



THE RIGHT OF ACCESS TO PUBLIC INFORMATION

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SÍNDIC

**EL DEFENSOR
DE LES
PERSONES**

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Síndic de Greuges de Catalunya

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GENERAL INDEX

1. INTRODUCTION	5
2. REGULATION OF THE RIGHT OF ACCESS TO PUBLIC INFORMATION	7
2.1. BRIEF REMARKS ON COMPARATIVE LAW	7
2.1.1. European Union Regulation and case law of the Court of Justice of the European Union	7
2.1.2. Council of Europe Convention on Access to Official Documents	8
2.1.3. Regulation in other countries	9
2.2. REGULATION OF THE RIGHT OF ACCESS TO INFORMATION IN SPAIN AND CATALONIA	12
2.2.1. Spain	12
2.2.2. Catalonia	13
3. THE RIGHT OF ACCESS TO PUBLIC INFORMATION AND INTERVENTIONS BY THE CATALAN OMBUDSMAN	17
3.1. EXAMPLES OF THE COMPLAINTS RECEIVED BY THE CATALAN OMBUDSMAN REGARDING THE RIGHT OF ACCESS OF INFORMATION	17
3.2. THE CODE OF BEST ADMINISTRATIVE PRACTICES AND THE RIGHT OF ACCESS TO INFORMATION ...	19
4. SCOPE AND CONTENT OF THE RIGHT OF ACCESS TO PUBLIC INFORMATION: CATALAN OMBUDSMAN'S CONSIDERATIONS	21
4.1. THE NEED FOR A NEW REGULATION	21
4.2. CONFIGURATION OF THE RIGHT OF ACCESS TO INFORMATION: SPECIFIC ITEMS TO BE REGULATED	23
4.2.1. Legal character of the right to access public information as a preliminary matter	23
4.2.2. Active and passive legitimization	24
4.2.3. Concept of the public information that must be accessible	27
4.2.4. Procedure for access: term, silence, grounded refusal and appeals process	28
4.2.5. Exceptions to the right of access: Proportionality principle and effective damage in the application of exceptions	30
4.2.6. Conflict of rights and weighting: access and privacy	33
5. CONCLUSIONS AND RECOMMENDATIONS	37
5.1. CONCLUSIONS	37
5.2. RECOMMENDATIONS	37

1. INTRODUCTION

The right of access to public information has a two-fold nature. From the general interest standpoint, it is an instrument for the democratic control of public institutions. On a more individual level, the level of the person accessing information, it has intrinsic value, in the sense of its impact on citizen-government relations.

With regard to the workings of institutions in democratic society, the right to information is an instrument to make effective the principles of transparency and accountability in public administration activity, while also being a requisite for the participation of citizens in management of public affairs and decision-making processes of public administrations.

The way in which this right is guaranteed in each legal code serves as an important –though not the only– means of measuring the level of transparency achieved by the public powers in a given society. The right to informed participation, based on prior knowledge and analysis of public information, must allow citizens to take an active stance on the Administration's actions and decisions, participate in public authorities' decision-making processes and make it possible for citizens to hold administrations accountable in everything they do.

The private or individual facet of the right of access to public information is found in allowing persons to access the information that could be of interest to them within the realm of their specific interests. The growing overlap of public authorities' activity into the daily affairs of private individuals (citizens, but also companies, organizations and associations of different profiles and purposes) means that there is a common personal or individual interest in attaining information on the activities of public powers that affect them individually or collectively.

Thus, regulation of the right of access to public information must protect general interest in access, as a democratic check on

public powers, and private interest in obtaining information on actions that specifically affect a given citizen or organization.

Along these lines, the Síndic de Greuges's (hereafter Catalan Ombudsman) record of interventions on the right of access to public information has made apparent the difficulties in resolving conflicts that citizens encounter in a legal framework that regulates this matter only partially and heterogeneously. The absence of a comprehensive code that regulates the procedure for access to public information, the exceptions and mechanisms for the protection of this right, and a response period that does not undermine its effectiveness, among other considerations, more in line with the options adopted in our judiciary environment, is a shortcoming that must be redressed.

In times such as the present, when citizens are facing cutbacks in public spending which affect the configuration of services they receive from public administrations, availability to all information on the decisions made should be of the highest priority, for the development of informed opinion. Regulations that guarantee transparency, accountability and access to information held by the administrations is one of the claims put forth by the 15-M movement.

Over the course of the previous legislature, the Spanish government presented two draft bills for the regulation of the right of access to public information, but they met with little success. The Popular Party group also presented in the Spanish Parliament a private bill on transparency, access to public information and good governance. In the same vein, in his inaugural address, the current President of the Spanish government announced the presentation of a law on transparency, good governance and access to public information. On another front, Catalan members of parliament have established a joint committee charged with developing a

private bill on access to information, which is beginning its work at the same time this report is being written.

Beyond the need for effective legal instruments, the Catalan Ombudsman's experience in the defense of the right to access information has shown a certain resistance on the part of our administrations to facilitating access to anyone seeking it, and disclosing information in an understandable way.

In addition to legally strengthening content of the right of access to public information and the mechanisms to exercise it, an educational effort must also be aimed at citizens, for them to know and use the right, and also among public servants, for them to gain awareness that the right to public information is a tool of democratic quality and a right of citizens, only conditioned by legally-determined limits. In administrative culture, access to public information must be perceived as the general rule, and restriction or secret as the exception.

To do so, public administrations must evolve from cultural and regulatory tenets, according to which citizens demand information and the administration provides it within a framework of established regulations and procedures, to a situation in which administrations take the initiative and disclose the updated information and make it immediately available to citizens.

Such an evolution would imply a drop in the volume of specific information requested, as there would be a significant body of information already available to the general public.

As background to this report, the "Conference on Access to Public Information: Advancements in Transparency", held by the Catalan Ombudsman on May 13-14, 2010, bears mentioning. The conference became a forum for thought on these two aspects, of utmost priority for the functioning of democratic societies: access to public information and transparency in administrative activity.

The conference benefited from the participation of academics in this field, representatives of committees set up to guarantee access to information, data protection agencies, the Spanish and Catalan administrations, and non-governmental organizations and associations committed to promoting greater transparency in public activity, consolidation of the right to access and the use of open technological standards and platforms in public institutions.

The conclusions reached over these sessions, together with those born out of the institution's experience with the issues brought up by individuals in this field, have provided much of the content of this report.

2. REGULATION OF THE RIGHT OF ACCESS TO PUBLIC INFORMATION

2.1. Brief remarks on comparative law

2.1.1. European Union Regulation and case law of the Court of Justice of the European Union

On one hand, citizens' right to access information in the power of European Union (EU) institutions is expressly recognized in Article 255 of the Treaty establishing the European Community, though with the entry into force of the Treaty of Lisbon, reference must be made to Article 15, section three, of the Consolidated Version of the Treaty on the Functioning of the European Union developed in Regulations 1049/2001, of May 30, of the European Parliament and the Council of Europe.

On another note, the Charter of Fundamental Rights of the European Union specifically guarantees "the right of every person to have access to his or her file" (Art. 41) and the right of access to EU institution documents (Art. 42).

In Regulation 1049/2001, the right to access is closely linked to the principles of transparency, democratic control over public powers and participation. Further, it has a broad scope, including even preliminary and internal documents, as opposed to the models of many states, which exclude access to provisional documents and drafts. Regulation 1049/2001 also regulates the filing of applications through an expedient procedure (15 days to resolve, with a "silence signifies refusal" provision) and the possibility to file a confirmatory application asking the institution to reconsider its position.

As for the limitations to access, Article 4 of the Regulation makes reference to public interest as regards: public security, defense and military matters, international relations, or the financial, monetary or economic policy of the Community or a Member State. Privacy and the integrity of the individual are also grounds for refusal. Finally, for certain cases,

exception to access is applicable only if there is an overriding public interest in disclosure.

As will be shown later, these conditions –with special reference to overriding public interest, as a modulation of exceptions to access– coincide by and large with the options adopted by the rules of certain member states of the European Union and with that established by the Council of Europe Convention on Access to Official Documents.

The right of access to information in the power of European institutions has also been interpreted in the case law of the Court of Justice of the European Union (CJEU). The Court has found that Regulation 1049/2001 is meant to promote best administrative practices and guarantee transparency, as an element of democratic checks and balances, and from that standpoint, restrictively interprets exceptions to access. Along these lines, the Decision of the General Court (European Union), of November 8, 2007, in *Bavarian Lager Co. Ltd. vs. the European Commission*, has been deemed especially relevant to understanding the relationship between the right of access to information and privacy. The judgment of the European Court of Justice, Grand Chamber, of January 26, 2010, in the case *Internationaler Hilfsfonds vs. the European Commission*, establishes that the right to access is linked to the democratic character of European institutions and that exceptions to the right of access must be restrictively interpreted.

It also bears mentioning that Regulation 1049/2001, on access to documents of the European Parliament, the Council and the Commission, has been in revision for some years now, with a view to adapting it to the experience achieved in its application, initiatives that the European institutions themselves have adopted in recent years to favor transparency and access to information, and also to incorporate the case law doctrine of the CJEU in this realm. This process of

revision and presentation of proposals for modification was still underway at the time this report was written.

At present, there is no rule equivalent to Regulation 1049/2011 within community law and applicable to member states, that aims to harmonize internal legal codes in the realm of access to information, at least not of a general scope, although there are directives that regulate access to information in state administrations' power regarding specific subject matters, especially the environment.

Thus, Directive 2003/4/CE, of January 28, on public access to environmental information, specifically regulates the exercise of this right, establishing the exclusions and specific access procedure. Its implementation into Spanish law was achieved through Law 27/2006, of July 18, by which rights of access to information, public participation and access to justice in environmental affairs are regulated.

Also in the area of environmental information, Directive 2004/35/CE, of April 21, on environmental responsibility as regards prevention and reparation of environmental damage, states that citizens can ask the public administration for the information it holds on environmental damages and on prevention, avoidance or repair measures of these damages. The rule that implements this directive into Spanish legislation is Law 26/2007, of October 23, on environmental liability.

Directive 2003/98/CE of November 17, on the reuse of information from the public sector, was adopted to harness the potential of public sector information, and overcome the barriers of a fragmented market –as the information generated by public bodies is of major interest for companies when operating in their realms of activity– and to contribute to economic growth and the creation of employment. In that regard, it is also of the general citizens' interest, as an element of transparency and guide for democratic participation. This directive was implemented into Spanish legislation by Law 37/2007, of November 16, on the reuse of public sector information.

In public contracting, Directive 2004/18/CE of the European Parliament and the Council, of March 31, 2004, on coordination of public works, supplies and service contract adjudication procedures, modified by Regulation (EC) 1422/2007 of the Commission, of December 4, also contains rules for access to

information and transparency. The implementation rule is Law 30/2007, of October 30, on public sector contracts (now, Consolidated text approved by royal legislative decree 3/2011, of November 14).

Finally, Directive 2006/123/EC, of December 12, on services of the internal market, recognizes the right to quality of public services rendered by electronic means, and to obtain information on the service activities. Law 17/2009, of November 23, on free access to service activities and their exercise, partially incorporates this directive on the state level, supplemented by Law 25/2009, of December 22, for modification of several laws to adapt them to Law 17/2009. In Catalonia, Legislative Decree 3/2010, of October 5, adapts the rules to Directive 2006/123/EC with the status of law.

2.1.2. Council of Europe Convention on Access to Official Documents

The Council of Europe Convention on Access to Official Documents, adopted by the Council of Ministers of the Council on November 27, 2008 and open for signature by member states since June 18, 2009, was inspired in practices and experiences common to a number of member states of the Council of Europe. Signature of this convention (Spain has not signed it at present; it is one of the few member states of the Council of Europe that does not have a specific law on the right of access to information), implies binding submission to certain minimum standards for the regulation of access to public information.

