclusive lists of limited categories of information, such as those mentioned above, in matters of national defence and national security, in order to avoid what happens in some legal systems in the region in which the general category of "defense and national security" is established as an exception without delimiting a priori the scope of the universe of information to which it must refer to and in some cases leaving to a wide margin of discretion of the respective authorities the final decision of what should be classified.

A second issue that I would like to mention is that of active transparency, which was developed in great detail in the Model Law 2.0. A model of active transparency is key to the entire regime of access to public information because it involves the publication of information by the obliged subjects on their own, that is, without necessarily the existence of a request for information from any citizen or group of citizens. This, in addition to promoting greater transparency, greatly reduces the number of requests and, therefore, the workload of the public administration to meet these requirements.

For many years, the Inter-American Juridical Committee had held that public bodies should routinely and proactively disseminate information about their functions and activities, including their policies, opportunities for consultation, activities that affect the public, budgets, subsidies, benefits, and contracts, all that in a way that ensures that the information is accessible and understandable.

The Model Law 2.0 includes in its articles a long and detailed list of the types of information that should be subject to active transparency. A novelty in this list is information on citizen participation mechanisms, as well as information on the needs of specific groups such as women, adults, people with disabilities, people belonging to indigenous peoples, Afro-descendants and the LGBTI community, among others. Of particular importance was the inclusion of gender issues related to information on the wage gap, on existing programs that benefit women, on statistics and indicators referring to labor inclusion, health, among others. It was precisely this, as we said before, that has led many to claim that the Model Law 2.0 was the first legal instrument of the inter-American system to include a gender perspective from its design.

Thus, in general, a regime of active transparency mandates all obliged subjects to proactively disseminate the key information established in the law, allowing the broadest access to such information, but also in such a way as to facilitate its "interoperability" in an "open data format", two novel concepts in the text of the the Model Law. In the same vein, the obliged entity must determine the strategies for identifying, generating, organizing, publishing and disseminating such information, in order to allow its easy reuse.

"Open data format" refers to a way of providing information in such a way that it can be used, reused, and redistributed, and that other derivative services can be created from it. An example of this is the delivery of information in a format or program that can be easily circulated on the network in such a way that it is available not only to the person requesting the information but also to anyone with whom he or she decides to share it. Linked to this is the term "reuse" which aims to make it easier for information to be shared among a greater number of people using the means available, including the website, broadcasting, television and printing. While the concept of open data is not new, its inclusion was a great contribution of the Model Law 2.0 because it finally enshrines it in an inter-American instrument.

While the concept of open data is not new, its inclusion was a great contribution of the Model Law 2.0 because it finally enshrines it in an inter-American instrument.

Thus, we can conclude that with the inclusion of a model of active transparency in the regime of access to public information, this figure is no longer exclusively related to the issue of transparency and the fight against corruption, but also becomes a tool of empowerment for certain sectors of society. Hence its importance.

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