



CENTRE FOR LAW  
AND DEMOCRACY

## *Paraguay*

### **Submission on the Law on Free Citizen Access to Public Information and Governmental Transparency**

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## 1. Introduction

### ***Introduction***

This Submission provides an analysis of the Law on Free Citizen Access to Public Information and Governmental Transparency (draft Law) of Paraguay. The purpose of the draft Law, as the name suggests, is to give access to information held by public authorities in Paraguay, or to give effect to the right to information.

The Centre for Law and Democracy (CLD) very much welcomes this initiative to adopt a right to information law. The right to access information held by public authorities is a fundamental human right, recognised in international human rights law, including the *Universal Declaration of Human Rights* (UDHR).<sup>1</sup> Proper effect can be given to the right to information only through implementing legislation.

The right to information is important to promote democratic participation and respect for other rights. Enhancing the flow of information helps to promote government accountability and a sense of trust amongst the people about the government and public authorities. It is also a key tool in combating corruption and other forms of public wrongdoing. The right to information is, therefore, a key public policy too for promoting good governance and other social benefits.

This Submission assesses the draft Bill against international standards on the right to information, as well as better practice in other States, in particular States in Latin America. The goal of the Submission is to make a contribution to ensuring that the law which is finally adopted conforms as far as possible to international standards in this area.

## 2. Comments

### **2.1 Purpose and Scope**

The draft Law does not really elaborate on its purpose, although Articles 1-3 make it clear that it aims to implement the constitutional right to information and that it should not be understood as authorising the limitation of any right recognised in the Constitution or international law. Article 5(1) calls on public authorities to recognise the right “in the amplest possible way”. Setting out clear purposes of a right to information law can help ensure that it is interpreted in the matter that best serves those purposes.

Article 4(1) establishes the right of anyone to request and receive information from public authorities and extends this right of access to all information “generated, managed or

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<sup>1</sup> UN General Assembly Resolution 217A(III), 10 December 1948.

obtained” by public authorities in any format. This is a wide and general definition. Article 19 makes it clear that public authorities are not required to create or produce information to satisfy a request; this is consistent with international standards.

Article 8(1) defines the scope of public authorities to include all three branches of government, including departments and municipal governments, the armed forces, universities, various independent bodies, such as the Ombudsman, Comptroller and Central Bank, and public companies and other companies with a majority State ownership. This is again a broad definition, although it does not extend to private bodies which are funded by the State or which undertake public functions. It is also not clear that it would cover all statutory bodies.

**Recommendations:**

- Consideration should be given to adding a list of purposes to the law.
- The definition of public authorities should be extended to include private bodies which receive public funding or which carry out a public function, and statutory bodies, to the extent that these are not all already covered.

**2.2 Procedural Rules**

Pursuant to Article 14(1) of the draft Law, requests may be presented in verbal or written form, in person, over the phone or electronically, and in Spanish or Guarani. A request must identify the public authority to which it is directed, and include a clear description of the information sought, an address for receipt of the information and the preferred form of obtaining access (Article 14(3)). No reasons need to be given for a request (Article 6) and assistance must be provided to requesters, including to make sure that requests include the required data (Articles 14(2) and (4)). Upon receipt of a request, the applicant must immediately be provided with a numbered receipt acknowledging this, delivered to the applicant in the same manner in which the request was lodged (Article 14(5)). These are all positive provisions.

If a request is presented to a public authority that is not “competent” to process it, that authority must transfer it to another body that is so competent and inform the applicant (Article 14(6)). The draft Law does not include provisions on consulting with third parties regarding requests that relate to them. This can be important to help ensure that their interests are protected.

Pursuant to Article 15, public authorities must provide information as quickly as is “materially possible” and in any case within ten days. This may be extended for another ten days, upon providing prior notice to the requester, due to the “volume or complexity” of the request, but this shall not include negligence or lack of interest on the part of the public authority. Where information is “reasonably related” to the prevention of grave or irreparable harm to the health of an individual or the environment, it must be provided within 48 hours, regardless of working days. Failure to provide the information within the

stipulated timeframe shall be a deemed refusal of access (Article 21(3)). These are again progressive provisions, since “volume” is not necessarily a good reason to extend a request and “complexity” is vague and open to misinterpretation. It would be helpful to stipulate more precise reasons for extending deadlines, such as a requirement to search through a large number of records or to consult with others.