The Council of Europe defines this agreement as the first international legal instrument that recognizes, with a general scope and in a binding manner, the right of access to documents in possession of public entities. Its two-fold value is noteworthy: on the one hand, from a collective viewpoint, as a key element to guarantee transparency and good governance of public entities, strengthen the trust of citizens in institutions and promote citizen participation; and on the other, from an individual perspective, it interprets access to information as essential for personal development and exercise of a person's fundamental rights.

According to the Convention, a public document is any recorded in any format that is created or received by a public authority and residing in its power. The Convention determines minimums that member states signing the agreement agree to respect in

regulation of the right of access to public information. Some of the most relevant aspects of its content are as follows:

- Guarantee the right of any person, without any sort of discrimination and without having to show any special interest, to access public documents in the public authorities' possession, once criteria of the two categories have been confirmed.
- Guarantee that the applications for access, and access to documentation bear no cost, although the applicant may have to cover the cost generated by the service or the making of copies.
- Possibility to establish a limited list of exceptions (Art. 3.1), subject to criteria of public interest, as long as they are set down precisely in law, are necessary in a democratic society and are proportionate to the aim of protecting other rights or legitimate interests.
- In line with the terms of many laws of Council of Europe member states, the Convention has also established that the principles of actual harm and overriding public interest in access must be applied, before denying access based on the application of any of the limitations outlined in Article 3.1 of the Convention. This means that in the event that any of the limitations outlined in the Convention were to apply, the Administration must determine if access would cause real harm to the right or interest protected by the limitation, and determine whether there is overriding public interest in disclosure, and its proportion to the right or interest protected by the limitation. Said evaluation must be made on a case-by-case basis, and under the guiding principle that access is the rule, and limitation the exception.
- Insofar as the procedure for filing access applications, it bears mentioning that, although the Explanatory Report written by the Council itself establishes that a prompt response to a request is at the core of the right of access to official documents, no fixed term for this response is set.
- The reasons for refusal of an application must be given, and the right of applicants to an appeals or review process over this decision guaranteed, prior to access to courts of justice or an independent, impartial body.

In conclusion, two final matters must be noted on this convention: it must necessarily be a reference document when preparing drafts on

the regulation of the right of access to information, although it has not yet been ratified by Spain, and the regulation it contains is of a minimum nature, so that if member states –and legislative bodies of a lower rank– ratify it, they may establish regulations that offer greater protection of the right of access to public information, but not reduce it.

Later, when other aspects of the regulation of the right to access are discussed, several references will be made to the content of this convention.

2.1.3. Regulation in other countries

Following is a concise summary of the regulation of the right of access to information in the internal legislations of Spain's peer countries, some of which have longstanding, highly consolidated information access systems.

Such is the case of the **United States (USA)**, which since 1966 has had a law, the Freedom of Information Act (FOIA, USA), which is one of the first experiences in the regulation of the right of access to information, and has been a source of inspiration for the regulations established later in other countries.

In the United States' information access model, the FOIA is based on the principles of transparency and information, and sets out a number of limitations that stem from concepts of public safety and privacy protection. Regulation of the right of access to public information in the USA has evolved from an initial "ownership" outlook on public information to the recognition of the right to access and its configuration as a necessary element for democratic participation in decision-making processes. Decisions of the courts of justice have also promoted the consolidation of a broad outlook on the right of access and restrictive application of disclosure limitations.

In **Latin American** countries, the ratification of generous regulations has been significant, with the implementation of the principle of transparency, clearly inspired in the FOIA-USA model. Such are the cases of Mexico's Federal Transparency and Access to Public-Governmental Information Act, of June 11, 2002, and Peru's Law 27806 on Transparency and Access to Public Information, of August 2, 2002.

Ireland's Freedom of Information Act (FOIA-IRL) dates back to 1997, although significant modifications were introduced in 2003, with the exclusion of certain public bodies from its scope of application and the implementation of fees to be paid as a condition for access in certain cases. Both measures have resulted in a reduced number of applications for access to public information and configuring a more restrictive right of access.

The law establishes the general principle of the right of access to information with a list of exceptions, some of which are absolute in nature and others subject to the test of actual harm to the right protected by the limitation and the test of overriding public interest in disclosure, with regard to a possible damage to a right or public or private interest that the limitation means to protect. The FOIA-IRL also includes the obligation to publish, with no special order needed, certain public information for its general interest.

The public organization that receives an information application must notify the applicant that the request has been received, and resolve it within 20 days.

In the case of Ireland, the office of Information Commissioner established by the FOIA-IRL is held by the same person appointed Irish Ombudsman, although it must be noted that these are two distinct figures, with different resources and mechanisms for intervention. The Information Commissioner's decisions are binding, and may be appealed in courts of law. The alternative of creating a specific commissioner as an independent authority with whom citizens can lodge appeals if they are denied access, has also been ratified by other countries.

In the **United Kingdom**, the regulation is the Freedom of Information Act of the year 2000 (FOIA-GB). It was ratified after the Irish model, although it shares significant similarities. This rule acknowledges the right of any person to request information in the power of public organizations or companies. It also contains limitations to the obligation to disclose information, some of which are absolute in nature, while others are only applicable if there is no prevailing public interest in disclosure (overriding public interest test).

The maximum period in which the information is to be provided is 20 working days; grounds for any refusal must be given, and the applicant informed of the procedures for appeal. The

law also creates the figure of an Information Commissioner, whose decisions are binding and can be appealed.

Outside the realm of Common Law, and as a reference closer to our judiciary tradition, **France** deserves consideration, with its Act 78-753, of July 17, on various measures for improved relations between the Civil Service and the public and on various arrangements of an administrative, social and fiscal nature. In keeping with this law, anyone is entitled to access administrative documents, which are defined as those produced by the State, public institutions or from public or private-law organizations managing public law, in the framework of the public service mission assigned to them. Refusal of delivery must be made in writing and the grounds explained. Information on the channels for appeal must be explained.

The French model for information access was developed in step with regulations on the right to data privacy, and it was decided to create two authorities to respectively protect each of these rights, as is the case of Italy. Specifically, the supervisory body of the right of access is the Committee of Access to Administrative Documents. It is in charge of seeing to the respect of the freedom of access to administrative documents and public archives, as well as all matters referring to the reuse of public information. It is compulsory to file a claim with the Committee to initiate an appeal in judicial review.

In **Germany**, the law regulating access to information of the German federal government is that of September 5, 2005. This law states that everyone has access to the official information of the federal government, and does not require any special justification of interest. At the same time, the law sets limits or exceptions to access, mainly based on public interest (primarily any affectation of the Administration's operation), protection of personal data and business and industrial interests. The application of these limits requires a weighting of the interests protected by the Law in the specific case, with relation to the access application.

Access to the information must be made effective in the period of one month. The supervisory body responsible for correct compliance with the Law is the Federal Commissioner for Freedom of Information, a role taken by the Federal Commissioner for Data Protection. The Commissioner may lodge complaints with administration authorities if

they believe the administration is violating the freedom of information law.

In **Italy**, access to public information is regulated by Law 241/1990, of August 7, on access to administrative documents. This law states that access to administrative documents is a general principle of administrative action to favor participation, ensure impartiality and transparency. This notwithstanding, it must be borne in mind that this law only refers to information that could be defined as administrative documents (Art. 22.1.d. of the Law), not merely information in the Administration's power. This way, the Law limits access to those persons with a clear legal (direct, concrete and currently existing) interest linked to the document to which access is requested. Therefore, it is a more restrictive approach, far from what other systems have defined as the right of access to public information.

As with other special traits of this rule, it is important to note that the applicant must justify their request for access. The "silence-signifies-refusal" provision comes into effect thirty days after the demand application, and the decision refusing the application must be based on one of the limitations contained in the Law. Decisions can be appealed by judicial review (to the Regional Administrative Court and, for appeals against its judgments, the Council of State). There is a body that supervises the right of access (Commission for Access) separate from the independent body charged with data protection (Garante for the Protection of Personal Data) with a monitoring role over the compliance with the Law and proposal for regulatory modifications.

Finally, and outside the realm of the British/American and continental traditions, reference must be made to **Slovenia**, whose Information Commissioner took part in the Conference on Access to Public Information, held by the Catalan Ombudsman on May 13-14, 2010.

The right of access to public information is specifically taken up in the Slovenian Constitution (art. 39). The constitutional guarantee of access has been developed by the Access to Public Information Act, of March 13, 2003. The model implemented by this law stands out for the broad scope of its subjects, from the judiciary branch to contractors and private companies providing public services or conducting administrative duties. The term for resolution of access applications is 20 working days, and the law stipulates 11

exceptions, including protection of privacy. Some of these exceptions are absolute in nature; others are subject to the test of overriding public interest in disclosure. The law also specifically stipulates the possibility of partial access to the requested information.

The Slovenian Information Commissioner Act, of November 30, 2005, assigns to this independent organization the duties of deciding on the claims related with access to public information and those related with personal data protection (Art. 2). Its decisions on the appeals against information access application refusals are binding, and any infringement can lead to a fine being imposed (Art. 15.2).

2.2. Regulation of the right of access to information in Spain and Catalonia

2.2.1. Spain

The right of access to public information is specifically recognized in Article 105.b of the Spanish Constitution (SC). While it is true that this constitutional provision does not refer to all public information, but only indicates citizens' right of access to archives and administrative records, and introduces general limits to its exercise (on information that affects safety and defense, investigation of crimes and personal privacy), in any event, it does imply a constitutional recognition of the right of access, and is a mandate for lawmakers to regulate the specific content.

Article 37 of Law 30/1992, of November 26, on the legal system of public administrations and common administrative procedure, in its basic nature, recognizes and regulates the general system of citizens' rights of access to documents that form part of a case file, and are found in administrative archives, as long as these case files are for proceedings concluded by the date of the application.

Article 37 excludes the right to access to documents containing data relative to individuals' privacy, and requires a legitimate and direct interest to justify access to documents of a personal nature. It also determines that this right of access is limited by reasons of public interest, third-party interests more deserving of protection or when it is established by law. In its Section 5, it lists certain cases in which access is also

barred. Last, it states that access refusal requires a grounded decision.

By and large, administrative doctrine considers this regulatory provision insufficient to regulate citizens' rights to access information in public administrations' power, as it limits access to only one specific part of the information in administrations' power (that forming part of a concluded case file), is vague in its establishment of limitations to access, and does not contain the instruments necessary to delimit the application of these exceptions in terms analogous to those established by other models (the harm and overriding public interest test, or the case-by-case consideration of compared rights or interests). The doctrine also highlights the lack of a specific procedure to request the information, with a short response time and an appeals mechanism against refusal judgments.

In short, it is an incomplete regulation that in no way guarantees the right of access to public documents in a dimension comparable to Spain's peer countries and the parameters of the Council of Europe Convention of June 18, 2009.

Further, it must be considered that this rule dates back to 1992, and is therefore prior, with few exceptions, to rules that regulate access to public information in the aforementioned cases. Along this line of reasoning, it is a rule incorporated into the law which regulates the legal and procedural system of public administrations that has been made obsolete by a social and political reality that calls for more transparency in public activities and regulation of the access to public information that gives this right the broadest possible content.

Article 35 of Law 30/1992, of November 26, regulates citizens' rights. Letter g contains recognition of the right to attain information and guidance on judiciary or technical requisites imposed by the provisions in force for projects, the actions or applications that could be made. Nonetheless, to be exact, this provision does not refer to the right of access established in Article 105 of the Constitution, but rather stipulates a right to receive guidance on conducting relations with the public administrations.

The same Article 35 (letters a and b) states, only for those who hold interests in any

proceedings, the right to know the status of the proceedings in which one is a stakeholder at any time, or the right to identify the authorities and personnel handling the process.

