

GLOBAL INFORMATION SOCIETY WATCH 2009

*Focus on access to online information and knowledge
– advancing human rights and democracy*



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)
AND HUMANIST INSTITUTE FOR COOPERATION WITH DEVELOPING COUNTRIES (Hivos)

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*Dedicated to A.K. Mahan - an activist who valued
intellectual rigour and concrete outcomes.*

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A reunion with democracy

Access to information was central to the process of returning to democracy in Peru and the fall of the authoritarian regime of former president Alberto Fujimori (1990-2000). Arguably, the fall of the regime was triggered not by the pressure of social forces or by the strengthening of political alternatives, but by the circulation of a video in which a presidential adviser is seen giving money to a congressman in exchange for him changing his political party. Shortly afterwards, with the opening of intelligence service files, secret documents – including videos – were circulated widely, and the extent of government corruption was shown. For this reason, when access to information is discussed in Peru, the most immediate reference is to the Fujimori regime.

Paradoxically, it was during that period that the right to access information was included for the first time as a fundamental people's right. The Political Constitution of Peru of 1993 includes the right of the people "to the freedom of information, opinion, expression and diffusion of thought through oral or written word or image by any social communication means, without previous authorisation or censure or any impediment," and "to request without requiring a reason the information desired and to receive it from any public entity in a legal time frame without additional cost, other than reproduction costs."¹

In addition, the legal action of *habeas data*² was incorporated into constitutional guarantees for the purpose of assuring compliance by authorities with regard to the right to access information and protection of data privacy.

Legal framework

The right to access information was recognised by the Peruvian state even before the Constitution of 1993. This recognition came through the ratification of the United Nations (UN) International Covenant on Civil and Political Rights (1980)³ and the American Convention on Human Rights (1978),⁴ whose Article 13 states that "[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either

orally, in writing, in print, in the form of art, or through any other medium of one's choice." Even so, the exercise of these rights was limited for more than two decades. Instead, a culture of secrecy was born, evidenced by the unjustifiable refusal of the authorities to provide information and by the establishment of restrictions on access to information.

In February 2001, during the democratic transition, Supreme Decree 018-2001-PCM⁵ and Emergency Decree 035-2001 were enacted. The first had the objective of establishing a procedure to facilitate citizens' access to information held by the government and the second specifically refers to the opening of public accounts.

This last decree was complemented by Emergency Decree 077-2001, which created the Economic Transparency Portal,⁶ designed to publicise, through the internet, public finances, macroeconomic projections, the execution of public and state expenditures, and tax collection, among others.

Later, during the government of Alejandro Toledo, the Law of Transparency and Access to Public Information (Law 27806) was enacted. However, there were some defects in its formulation that left space for different interpretations of what information should be considered secret, restricted and confidential. This caused the Office of the Ombudsman to request a modification of the law and to ask the Constitutional Tribunal to recognise its unconstitutionality. To avoid a ruling from the Constitutional Tribunal, the National Congress then promulgated Law 27927 with the necessary clarifications.

The final text of Law 27927 was approved by Supreme Decree 043-2003-PCM⁷ and the law was regulated by Supreme Decree 072-2003-PCM.⁸ The final text, according to the Ombudsman, is one of the most complete and advanced in Latin America.

Information access rights

As established by the legal framework, access to information is a right of all persons. On the other hand, the obligation to provide information is mandatory for all public and private entities that provide public services or carry out administrative functions. In the case of the private sector, the entities are obligated to provide information on the nature and tariffs of the services they provide.

1 Constitución Política del Perú, Artículo 2, numerales 4 al 6. www.tc.gob.pe/legconperu/constitucion.html

2 *Habeas data* is a constitutional right granted in several Latin American countries that is designed to protect, by means of an individual complaint presented to a constitutional court, the image, privacy, honour, information self-determination and freedom of information of a person. See: en.wikipedia.org/wiki/Habeas_Data

3 www2.ohchr.org/english/law/ccpr.htm

4 www.oas.org/juridico/English/treaties/b-32.html

5 The text of the laws cited in this section can be found at: transparencia-economica.mef.gob.pe/normas

6 transparencia-economica.mef.gob.pe

7 transparencia-economica.mef.gob.pe/normas/tuo.php

8 transparencia-economica.mef.gob.pe/normas/DS072_2003PCM.php

The legal framework also establishes that the information handed over should be current, true, precise and complete, given that the provision of incomplete or false information does not fulfil the constitutional objective of the right. This has been established clearly by the Constitutional Tribunal in Decision 1797-2002-HD/TC,⁹ which states that “not only does this ruling [the right to access information] affect the right to access information when it is denied without the existence of a constitutionally legitimate reason for doing so, but also when the information provided is fragmentary, out of date, incomplete, imprecise, false, not timely or wrong.”

