Written Report
of the Open Society Justice Initiative

Concerning the Compliance of
Peruvian Executive Decree 1129
with International Law

I. INTRODUCTION

1. Excessive national security secrecy is irreconcilable with democratic oversight. Moreover, while national security may justify legitimate restrictions on the public's right to access information when certain conditions are met, the public's knowledge of state activities, including in the security sector, is often protective of legitimate national security interests. It promotes accountability to avoid human rights violations, corruption, waste and abuses.

2. Public scrutiny safeguards against abuse by public officials and ensures democratic participation and oversight of policymaking in a sector where there is otherwise significant executive discretion and sometimes undue deference. A government's over-invocation of national security concerns, or the undue deference to national security assertions, can seriously undermine the main institutional safeguards against government abuse: independence of the courts, the rule of law, legislative oversight, media freedom, and open government.

3. In 2002, Peru enacted the Transparency and Access to Public Information Law ("the RTI Law") at a time of governmental transition, after uncovering abuses of power by the political, military and intelligence elites which had taken place under a veil of secrecy, and following a public commitment from a new administration to challenge corruption.[1] The RTI Law includes, as all or virtually all RTI laws around the world do, an exemption from the law for information legitimately withheld on national security grounds.[2] The RTI Law also includes, within the same provision as the national security exemption, a prohibition of the classification of information "related to violation of human rights or the Geneva Conventions of 1949 committed in any circumstances, by any person."[3] The strict national security exemption was influenced by historical concerns in Peru related to the excessive invocation of national security to justify the secrecy of information concerning human rights violations.

4. In December 2012, the President issued Decree 1129, which includes a sweeping secrecy provision in the areas of security and national defense. Article 12 of Decree 1129 provides: "in general, all information or documentation that is generated in the area of subjects related to Security and National Defense, and those which contain deliberations of sessions of the Council on Security and National Defense, are by their nature secret." Decree 1129 is under review by the Constitutional Court of Peru.

5. In light of the ongoing constitutional challenge to Article 12 of Decree 1129, the Open Society Justice Initiative was requested by Peru's National Ombuds Office (*Defensoría del Pueblo*) to

[1] *See* Javier Casas, *A Legal Framework for Access to Information in Peru*, in Article 19, Time for Change: Promoting and Protecting Access to Information and Reproductive and Sexual Health Rights in Peru, 2006, at http://www.article19.org/data/files/pdfs/publications/peru-time-for-change.pdf.
[2] Transparency and Access to Public Information Law (2002), Art. 15.
[3] *Ibid.*

provide an analysis of the consistency of this provision with international and comparative law. The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. In the field of freedom of expression and information, the Justice Initiative has provided pro bono representation before, or made amicus curiae submissions to, all three regional human rights systems and the UN Human Rights Committee. Among others, the Justice Initiative made amicus curiae submissions to the Inter-American Court and the Inter-American Commission on Human Rights (the "Inter-American Commission") in the landmark cases of *Claude Reyes et al v. Chile*, and to the Inter-American Court in *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil* and *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*.

6. The Justice Initiative, along with 21 other organizations and academic centres, developed a set of Global Principles on National Security and the Right to Information (the "Tshwane Principles," named after the municipality where the meeting to finalize the Principles was held). The Tshwane Principles, issued on 12 June 2013, are based on international and national law, standards, good practices, and the writings of experts. They have been endorsed by the UN Special Rapporteurs on the protection and promotion of human rights while countering terrorism, and on freedom of expression; and the three regional special rapporteurs on freedom of expression and the media of the Organisation of American States (OAS), the Organisation for Security and Co-operation in Europe (OSCE), and the African Commission on Human and Peoples' Rights (ACHPR); as well as the Parliamentary Assembly of the Council of Europe (PACE).[4] The Tshwane Principles are attached as Annex A and elaborated below.