As a rule of general scope on the right of access to information, reference is also to be made to Law 11/2007, of June 22, on citizens' electronic access to public services, also of a basic nature, which recognizes citizens' right to interact with public administrations using electronic media, for the exercise of the rights established in Article 35 of Law 30/1992, and also to obtain information. Although Law 11/2007, of June 22, establishes the right to apply for and obtain information, it adds no content to the substantive regulation of this right or the procedure to exercise it.

Law 37/2007, of November 16, on the reuse of public sector information, which incorporates into our legal code Directive 2003/98/EC, of November 17, 2003, does not modify the system for access to administrative documents, but recognizes the importance and value of information generated from public bodies for use by companies and persons, with the consequent added value for economic growth and the creation of jobs.

On a local level, mention must be made of Article 18.1e of Law 7/1985, of April 2, which regulates the framework for the local system, and recognizes the rights of local residents to be informed, after filing a reasoned request, and to send applications to the municipal administration with regard to all municipal case files or documentation, pursuant to the terms of Article 105 of the EC. Article 69 obliges local councils to disclose the most extensive information possible on their activities, and Article 77 specifically outlines the particular system for access of elected officials to municipal information. Sections 1 and 2 of Article 70 also refer to the disclosure of territorial organization and planning instruments, urban management documents and town planning agreements.

Law 16/1985, on historic Spanish heritage, regulates access and consultation of documentary and bibliographic heritage. In principle, documentary heritage is of free consultation, with the exceptions referring to classified materials and those containing personal information. In any event, administrative authorization must be secured.

There are certain sectorial rules that have also regulated access and disclosure of public information. Among others, in the environmental realm, the rules on the access to public information can be found in the implementing rules for directives 2003/4/EC of the European Parliament and Council of Europe, of January 28, on public access to environmental information and 2004/35/EC, of the European Parliament and Council of Europe, of April 21, on environmental liability with relation to prevention and reparation of environmental damages. In section 2.1.1, reference has been made to these rules and the legal provisions they implement in the Spanish legal code.

Last, reference is to be made to Law 30/2007, of October 30, on public sector contracts. One of the purposes of the Law is to increase transparency in an area of administration activity; public contracting, which can generate situations of corruption and malfeasance of public funds.

2.2.2. Catalonia

The Statute of Autonomy of Catalonia (SAC), in the section devoted to the administration of the Generalitat (Autonomous Catalan Government), establishes in Article 71.4: "The administration of the Generalitat, in keeping with the principle of transparency, must publish the information necessary for citizens to evaluate its management."

Law 26/2010, of August 3, on the legal system of the public administrations of Catalonia, ratified in the development of the competencies that Article 159 attributes to the Generalitat in matters regarding the legal system and procedure of public Catalan administrations, regulates in Articles 26 and 27 the right of access to the administrative case files, archives and records and, in essence, has not made for any variation with regard to the regulation contained in Article 37 of the Spanish Law 30/1992, of November 26.

In this regard, it is worth mentioning that, despite the time that has transpired between one and the other, Law 26/2010, of August 3, does not include a broad and contemporary conception of the right of access to information, in step with the configuration of this right in other countries, nor does it resolve the aspects specifically criticized by the doctrine as regards Article 37 of Law 30/1992, of November

26. It must be noted, however, that this is a rule that regulates different areas of administrative activity, and its object is not to regulate, specifically or comprehensively, the right of access to public information.

Thus, it can be concluded that the right of access to information continues to be handled from a strictly procedural standpoint: access to administrative case files, and not any case files, but only those finalized by the date of the application, or those in which the person applying for access is a stakeholder. The Law, therefore, does not resolve the need to regulate the right of access and informative transparency in a comprehensive manner. Therefore, it must be understood that this comprehensive resolution adapted to the standards approved by other countries and taken up in the Council of Europe Convention of June 18, 2009 must await approval of the draft bill now being prepared by the joint parliamentary committee, which has been referred to in the introduction to this report.

Law 26/2010 does not modify the maximum period for notification of resolution in administrative procedures, which in the general system for administrative procedures is three months. This term, which may be suitable for the general administrative procedures, is clearly excessive, given the expediency required for the right of access to information to be effective. This notwithstanding, it is significant that the Law establishes a regulatory development process to establish the terms and conditions in order for the right of access to be effective.

On a positive note, it can be stated that the Law imposes on the administrations the obligation to affirmatively publish information on the administration itself, the services it provides, administrative procedures, calls for tenders, personnel and subsidies, and mechanisms to appeal administrative decisions.

Mention is deserved by Law 10/2001, of July 13, on archives and documents, which recognizes the right of access to documents held by the Administration with a much broader outlook. As opposed to the rules on the legal system and administrative procedure (Laws 30/1992 and 26/2010), this rule acknowledges the right of access by anyone; it is not a requisite that the documents applied for form part of a case file, and the fact that a document is not present in an

archive does not exclude it from public consultation. The concept of public document established in Article 6 is much more wide-ranging than in the aforementioned laws – though it is also linked to the requisite of a finalized administrative procedure– and includes private persons and organizations that perform public duties, in relation to these duties.

Law 10/2001 of July 13, also stipulates the possibility of excluding from consultation certain documents, which is set aside once 30 years have passed since the production of the document (50 years if it is a document with information relative to a person's privacy, or 25 years after their death). Nonetheless, it is worth noting that this law states that partial access must be allowed to documents that contain information that must be kept reserved, if this preservation is guaranteed in consultation.

The term in which public document access applications are to be resolved is two months and the silence-signifies-refusal principle applies. Although this stands for an improvement over the general administrative procedure term, it must now be considered excessive as a general term in which to resolve an application for access. Generally speaking, the process of deciding to allow or refuse access hardly justifies such a long term. On another note, it must be remembered that, as already indicated, the Council of Europe Convention, of June 18, 2009, though it does not set a maximum term, requires an expedient decision to be made, either as soon as possible or within reasonable time limits. Compared legislation also establishes shorter terms to resolve access applications.

Law 10/2001, of July 13, also regulates the duties of the National Documentary Access, Evaluation and Selection Committee, which must, among other tasks, set criteria on the application of the regulations that govern access to public documents and publish reports on the claims of legal and private persons and organizations that believe that their right of access to documents has not been upheld. Decree 13/2008 of January 22, on the access, evaluation and selection of documents, regulates a procedure for persons who believe their rights of access to be infringed, and any organization competent to decide on document access claims to be able to request a –non-binding– report from the National Documentary Access, Evaluation and Selection Committee.

As concerns the Catalan law on archives and documents, it should be stated that, though not a rule specifically created to regulate the right of access to public information, it has much more advanced determinations. It may be that its main shortcoming, from the standpoint of access to information, is the fact that it is not a general, comprehensive regulation of this right (its scope also covers documentary management and preservation) and the very limited use made with regard to the exercise of this right. Furthermore, the Catalan Ombudsman believes that it constitutes, in some of its determinations, a valuable precedent, with a regulation of the right of access and administrative transparency much closer to the standards of our peers than can be found in the judicial rules of the basic and Catalan administrations. It is, therefore, a reference to be borne in mind when designing a specific and comprehensive regulation of the right of access.

Law 29/2010, of August 3, on the use of electronic media in Catalonia's public sector, develops in this autonomous region the right to interact with public administrations using electronic media, in the framework of the basic regulations established in state Law 11/2007, of June 22, on citizens' electronic access to public services.

It must also be highlighted that this law establishes the obligation for organizations that make up Catalonia's public sector to disclose, through their websites, information on every public body, the services they provide, the procedures and rules applicable to their activity, and any other information of general interest for citizens. Further, the information must be of high quality and kept updated. Article 10 stipulates local councils' obligation to publish the minutes from plenary sessions on their website. This law also recognizes the rights of citizens to communicate electronically with Catalan public administrations and access information on procedures in which they are stakeholders (Art. 13).

Article 43.e of the Consolidated Text of the Municipal and Local Government of Catalonia Law acknowledges the rights of local residents to receive information on municipal affairs, after filing a reasoned request, and Article 164 establishes a unique system for access to municipal information by town or city councilors.

In terms of the provisions found in sectorial legislation, mention is deserved, among others, by rules that regulate the right of access to information as well as administrations' obligation to conduct a policy of active disclosure of public information that is of interest to citizens, such as the Consolidated Text of the Town Planning Law, approved by Legislative Decree 1/2005, of July 26, and Law 3/2007, of July 4, on public works, or Law 12/2007, of October 11, on social services.

Though it does not form part of the Catalan regulatory corpus, in July 2005 the document *Report on Good Governance and Administrative Transparency* was published. On December 21, 2004, the government of the Generalitat created a task force devoted to matters of good governance and administrative transparency,

from which this report was commissioned. The task force was led by Mr. Anton Cañellas i Balcells, who had held the office of Catalan Ombudsman until that year.

The *Report on Good Governance* defined transparency and good governance as “the set of measures that an advanced society uses to facilitate and make effective accountability, through the evaluation of the work of institutions, processes and practices that determine how power is exercised, how citizens participate in public decision-making and how these decisions are made in accordance with the general interest. The *Report on Good Governance* discusses principles and proposals that must guide the actions of public administrations in the different realms of Catalan government.

3. THE RIGHT OF ACCESS TO PUBLIC INFORMATION AND INTERVENTIONS BY THE CATALAN OMBUDSMAN

3.1. Examples of the complaints received by the Catalan Ombudsman regarding the right of access to information

The Catalan Ombudsman, by virtue of this office's duty to defend the rights of persons with respect to public administration actions, directly witnesses the barriers and difficulties that exist to suitably, and fully, access public information, and consequently, provide content to the fundamental right to participation in public affairs, by persons on an individual level or in organizations, as well as by elected officials in their supervisory role over the activities of government bodies. This is a shortcoming that affects all levels of the public administration, regardless of the political party in power at any given time.

A significant part of the Catalan Ombudsman's activities, which has an impact across areas of the institution's interventions, has to do with the lack of response to citizens' applications and claims addressed to public administrations. This lack of response may have different manifestations, ranging from silence, the total lack of response, to partial or incomplete responses, or ungrounded or insufficiently grounded responses.

This range of irregular situations also occurs when what the applicant is seeking is, specifically, access to given information in an administration's power, and they address the Catalan Ombudsman because they are not attaining it.

In these cases, the Catalan Ombudsman must only judge if the alleged grounds are in accordance with the terms of the regulations, if the Administration has asked the applicant for obligations or conditions that are without legal coverage, or has extensively interpreted the law in a manner not in keeping with its spirit. The Catalan Ombudsman has handed down decisions on a possible abusive use of

the right of access when the administration has interpreted it thusly.

The most frequent sort of case arises when the Administration refuses access to information because the documents requested contain personal information. It cannot be denied that the protection of privacy must act as a limit to disclosure and access to public information. This notwithstanding, this limit must not be automatically applied only because identified persons appear in the documents.

This report features a section specifically devoted to this matter, but it may now be said that the Catalan Ombudsman has stated that the Administration must facilitate consultation of public documentation. In light of this consideration, if a consultation affects privacy and is not legal, before refusing it, the Administration must determine whether partial access or anonymous access, using the procedure of dissociating data, or anonymization, would make it possible to satisfy the access application without violating the right to personal information protection.

In some cases, the Catalan Ombudsman has found that a violation of the right to personal information protection could not be adduced to refuse access, as there was no real affectation of privacy, and therefore it was necessary to facilitate access to all of the requested information.

The Catalan Ombudsman has also observed that there are some citizens who request large amounts of information from the Administration, or who demand information that must be especially prepared to meet the request, or who very frequently request information, overloading the administrative services especially in small municipalities or public bodies with little staffing.

These information requests generate a large workload for the organization receiving them, which is probably not proportional to the purposes to be achieved (although this is not for the public administration to decide). In any event, they have a negative impact on the effectiveness and efficiency of public administrations' operation.