Exceptions

Access to information rights are not absolute and have limitations and exceptions. The limitations are related to data privacy. The law establishes exceptions in the exercise of the right regarding information of a private nature or information that could affect personal privacy (such as the guaranteed privacy of tax records), national security, and financial institutions. The Constitutional Tribunal has recognised the importance of these limitations by pointing out that the right to access information “is subject to limitations or restrictions that can arise from the need to harmonise its exercise with other rights of the same kind (e.g., the right to personal privacy), or from the need to safeguard constitutionally relevant priorities (e.g., national security), given that these have been explicitly envisaged by law.”¹⁰

It is important to stress that this statement by the Tribunal refers to the principle of public information, according to which all information is public unless a law expressly establishes the contrary.

Implementing the right to access information

The diverse obligations for public administrative entities include the obligation to create websites to share public documents, and the obligation of the Presidency of the Council of Ministers (PCM) to report to the National Congress on the results of the implementation of the law.

The job being done by the PCM has been criticised by various sources as offering an inadequate analysis of the information reported by the different entities.¹¹ Despite the criticism, the PCM has not developed a responsible attitude regarding enforcing the implementation of the law. Its 2008 report only collects information supplied by 21% of the entities required to provide information by law. Nearly 80% of the entities omit reporting (including the Congress itself, the Ministry of Education, and 65% of local governments) without receiving any sanction at all.¹²

9 www.tc.gob.pe/jurisprudencia/2003/01797-2002-HD.html

10 File N.º 1219-2003-HD. Available at: www.tc.gob.pe/jurisprudencia/2004/01219-2003-HD.html

11 El Comercio (2008) Critican a PCM por no llevar registro adecuado sobre pedidos de información, 1 October. www.elcomercio.com.pe/ediciononline/HTML/2008-10-01/critican-pcm-no-llevar-registro-adecuado-sobre-pedidos-informacion.html

12 Even though Article 22 of DS 072-2003-PCM clearly establishes that obligation.

In its conclusions, the PCM report itself points out deficiencies such as general ignorance of the laws, lack of infrastructure, lack of suitable personnel and a failure to meet deadlines.

Considering these deficiencies, the role of the Constitutional Tribunal is notable, not only in resolving cases, but also in creating jurisprudence and clarifying, through its decisions, certain aspects that could be ambiguous or interpreted in a different way than that intended by the law.

Even so, according to an investigation carried out by the Press and Society Institute (IPYS) on 105 decisions handed down from 1996 to 1998, it was possible to verify the implementation of only one of them.

Culture of transparency

The most important tool to guarantee the right to access information resides in the actual behaviour of the administration, because no law or procedure will have a real effect without a change in the prevailing culture in public management. This was stressed by Ombudsperson Beatriz Merino during the Americas Regional Conference on the Right of Access to Information (in Lima, April 2009), when she pointed out that it was a challenge to eradicate the “culture of secrecy” in Peru because the laws often are interpreted in a sense contrary to their objective. For that reason “clear regulations are required, but also supervision that guarantees proper respect and observance [of the law], but above all, a policy directed to accomplish a substantial improvement in public servant capabilities, which will ultimately ensure that they not only know the law, but enforce it with passion.”¹³

The Ombudsperson has stressed elsewhere that “it is about fighting a cultural battle, something that can only be won with a permanent and tenacious affirmation of ideas and with permanent control of its enforcement by means of regulations and institutions willing to give them effective compliance.”¹⁴ This is where civil society organisations have played a fundamental role: in keeping watch on the implementation and enforcement of the law guaranteeing access to information in Peru.

Citizens' watch

Diverse independent entities like IPYS, the Peruvian Press Council, *Ciudadanos al Día* (or “Citizens up to date”) and the Ombudsperson’s Office itself, among others, have been promoting workshops and training programmes, as well as running information campaigns and developing publications oriented to strengthen peoples’ capabilities to exercise their right to access information.

