

The Right to Access Public Information in Peru

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Abstract

The descriptive analysis of the background developments that determined the regulation of the right to information in Peru is the premise under which this investigation was prepared. The Peruvian institutional reality, a product of the corruption scandals that arose during the Fujimori government, in addition to being clearly and systematically described by the author, indicates the need for the members of any political community to have the legal instruments and a constitutional framework that will allow them to exercise their right to be informed. The journalist provides the reader with important information on the main social basis of the right to be informed, as well as the most noteworthy aspects in exercising the right to information in Peru.

Resumen

El análisis descriptivo de los antecedentes que determinaron la regulación del derecho a la información en Perú es la premisa bajo la que se construye esta investigación; la realidad institucional peruana, producto de los acontecimientos de corrupción suscitados durante el gobierno de Fujimori, además de quedar descrita de manera clara y sistemática, evidencia la necesidad de los miembros de cualquier comunidad política, de contar con instrumentos legales y con un marco constitucional, que le permita ejercer su derecho a estar informado. El articulista proporciona al lector información relevante sobre los principales fundamentos sociales del derecho a estar informado, así como los aspectos más sobresalientes en el ejercicio del derecho a la información en Perú.

The way in which Alberto Fujimori's government came to an end has no precedent. Many presidential administrations have ended their terms in office immersed in major corruption scandals, but there has been no case, such as occurred in Peru, in which the participants in these developments and the actions themselves were exposed to such an extent before public opinion. The video revealed the unimaginable scale of the cover-up involving the affairs of state. All those who met publicly with the country's president were complying with a mere formality, in order to subsequently deal with the underlying issues, the topics of importance to their own interests, secretly, in the halls of the National Intelligence Service.

The policy of the transitional government in response to this degree of secrecy in the previous administration was to promote important norms that allowed the right to access information to be exercised. Examples of this are Supreme Decree 018-2001-PCM, which promotes the incorporation of procedures for accessing information held by government departments and agencies and Emergency Decree 035-2001-PCM, which orders all public entities to include a minimum amount of information in their respective Internet pages. In the current administration, with the Possible Peru party in office, Law no. 27806 on Transparency and Access to Information, which deals with the public administration, has just entered into effect.

But how paradoxical it is that the source of all these norms on transparency is the 1993 Constitution, which is currently the object of scorn and contempt, not because of what it does or does not say, but due to the circumstances in which it was adopted. Lately, Congress has been immersed in attempts to completely overhaul the Constitution and no one knows exactly which proposals will emerge and how the process will conclude. The only element that is clear is that the Peruvian Constitution has reached its limits, at least in its

current form, because it was the product of an authoritarian era.

I was able to fathom this paradox, since it was this denigrated norm that for the first time in the history of Peru recognized the fundamental right of every individual to apply for information from any government department or agency, without stating the motivation, and to receive it within a pre-established timeframe and at a cost commensurate with the request. And it is thanks to the recognition of this fundamental right that we no longer worry about knowing whether or not we have the right to be appraised of government activity, but rather to what extent we can better exercise this right.

The paradox is double if, at a time of democratic opening and the promotion of transparency in government activities such as currently is the case, the constitutional reform proposal in relation to access to information that could be approved by Congress, severely restricts our rights.

The origin of our concern is that if at present we can request information from any public entity, the reform proposal indicates that we can only do so from a government department or agency. If this is adopted, our right to request information from, for example, state-owned enterprises will be placed in danger.

State-owned enterprises are public entities and are defined as such in Emergency Decree 035-2001-PCM on Citizen Access to Public Finances. But state-owned enterprises are not part of the public administration, because their activity is not aimed at meeting objectives in the public interest. These state-owned enterprises seek to obtain resources for the state and for such effects, compete with private companies in the same market.