An excessive exercise of the right for access to information, or applications that are clearly unreasonable could form grounds for access refusal. Still and all, in these cases, the Catalan Ombudsman has reminded users and administration that the burden of proof of a situation of abuse that hinders the administration's activity should be borne by the administration making the claim, as the courts have ruled.

Special attention should be paid to the terms of Article 37.7, of Law 30/1992, of November 26, on the legal system for public administrations and common administrative procedure, which establish that the access to administrative archives and records can not affect the effectiveness of public administrations, although this limitation on access to information must necessarily be interpreted in a restrictive manner, so as to not ignore information applications that do not accurately indicate what they wish to consult.

From the same perspective, the Catalan Ombudsman has sought to highlight the importance of the administrative archives and records being correctly organized and indexed, so as to facilitate consultation and localization of the information to be obtained in each case, as well as the role that could be played by new technologies in facilitating the organization and consultation of the archives and records. Efficient organization of administrative documents and archives facilitates the task of active information disclosure, as well as the research by citizens wishing to access them.

In the same regard, the Council of Europe Convention on the access to public documents establishes that party states must apply the necessary measures to, among other requirements, manage their documents efficiently so that they are easily accessible, and apply clear rules on the preservation and destruction of their documents (Art. 9, letters d. and c.).

The access to public information from the standpoint of the right to political participation by elected officials has also been evaluated by the Catalan Ombudsman, who has given an opinion on the range of factors that affect this right in order to fulfill the duties inherent to their offices.

The task of democratic supervision attributed to elected officials implies that their right of access to public information have, in this case, specific regulations, with a level of protection that is higher than for citizens in general.

On another note, the exceptions are outlined more restrictively, and must also be interpreted along these lines. Thus, when the municipal government body has denied information requested by councilors, on the grounds of the protection of privacy, the Catalan Ombudsman has asked that this exception be tempered with the requirement of councilors' reservation obligation.

Thus, in the 2006 *Annual Report to Parliament*, the Catalan Ombudsman stated that when a local elected official applies for access to any given documentation, although it can be refused if it violates the constitutional right to honor, personal or family privacy or personal image, the right to privacy must only prevail in cases in which access to data that affect the privacy of a third party are clearly unrelated to the political supervision and monitoring duties. Even in cases in which the right to privacy must prevail, the proportionality principle dictates that there be a provision of at least partial communication of the documents, once the aspects affected by this right are cleared.

These have been the main tenets developed by the Catalan Ombudsman regarding the right of access to information (in a succinctly summarized overview, as a complete compilation is not the object of this report). The common denominator of these opinions, and the best practice recommended by the Catalan Ombudsman, is that the administration can not demand justification of the purpose for information consultation, or allege reasons of political expediency to refuse access. Further, there must be restrictive interpretation of the legally-established grounds for denial.

3.2. The Code of Best Administrative Practices and the right of access to information

Based on the office's experience and role supervising Catalan public administrations, and as a watchdog of maladministration, the Catalan Ombudsman has deemed it opportune to develop and present, for the consideration of all Catalan public administrations, a code of best administrative practices, approved by a ruling of September 2, 2009.

This Code, inspired in the Code of Good Administrative Behavior of the European Ombudsman approved by the European Parliament in 2001, aims to set certain basic principles guiding the content that must configure the right to good administration, and is based on the recognition of the right to good administration taken up in Article 30 of the Statute of Autonomy of Catalonia and the duty to monitor administrations' guarantee of the right to good administration that Law 24/2009, of December 23, attributes to the Catalan Ombudsman.

In the code, the principle of legality is the keystone which sustains all the other seventeen principles, and it is present in all of their developments. Articulation of the seventeen principles is necessarily generic in nature, and is completed with a compilation of best practices, derived from the decisions which, over the years, the Catalan Ombudsman has sent to administrations to guarantee good administration. It is a compilation and a selection of practices derived from specific cases, but formulated with a general character to the degree in which they are applicable in this way.

One of the principles taken up in this code is that relative to access to information, publicity and transparency. The Code includes a number of recommendations that the Catalan Ombudsman has made over time, and that are believed suitable to help configure the right to good administration in this specific realm. Following are some of the headings of best practices taken up in the Code regarding access to information and transparency.

a) Best practices on the right to access public documentation

In the right of access to information, it has been stated that there must be regulation of the conditions of exercise and limits, and that these limits should be interpreted in a restrictive manner.

It is worth underscoring that the Administration can not demand a justification of the purpose for the application for information, and cannot allege reasons of political expediency to refuse access.

Likewise, the Code recommends that when the documents to be consulted affect the privacy of third parties, an evaluation must be performed on whether partial access to the documents, or the dissociation of the identification data, make it possible to satisfy the request without violating the right to personal data protection.

b) Best information practices related with processing an administrative case file

When it comes to the documentation contained in an administrative case file, aside from applying the provisions of Law 30/1992, of November 26, emphasis must be placed on the need to coordinate the administrations and services intervening in a single procedure to guarantee access to the complete information.

In the realm of administrative fines/disciplinary procedures, the Catalan Ombudsman has sought recognition of a specific legal status for the claimant, distinct from that of stakeholder, and as a balance to their position as collaborators with the administration, as they inform it of events that could presumably constitute legal infringements. In any event, the claimant who is not a legitimate stakeholder in the procedure must be informed of the actions derived from their complaint and its outcome.

c) Best practices in the rendering of information services

The information on resources and services offered by the administration to citizens, and on the requisites to use them must be easily accessible by means of several channels.

d) Best practices on publicity and transparency

From the standpoint of transparency as a means of active disclosure of public information, the Catalan Ombudsman has issued opinions stating that the memoranda and instructions with any impact on citizens must be made public, and even if they do not have the status of legal rules, disseminate the criteria of interpretation of the rules approved by the administration.

Publication of employment calls for personnel and results of recruitment processes must also be guaranteed.

4. SCOPE AND CONTENT OF THE RIGHT OF ACCESS TO PUBLIC INFORMATION: CATALAN OMBUDSMAN'S CONSIDERATIONS

4.1. The need for a new regulation

Previously, criticism of the basic regulation of the right of access to information in Spain has been outlined. The most questioned element is that this regulation is clearly insufficient, with a restrictive view of the right of access, distant from the standards of comparative legislation.

The basic regulation of the right only refers to the information contained in administrative case files, and ignores all of the information in the power of the administration that does not form part of a given administrative case file.

The importance given to the condition of stakeholder in the procedure and the need to justify it to obtain information is a consequence of this procedural approach. Another consequence is the fact that the basic regulations determine the requisites to access information that citizens demand, but does not refer to the initiative of the administration to disclose the information that it possesses and that may be useful for people and companies in keeping with the modern and democratic conception of the right of access to information.

Along those lines, the regulations of Article 37 of Law 30/1992, of November 26, are based on a conception in which access to information is only a reaction to a citizen's demand, to be contrasted against –real or alleged– public interest in preserving the secrecy of the information, not a true right of citizens, or an expression of the principle of transparency which must govern the actions of public administrations. This double-faceted content of the right of access–individual right to obtain information of personal interest and manifestation of the principle of transparency, as an instrument of democratic control– is not present in the basic regulations of Law 30/1992.

In the 2004 *Report to the Parliament of Catalonia*, it was stated that “we believe it necessary to overcome the logic of the individualized

request for information and replace it with the administrations' prior willingness to disseminate administrative information, and make its activity more public and transparent, through these new technologies”. In this regard, it should be noted that for some time now public administrations have been conducting a policy of affirmatively publishing public information of citizen interest, mainly by electronic media.

The expansion of the use of information and communication technologies facilitates, without a doubt, this task of proactive disclosure for public information of citizen interest, and provides tools for research, selection, and dissemination of large amounts of information at a relatively low cost.

This regulatory shortcoming was only partially corrected by the law implementing the directive on the reuse of public information and the Spanish and Catalan laws that regulate the relationships between citizens and administrations by electronic channels, which introduce for the first time the obligation of administrations to disclose quality information on the services they provide.

Furthermore, to the degree in which information disclosure is, without a doubt, a requisite for the full effectiveness of the transparency principle and accountability in public affairs, and to favor informed participation in public decision-making processes, the Catalan Ombudsman considers that a law that regulates the right of access to public information must also refer to the obligation to disclose information of public interest. Moreover, it should be remembered that intensive informative disclosure would also reduce the need for specific access applications.

One example of this is the provision of the FOIA-GB, which obliges all public organizations to have information disclosure mechanisms, and the role that an independent authority in information access could have as a facilitator

of criteria and protocols for disclosure of public information (this was discussed by the representative of the Information Commissioner of that country at the May 2010 seminar).

In addition to the foregoing shortcomings, there is the one discussed in paragraph 2.2.1, to wit, the absence of a specific procedure to obtain public information within a reasonable response time, and the absence of mechanisms to defend the exercise of this right, such as a specific appeals system and the creation of an independent body for protection of the right to access in terms similar to those now existing for the protection of personal data.

What is more, the regulations of exceptions to the right of access have been established as a simple list, without setting any application criteria. This gap is especially significant in the case of the protection of privacy, which generates many of the access refusals and is often applied abusively, based on an absolute configuration of the right to privacy, as an instrument to keep from providing public information that should be accessible. In this regard, the need to establish criteria to harmonize application of both rights is especially evident.

With regard to this issue, especially important is the use, in comparative law, of mechanisms such as the harm test and overriding public interest in disclosure, and the proportionality principle and the need to weight, case-by-case, both rights to determine which must prevail and with what scope. These matters are specifically discussed in sections 4.2.5 and 4.2.6 of this report.

Aside from the basic regulations governing the legal system for public administrations, last of all, discussion must center on regulatory dispersion as an element that impedes the exercise of the right of access to information. Aside from sectorial rules that regulate access in specific areas of administrative activity, there are, as was stated in section 2.2, other rules that regulate specific aspects related with the right to access.

In light of all these shortcomings, it can be concluded that the right to access to public information must be regulated with a unique law, in such a way that all aspects of the right are integrated, overcoming the gaps identified and the dispersion of current legislation.

The option of a unique law that comprehensively regulates the right of access to public information was, on another note, the model followed by the Council of Europe Convention, and by the countries that have sought to strengthen access to information in the power of public administrations, as well as the option chosen to regulate access to information possessed by institutions of the European Union, as previously discussed. Finally, it also seems to be the option chosen by Catalan lawmakers, as at the time this report is written, a joint committee is working in the Parliament of Catalonia to develop a proposal for such a unique law.

As proof of this, several speakers at the Conference on Access to Public Information, held in May 2010, agreed in qualifying current laws as insufficient and obsolete, and expressed their desire for regulations adapted to a modern conception of what transparency must mean in the public administration and its governing actions, comparable to the model proposed by the Council of Europe Convention. It is significant to note that Spain is one of the few member states of the European Union that does not yet have a specific law to regulate access to information possessed by public administrations.

Joining their plea for new regulations were organizations of news and communication media professionals, who see their efforts to obtain public information that is objective, true and current often come up against the lack of legal instruments to achieve access, and the reluctance to actively disclose information of public interest, still deeply rooted in administrative practice. In the same manner, non-governmental organizations committed to transparency and evaluation of public policies also call for regulatory and cultural changes in access to information.

It is within this context that the next section shall offer an assessment of the elements that the new regulation on the right of access to public information should feature, in the Catalan Ombudsman's opinion.

4.2. Configuration of the right of access to information: specific items to be regulated

This section does not intend to make an exhaustive list of the contents of the right of access to information –a decision which, furthermore, is competency of lawmakers– but simply to outline, with a view to achieving full recognition of this right and allowing effective exercise of it, certain aspects understood to form part of its most essential configuration.