7. This report first provides the relevant legal standards governing the right to information under international law, including an analysis of legitimate restrictions on the right to information on the ground of national security. Then, the report provides an analysis of the compliance of Decree 1129 with these international legal standards. This analysis finds that Decree 1129's blanket secrecy for information related to security and national defense is inconsistent with Peru's international law obligations. Such a limitation on the right of access to information (1) is neither necessary nor proportionate, (2) violates the principle of maximum disclosure, (3) allows for perpetual secrecy, and (4) exempts the withholding of information in these categories from independent oversight. It is flatly inconsistent with Peru's existing right to information framework which properly requires limited (rather than absolute) exclusions from the State's disclosure obligations, each restriction with particularized justifications; and requires the disclosure of information concerning human rights violations and crimes of international law.

II. RELEVANT LEGAL STANDARDS: THE RIGHT TO INFORMATION UNDER INTERNATIONAL LAW

8. (A) The right of access to information is well-established in international law, including in international treaties binding on Peru. (B) There is broad consensus as to the content of that right, which includes at its core the principle of maximum disclosure, a requirement that any restrictions to the right be limited, and consequently necessary and proportionate, and a right to independent

[4] Global Principles on National Security and the Right to Information (the "Tshwane Principles"), 2013, available at http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles, attached as Annex A. Endorsed by the PACE and relevant Special Rapporteurs: PACE, Recommendation 2024(2013), para. 1.3, adopted 2 October 2013. PACE, Resolution 1954 (2013), adopted 2 October 2013, paras. 7-9. Open Society Justice Initiative, Press Release: New Principles Address the Balance between National Security and the Public's Right to Know, 12 June 2013, at http://www.opensocietyfoundations.org/press-releases/new-principles-address-balance-between-national-security-and-publics-right-know. The Open Society Justice Initiative was among the entities involved in drafting the Tshwane Principles.

and effective oversight and review of any limitations on the right of access to information. (C) These principles must be applied to any restriction on the right to information, including the restriction on the ground of national security.

A. Access to Information as a Well-Established Right Under International Law

9. The right of access to information has become widely accepted in the democratic world as a basic political right. Whether as part of traditional free expression guarantees or as an important entitlement in its own right, it is perceived as an integral and imperative component of the broader right to democratic governance, as well as a precursor to other fundamental rights. Indeed, it has become untenable to argue that the public does *not* have a general right to know what their government knows and does, subject only to compelling exceptions.

10. The right to access information, including information in the hands of the government, is well-established in international human rights law and is widely recognized in democratic states. The right to seek and receive information is protected expressly in Article 13 of the American Convention and Article 19 of the ICCPR. In 2011, the UN Human Rights Committee, tasked with authoritatively interpreting the obligations imposed on States by the ICCPR, adopted a General Comment finding that Article 19 of the Covenant guarantees the right of access to government-held information.[5] Also, the Special Rapporteurs on freedom of expression of the United Nations (UN), the Organization of American States (OAS), the Organization for Security and Cooperation in Europe (OSCE), and the African Commission on Human and Peoples' Rights (ACHPR) have repeatedly affirmed that freedom of expression includes the right to government-held information.[6]

11. Of the three regional human rights systems, the Inter-American System is the most developed in recognizing the right of access to information, and corresponding state duties. In the 2006 landmark ruling of *Claude Reyes v. Chile*, the Inter-American Court re-affirmed that Article 13 of the American Convention "protects the right of the individual to receive information and the positive obligation of the State to provide it."[7] The fundamental nature of the right of access to information has also been recognized by the Inter-American Commission,[8] and by States in the region in their endorsement of relevant declarations, including the Chapultepec Declaration[9] and the Inter-American Declaration of Principles on Freedom of Expression.[10]

12. The European and African regional institutions have similarly recognized that the right to freedom of expression includes a separate right to access information. In recent decisions, the European Court of Human Rights has recognized that Article 10 of the European Convention, which protects freedom of expression, gives rise to an independent right to receive information held by public authorities and relevant to public debate—irrespective of any personal interest of the requestor in

