

El Caso Claude Reyes y el derecho de acceso a la información

The case of Claude Reyes and Freedom of Information Law

O Caso Claude Reyes e do direito de acesso à informação

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Luis Carlos Castro Vizcarra

Facultad de Derecho Mexicali, Universidad Autónoma de Baja California

luiscarloscastro@uabc.edu.mx

Alejandro Sánchez Sánchez

Facultad de Ciencias Administrativas y Sociales, Universidad Autónoma de Baja California

alexsasacc@uabc.edu.mx

Resumen

El propósito de este trabajo es comprobar si el Derecho de Acceso a la Información es un derecho humano, para lo cual se dan las definiciones de derechos humanos y derecho de acceso a la información pública, y a la vez se toma en cuenta la opinión de la Corte Interamericana de Derechos Humanos, jurisprudencia válida en nuestro sistema jurídico. El caso más importante que se encontró es el de Claude Reyes vs Chile, parte central de esta investigación, donde se estableció que el derecho de acceso a la información es un derecho humano por sí solo. En consecuencia, la Corte Interamericana fue el primer organismo internacional en reconocerlo en una sentencia.

Palabras clave: acceso, información, derecho humano, Claude Reyes.

Abstract

The purpose of this work is to check if the Freedom of Information Law is a Human Right, to do so, the definitions of Human Rights and Freedom of Information Law are given, and at the same time taking into account the opinion of the Inter-American Court of Human Rights, valid law in

our legal system. The most important case that was found is that of *Claude Reyes vs Chile*, central part of this research, where it is established that the Freedom of Information Law is a human right by itself. As a result, the Inter-American Court was the first international agency to recognize it in a sentence.

Key words: Freedom of Information, access, information, Human Rights, Claude Reyes.

Resumo

O objetivo deste trabalho é verificar se o direito de acesso à informação é um direito humano, para o qual as definições de direitos humanos e direito de acesso à informação pública, constam ainda tido em conta o parecer do Corte Interamericana de Direitos Humanos, a jurisprudência válida em nosso ordenamento jurídico. O caso mais importante foi encontrado é o de *Claude Reyes vs. Chile*, parte central desta investigação, onde foi estabelecido que o direito de acesso à informação é um direito humano em si. Assim, o Tribunal foi a primeira organização internacional a reconhecê-lo em uma frase.

Palavras-chave: acesso, informação, direito humano, Claude Reyes.

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Introduction

Freedom of Information Law is a human right recognized in our Constitution in its article 6° (Political Constitution of the United Mexican States, 1917), as well as the article 13° of the American Convention on Human Rights (1969), the 19° of the Universal Declaration of Human Rights (1948), and the International Covenant on Civil and Political Rights (1966), all these international treaties that Mexico is part.

Likewise, the constitutional article six establishes a mechanism of guarantee of this right, made up of a national organization guarantor (the Federal Institute for Access to Public Information) and local agencies (in Baja California, the Transparency Institute for Access to Public

Information). There, principles are established such as the maximum publicity and that all persons can enforce such right without having to prove any interest.

Internationally the same guarantee scheme is non-existent since an international organization guarantor of this right particularly or specialized in this subject is non-existent. International treaties, at least the Universal Declaration of Human Rights, the American Convention on Human Rights, and the International Covenant on Civil and Political Rights, locate to the Freedom of Information Law as an accessory right of Freedom of Speech. In the American system, the Inter-American Court has established that the Freedom of Information Law is a Human Right.

“The principles of interdependence and indivisibility of human rights referred to in paragraph three of the first article of our Constitution, established that all human rights exist at the same time” (Vázquez and Serrano, 2012), so it is necessary to establish mechanisms of coexistence of their rights. The obligations of protect, guarantee, promote and respect human rights, enshrined in the same article, apply to the Freedom of Information Law and all our authorities.

“The Freedom of Information Law is directly related to accountability, transparency and citizen participation and is an essential element in any democratic government” (Castro, 2014), that can be used as a tool to improve the quality of life of citizens “given that its exercise is an important part of the confidence that the governed might have on the rulers” (Castellanos, 2004).