As noted, a request must include the form in which the requester would like to access the information. Article 17 provides that where the form specified is inspection of the information, sufficient time must be allocated for this, although this form may be refused where it would harm the conservation of the information. Article 18 provides that where the form of access is copying, electronic copying shall be privileged. Although many requesters will be happy to receive an electronic copy, this decision should be up to them, not set out in law. Also, the draft Law fails to specify other forms of access, such as a transcript or an opportunity to copy the record using one’s own equipment.

Article 7 provides that the exercise of the right to information shall be free except regarding the cost of reproduction of documents, which may only include the market cost, along with the cost of delivery, where relevant. For photocopies, Article 18 provides for a maximum amount of 0.4 percent of a minimum daily salary per page (presently about US\$.04). One possible concern with this is that linking the cost of copying to daily salaries may be problematical, as these may go up or down independently. Instead, it might be preferable for a central body, such as the Committee for Citizen Access to Information, to set maximum photocopying fees for all public authorities.

Where access is refused, the public authority must notify the requester of the “interest or right” being protected, what harm disclosure would be likely to cause and that such harm is greater than the public interest in disclosure, as well as the time for which the information is expected to remain confidential (Article 21(2)). It would be preferable to require the public authority to identify the precise provision in the law being relied upon to deny access, although this might perhaps be included in the disclosure of the harm disclosure would cause. It would also be useful to require public authorities to notify requesters of their right to appeal against the refusal.

**Recommendations:**

- Consideration should be given to providing for consultation with third parties where a request is for information provided by them which might affect their interests.
- The precise grounds for extending the timeline for responding to a request should be elaborated in the law.
- The law should not ‘hardwire’ a presumption in favour of electronic copies. This should instead be left up to the requester. The law should also provide a fuller list of forms in which information may be accessed, to ensure that these are made available to requesters.
- Consideration should be given to replacing the four percent rule in Article 18 with a provision to the effect that a central body, such as the Committee for Citizen

- Access to Information, may set maximum copying fees.
- Consideration should be given to requiring public authorities, when denying access to information, to stipulate the precise provision of the law being relied upon to justify this, as well as the right of the requester to appeal against the refusal.

### **2.3 Proactive Disclosure**

The main proactive disclosure obligations set out in the draft Law are found in Articles 9-12. Article 9 sets out minimum proactive disclosure obligations for all public authorities, while Articles 10-12 describe the special obligations of, respectively, the legislative, executive and judicial branches of government.

Article 9 lists 20 categories of information subject to proactive disclosure, covering areas such as structure, powers, regulatory framework, policies, staff and functions, asset statements, financial information including audit reports, reports on official trips, contracts and summaries of bank accounts, classification system and index of documents, mechanisms for citizen participation, and how to make a request for information. This information must be made available through the Internet and other means, in a manner that facilitates its use by the people, as well as its quality and veracity. Annual reports on performance, including as to meeting of objectives, problems encountered and resources spent must also be published.

The legislative branch of government must additionally publish, over the Internet, a database containing all laws and draft laws, along with the views of parliamentary committees on them. All statements by Senators and Representatives must be recorded, and the meetings of both chambers of Congress, as well as departmental and municipal oversight boards, must be public, unless the rules provide for closure.

The executive branch is required to make public a wide range of financial information, including the budget, the budget from the previous year, summaries of detailed expense breakdowns, including for the previous year, economic indicators, information about public debt and information on public contracting. This branch must also make available Presidential decrees, statistical information, environmental impact statements and other environmental information, an annual report on human rights and safety information. Minutes of meetings of the cabinet must be recorded and shorthand copies made available.

The judicial branch must make available all Supreme Court decisions, whether interim or final, a list of all cases before the courts, along with order information, a representative selection of cases, the agreements and administrative resolutions of the Supreme Court, and decisions of the Court of Ethics.

Finally, pursuant to Article 41(3), all documents in the archives must be catalogued and the catalogue must itself be made public (and continuously updated).

These are extensive proactive publication obligations. However, it may be unrealistic to expect all public authorities to be able to achieve this level of proactive disclosure quickly, and some thought might be given to allowing bodies to increase the amount of information they make available proactively over time. They could, for example, be given a period of time to reach full disclosure, with the oversight body playing a role in approving their plans to reach full disclosure.

**Recommendation:**

- Consideration should be given to incorporating into the law a system to allow public authorities some time to meet their full disclosure obligations.