A directive was issued in July of this year concerning transparency in the activities and management of companies and agencies under the jurisdiction of the National Fi-

nancing Fund for State Business Activity (Fonafe), which ordered that procedures be incorporated for access to information held by state-owned enterprises. This directive is based on the previously mentioned Emergency Decree, which, in turn, is based on the current Constitution. What would remain of these rules and regulations if all of a sudden an individual could only request information from government departments and agencies as such?

The Peruvian Press Council has shown its concern in this regard by pointing out the deficiencies that it has uncovered in the latest transparency law in terms of information that is classified as reserved for reasons of national security. We believe that the Council's position of demanding a more precise legal definition of this concept can be positively dealt with. By the same token, groups such as Informed Citizens or Justice and Good Government, headed by the Public Defender Jorge Santisteban de Noriega, demonstrate a growing concern on the part of civil society organizations to specifically delve into the issue of transparency in government activities.

The national exporters' association ADEX has also been decisively involved with the issue of business ethics and government activities and is part of the Proética Consortium for Public Ethics, together with the Andean Jurists' Commission, the Transparency Civil Association, and the Press and Society Institute. The Proética Consortium is today the main ally of Transparency International in Peru.

But there also exists a whole series of civil society organizations that require information from the government, but do not know how to obtain it. Furthermore, most individuals do not really know what the right to access information held by the government means. The experience of the Office for Access to Public Information has shown that erroneous ideas such as, for example, that only an adult or citizen can request information or that the request for data must demon-

strate a legitimate interest, or that a foreigner has no right to request the same information as a Peruvian, are generalized, even among professionals.

Despite the right to access to information having existed for almost 10 years, it has only enjoyed the most precarious level of assimilation in society. Our experience has demonstrated that the dissemination of information on this right, an effort in which the Peruvian Press Council and the Public Defender's Office have a key and mandated participation, should be reinforced with the transfer of technical knowledge to civil society organizations. The work of the Office for Access to Public Information, a technical department of the Press and Society Institute and the Proética Consortium is conceived within this strategy. Our Office seeks to acquire a solid specialization in procedures for accessing information, with the purpose of transferring such knowledge in the medium term to other civil society organizations. Thus, in response to a tremendous unsatisfied demand for information held by the state, these organizations would be able to generate a supply of specialized legal consultancy services in the field. Based on this flow of supply and demand in civil society, the exercise of the right to access public information could be strengthened and the state could be subjected to better formulated requests for such data.

While any person can request information from the state, the fact is that it should be done through a formality, in other words, a procedure. The individual should clearly know what information is considered public and what is reserved and that he or she cannot demand that the government furnish data other than that held in its possession at the time the request is made. He or she should know what government department or agency to go to in order to request the information and how many levels the procedure involves. The applicant should also know at what point he or she should consider that the request has been denied and very impor-

tantly, the legal options available once the administrative route has been exhausted. This information, although it is within the reach of all, is only known and appropriately employed by those who have studied and regularly put it into practice.

With the global strategy of publicizing and exercising the right to access information, the Press and Society Institute and the Proética Consortium are dedicated to the application of this right through the Office for Access to Public Information.

Why is specialization in the field necessary on the part of civil society? Because it is an empirical fact that in Peru the capacity of public officials to determine whether or not to furnish information, and even more, to decide to actually do so, is in direct relation with their position or level in the public entity in question. The lower their rank, the less decision making capacity they have.

As an example of such cases, on one extreme, there was the denial on the part of a telephone operator to provide the name of the president of the company, because she was not authorized to give out such information. Another case, also involving the search for information via telephone, involved what is known as “passing the buck”, that is, when one is forced to go from one office to another and no one wants to take responsibility for attending to the request for information.

