

Chapter 7

Access to Information: The Best International Practices and the Brazilian Experience

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ABSTRACT

Right to information means the right of citizens to have access to information produced by, or held by, public/governmental agencies. This chapter intends to analyze the legal grounds of the right to access to information in Brazil as compared to the best international practice. One of the main risks to good governance and democracy is the use of public resources for private purposes, and the development of new communication technologies, especially the Internet, has revolutionized the manner in which the public interacts with the information available, impacting democratic practices. In November 2011, the adoption of Federal Law 12,527 made Brazil the 89th country in the world, and the 19th in Latin America, to adopt specific legislation implementing the right to access to public information. In Brazil, public authorities, especially the courts, tend to accept easily the allegations of violation of privacy and defamation of those whose interests are harmed or threatened by the broadcasting of information. In the conflict between access to information and private interests, the latter has prevailed. In this context, the Access to Information Law has become a relevant policy to the Brazilian civil society to strengthen and consolidate a democratic political culture and promote institutional maturity.

INTRODUCTION

Right to information (hereinafter, RTI) means the right of citizens to have access to information produced by, or held by, public/governmental agencies. Such right stems from the principle that the State does not produce

or hold information in its own, but rather in the public's interest (MENDEL, 2009:4). Therefore, all information held by the State must be accessible by each and every citizen, except for cases where public interest itself mandates such information to be kept as secret.

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This chapter intends to analyze the legal grounds of the right to access to information in Brazil under a comparative perspective with the best international practice and is divided in four parts. The first section exposes the legal base for RTI as a fundamental Human Right. Section two presents internationally established principles that must guide governments in the implementation of effective legislation regulating the access to information. The third section presents the recent developments in the RTI legal framework in Brazil under a critical perspective, especially the adoption of specific legislation, in November 2011, on the access to public information. The strengths and shortcomings of the Brazilian legal system of access to information are analyzed according to the international literature and the main civil society organizations acting in the field. Section four covers current development in the regulation and practice of RTI, and the directions it may potentially take regarding the relationship between the State and civil society and its organizations, with special focus on the impact RTI practice has on governmental transparency.

ACCESS TO INFORMATION FUNDAMENTALS

Demand for greater transparency in the public sector has increased significantly in recent times. In many countries, there is a trend of growing civil society's interest in information on public agencies and authorities's actions and performance, policy results, public budget expenditures and resource allocation, motives and criteria of decisions by regulatory agencies, etc. The principle of governmental transparency--that is that the government must be transparent in their actions and decision-making, and be subject to society's scrutiny and that secrecy of information is an excep-

tional measure, justifiable only in extreme instances, and under rigid regulations--finds its foundations in a number of elements, both of moral, managerial and political natures. Some of such elements will be commented on below:

The Growth of the Public Sector

The progressive increase of the State's scope, which transfers a growing number of functions and actions to its domains, namely healthcare, education, social security among others has been a powerful trend throughout the twentieth century up to our days, especially in Latin America (Fukuyama, 2005). Under the influence of interventionist ideologies, governments felt pressured to provide an ever growing number of public goods and services; this has resulted in an impressive increase in the size of the State apparatus and in the creation and development of a complex, hermetical, centralizing, self-refereed, and often authoritarian bureaucratic structure (Weber, 1999). The initial intention of bureaucracies was that they became islands of technical and scientific rationality, protected from the intrusions of politicians and the uninformed public opinion (Nunes, 1997). In this token, secrecy became not only an instrument, but a true corollary of bureaucratic public administrations.

Indeed, the increase of the State's apparatus poses a challenge to transparency. This is so due to a number of reasons: first, the larger the bureaucratic apparatus, the more difficult it is to have a comprehensive perspective of the whole public administration, e.g. knowing who decides what, under what criteria and who benefit from such decisions. In addition, the growth of the State's bureaucracy means primarily the growth of the Executive *vis à vis* the other branches of government (Legislation, Judicial and Accountability functions), which

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