METHOD

The problem raised requires its systematization, for it is necessary to seek to answer the questions and achieve the objectives set, seeking to demonstrate the established hypotheses. This will be achieved with a quantitative and qualitative approach, as well as an exploratory, descriptive, correlational and explanatory scope of the research, using as a unit of analysis "the right of Access to Information in Mexico" and the "constitutional guarantee for its protection" "With a non-experimental, cross-sectional research design, utilizing documentary and field research techniques.

The fundamental questions to be answered are: what is the right of access to public information in Mexico ?, what is the legal nature of the right of access to public information in Mexico ?, what is the constitutional guarantee for the Protection of the right of access to public information

in Mexico? What is the constitutional, conventional and legal basis of the constitutional guarantee for the protection of the right of access to public information in Mexico? What has been the quantitative and Qualitative of the right of access to public information in Mexico?

The objectives established for the investigation are the following:

- Locate the right of access to public information in Mexico.
- Define the legal nature of the right of access to public information in Mexico.
- Establish the constitutional guarantee for the right of access to public information in Mexico.
- Establish the constitutional, conventional and legal bases of the constitutional guarantee, for the protection of the right of access to public information in Mexico.
- Investigate and analyze the quantitative and qualitative use of the right of access to public information in Mexico.
- To determine the effects of the constitutional guarantee for the protection of the right of access to public information in Mexico.

It is considered that the questions and objectives set forth are expressed in an enunciative and non-limiting way. If it is necessary to rephrase them, it will be done during the extension of this research.

RESULTS

Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton, Chilean citizens, filed a petition to the Inter-American Commission on Human Rights in December 1998, represented by lawyer Juan Pablo Olmedo Bustos, known for the sentence "The Last Temptation of Christ."

The request was for the Chilean State's refusal to provide information related to a forestry industrialization project, as well as the absence of an effective remedy to challenge that decision (Inter-American Court of Human Rights, 2008).

In May 1998, Claude Reyes, director of the Terram Foundation, asked the Foreign Investment Committee for information related to a forestry industrialization project, but his request was denied. In July of the same year, Reyes (representing Terram), Cox (representing the NGO Forja) and Longton (Chilean deputy) filed an appeal for protection before the Court of Appeals of Santiago. This appeal was filed because of the CIE's refusal to provide information about the project; However, the appeal was declared inadmissible (IACHR, 2008).

On December 17, 1998, the three Chileans submitted the petition to the Inter-American Commission and was admitted on October 10, 2003, and issued a background report in March 2005. The Commission decided to refer the case to the Inter-American Court in July Of 2005 (IACHR, 2008).

The Commission asked the Court to declare the Chilean State liable for violations of Articles 13 and 25 of the American Convention, which tell us about access to information and judicial protection, respectively. The international tribunal concurred with the violations alleged by the Commission and also considered violations of articles 8 and 23 of the treaty, which deal with judicial guarantees and political rights respectively (IACHR, 2008).

Reyes' request was about a logging project in the province of Magallanes, known as Río Córdor, and its purpose was to measure its impact on the environment. The project was headed by the foreign company Forestal Trillium, but it was never carried out due to the political and media pressure generated by the request, but the case set an emblematic precedent on the Right of Access to Information (Olmedo Bustos, 2006).

The analysis on access to information and the case Claude Reyes confirms that, to the extent that there is confidence that the authorities make public all the documents that they generate or have in their possession and that only the information that endangers is reserved National security or the public interest, it is possible to advance towards the democratic consolidation of our country, to improve the administrative, regulatory and governmental areas of Mexico, and to have more and more confidence, openness, transparency and true citizen participation. By themselves, these factors help increase institutional performance.

The guarantee of the right of access to information directly benefits all those who use Internet systems and portals: the media, researchers, students, the opposition, organized civil society,

among others; But indirectly it also affects all individuals, since having real access to information can generate better working conditions, greater competitiveness, new business opportunities, studies and analysis attached to reality, among many other advantages.