## 2.4 Exceptions

### Systemic Issues

Article 13 contains a comprehensive list of grounds for refusing to provide information, and Article 21(1) confirms that these are the only reasons that might justify a refusal to provide information. The draft Law does not specifically refer to its impact on pre-existing secrecy laws, and it is not clear that Article 21(1) is intended, or specific enough, to achieve this. Better practice laws – including in South Africa and India – provide explicitly that they have overriding force in case of conflict with a secrecy law. The Indian law specifically mentions that it takes precedence over the Official Secrets Act, 1923, presumably because it was recognised as being particularly problematical from a secrecy point of view.

Most, but not all, of the exceptions include a harm test, but these vary in terms of stringency. In some cases, the draft Law simply refers to ‘affecting’ the interest, which is strictly speaking not a harm test. In other cases, weak standards such as ‘impairs’ or ‘prevents’ are used. This is partly mitigated by Article 5(2), which provides that where there is reasonable doubt as to whether information is protected, it should be made public. It would be preferable if a consistent, and high, standard of harm were applied, such as “would, or could reasonably be expected to cause serious harm [or prejudice]” to the protected interest.

Article 5(2) contains a form of public interest override, stating that the obligation is on the State to prove that information falls within the scope of an exception, and that the harm from publication outweighs the public interest in knowing the information. This mixes the ideas of onus of proof, which lies on the State, and the standard of proof. As a result, it is not entirely clear that this unequivocally establishes a public interest override.

Article 5(3) provides for severability, indicating that where a document contains both confidential and public information, the public portion shall still be released. The draft

Law does not, however, provide for presumptive overall historical time limits to confidentiality, with the exception of information relating to national security (see below). These are important to ensure that, over time, all, or at least most, information is made public. Article 13(3) does provide that confidentiality only lasts as long as the reasons for it remain relevant, but this is not the same idea.

Historical time limits are common in right to information laws. In Nicaragua, for example, information remains classified for up to ten years, which may be extended once for another five years. In Guatemala, classification lasts for seven years and may only be extended once, for a maximum of an additional five years. In Honduras, classification lasts only for ten years and may be extended only by court order. Similarly, in Mexico, only the oversight body may extend the initial period of classification, which is 12 years.

#### Particular Exceptions

For the most part, the exceptions listed in Article 13 protect legitimate interests. An exception is 13(1)(b), which protects the dignity of any person. This is not a recognised ground not to release information held by a public authority in other countries and a distinction must be made between defamation law, which exists to protect dignity, and the right to information.

Article 13(1)(f) provides blanket protection for banking secrecy. This is not warranted and is not a rule found in better practice right to information laws. The law already protects privacy and provides some protection for commercial interests (but see comments below). There is no need to go beyond this to protect ‘banking secrecy’, whatever that might be deemed to cover.

On the other hand, the draft Law appears not to provide protection for certain interests normally exempted from disclosure under right to information laws. Thus, Article 13 does not provide protection for client-attorney privilege, or legally privileged information. The protection it provides for commercial confidentiality is also rather limited, applying only to confidential tenders, until the conclusion of the contracting process. Most right to information laws provide greater protection for commercial advantage, in recognition of the fact that commercial companies provide a lot of information to government in one way or another and that their interests do need to be protected.

Particular mention should be made of the exception relating to national security (Article 13(4)), which, as noted above, does incorporate overall historical time limits, but also builds in a number of protections against abuse. Most important among these are the fact that the classification of a document as confidential on grounds of national security must be approved by the oversight body, the Committee for Citizen Access to Information. The Committee’s decisions on national security classification cannot be appealed except on constitutional grounds.

#### **Recommendations:**

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- The law should state clearly that it overrides secrecy provisions in other laws, to the extent that they conflict with its provisions.
- All exceptions should be subject to a strong and consistent standard of harm.
- The public interest override should be stated clearly and explicitly, and separately from the statement about where the onus of proof lies.
- Historical time limits on classification should be introduced into the law.
- The references to dignity in Article 13(1)(b) and the protection for banking secrecy in Article 13(1)(f) should be removed.
- Consideration should be given to adding an exception to protect legally privileged information and to provide broader protection for legitimate commercial interests.

## 2.5 Complaints

The draft Law does not appear to provide for an internal level of complaint. This can be a useful way of resolving some problems quickly and with a minimum of fuss. At the same time, better practice, particularly in Latin America, is not to require requesters to go through this step before they may lodge a complaint with the independent oversight body.