Similarly, the publication of independent evaluations by institutions and civil society associations like *Propuesta Ciudadana* (“Citizen Proposal”) has had an impact on local

13 Press release from the Office of the Public Defender (Ombudsperson): www.defensoria.gob.pe/descarga.php?pb=3684

14 IPYS (2008) Relatoría. Primera conferencia nacional sobre acceso a la información, Lima, 29 y 30 de septiembre de 2008, p. 63.

and regional governments in that they serve as a form of moral sanction against those who do not comply and offer good publicity for those who do. A 2007 study carried out by *Vigila Perú* (Peru Watch) shows that the response of regional governments to the publication of transparency indicators has shifted from a defensive attitude to a proactive and collaborative one.

Another example of positive enforcement is the Annual Competition on Good Government Practice promoted by *Ciudadanos al Día*, where one of the categories of evaluation is Transparency and Access to Information. Here a range of factors are assessed, including the presence of municipal internet portals, application processes for accessing information, supplementary services for users, information on costs and prices of public services.

Complexity in accessing information: The case of the National Congress

In August 2008, a scandalous event was uncovered in the National Congress: a congressman had used false documents to justify part of his operating costs. The congressman was sued for having committed a crime. However, this event generated suspicion about the use of state funds by members of congress.

As the information was not available on the Congress' website, a group of Peruvian bloggers began a campaign entitled "Adopt a Congressman". The idea was that each blogger would track the operating costs of a member of congress. To do this, the blogger requested the report of these costs from Congress.

The result was shameful. Various members of congress declared themselves against the initiative, threatening to take legal action against the bloggers, and the Congress refused to provide the information, considering it "reserved" given that it was in the process of being revised by the Office of the Comptroller General.

Finally, after much public pressure, the "operating costs" line item was eliminated from the budgets for congresspersons and the amount was incorporated as part of their salaries. In this way the obligation to provide information was evaded. Nevertheless, the case stressed the important role of alternative media and information sources in the achievement of democratic objectives.

The role of ISPs

In Peru, discriminatory practices by internet service providers (ISPs) related to accessing information are prohibited by law. In 2005, the telecoms regulator adopted a rule that expressly provides that ISPs "cannot block or restrict the use of any application." However, it has been verified that some end-user contracts have clauses limiting the use of the service. Such is the case of Claro's third-generation (3G) service, which states in its contract: "The operator reserves the right not to pass on or to block certain types of internet traffic such as voice over internet protocol, peer-to-peer traffic, spam and anything else considered necessary."

Service providers could, under the right granted them by another law,¹⁵ suspend a service when there is a "misuse" of that service. It should be noted that the word "misuse" is not clearly defined in Peruvian legislation. Due to this lack of clarity, ISPs can control access to applications and information at their own discretion.¹⁶

Action steps

The action to take involves raising awareness of the right to access information as a personal right, but also as an administration responsibility. Creating an awareness of the importance of this right, not only for oversight and supervision of public administration, but also as a basis for democratic coexistence, is a fundamental task to be undertaken.

Clarifications on the legal framework are also needed at this point. There are still many aspects to elucidate regarding the limitations and exceptions to the right to access information. For instance, there is no clarity in the process of defining information that is reserved or considered a commercial secret. The rulings of the Constitutional Tribunal have helped to clear up some points, but there are still areas of doubt that help to maintain the culture of secrecy in the country.

It is also necessary to strengthen the capabilities of institutions to manage information. Significant emphasis has been put on the publication of information on the internet, but very little or none on the improvement of the records management systems of public administration.

The state should recognise the importance of the initiatives of different organisations that seek to encourage good practices in transparency, and reward entities that are outstanding in their compliance. But it should also adequately supervise a minimum compliance to the law, and to the rulings of the Constitutional Tribunal that penalise entities that systematically evade their responsibility. ■

¹⁵ Law on Conditions of Use of Public Telecommunications Services.

¹⁶ See Bossio, J. (2009) *Peru: The Battle for Control of the Internet*, APC, Quito. www.apc.org/en/system/files/CILACInvestigacionesPeru_EN_20090630.pdf

GLOBAL INFORMATION SOCIETY WATCH (GISWatch) 2009 is the third in a series of yearly reports critically covering the state of the information society *from the perspectives of civil society organisations across the world.*

GISWatch has three interrelated goals:

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- **Encouraging** critical debate
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GISWatch is a joint initiative of the Association for Progressive Communications (APC) and the Humanist Institute for Cooperation with Developing Countries (Hivos).

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2009 Report

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