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[5] UN Human Rights Committee, *General Comment No. 34 on Article 19*, UN Doc. CCPR/C/GC/34, 12 September 2011.
[6] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, Dec. 6, 2004 ("2004 Joint Special Rapporteurs Declaration"). Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression, and the ACHPR Special Rapporteur on Freedom of Expression, 20 December 2006.
[7] *Claude Reyes v. Chile*, IACtHR, Judgment of 9 September 2006, Series C No. 151, para. 77. *See also Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, IACtHR, Advisory Opinion OC-5/85, 13 November 1985, Series A No. 5, para. 32 ("For the average citizen it is at least as important to know the opinion of others or to have access to information generally as is the very right to impart his own opinion.").
[8] *Inter-American Declaration of Principles on Freedom of Expression*, adopted by the IACommHR, 108th regular session, 19 October 2000, para. 4.
[9] *Chapultepec Declaration*, adopted by the Hemisphere Conference on Free Speech (Mexico City), 11 March 1994, Preamble and Principle 2.
[10] *Inter-American Declaration of Principles on Freedom of Expression*, note 8 above, preamble.

the information other than an interest to contribute to public debate.[11] The Council of Europe has also put forth a Convention on Access to Official Documents, the first treaty of its kind, guaranteeing a binding right of access,[12] and the Charter of Fundamental Rights of the European Union grants a right of access to documents held by Union institutions.[13] The African Commission on Human and Peoples' Rights, for its part, has held that Article 9 of the African Charter on Human and Peoples' Rights [14] protects not only the free speech rights of the speaker, but also the rights of those interested in *receiving* information and ideas from all lawfully available sources.[15]

13. The recognition of a fundamental right of access to information is increasingly reflected in constitutions,[16] statutory laws, state practice and national jurisprudence.[17] More than ninety countries and major territories around the world, including at least twenty in the Americas, have adopted freedom of information laws that provide for access to state-held information.[18] As of May 2012, when Brazil's law entered into force, more than 5.5 billion people worldwide live in countries that provide in their domestic law for an enforceable right to obtain information from their governments.

14. The right of access to information is fundamental on its own, but has also been recognized as a precondition for the exercise of the basic rights of political participation and representation, as well as the right to truth. The Inter-American Court has held that "access to information held by the State may permit participation in public governance by virtue of the social oversight role that can be exercised through such access."[19] Similarly, the right to truth can only be satisfied if appropriate mechanisms for access to the relevant information are adopted. A 2006 study by the UN High Commissioner of Human Rights concluded, after an extensive review of international law and practice, that legislation on access to information constitutes an important step to ensuring the right

[11] *Gillberg v. Sweden*. ECtHR [GC], Grand Chamber Judgment of 3 April 2012. App. No. 41723/06, para. 82. *See also Társaság a Szabadságjogokért v. Hungary*, ECtHR, Judgment of 14 April 2009, paras 36-38; *Kenedi v. Hungary*, ECtHR, Judgment of 26 May 2009, paras. 43, 45. Article 10 of the European Convention provides that "[e]veryone has the right to freedom of expression" including the freedom to "receive … information and ideas without interference by public authorities." European Court jurisprudence has long recognized a conditional right of access to state-held information under circumstances in which the failure to provide such information adversely affects the enjoyment of other Convention rights. *See, e.g.*, *Guerra et al. v. Italy*, ECtHR, Judgment of 19 February 1998.

[12] Council of Europe Treaty Series No. 205, adopted by Council of Europe 27 November 2008; ratified by six States and signed by an additional eight (requires ten ratifications for entry into force). *See also Recommendation (81) 19 on Access to Information Held by Public Authorities*, adopted by Council of Ministers 25 November 1981; *Recommendation (2002)2 on Access to Official Documents*, adopted by Council of Ministers 21 February 2002.

[13] Art. 42. The Charter was proclaimed 7 December 2000 and became binding with the adoption of the Lisbon Treaty.