Pursuant to Article 22, any one may make a complaint to the Committee for Citizen Access to Information (Committee) in case of a denial of a request for information. Where a requester lives 50km or more away from the seat of the Committee, he or she may present the complaint at the Departmental Governor's Office or the local municipality, and these bodies must forward the complaint to the Committee. Other conditions on submitting complaints are to be set by the Committee.

Article 23 establishes strict timelines for the processing and resolution of complaints. Where the information is claimed to be confidential on grounds of national security, in accordance with Article 13(4), as noted above, the public authority shall provide the resolution cataloguing the information as such, which shall be conclusive as to that fact. Pursuant to Article 40(1), a decision of the Committee on a complaint is binding.

The grounds for lodging a complaint with the Committee are narrow; in most countries requesters may complain about other breaches of the law, such as a failure to respect the timelines for processing requests, charging too much or not providing access in the form sought.

The timelines for processing requests, which include not only overall timelines but also strict internal instructions, for example as to when complaints must be sent to public authorities and when they must respond, are unnecessarily detailed. Most right to information laws simply provide for an overall time limit for processing requests, such as 30 or 40 days.

The draft Law does not indicate clearly the powers of the Committee when dealing with complaints (for example, whether or not it can compel evidence and witnesses or undertake on site investigations). It also fails to set out clearly the scope of remedial

decision-making of the Committee and, in particular, whether it can only make orders to disclose the contested information or whether it has wider powers to order structural remedies (such as to appoint an information officer or to provide more training to staff).

Pursuant to Article 24, all complaints which do not deal with national security information may be appealed to the courts. Expedited (and again somewhat detailed) timelines are again provided for, including provisional measures (Article 25).

Article 26 establishes the Committee as an autonomous legal entity within the sphere of the Executive Branch of government, “relating” to the Office of the President and with its main office in Asuncion. Its financial activities fall under the supervision of the Office of the Republic’s General Comptroller and its resources (“patrimony”) consist of annual allocations from the national budget, its property and any donations it may receive (Article 29). The Committee’s objects include ensuring effective enjoyment of the right of access and its functions include ensuring compliance with the law and resolving complaints (Articles 27 and 28).

The Committee has three members, appointed for four years renewable once, at least one of whom must be a woman. They are appointed by an absolute majority of the Senate, from a list of exactly three names nominated by the Chamber of Representatives. Candidates are subject to the same rules of incompatibility as judges and they may not engage in any political activities during their tenure. They are also paid the same as a judge of the Court of Appeals. The members elect one from among themselves to be the President of the Committee.

There are detailed provisions on public representations on candidates, which must be in accordance with Law No. 1620/00, on Public Functions. Prior to appointment, information about candidates must be made available on the Internet for at least three weeks and anyone may lodge an objection or comment on a candidate. After this period, there is a public hearing at a Bicameral Chamber of the National Congress at which candidates must appear and any legislator and the president may question them (Articles 30-33).

These rules appear to provide strong protection for the independence of the Committee. In some countries, these bodies report directly to the legislature, rather than to a member of the executive (such as the President, as is the case with the Committee). This can help further protect their independence. The case in many countries is also similar as regards budget oversight, with the legislature allocating the annual stipend to the body.

The draft Law also creates another administrative body, the Center for Access to Public Information (Center), within the framework of the Office of the Ombudsman. Its objects include providing free legal assistance to promote the right to information, in particular to members of vulnerable groups, including by supporting complaints before the Committee and/or judicial appeals (Articles 34-36). This is an innovative way of supporting information complaints and appeals.

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**Recommendations:**

- Consideration should be given to the possibility of adding an internal level of appeal to the law.
- The grounds for lodging an appeal with the Committee should be broadened to include all failures to respect the rules when processing requests.
- Consideration should be given to replacing the detailed timelines for processing complaints and appeals with one overall time limit.
- The law should set out clearly the powers of the Committee both as to investigating complaints and as to making remedial orders.
- Consideration should be given to whether it might be preferable to have the Committee report directly to the legislature rather than to the President.

**2.6 Sanctions and Protections**

The draft Law includes a number of provisions on sanctions. Pursuant to Article 21(3), failure to respond to a complaint within the established timelines is considered a “grave fault” under Law No. 1620/00, on Public Functions, and a violation of the “essential duties” of public officials. The main rules on sanctions are found in Articles 38 and 39. The former defines as “grave faults” the lack of adequate reasons to deny access and the unjustified failure to disclose information, when this has been ordered. Article 39 sets out the applicable sanctions, namely suspension without salary for up to thirty days and, in case of a second offence within five years, disqualification from public office for two to five years. Both of these sanctions are independent of any civil or criminal liability that may ensue.