The right of access to information allows us to have access to all documents generated or held by the authorities (Federal Law on Transparency and Access to Governmental Public Information, 2002). It is statistical information that can serve our business, as it contains even the purchase prices of several products that the government can use, which can be used to elaborate a proposal to sell to the government by companies. It also helps potential investors and job creators to have an idea of the economic and social reality of the country.

The guarantors are those who must review the reserved information and resolve the appeals filed by non-conforming citizens about the classification of public information. At the federal level there is the Federal Institute for Access to Public Information and Data Protection (IFAI), and in Baja California the Institute of Transparency and Access to Public Information of Baja California (ITAIPBC). The greater the credibility of these agencies, the more will be the use of information access systems and the greater the confidence of the users towards the requests and their answers.

Our state law does not have an express sanction against the authorities that reserve information and do not comply with the characteristics that the laws indicate; The law of transparency only refers to the law of responsibilities, which also does not establish a specific sanction for said act. The absence of such a sanction means that the authorities reserve many documents without complying with the constitutional and legal requirements, which contributes to the governmental opacity and prejudice of transparency.

The state authorities do not comply with the constitutional mandate regarding the legal requirements established by the local and federal standards of transparency and the proportionality test established by the doctrine and the court on human rights limits when reserving public documents.

In a brief investigation carried out in the transparency portal of ITAIPBC, it was found that more than 60% of the resources that were filed before the same Institute, from 2013 to date, against the obligated subjects of the State, was resolved against Of the authorities, who were ordered to give the information without modifying it (Institute of Transparency and Access to Public Information, 2013). In many cases, the authority classified public information as reserved.

The same article 6 of the Constitution establishes that in our country the principle of maximum publicity must prevail, which dictates that in case of doubt whether the information should be delivered or not, the authority should opt for the first option. This does not seem to be the case in Baja California due to the large amount of resources (184 in 2014) (ITAIP, 2014) filed before the Institute.

There is a lack of confidence on the part of the inhabitants of the state of Baja California to request information from the authorities. This can be manifested by the demands made by organized civil society, such as OBSERBC A.C., among others.

Another important point is the delay with which the authority catalogs the information and responds to the requests; In some cases the state authority does not catalog the information until the request arrives, in other cases it takes the maximum time (ten business days) to inform that the documents are considered reserved.

In the page of the government of the State and some other forced subjects we can find the catalogs of reserved public information. In the case of the state executive there are complete pages of information that is considered reserved, other authorities do not find these catalogs so we can not know exactly how many documents are reserved, which decreases trust and transparency.

Another symptom of the lack of transparency and the excess of opacity is the ease with which the state authority reserves the information. In many cases, information is not supported, others reserve information that clearly should not be classified as such, and the process of declassification (resource) is very slow because it can last up to twelve months or more.

Baja California enacted its second Transparency Law in 2010, which repealed that of 2005, which created the Institute of Transparency and Access to Public Information, an autonomous constitutional guarantor. It is worth emphasizing that our state was the last in the country to have such an organism.

From all of the above, we can conclude that: guarantors with greater credibility, penalties for public servants who do not comply with the transparency law, restrictions to reserve and hide information, help exercise the right of access to information, which in turn Helps to have greater transparency and confidence in our institutions, which strengthens the competitiveness in our state.

The judgment of Claude Reyes is important because it creates an international precedent on the importance of the Right of Access to Information and the general interest of disseminating public documents.

DISCUSSION

The right to access to public information in the Mexican legal system is based on Article 6 of the Political Constitution of the United Mexican States, the second paragraph of which states that: "Everyone has the right to free access to public and timely information, As to seek, receive and impart information and ideas of all kinds by any means of expression "(1917).

Later, the same article states that: "All information held by any authority, entity, body and agency of the Executive, Legislative and Judicial Branches, autonomous bodies, political parties, trusts and public funds, as well as any natural person , Moral or union that receives and exercises public resources or acts of authority at the federal, state and municipal level, is public "(1917).

All information is public, however, may be reserved temporarily for reasons of social interest and national security, as set forth in Article 6 itself and the laws. When interpreting the right of access to information, the Constitution establishes that the principle of maximum publicity should prevail (1917).