4.2.1. Legal character of the right to access public information as a preliminary matter

An initial matter that must be discussed is whether the right of access to public information is to be configured as a fundamental right, with the specific guarantee and regulation instruments that our legal system attaches to these rights.

Article 105 of the SC, which recognizes citizens' right of access to the archives and records of the administration, is found within Title IV, devoted to government and administration; in other words far from the section on fundamental rights. The Statute of Autonomy of Catalunya regulates it as an obligation of the Autonomous Government of Catalunya in the section devoted to it, as if it were just another organizational matter and, not the recognition of a right of the people.

Therefore, although it is a right with constitutional and statutory coverage, the fact that it does not form part of the rights that the EC lists as fundamental, implies that it can only be considered as a fundamental right (this has been the theory of part of the doctrine) if it is understood that its configuration is derived from direct association with some of the rights that do have that condition: fundamentally, the right to free movement and exchange of true information (Art. 20.1. d of the EC) and the right to participation in public affairs (Art. 23 of the EC).

Up to now, the position of the courts has been contrary to recognizing the right of access to public information as having the character of fundamental, and has ruled that it is not associated with the right to free movement and exchange of true information of Article 20.1 d of the EC, nor does it form part of them. To illustrate this posture, two rulings from

the Supreme Court of March 30, 1999 and May 19, 2003 are helpful.

On another note, there are many rulings that link the right of access to information of Article 105 of the EC to the correct exercise of the fundamental right to participation in public affairs of Article 23.1, and the importance of the right in Article 20.1.d as a guarantee of the existence of free public opinion, intrinsically linked to the political pluralism inherent to a democratic state, but without granting the right of access to public information the status of fundamental right. Examples can be found in Ruling 161/1988, of September 20, of the Constitutional Court, and the Interlocutory Order of the same court of November 15, 2006, and the rulings of the Supreme Court of November 14, 2000 and May 19, 2003.

Although the case law is unanimous in interpreting that the right of access to information held by administrations does not form part of, and is not derived from, the fundamental rights of Article 20.1.d of the SC, a part, although not a majority, of the doctrine has believed it necessary to give this right the status of fundamental.

This view is essentially based on the belief that there exists a direct, indissociable link between access to public information and the fundamental right to participation in public affairs, to the degree in which it is not possible to exercise the right recognized in Article 23.1 of the SC without having access to sufficient, high-quality information, by citizens who may exercise their right to participate directly as well as by their political representatives. In this way, by considering the right of access to information as an instrument necessary to make the fundamental right to participation a reality, this direct connection would bring the nature and rank of the right of access closer to that of a fundamental right, despite not being specifically configured as such by the drafters of the Constitution.

The most widespread belief, coinciding with the courts, holds that it is not a fundamental right, although it is linked to the fundamental rights of political participation and the freedom of information.

In the Opening Statement of the Draft Bill on Transparency and Access to Public Information, presented by the previous Spanish government on July 29, 2011, this

association is expressed in the following terms: “The principle of publicity and the right of access to public information are called to strengthen democratic principles, while opening and broadening the channels of communication between citizens and those charged with the administration of public affairs. On another note, if transparency and the right of access provide substance to citizens’ ‘right to know’, it is also evident that their effectiveness complements and reinforces the fundamental right to freely receive information found in article 20.1.d of the SC, a right which underpins the very possibility of existence of public opinion, an indissociable element of the political pluralism inherent to the Democratic state.”

In any event, beyond the specific debate on the character of this right, the Catalan Ombudsman believes that the legal regulation of the right of access must provide the instruments necessary to guarantee its effective exercise with full guarantees, and to promote a culture of informative transparency, accountability and informed participation, as essential democratic values. The fact that in the Spanish and Catalan legal codes the right of access to public information is not considered as a fundamental right cannot justify restrictive regulations with as few guarantees as the current legislation, nor that it necessarily have to be subjugated if confronted with other rights, whether fundamental or not (specific discussion on this matter is featured in section 4.2.5).

Furthermore, the fact that it is a legally configured right, so that the constitutional and statutory content leaves a broad decision-making capacity for lawmakers to define the limits, means that they must be especially careful when setting the scope and instruments for its exercise to not unnecessarily limit its effectiveness. Therefore, although the law that regulates the right of access may add additional limitations to those established in Article 105 of the SC, these limitations must have an objective justification and be proportional to the intended purpose.

A final reminder must be made on the experience of other countries, treaties and international conventions, and the legal system of the European Union, as they provide guidance sufficient to give the right of access to information proper content, with a configuration that is modern and adapted to the requirements of democratic society, far from the restrictive, partial and scattered

regulations now in force in our legal system on this subject matter.

4.2.2. Active and passive legitimization

4.2.2.1. Active legitimization

Article 105 of the EC attributes the right of access to citizens, a concept that could lead to exclusion of persons who do not hold all the rights of political participation, due to the association of the right of access with the right regulated in Article 23 of the SC.

Nevertheless, the Catalan Ombudsman believes that despite the literal wording of Article 105, the right of access to public information must be recognized with the maximum possible breadth. This means that anyone, regardless of their condition, must be able to apply for access to public information. Therefore, it includes natural as well as corporate persons, domestic and foreign. It should not be necessary to accredit specific interest with regard to the information requested, without prejudice to this factor being relevant when it is necessary to weight the interest in access with relation to other rights or interests that could be affected (section 4.2.6 of this report).

This way, in a new regulation of the right of access, a basic principle must be that the general rule be one of accessibility to information, and that exclusions be regulated by law, grounded on objective, not subjective reasons, in a way that the person applying for access can not be required to accredit personal interest justifying their request, but rather, what must be justified is the refusal, being based on objective, legally outlined causes.

Further, this has clearly been the option taken by the most modern laws on access to public information (cases of the United Kingdom and Slovenia, as indicated by representatives of the respective commissioners at the May 2010 Conference) and specifically, the Council of Europe Convention on access to Official Documents of June 18, 2009 (Art. 2.1.) which has already been identified as a key reference when undertaking an ex novo regulation of this right.

A matter to be specifically appraised is whether a minor or disabled person can directly request access to information, or if it must be done through their legal guardian or custody holder.

Theoretically, in the absence of other specific regulations, the terms of Article 30.e of Law 30/1992, of November 26, would apply. It recognizes minors' right to act before public administrations in the terms dictated by civil law whenever "their actions are allowed by the administrative legal system". Thus, it can be inferred that the specific rule regulating the right to access could establish the cases in which a minor could hold the right of access and exercise it directly.

It must be said that the Council of Europe convention on access to Official Documents and many of the rules that regulate this right in other countries recognize the right to access in the same breadth and without restrictions. For that reason the Ombudsman believes that recognition of minors' right to access should be at least equivalent to that established to authorize treatment of personal data in Article 13.1 of the regulations that develop Organic Law 15/1999, of December 13, on personal data protection (over 14 years of age, unless the law requires assistance of guardians or holders of custody).

4.2.2.2. Passive legitimization

As for the bodies that hold public information, the Catalan Ombudsman also believes that an attempt must be made to achieve the maximum scope, in order for it to include all public organizations, even public companies with corporate structures.

a) The justice administration, and constitutional and statutory bodies

The Catalan Ombudsman believes that a future law on the access to information must include in its scope of application the justice administration, without prejudice to establishing as an exception any impact on privacy and, specifically, any information whose disclosure could affect the conduct of judicial proceedings and investigations or the proper administration of justice. Likewise, this exception should be subject to the same limitations and the same restrictive application criteria indicated in section 4.2.5 of this report.

As for the public information of all other constitutional and statutory bodies, even those making up the legislative branch, the Catalan Ombudsman believes that, in light of the terms of the Council of Europe convention, they should be included within the scope of the law, at least everything relative to the development of administrative functions, although it remains

up to lawmakers whether to also include, within access, information relative to the rest of their activities. Once again, it would be necessary to observe in the same terms applied to the rest of public authorities, a system of exceptions to the rights of access.

The Draft Bill on Transparency and Citizen Access to Public Information of the Ministry of the Presidency of 2009 subjects the procedure of information access in the realm of the legislative and judiciary branches, and other constitutional bodies to their own internal organization and procedural rules, though it also proposes that certain provisions of the Draft Bill must be common provisions. The private bill developed by the Popular Party in the Spanish Parliament excludes these bodies from the scope of application of the law, and also refers back to their rules of organization and operation.

On another note, the most recent bill presented by the previous administration on July 29, 2011 states that the law is applicable to the public information of the Spanish Parliament, the Senate, the Constitutional Court and the General Council of the Judiciary, as well as the Council of State, the Spanish Ombudsman, the Court of Auditors and analogous autonomous institutions, with regard to their activities that are subject to administrative law.

b) Contractors and private companies providing services of general interest

In the case of private companies contracted by the administration, and those that provide services considered essential or of general interest, they should also be subject to the obligations of disclosure and access established by the rule, though obviously in a manner restricted exclusively to the information relative to the exercise of their public duties or services, or in that which refers to the provision of the essential service, not all of the information they possess.

It must be borne in mind that in such cases, determining what must be accessible among the information that the subject holds could be complex. Therefore, an effort would have to be devoted to delimiting the information in possession of private parties within the new regulations.

As stated in other ambits of the rights of persons before public administrations, what must be determinant in the application of the tuitive rules and mechanisms of public law is the exercise or provision of public service, not the way in which the service is provided. In

this regard, a concept of citizens' rights before public activity focused on the subjective aspects runs the risk of progressively voiding itself of content as a result of the growing presence of private subjects exercising or collaborating in the provision of public services, including certain essential services.

What should be relevant in the application of a regulatory code on the right of access is that the information refer to public activity, understood in the broadest sense, regardless of whether it is in possession of a public or private subject. And if any information of public relevance is not accessible, it must be for objective, grounded reasons, because there is an exception to access, not because of the body or person that holds this information.

This approach is concordant with the terms of the Council of Europe Convention, of June 18, 2009, which stipulates that natural or corporate persons, to the degree in which they carry out activities that involve public authority, are subject to the determinations of the Convention with regard to the public information they possess (Art. 1.2 a, section 3). It also includes the justice administration (Art. 1.2a, section 2) though it also includes terms for exclusions meant to protect the effective workings of the judiciary branch and equality of the parties in any proceedings (art. 3.1.i).

In the same vein, for private bodies exercising public duties or working with public funds, their inclusion is not a mandatory provision derived from accession to the Convention, but rather is left up to domestic lawmakers (Article 1.2b, section 3).

With regard to this, the Explanatory Report written by the Council of Europe states the drafters of the Convention recognized there was no common definition of these notions among party states regarding what could be understood as public function, to the effects of applicability of the right of access, with notable differences from one country to another, which made it difficult to include a concept in the Convention compatible with all of these concepts and the tradition of each judiciary system. This is why the inclusion of bodies or persons that exercise public duties, and the very notion of public duties or activities are decisions that the Convention refers to domestic lawmakers.

In comparative law, the definition of the subjects to whom the laws of access to public information are applicable is not uniform.

There are laws with notable exceptions (some of which, such as the FOIA-IRL, following the reform of 2003 which, along with the charging of fees for access, can only be considered as an expression of lawmakers' desire to restrict access to public information overall) and others with a remarkably broad scope, such as Slovenia, which specifically includes the justice administration and private government contractors.

The Draft Bill of the law on transparency and citizen access to public information prepared by the Ministry of the Presidency in 2009 recognized the right of access to public information "of all persons" with no need to justify the application (Art. 4 of the Draft Bill). This condition has been maintained in the latest draft bill presented by this ministry on July 29, 2011 and is also incorporated into the private bill prepared by Popular Party lawmakers in the Spanish Parliament.