In terms of the procedures, the most common practice in government offices, which we have faced when requesting information, is silence. In most of the cases that we have known, the government department or agency does not respond until a notarized letter is sent, an indispensable requirement that the law demands in order to begin an action of Habeas Data.¹

¹ For example, an official at a state-owned enterprise called us at the office, the day after a notarized letter was left, to request the date in which we had filed our re-

The problem of public entities ignoring requests for information has led us to review the way in which the legislation guarantees access to public information. As has already been noted, for the first time, the 1993 Constitution recognized the fundamental right of each individual to request information from any public entity. The same norm contemplates a timeframe for responding and a cost for furnishing the information, which should be regulated by the law. As a result of the antidemocratic trend of President Fujimori's administration, Peru lacked a norm that regulated the exercise of the right to access information until the government fell. Around 1996, congressional deputy Carlos Ferrero, then a member of pro-government legislative caucus and today chairman of Congress, selected from the ranks of the supporters of President Alejandro Toledo, presented a bill to regulate the right to access information, which was never brought before the full session of parliament. This draft bill was later used as a basis for formulating the current Law on Transparency and Access to Information.

After Alberto Fujimori's administration came to an abrupt end, in 2001 the transitional government of President Valentín Paniagua issued regulations further defining Legislative Decree 757, which had been in effect since 1991 and that promotes administrative simplification in government, in order to stimulate private investment. This was Supreme Decree 018-2001-PCM, issued in February 2001, which or-

quest, one month previously. After a few days, the company responded negatively to our request, and so we will soon file a writ of Habeas Data to attempt to reverse the decision.

In another case, the rector of a public university responded to our request after about 20 days following the presentation of a notarized letter that "threatened" legal action. In only a single case, the government department to whom the petition was addressed, an autonomous state agency, formally denied us the information based on the appropriate juridical argument and within the timeframe established by the new law on access to information. We will also take this case to court through a writ of Habeas Data.

dered all the departments and agencies under its jurisdiction to incorporate a procedure for accessing information. By the same token, the transitional government issued Emergency Decree 035-2001-PCM (a norm with the status of law) in March of the same year, through which all government departments and agencies (including state-owned enterprises) were ordered to publish important minimum information on their personnel and financial accounts on their respective Internet pages. This Emergency Decree, by being more broadly applied jurisdictionally (because it is not restricted to the public administration), was regulated in July of this year by a Directive from the National Financing Fund for State Business Activity (Fonafe), which requires companies and entities under its jurisdiction to prepare a procedure for accessing information, in addition to the publication of data on the Internet.

But compliance with the two above-mentioned general norms has been uneven. Most of the entities consulted outside of the capital have not integrated the steps for accessing information into their Unified Body of Administrative Procedures (TUPA), even though DS 018-2001-PCM gave government departments and agencies a 30 day deadline in which to do so, counted from as of when the decree took effect in February 2001. Meanwhile, in Lima, the most important entities have made efforts to incorporate information in their web pages, but there is no evidence that that the data is periodically updated. On this latter point, the new Law on Transparency no. 27806 has established new deadlines for all public administration entities to create or update their respective web pages.

After President Alejandro Toledo's administration took office, during its first year, the debate on a law on access to information was a priority issue in the legislative agenda. From the ranks of civil society, the Peruvian Press Council, whose members have ties with the Inter-American Press Society,

maintained its demand on its agenda that Congress not relegate this debate to the sidelines.

Finally, in August, Law no. 27806 on Transparency and Access to Information was enacted, which includes the entire prior body of regulatory norms related to the jurisdiction of the public administration. For the other public entities, Emergency Decree 035-2001-PCM and the Fonafe directive remain in effect, as regards to transparency.

The existence of Law no. 27806 is important because it encompasses most of the state apparatus, and undoubtedly will determine the scope for future legislation. Among the law's main positive aspects is that it requires all government departments and agencies to regulate their activities based on the principle of disclosure, in other words, that everything a public official does should be public knowledge, unless otherwise explicitly indicated by the appropriate body, on the grounds of the reserved character of the respective information. It is also important that the law mandates the creation of a department responsible for following procedures regulating access to information and that it anticipates the application of sanctions for arbitrary denials of such requests. Furthermore, the law defines the concept of public information and standardizes a procedure for accessing such data, either based on a deadline if a copy is requested or immediately if the petitioner merely seeks to review the original document in the respective government office. Another very important aspect of the law concerns the cost for obtaining the information, which has been eliminated in the case of direct and immediate access, and which is equivalent to the price of reproducing the texts in the case of photocopies. This should force many public administration entities to drastically reduce their rates for accessing information, because based on the criteria that the fee was a way to obtain economic resources, they irrationally boosted the cost, thus undermining the capacity to exercise this fundamental right.