Therefore, it is important to note that the Constitution states that: "The obligated parties must document any act that derives from the exercise of their powers, competencies or functions, the law will determine the specific cases under which the declaration of non-existence of the information" (1917).

If we consult the local Constitution, that is, the Free and Sovereign State of Baja California, we find that Article 7, section C, states: "Every person without the need to credit any interest has the right to access information that the law Classifies as public, their personal data, or the rectification thereof. The Law of the subject must observe, among others, the principles of protection of personal data, maximum publicity and gratuity; It shall also establish mechanisms for access to public information, for the protection of personal data, as well as for review procedures, and to indicate that it has the nature of a reserved or confidential nature "(Political Constitution of the Free and Sovereign State of Baja California , 1953).

Regarding the definition of public information in the State, it is necessary to refer to the Law on Transparency and Access to Public Information for the State of Baja California, article 3 of which states that: "Information generated, administered or held by the Obligated subjects, is considered a property of public domain, reason why any person will have access to it in the terms and with the exceptions that this Law indicates. Its regulations may not establish more exceptions than those provided for in this law "(Law on Transparency and Access to Public Information of Baja California, 2010).

At the international level, the Right of Access to Information is in the hands of freedom of expression. The Universal Declaration of Human Rights, article 19, states: "Everyone has the right to freedom of opinion and expression; This right includes not to be disturbed by their opinions, to investigate and receive information and opinions, and to disseminate them, without limitation of frontiers, by any means of expression "(1948).

The International Covenant on Civil and Political Rights (1966) follows the same line, and article 19.2 states: "Everyone has the right to freedom of expression; This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, whether orally, in writing, in printed or artistic form, or by any other procedure of their choice. "

In the American Human Rights System we can find that Article 13 of the Pact of San José (1969) also associates the right of access to information with that of freedom of expression, stating: "Everyone has the right to freedom of expression. Freedom of thought and expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in printed or artistic form, or by any other process of their choice.

The word access, according to the Royal Academy of Language, means "the action of arriving or approaching." By public information, we saw that the law refers to the contained in the documents that the obligated subjects generate, obtain, acquire, transform or conserve for any title. The same law establishes that documents are any record that documents the exercise of faculties or their activity in any medium, whether visual, printed, sound, written, electronic or holographic.

We can conclude that the right of access to information is the prerogative of any person, without any interest, to reach the documents that generate, obtain, acquire, transform or conserve the obligated subjects in any medium.

The DAI (Right of Access to Public Information) is always associated with transparency and data protection, we can see it in the name of the laws (Law on Transparency and Access to Public Government Information) and in the guaranteeing bodies (Federal Institute for Access to Public Information and Data Protection), and although they are different issues, all protect the same right: access to public information, either for the government's obligation to transparent their documents or to protect confidential data of people.

The word transparency comes from the adjective "transparent", which suggests a quality of a body that lets you clearly see your objects, allowing you to let light pass, which is translucent, which is obvious or understood without doubt or ambiguity. Applied to political philosophy, it is understood as an obligation on the part of public servants to make public the acts and documents of their administration, especially the use of public money, to prevent corruption. The organisms and institutions of government must simulate to place all the information in a glass box, transparent, where it passes not only the light but the eyes of the citizens and the public opinion.

While it is true that transparency arises as a demand of society, to know what the government does with the money of our taxes, the practice of this activity has given many metapolitical benefits, because it is about sharing information that may be useful for Citizens, companies, civil associations and groups that can benefit in many ways by having information that is easily accessible, real and concise that the government collects, generates or safeguards through its various activities.

Access to Information must be understood as a human right, enshrined in our Constitution and that gives anyone, without having to prove any interest, the prerogative of becoming any document that any public servant generates, saves or has at their fingertips. There are exceptions to access to information, such as reserved information, which is public information that is kept in custody for a certain time in order to protect some other right if it is disseminated, such as life, security or Governance. Likewise, there is also confidential information, which is never disclosed and kept secret as it consists of personal data of the inhabitants of the State. However, in our country must be the principle of maximum publicity that the Constitution (Castro Vizcarra, 2014) states.