As for the passive subject of the right to access public information, the draft bill chose—correctly, in the Catalan Ombudsman's view—to follow an objective criteria of delimitation, so that public information subject to the right of access is considered any in the power of bodies and subjects which, even if they do not have the condition of "public authority", "render public services or exercise administrative duties", but only when the information "has been generated or obtained in the exercise of their public activity". The private bill being prepared by the Popular Party in the Spanish Parliament includes the same terms.

Although the Catalan Ombudsman takes a positive view of this provision, in the delimitation of the scope of application of the right of access found in the draft bill, the Ombudsman finds lacking the inclusion of information held by private companies providing essential or general interest services, without prejudice to, in these cases, it being necessary to set specific limitations, as long as they are reasonable and justified, and are based on the general rule of free access to information related with a broad conception of public activity.

The draft bill presented on July 29, 2011 includes within its realm of application the public information held by natural and corporate persons, public or private, that provide public services or exercise administrative duties.

4.2.3. Concept of the public information that must be accessible

An assessment of the legislation in force on the right of access to public information has revealed that the basic laws are extremely restrictive because they link access only to the public information contained in an administrative case file, which also must be finalized, unless the applicant qualifies as a stakeholder in the proceedings.

In the foregoing, it was also stated that what must determine whether specific information is subject to the regulation by right of access is its link with public activity, in the broadest sense, beyond who has drafted or received it, and it being held by a public or private body. In this regard, the idea of transparency and democratic control over public activity requires this extensive notion.

Another aspect relative to the type of information that must be accessible, and that may generate debate, is whether to include in the right of access the information that refers to public actions and decisions that are in the process of development, and that must be expressly rewritten or prepared following an application of access.

Concerning this matter, it must be stated that although it seems logical to exclude from the right of access unfinished documents, drafts not yet in final document form, or the development of information or documents “on demand”, it is more debatable from a democratic transparency and accountability standpoint that preparatory reports and documents, the minutes of deliberation meetings and internal memoranda must be excluded due to the simple fact that they are support or preparatory documents; in other words, they are not in themselves manifestations of a decision made, or the exercise of public duty or activity, but rather documents of support or preparation for this exercise of duty or decision-making.

Within this concept, it must be noted that promoting a view on the right of access constrained to what could be called final documents makes for a restriction of the right of access that would not be justified or, at the least, not as a general restriction for all cases.

Once again, it must be remembered on this point that the limitations to access must be grounded, and should be justifiable for objective reasons of protection over other rights that could be damaged by disclosure. Therefore, when

knowledge of information that is not definitive, a report or preparatory memorandum could be of public interest from the standpoint of evaluating public activity, access to it should not be excluded simply due to its condition as a support, or provisional document, but rather, only when –just as in the case of definitive information– access could involve damage to other rights or interests and exclusion is necessary to protect them.

Based on this premise, attention must be redirected to what the Council of Europe Convention stated with regard to the limitations of access to public information:

- They must be expressly, accurately established by law.
- They must be necessary in a model of democratic society.
- They must be proportional to the purpose of protection intended with the exclusion.

This would not be the case of generalized, imprecise exclusions of the right of access to provisional or support documents, or access restrictions not based on the content of the information and the possible affectation of third-party rights or concrete areas of public activity that require confidentiality.

Pursuant to this approach, it is necessary to be critical of the provision in Article 2.3 of the two draft bills presented by the previous Ministry of the Presidency, which exclude from the scope of application all information of an auxiliary and support nature for the exercise of public activity that does not have official status and is not meant to form part of a case file, as well as the provision in the private bill presented by the Popular Party (Art. 4) when it states that all documents considered preparatory for activity by administrative bodies are excluded from the right of access.

That said, the federal German law on access to public information, of September 5, 2005, excludes notes and projects that do not form part of a case file from access. It also excludes information on decisions in the process of being approved, though in this case, in a nuanced manner: only to the extent in which premature disclosure could interfere in the decision-making process, and with the obligation to inform the applicant of the procedure’s conclusion, and therefore, the decision made (Section 4 of the Law, under the heading “Protection of the official decision-making process”).

The Slovenian Freedom of Information Act includes similar terms in its Article 6.1.9, which states as an access exception, "Information (...) in the process of being drawn up and is still subject of consultation by the body, and the disclosure of which would lead to misunderstanding of its contents".

In step with the aforementioned rules, the Catalan Ombudsman believes that although the exclusion of information to be published in the short term, or that would have to be expressly prepared for the applicant would be justified, in the event of support and preparatory information for administrative actions or decisions it would only be justified in cases in which disclosure could damage the public deliberation and decision-making process so that the information contained in preparatory documents may be of public interest, and its exclusion is only justified based on the damage that disclosure could generate, and not in a generalized way.

Finally, it must be said that a law that attempts to thoroughly regulate the right of access and transparency in public administration activity must also establish the obligation to disseminate information relevant to private citizens, companies and to the extent possible, list cases in which disclosure would be mandatory, without prejudice to the establishment for this matter of sectorial rules that regulate the area.

In keeping with this idea, the Council of Europe Convention on access to official documents states that public authorities must disclose public information for the purpose of promoting transparency and efficiency of administrations and facilitating citizens' informed participation in matters of general interest (Art. 10).

4.2.4. Procedure for access: term, silence, grounded refusal and appeals process

Continuing the effort to define the essential traits that should make up regulation of the right of access to public information, there follows a discussion on the need to regulate a specific procedure that sets a framework for the exercise of this right, and establish appeals and revision mechanisms on rulings for application refusals.

One of the shortcomings unanimously criticized in the current regulations is that they do not describe a specific procedure by which to resolve access applications with sufficient expediency so as to not devoid this right of content.

Thus, the general administrative procedure, applicable by default given the lack of a specific provision, and with a three-month term to resolve and notify of the decision, is markedly inadequate for the exercise of a right that clearly requires a faster response that rarely –in the vast majority of cases– presents a complexity that justifies the application of this term.

In the foregoing, it has been shown that a significant number of regulations in Spain's peer countries have set a maximum term of resolution of 15 calendar or 20 working days, and the Council of Europe Convention on the access to information calls for agile, expedient response.

In the first draft bill of the Ministry of the Presidency, this term is set in an intermediate position. It sets a term of 30 calendar days as a maximum to decide on the application, although with the peculiar trait that, in order for silence-implies-assent to apply, the applicant must reiterate the application within 10 days from the conclusion of the term in which the decision must be made, and the silence will have no effect until 30 additional days following confirmation of the application. The private bill of the Popular Party calls for a maximum term of 15 calendar days, and repeats the provisions on the positive effects of silence if the application is repeated.

Nonetheless, the draft bill presented by the Ministry of the Presidency in July 2011 calls for a maximum term of one month from the reception of the application by the body competent to decide, and silence implies refusal.

As for the implication of silence, if the general rule must be that of access, and refusal must be based on legally-established causes, it must be understood that silence can only signify assent. Confirming the application, in the terms of the aforementioned draft bill, is an unjustified burden for the citizen, especially considering that the possibility to have an additional term of 30 days is already given, at the initiative of the body that must provide the information, when the volume or complexity of the information make it impossible to comply with the general term.

In conclusion, in order for the right of access to information to be effective, a short period in which to decide on the applications must be set. In general, the Catalan Ombudsman thinks it would be suitable to set it at 15 days,

without prejudice to the possibility of expanding it by the same term, at the most, because of the volume or complexity of the information requested. The applicant must be notified of this optional extension within five days after filing the application, indicating the reasons justifying, with relation to a specific request, an extension of the regular term. The meaning of silence must be assent, with no need for additional or confirmatory actions.

The next section refers to the establishment of exceptions to the general rule of access and the criteria to apply them. It can be stated now that refusal decisions must be grounded, and supported by one of the exceptions to access established in the law, taken from a closed list.

Another aspect that the law must determine is if the access to information is to be in exchange for any compensation.

On this matter, as previously stated, it must be remembered that the Council of Europe Convention determines that access should not imply any cost for the person applying for it, with the option of passing on the costs of the services provided by the archives and museums, or for the copies of the document in the format they are delivered in.

The draft bill of the transparency and citizen access to public information law developed by the Ministry of the Presidency in 2009 calls for free access to information in situ, without prejudice to the specific legislation of archives, libraries and museums, although making photocopies and the conversion to formats other than the original can be provided in exchange for payment of an amount not to exceed their costs. This provision is maintained in the draft bill presented by the Ministry on July 29, 2011, though it no longer refers to free in situ access of the information.

The private bill prepared by the Popular Party committee in the Spanish Congress also calls for access to information being free of charge, although specific legislation will be applicable in the case of archives, libraries and museums. The draft bill also includes the possibility of charging fees per photocopy or format conversion.

The Catalan Ombudsman's position on this matter is that it is legitimate for the regulation of the right of access to establish the possibility to require the applicant to assume the cost generated by the making of photocopies of the

documents requested, although the fee must have the limit of strictly covering the cost generated by the making of copies, and in no case have a deterrent or restrictive effect on access.

When regulating an access to information procedure, there must also be established a system for review of the decisions denying access, without prejudice to the right to address courts of justice. Again in such case, it must be noted that the procedure of revision in the administrative channel must be reasonably agile to avoid unnecessary delays. From this standpoint, the process of revision in the administrative channel could be that generally established by Law 30/1992, though the possibility of shortening decision times must be examined.

As for the appeals channels, in the models of Spain's peer countries there has been a majority trend toward creating an independent authority with supervision over the right of access and revision of the decisions taken by administrations in this realm.

The Council of Europe Convention on Access to Public Information also establishes the obligation to regulate an agile review procedure, prior to access to the courts or other independent authority. The existence of an independent authority is configured as an instrument of additional protection of the right, which acts as a guarantee of impartial review of the application prior to judicial channels.

The models found in compared law are diverse, and range from the establishment of a specific authority in the field to the assignation of this duty to an existing body, which could be the Ombudsman.

For example, the cases of New Zealand and Peru, which have given supervision competencies for compliance with their Freedom of Information Acts to the Ombudsman. Austria, Finland, Romania and Sweden also enjoy an additional right to petition their Ombudsmen. In Ireland, the authority for information access is independent from the authority over data protection. That notwithstanding, as has already been mentioned, at this time the same person designated as Ombudsman has also been appointed information commissioner. This is an option expressly described in the FOIA-IRL. Nonetheless, they are two organically and functionally separate offices, and, contrary to the recommendations of the Ombudsman, the

decisions of the Information Commissioner are binding.

In the case of the United Kingdom, Slovenia or Germany, the decision has been made to group in the existing independent authority the supervisory duties over the right of access to information and data protection.

In favor of this second option, it is generally said that it allows the conflicts between right of access and data protection, which are the most common cause for access refusal, to be resolved by a single authority, regardless of who is making the claim (application for information or owner of data) in a manner that favors homogeneity of criteria and prevents citizens' confusion as could occur if they had to choose between two bodies when filing claims. Another advantage in addition to these is the lower cost that comes from concentrating the two roles in a single body.

A disadvantage, and an argument in favor of appointing two independent authorities, is the risk that situations of imbalance and prevalence of one right over another occur, especially when one of the two rights has legal or constitutional protection that is superior to the other and has a tradition of judicial protection or application of the protection legislation over an extended period of time. From this standpoint, it has been indicated that this risk is higher when one of the two rights has only recently been regulated, and has not yet been assumed in a consolidated fashion, among civil servants who are to apply it as well as the possible beneficiaries who can claim it.

In any event, it is an option to be freely adopted by the legislator, in which elements of opportunity and economic cost, not just technical matters, come into play.

In the realm of the Spanish administration, the option prepared by the Ministry of the Presidency in the first draft bill was to group the functions of data protection and information access in a single authority. To the contrary, in the draft bill presented in July 2011, transparency promotion and protection of the right of access to public information was grouped into a single collegiate committee ascribed to the Ministry of the Presidency. The private bill presented by the Popular Party group in the Spanish Parliament does not call for an independent authority with duties in the field of the right of access to public information, but also determines that

when access has been refused to protect the privacy of third parties and the applicant files an administrative appeal for review, the body to rule on the appeal must request a binding report from the Spanish Data Protection Agency.