When deciding upon complaints, the Committee may indicate whether or not an administrative action needs to be lodged against either an official or a public authority (Article 23(5)). The Center also has a mandate to “denounce” officials who have either breached timelines or unjustifiably refused to disclose information (Article 36(c)).

Where a public authority has failed to comply with an order of the Committee or of a court, the court may order compensation to be paid to the requester of between 90 and 300 minimum daily wages, depending on the seriousness of the breach. Responsibility for payment of these charges falls on the public officer responsible for providing the information and the head of the public authority (Article 40(2)).

These are strong rules on sanctions. One comment is that they could be expanded to cover a wider range of wrongs for failure to respect the law, such as charging excessive fees or refusing to provide information in the form sought.

The draft Law fails to establish any protections for officers acting in good faith in disclosing information pursuant to the law. This is unfortunate since such protections can help give officials the confidence to disclose information under the law, something which is probably contrary to their long-established experience as officials. Furthermore, better

practice right to information laws, or separate laws, provide protection for whistleblowers, individuals who disclose evidence of wrongdoing, whether or not this is pursuant to the disclosure provisions of the law.

**Recommendations:**

- Consideration should be given to widening the scope of activities that constitute wrongs under the law.
- Protection for good faith disclosures, whether acting in accordance with a duty under the law or to expose wrongdoing, should be added to the law.

**2.7 Promotional Mechanisms**

The draft Law includes a number of promotional rules. Pursuant to Article 14(1), every public authority must establish an Office for the Access to Public Information to receive requests for information. This is analogous to the information officers that many laws required public authorities to appoint.

The Committee has a wide general mandate to facilitate the right to information (Article 27), as well as a number of specific obligations, including to participate in classification procedures, to make general resolutions for better compliance with the law, to promote among public authorities good practices, and to prepare reports and compile statistics (Article 28). The Center also plays a role, including by coordinating training efforts with the Committee and coordinating wider public education efforts with the Ministry of Education and Culture (Article 36(d) and (e)).

Public authorities are required to include adequate funding for implementation of the right to information in their budgets (Article 43) and the National Telecommunications Commission shall support the technological needs of public authorities in implementing the law, through the Universal Services Fund (Article 44). Finally, the Secretary of the Public Function is required to ensure that the law is understood by all public officials, without prejudice to other training activities (Article 46).

These are useful promotional measures, but additional measures could be considered. The Office that each public authority is required to create could be given a wider role in promoting implementation of the law within the public authority.

More specific, and wider, public educational efforts could be considered. In addition to the general obligations noted, a central body, probably either the Committee or the Center, could be tasked with preparing and disseminating widely a general guide for the public on their right to information and how to use it. The educational authorities could also be required to introduce modules on the right to information into the school curriculum. This is a bit of a focus in Latin America. The Nicaraguan law, for example, provides for the incorporation of the right to information into school curriculums at all levels. Other countries which promote wide training and public education activities include Ecuador, Guatemala and Honduras.

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Good record management is key to the success of a right to information law. If public authorities cannot easily find the information they hold, they cannot provide access to it. Many right to information laws establish systems for setting, and gradually increasing over time, minimum record management rules. This could, for example, involve tasking a central authority – either the Committee or Center, or perhaps a ministry – with developing binding codes in this area, which may be revised over time as public authorities gain capacity.

Finally, the draft Law fails to put in place a system for reporting on implementation. In many countries, all public authorities are required to report annually to the administrative oversight body on their implementation efforts, including the number of requests they have received and data on how they have processed them. The oversight body, in turn, is required to provide a central report to the legislature, highlighting key successes and areas for future work, and giving an overview of implementation, including in relation to the processing of requests.

**Recommendations:**

- Consideration should be given to imposing a wider promotional role on the Offices for the Access to Public Information that public authorities are required to establish.
- Broader public education efforts could be added to the law, including an obligation to produce and disseminate widely a guide for the public and introducing the right to information as a subject in schools.
- A system for promoting better record management should be added to the law.
- A system of reporting by all public authorities, through a centralised body such as the Committee or Center, should be added to the law.