Also among the positive aspects of the legislation is the establishment of negative administrative silence within the procedure, because Supreme Decree 018-2001-PCM contemplated positive silence, generating a serious obstacle when seeking to activate the judicial route in dealing with the lack of response by a government department or agency to a request for information. In theory, the failure of the entity to respond would be the equivalent of agreeing to furnish the requested information, thus complicating the use of a writ of Habeas Data, unless the entity explicitly denied access.

There are also negative aspects in the new law on access to information, according to our criteria. The first is that it only regulates public administration entities, thus preventing all state entities or those controlled by the state from being subject to the same legal framework on the question. For example, the timeframe in state-owned enterprises for furnishing information is 30 calendar days, which can be prolonged for an additional 30 days, while for public administration entities, in accordance with Law no. 27806, the deadline can be no longer than 12 business days, and an additional 10 days for a second instance decision. Another negative aspect of the legislation is the absence of sanctions for the public official responsible for the failure of the corresponding government department or agency to respond to the request for information, which leaves the open door for the public administration to fail to exercise its obligation to attend to such petitions. By the same token, the law considers an ambiguous response to be a case of information denied, which is a subjective approach, unless the ambiguity is apparent. In terms of the timeframes, we also feel that it is excessive that the law granted up to three years to local governments and decentralized state agencies on the provincial and district level to establish their web pages.

The most controversial of the negative aspects concerns the possibility of allowing the Council of Ministers, based on

a Supreme Decree, to develop the content of the concept of “national security.” Those who have objected most vehemently to this disposition are the Peruvian Press Council and the Public Defenders’ Office, which demand that it be the law and not a lower level norm that determines the concept. The debate is open, and in the meantime, the Public Defender’s Office has filed a motion challenging the constitutionality of that article of the law. On the other side, there are those who feel that the law has not gone too far by confining the definition of the concept of “national security” to a regulatory decree. Beyond a consideration of whether or not the law is ideal in this regard, in the Office for Access to Public Information we feel that it is advisable and healthy that it be a law adopted by Congress that defines the parameters in order to avoid subsequent abuses.

Finally, as a final guarantee of the right to access information there is the judicial route. In response to a negative resolution that exhausts the administrative road in the field of access to information, the aggrieved party can appeal to the judiciary through an action of Habeas Data, contemplated in article 200 of the Constitution, or through lawsuit based on administrative law, in accordance with article 148 of the same Magna Carta. Through an action of Habeas Data, the claimant asks a judge to order a public official or individual to furnish information, access to which has been denied. With a lawsuit based on administrative law, the petitioner can request the annulment of the ruling adopted by the last instance that denied the request, based on formal or material defects.

As regards Habeas Data, the court that has handed down the most interesting sentences, from the point of view of legal grounds, has been the Constitutional Court, mainly due to the recognized professional capacity of most of its members. These judges enjoy prestige among the country’s legal

community, with the independence some of them displayed in relation to President Fujimori's government.

In its jurisprudence, the court established criteria of reasonability that were then integrated into the norms on transparency and access to information, such as, for example, that one cannot demand public information from a department or agency that it does not possess; that data on private individuals which has been made available to a public entity at their request, cannot be considered to be in the public domain and the entity can only disclose it with authorization; and that there is no state entity or an entity with legal status in public law that is excluded from the obligation to provide the requested information.

The judges, both those of the first as well as the second instance, do not deserve to appear among jurists as meriting greater confidence, due to the little credibility and independent criteria that that have demonstrated in general terms. Furthermore, a deficient doctrinal preparation in general is an important handicap at the moment in which the scope of the right to access information is being determined.