In the case of Catalonia, at the time this report was written, it was not known whether plans called for creation of an information access authority and what the chosen option would be. In any case, it is worth noting that the decision made by Catalan legislators, in this organizational option, would have to be completely autonomous from that made by Spanish lawmakers.

4.2.5. Exceptions to the right of access Proportionality principle and effective damage in the application of exceptions

All laws governing access to public information include an indeterminate number of exceptions to access, with a view to protecting other public or private rights and interests, which could be damaged with the access to or disclosure of the information. As the rights do not have an absolute scope in any case, it is perfectly legitimate and desirable to establish limits to their exercise for cases of conflict with other rights or interests deserving of protection.

Nevertheless, it also bears mentioning that the cases of exclusion to the right of access to public information must be truly exceptional, so that the general rule is that of allowing access to information and refusal being grounded in the protection of other rights or interests affected by access.

Therefore, it must be understood that legal exceptions are to be interpreted restrictively—strict, in terms of the case of the European Court of Justice—and therefore, without any possibility for an indiscriminate or disproportionate application that reduces or devoids the right of access of its content.

Along this line of reasoning, it should be stated that the exceptions to access are only those established by law, without any extension, by analogy, to other non-regulated cases. It must also be added, as indicated under heading 4.2.2 and as stated in the explanatory memorandum of the Council of Europe Convention on Access to Official Documents, that the exceptions or limits to access must refer to the content of the document and nature of the information; in other words, they must have an objective base that justifies them and be proportionate to the

purpose of protecting other legitimate rights or interests.

It must be remembered that the explanatory memorandum of the Council of Europe Convention on access to official documents also states that respecting the spirit of the convention implies allowing the broadest possible access to public documentation, and not preventing access through an incorrect (extensive) application of the limitations that Article 3 makes it possible to establish.

The general principle of access to public information and the strict interpretation of exceptions has also led to the most advanced legislation in the protection of the right of access incorporating instruments to evaluate in each case if it is necessary to apply the exception and refuse access, or whether the right to access should prevail.

One of these instruments is the *harm test*: the administration that receives an application for access that may enter into conflict with a right or interest protected by an exception to access must weight the harm that access to the information could effectively cause. If no real, or only minor harm is found, access must be granted despite the exception.

In the same manner, the proportionality principle aims to modulate the application of exceptions, so that it is possible to have partial access to information, if this way the data used for the exception can be preserved without completely eliminating the right of access.

The application of the overriding public interest principle prevalent in information disclosure has special significance. This criterion means that the administration holding the information when one of the exceptions outlined in the law occurs it must be determined whether there is public interest in disclosure of the information that is of greater transcendence than public or private interest that the exception means to protect, so that, despite the affectation of this interest, access to the information must be allowed.

Certain legislations, such as that of Slovenia and the United Kingdom, distinguish between exceptions to access of absolute and relative natures, so that the application of the criterion of overriding public interest would only be viable in the latter case.

In its current version, Regulation 1047/2001, on the public's access to the documents of the European Parliament, Council and Commission, also takes up the distinction between absolute and relative exceptions, and the criterion of overriding public interest.

It should be noted that the Council of Europe Convention on access to official documents contains a list of access exceptions that the states party to the Convention can establish, but it also stipulates that the exception is not to be applied when there is a prevalent public interest in disclosing the information.

The Explanatory Memorandum to the Convention refers to the application of the principles of the harm test and the weighting of public interest in access to information to evaluate access exceptions.

On the articulation of these two principles, the Memorandum states that if access to the official document does not cause any harm to the interest protected by the exception, access is not to be limited. On the other hand, if access to the document could harm a right or interest protected with an exception, then it is necessary to determine if there is public interest in the disclosure of the public information that is greater than, or overriding, the interest protected by the exception, so that the harm that could be caused to this right or interest can not impede access to it.

The explanatory memorandum of the Council also indicates that this harm test and a balancing of interests must be applied in each individual case in which a possible exception to access occurs, in the terms in which internal legislation has established the limitations.

Along these lines, the Convention party states can establish their own requisites or criteria for the application of the harm test. These criteria can take the form of a presumption for or against information disclosure. For example, in the case of the exception on protection of personal data, the legal presumption can range from establishing that all personal information affects privacy and causes harm to this right, to establishing that only the information on sensitive personal data can be grounds for exception.

This memorandum also shows that the application of the harm test is directly linked with the time that has elapsed, in that, with regard to certain limitations, the passage of

time can imply that excluding of access to information no longer has meaning, or that the harm that disclosure could cause is lessened.

In the same way, the Memorandum makes it known that the party states to the Convention can set, by domestic legislation, absolute or unconditional legal exceptions for the most sensitive information, so that in such cases, it would be sufficient to find that the information affects any absolute exception to refuse the access application. It must be remembered that the restrictive or strict application of exceptions means that the administration must state the probability –or likelihood– of access generating effective harm to the good or interest that the absolute exception aims to protect. In no case should the application be automatic simply because the access application affects a protected area with an absolute exception.

Furthermore, the Memorandum makes it clear that absolute legal exceptions, in the degree that they totally exclude access, must be the minimum possible. Speaking on this at the May 2010 conference, the Slovenian Information Commissioner said that an element to determine if a law for access to public information was in accordance with the democratic parameters of transparency and accountability was the number of absolute exceptions established in the information access law.

In any event, Article 3.3 of the Convention calls for time limits to access exceptions, so that applications may never be refused if the legally-established time limits have been surpassed.

It goes without saying that these criteria for the application of access exceptions established in the Council of Europe convention on access to official information and legislation of many countries similar to Spain have yet to be incorporated into Spanish legislation. In section 2.2 it was stated that a list of exceptions to access that was too generic and vague, together with the lack of instruments to evaluate the cases of conflict between access and other rights or interests, was one of the shortcomings affecting the Spanish and Catalan legislation in force, and that could turn the exception into the rule, especially in the event of conflicts between access and personal data protection.

Therefore, a new regulation of the right of access is also necessary from this standpoint, and should include application of these instruments in terms analogous to

international standards, and pursuant to the terms of the Council of Europe Convention on Access to Public Information taken up in this section in summary form.

The draft bill of the Spanish law on transparency and citizen access to public information disseminated by the Ministry of the Presidency in 2010 established a closed list of exceptions to the right of access for cases in which the disclosure of the information could harm the interests and rights protected with these exceptions. It also stipulated the application of the principles of proportionality and overriding public interest in disclosure when assessing limitations that was in accordance, at least partially, with the parameters previously outlined. The specific cases listed as exceptions also corresponded generically, in some cases verbatim, with those taken up in the Council of Europe Convention on Access to Public Information. The draft bill presented in July 2011 distinguishes between absolute exceptions, including certain vague descriptions, such as the guarantee of constitutional rights and relative exceptions, subject to harm and overriding public interest tests, and the possibility of partial access.

As for the private bill presented by the Popular Party in the Spanish Parliament, it also includes a list of exceptions to be applied with a view to ensure the protection intended when establishing them, without prejudice to a higher interest justifying disclosure of the information.

4.2.6. Conflict of rights and weighting: access and privacy¹

The protection of personal information, or in other words, the protection of personal privacy, is the most commonly brandished exemption to refuse access to information. It is so in our judiciary system, in which the protection of the right to informative self-supervision has a specific and complete regulation, as opposed to the right of access to information, but it is also so in other models that do have protective regulations over the right of access more in accordance with the foregoing standards and, therefore, in which legal protection of both rights is more balanced.

The two personal rights appear to work in opposite directions: the right of access aims to guarantee the disclosure of information in the administrations' power, and the right of informative self-supervision aims to give

individuals instruments to control the processing, use and communication of their personal data by third parties (not only public administrations). Despite this, it must be clearly stated that the right of access to public information and the right to privacy are not two irreconcilable rights, but rather should also be seen as two complementary ones meant to protect personal freedoms before public powers. Both are related with the obligation of public authorities to be held accountable.

That said, despite this antagonism being only apparent, it is true that situations of conflict do arise in practice, and mechanisms to resolve them must be articulated, as it is not admissible to anticipate a prevalence of one right over the other, but rather a case-by-case evaluation should be made, considering the weighting instruments offered by the legal models of our peer countries indicated hereafter. This weighting must be conducted applying the proportionality principle, which guarantees balance between the two rights.

There are models, such as ours, in which the rights of access and data protection are regulated by different laws. This circumstance can act as a factor of added complexity to weight the two rights in cases of conflict. In this regard, data protection laws refer to a broad concept of personal data which, if applied directly as an exemption for information applications would determine a very restrictive interpretation of the right of access. Incomplete and vague regulations on the right of access such as those in force in Spain and Catalonia definitely lead to the public bodies that receive an access application conducting an extensive interpretation of the personal information exemption as a limit to access.

Therefore, any future law of access to public information should delimit the cases that could make for access exceptions to protect personal privacy. In the same turn, lawmakers would also have to clearly state which definition of personal data is to be used to determine whether the access exception is applicable. The FOIA-IRL excludes certain personal data which could constitute an exception to the right of access. For example, with a view to applying this

exclusion, it expressly excludes from the definition of personal information any relative to the activities of public servants, and the organizations providing public services.

To undertake comprehensive legislation adapted to international right to information standards, it is also important to determine the suitability of introducing provisions that facilitate the harmonization of the two laws, always from a perspective of facilitating the task of administrative bodies that must weight the two rights when faced with applications for access to information containing personal data. Likewise, consideration must be given to the formal rank required to introduce any modification that directly affects Organic Law 15/1999, of December 13, on personal data protection.

It bears consideration that a legitimate option for lawmakers is to establish that information on identifiable persons constitutes an exception to access, and refer to the data protection law to define what personal information is. This is the model approved by several countries of the Anglo-Saxon realm (Canada and the United Kingdom), among others. This does not imply that the exception is absolute in this case, but it does mean that, in this model, the effort of the body that must evaluate the access application to weight both rights and make a balanced and proportional application becomes especially determinant, before the lack of legal standards that help specify the scope of the exception, and based on a definition of personal data which in the legislation on privacy protection is necessarily extensive.

To facilitate the weighting task when the privacy exemption is articulated according to this model, in 2008, the Ministry of Justice of the United Kingdom set a number of parameters (they are included in the article by David Bansar mentioned at the beginning of this section) to determine if the access to public information containing personal data can be considered proportionate and appropriate.

Of them, especially significant are those referring to the application tests of harm and overriding public interest in disclosure, that have already identified as two parameters that

¹ Much of the content of this section is based on an article published by the World Bank Institute in 2011 by David Bansar, an expert in privacy and freedom of expression who took part in the Conference on Access to Public Information of May 2010: "The right to information and privacy: balancing rights and managing conflicts". Governance Working Paper Series. A pdf version of this document can be consulted at <http://ssrn.com/abstract=1786473>.

should be applicable to all exceptions in access of a relative nature. As specific criteria to evaluate the release of information containing personal data, it must be considered whether the person whose data is at stake specifically rejected disclosure, the way in which the information was obtained, its content and the reasonable expectations that could have been created at the time of providing the data with regard to whether the information would be reserved or accessible to third parties.

To these parameters, there must be added, as specific instruments for weighting the right of access and privacy, the option of anonymizing the personal data before disclosing them, or only allowing partial access.

In any event, these are options that must be taken under consideration as alternatives before refusing access in cases in which the administration that must rule on the access application determines that the right to privacy protection must prevail. Therefore, it is not an alternative to dissemination that must be automatically applied when the information contains personal data, but rather, it only comes into play later in the weighting of access in specific cases when the conclusion is that access to personal data is not to be allowed.