The DAI in the American system, as noted in the previous subchapter, the Right to Access to Information, is enshrined in international treaties on freedom of expression, however, we are going to review some judgments and documents where the Inter-American Court and Inter-

American Commission establish that the Right of Access to Information is a human right by itself.

The Right of Access to Information, as it is now known, arose from the nineties. Its first attempts were in the seventies, with the constitutional reform of 1977 to the sixth article, nevertheless, this only established that the Right of Access to Information would be guaranteed, but it did not say how. It was not until 2002 that the law and the body that would guarantee this right were created in our country.

Taking into account the historical background of the Right of Access to Information we can see why the treaties signed in 1949, 1966 and 1969 did not establish the right of access to information in an article, but as part of freedom of expression.

The Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights established in 2012 that: "The Right of Access to Information is a fundamental right protected by Article 13 of the American Convention. It is therefore a particularly important right for the consolidation, operation and preservation of democratic systems, and has therefore received a high degree of attention, both by the member states of the OAS and by international doctrine and jurisprudence "(IACHR, 2014).

The Special Rapporteurship itself in the same document gives us a concept through its interpretation: "Article 13 of the American Convention includes the positive obligation at the head of the State to allow citizens to access the information that is in their possession" (IACHR, 2014). This leaves no doubt that Article 13 covers not only the Right of Access to Information in the American system, but is itself a human right, different and important for the consolidation of democratic systems.

In addition, "the Inter-American Court has established that Article 13 of the American Convention, by expressly stipulating the rights to seek and receive information, protects the right of every person to access information under State control, with the permitted qualifications Under the strict regime of restrictions established in said instrument "(IACHR, 2014). While this is true, it speaks of control by the State and also points out the content and scope of the right and that the restrictions should be minimal.

We can find other evidences where the Court recognizes that it is a new human right including in the sentences of the cases Claude Reyes and others and Gomes Lund and others (Guerrilha do Araguaia). The Court no longer referred to the classic formulation of Article 13 of the American

Convention (in terms of freedom of expression) and rather held the existence of a new human right (Bertoni and Zelada, 2014).

The decision of the Inter-American Court to affirm that access to information constitutes a fundamental right is considered by many human rights organizations to be historical, since it was the first international court to do so (Bertoni and Zelada, 2014).

CONCLUSION

Human rights are a type of rights that focus on protecting dignity and basic goods, which create obligations for the authorities and whose positivization is very important. They are endowed with special characteristics: they are inherent to the person, unconditional, transnational, inalienable, imprescriptible and irreversible. However, human rights are not absolute, that is, they need to be limited in order to prevent them from encroaching on other human rights, since they are indivisible and interdependent (Carbonell, 2014).

The purpose of this work is to verify that the Right of Access to Information is a human right, and therefore we first define what human rights are, then what is the Right of Access to Public Information and, finally, we seek opinions of The Inter-American Court of Human Rights, jurisprudence that applies to our legal system (Steiner, 2014), sentences that we enumerate and where the Court establishes that in fact the Right of Access to Information is a human right.

Adding the DAI to the catalog of Human Rights in our country is an important step forward, as it generates the obligations to the authorities to promote, guarantee, respect and protect said right with the principles of consistent interpretation and pro-person, forcing the State to only Limit it when it conflicts with another human right and create the necessary conditions for that right to be exercised.

The final purpose of the investigation is to apply conventional principles to the limits of the Right of Access to Information, in particular to the temporary reservation of information by the authority, in order to strengthen this right and restrict the limit of the same to The cases in which it is strictly necessary and that comply with the requirements established by the Constitution and the American System of Human Rights.

The judgment of Claude Reyes et al. Vs Chile is an important part of our work as it will help us to establish the conventional principles and the opinion of the Inter-American Court on ICD.

This study provides an important foundation for considering the Right of Access to Information as a fundamental right that requires the guiding principles and obligations and duties that entail. The State, in the case of Mexico, is responsible for allowing access to public information for every inhabitant of the United Mexican States, reserving information that is strictly necessary for national and private security, and thereby contributing to the Consolidation of a state of law that allows the enjoyment of fundamental rights within the constitutional and conventional framework of which Mexico is a part.

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