It has been previously stated that the public interest test is not an exclusive parameter of the privacy protection exception, but it has a special impact in this realm, especially in cases in which the information identifies a public servant or elected official and refers to the exercise of duties, and the provision of public services, or has to do with the use of public funds.

In cases such as these, with strong presence of public interest in disclosure, this circumstance must be taken especially into account to determine whether information can be accessible, although it contains private data, and dissemination could eventually cause some type of harm to the person whose records they are. In other words, evaluation must be carried out on the relevance of this public interest in disclosure, in contrast to the type of personal data and the damage that dissemination could cause. In this respect, the impact of specific information applied from the standpoint of supervision over the exercise of public authority and effective accountability is a determinant element of the balance between the right of access and data protection, and must act as a limit to an extensive application of the right to privacy as an exception to access.

Likewise, it should also be remembered that an access applicant could have a specific interest in accessing information, often because it is a requisite, or they believe it is relevant for the exercise of another right. In these cases, if the information applicant voluntarily expresses this motivation, their specific interest in accessing the information must also be taken into consideration when weighting the two rights in conflict.

It should be highlighted that in some models of access to public information the legislation establishes in the same regulation that, as a general rule, the personal identification of the public servant or elected official who approves a given decision or intervenes, because of their duties in a public action, and also the personal information that refers to the exercise of these functions, must not be considered information relative to personal privacy to be preserved in access by third parties (this is the case of Ireland, as stated above).

In the case of elected officials and persons occupying the highest-ranking posts in public organizations, the scope of personal information that must be available will usually be broader, given their more determinant role in the exercise of public power and decision-making and therefore, the greater relevance, in general terms, of the information referring to them, from the general interest perspective. Obviously, in these cases, the body receiving the application can not refuse access on the grounds of the privacy protection exception, as it has been expressly excluded by law.

In the case of access to information relative to public expense, a decision by the European Ombudsman of July 14, 2008 must be mentioned. It determined that it was maladministration to withhold information on the expenses incurred by European Parliament members (MEP's), including their travel and per diem allowances (case 3643/2005(GK)WP). As it was a case of apparent conflict between rights of access and privacy, the European Ombudsman sought the European Data Protection Supervisor's opinion, which was that the public was entitled to receive information on the conduct of the MEP's. In this decision the European Ombudsman stated that in a transparent, democratic society, the public had a right to be informed about the use of public funds entrusted to MEP's.

Still and all, it must be stated that in the weighting of public interest in disclosure of data on public expenditures and the also public

interest in preserving personal privacy, the latter concept will have a more relevant impact when the information refers to medical or social assistance, as the information could contain sensitive data on the health of persons or their family or social situation, that must be preserved, than when it is a public expenditure related with the exercise of the duties inherent to elected officials and public servants, in which the impact on the realm of personal privacy is much smaller.

In the Decision of December 8, 2010, the European Ombudsman stated that there is no maladministration by the European Parliament when it refuses an application for the statistics of MEP absences due to health reasons, as to prepare them, it would be necessary to process information of specific MEP's, and this is a processing of personal data that can only be done following strict guidelines. In that case, the European Ombudsman also held that, in specific circumstances, the statistics requested would have allowed the identification of specific MEP's (case 2682/2008/(MAD)(TN)ELB).

In keeping with the foregoing considerations, and with a view to incorporating into our legal code a regulation on the right of access adapted to the most advanced international standards, the regulation would have to establish, with the maximum possible specificity, the cases (or criteria by which to determine them) in which personal information must be excluded from the right of access.

From this standpoint, and based on the examples of other aforementioned legislation, the new regulation on the right of access could establish for personal data related with a person's privacy that exclusion be the general rule and access, the exception. Access would require the consent of the affected person or an overriding public interest in disclosure, which in this case must be an interest of high relevance for all society. On the other hand, in the case of personal data linked to the exercise of public duties, the general rule should be to allow access. The regulation should also dictate the application of overriding public interest and harm tests, with a view to guaranteeing accurate and proportionate application of the rights in conflict.

Still, it should be borne in mind that the overriding public interest test, despite its relevance, only provides a parameter or orientation to weight one and another right in the cases of conflict, and help set the limits in a

given case. The process of applying the proportionality principle to the rights in conflict, weighting the public interest in disclosure and the harm that access would cause the owner of the data, must be done case by case, and definitely implies a certain complexity that the law can not prevent.

That is why the existence of an independent authority to supervise the application of the access law, and that can set criteria and parameters for the weighted application of exceptions, must be considered necessary to strengthen the right of access to public information and guarantee proper application. As for the various options or models of supervisory authority, reference is to be made to the content of section 4.2.4 of this report.

Another element that should be borne in mind in regulating situations of conflict between access and privacy should take the form of a provision by which, for a third party to have access to the information that contains personal data it is not necessary, as a general rule, to have the consent of the person whose data they are. If this were the case, the possibility of access would be exclusively predicated on the will of the data's owner, giving clear superiority to this right, contrary to the proportionality principle.

This does not mean that the data owner cannot intervene in the process of weighting between the two rights. Along these lines, and as indicated by professor Emilio Guichot, a speaker at the Conference on access to Information and Transparency held in May 2010, a hearing for the data owner can be useful in the process of weighting the two rights to proportionately gauge the affectation that access would involve, but it need not necessarily be a requisite to resolve the access application when there are elements that make it possible to properly weight whether to allow or refuse information access.

Article 6 and 7 of the draft bill of the Ministry of the Presidency on transparency and citizen access to public information, from 2009, specifically regulates the relationship between public information and personal data protection. In a positive light, it is to be noted that the applicable law would be that which regulated the right of access (unless the applicant for access is the owner of the personal data) and sets as a general parameter the access to information referring to the public body that requests it, and refusal when the information contains personal data or that affect people's private lives. It also establishes the possibility

for partial access and anonymization of the information.

As shortcomings of this draft bill, it should be noted that it does not establish that the decision must weight the two rights in accordance with the proportionality principle, the application of the harm or overriding public interest tests. In this regard, the application of the principles can be understood to be supported by the general regulation of the exceptions in Section 5 of the draft bill, notwithstanding the fact that it would have been preferable to indicate it more specifically.

On the other hand, the last draft bill presented by the Ministry of the Presidency establishes evaluation of access to information directly associated with the organization, operation and

public activity of the subject the application is addressed to. It also mentions performance of a weighted analysis, with sufficient grounds, between both rights, by the body or subject that must decide on the application, with regard to the information that contains personal data that are not qualified as especially protected, when the disclosure of these data does not harm the constitutional rights of the person and, especially, the right to privacy.

As for the private bill on transparency, information access and good government presented by the Popular Party in the Spanish Parliament, it regulates the relationship between access to information and protection of personal data in terms very similar to those of the first ministerial draft bill (article 17 and 18).

5. CONCLUSIONS AND RECOMMENDATIONS

5.1. Conclusions

1. The right of access to public information is linked to the fundamental right to participation in public affairs and the freedom of information, it is a guarantee of free public opinion, and an intrinsic part of political pluralism in a democratic state.
2. The right of access to information in the hands of public administrations has a twofold dimension, which includes the perspective of general interest in democratic supervision of public authorities and the right of private persons to obtain information that they wish to know or that specifically affects them.
3. From a general interest perspective, public information being accessible is a requisite to make effective the principles of transparency and accountability, which must govern public activity, and a necessary step for informed participation of citizens in public management and in the administration's decision-making processes.
4. The private or individual dimension of the right of access to public information is manifested in the possibility for an organization or citizen to access information they consider relevant for their interests.
5. Article 105 of the Constitution contains the mandate for lawmakers to regulate "access by citizens to the archives and records of the administration".
6. The regulation of the rights of access to public information in the Spanish and Catalan legal codes is incomplete, is centered on the realm of administrative procedure, and is insufficient to guarantee the effectiveness of this right.
7. Some sectorial rules incorporate more favorable regulations on the right of access, but regulatory dispersion and the lack of a general law that regulates this right in a comprehensive and unified way undermine its effectiveness.
8. There is not a specific procedure that is agile enough to resolve applications, and the list of exceptions to access has been made but without any standard or criteria to resolve cases of conflict with other rights that would favor harmonized application. Furthermore, there is no independent authority as an additional instrument of protection over the right of access.
9. A specific law is needed to regulate this right in terms comparable to those of Spain's peer countries and the parameters of the Council of Europe Convention on Access to Official Documents, of June 18, 2009.
10. A complete regulation of this right, that takes into account its dimension as a requisite for democratic supervision of public authority and informed participation of citizens, must also include the obligation to disclose information of public interest, as a manifestation of the transparency principle. An intensive disclosure activity –facilitated by information and communication technologies– would reduce the need for express access applications.
11. A rule adapted to international standards is a measure necessary to reinforce the right of access to information, but insufficient if not accompanied by a change in administrative culture, so that access to public information is seen as the general rule, and restriction or secrecy the justified exception.

5.2. Recommendations

A new regulation on the right of access to public information, taking into account the standards established by the Council of Europe Convention on Access to Official Documents

and the systems of Spain's peer countries, should include the following items:

- a) Anyone should be able to apply for access without needing to accredit any personal interest or justify their application.
- b) Any refusal of access must be justified based on objective, legally outlined causes.
- c) What should be relevant in the application of the law is that the information refer to public activity, understood in the broadest sense, regardless of whether it is held by a public or private body. It should also include the Justice administration, and also the public information from all other constitutional and statutory bodies, at least as regards the conduct of their administrative duties.
- d) Promotion of an outlook on the right of access to public information constrained to final documents is a generic unjustified restriction of the right. Unfinished or preparatory information that is of public interest should not be excluded from access due to its supportive character, unless it could somehow harm other rights or interests and the exclusion is necessary to protect them.
- e) The term in which an application must be decided on should be 15 days, with an option to extend the period an additional 15 days if the volume or complexity of the requested information so justifies it. The silence-signifies-assent principal must be applied, with no need for additional or confirmatory actions.
- f) Access to information must be free, although limited fees are allowable strictly to cover the cost of making copies. Under no circumstances may they have a deterrent or restrictive effect.
- g) The intervention of an independent authority for the protection of rights from among those that already exist would be an instrument to promote access to information and guarantee an impartial review of administrative decisions prior to taking any legal action.
- h) The general rule must be to allow access to information, and refusal should be the exception. Exclusions to access must be limited in time, make reference to the content of the

document and be justified by the protection of other rights or interests affected by access.

- i) As they completely exclude access, absolute legal exceptions must be the minimum possible. Instruments must be incorporated to evaluate, case-by-case, whether it is appropriate to apply the exception and refuse access or whether the right of access to information must prevail. Instruments with which to evaluate applications for access offered by comparative law and the Council of Europe Convention on Access to Official Documents are, fundamentally: the harm principle that takes into account the passage of time as a factor limiting harm, and the principles of proportionality and overriding public interest in the disclosure of information.
- j) If access to public information does not cause any harm to interests protected by exceptions, access should not be limited. If some harm is caused, it must be determined whether there is public interest in the disclosure of information that would be overriding. In this case, the harm that disclosure could cause to the right protected by the exception must not impede access.
- k) The right of access to information and the right to privacy are not irreconcilable rights, but rather must be considered complementary, with a view to protecting personal freedoms from public powers, and with the goal for public authorities to fulfill their accountability obligation.
- l) There must be a delimitation of the cases that could constitute exceptions for access to public information to protect personal privacy, with a specific definition of the personal data concept, that cannot coincide with the extensive concept taken up in personal data protection regulations.
- m) The weighting of the right of access and privacy, and the effective harm that disclosure of information could cause should not become an absolute exception when public interest and access is considered overriding.
- n) There must be evaluation of the option to anonymize personal data or provide partial access only when it is concluded that the right to privacy impedes access to information.

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