[14] Article 9 of the African Charter provides: "1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law."

[15] *See, inter alia*, *Sir Dawda K. Jawara v. The Gambia*. ACHPR, Decision of 11 May 2000, para. 65. ACHPR, *Declaration of Principles on Freedom of Expression in Africa*, adopted at the 32nd Ordinary Session, 17-23 October 2002 (Banjul), Principle IV, recognizing that "[p]ublic bodies hold information not for themselves but as custodians of the public good."

[16] Colombia, Costa Rica, Mexico, Panama, Peru, and Venezuela are among the countries which have expressly incorporated the right of access to public information into their constitutional bills of rights. *Available at* http://www.right2info.org/.

[17] *See, e.g.*, In the Matter of Constitutionality of Article 13 of the Constitutional Organic Law on the General Bases of State Administration (No. 18.575) ("*Casas Cordero* case"), Constitutional Tribunal of Chile, Judgment of 9 August 2007. Regulation of the Supreme Court of Justice (Argentina), No.1/2004, Record 315/2004 Gral. Adm.. For cases outside of the Americas: *see, e.g.*, *S.P. Gupta v. Union of India*, Supreme Court (India), Judgment of 30 December 1981, AIR [1982] (SC) 149, at 232 ("[w]here a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing").

[18] *See generally* http://www.right2info.org/laws.

[19] *Claude Reyes v. Chile*, note 7 above, para. 86. *See also* Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, OAS Special Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media, 26 November 1999.

to truth, and "[a]ccess to information and, in particular, official archives is a crucial exercise of the right to truth."[20]

B. Content of the Right of Access to Information

15. There is increasing clarity about the content of the right of access to information, especially but not only in the Americas. This section provides an overview of key components of the right which are relevant for assessing the compliance of Peru's Executive Decree 1129 with international law, relying in large part on binding and persuasive authority from the Americas, and incorporating international and comparative jurisprudence for guidance from outside the region.

16. Jurisprudence of the Inter-American Court, as well as decisions of the Inter-American Commission and declarations and reports of the OAS Special Rapporteur for Freedom of Expression, support a regional consensus on the content of the right of access to information.[21] In 2010, the Special Rapporteur produced the Inter-American Legal Framework regarding the Right of Access to Information, a summary of the state of the right in the region drawing on the decisions of the Inter-American Court and the Inter-American Commission, and other regional authorities.[22]

17. Also in 2010, the General Assembly of the OAS adopted an Inter-American Model Law on Access to Information ("Inter-American Model Law"),[23] "establish[ing] a broad right of access to information, in possession, custody or control of any public authority … based on the principle of maximum disclosure" with limited exceptions.[24] The Assembly encouraged the States to design, execute and evaluate their ATI laws in light of the Model Law,[25] and recent laws in the region have been informed by the provisions of the Inter-American Model Law.

18. As rooted in these instruments and body of jurisprudence, the right to access information derives in part from the fact that the state holds a significant part of the public information a properly informed citizenry requires. That body of information is produced, collected and processed using public resources, and it ultimately belongs to the public.

19. Thus, the right has at its core the principle of **maximum disclosure**—the presumption that all government-held information (or privately held information related to the performance of government functions) should be subject to disclosure *unless* there is an overriding public or private interest justifying non-disclosure. Disclosure is the rule, withholding the exception, and any doubts must be resolved in favor of disclosure.[26] The principle of maximum disclosure requires limited restrictions on the right to access information and that all limits be adequately reasoned.

20. The **scope of entities and type of information covered** under access to information laws should be broad. The scope of access to information laws should include all public bodies, "and organizations

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[20] UN Commission on Human Rights, *Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights*, 8 February 2006, E/CN.4/2006/91, available at http://www.unhcr.org/refworld/docid/46822b6c2.html, paras. 32, 52.

[21] *See Claude Reyes v. Chile*, note 7 above, para. 78 ("regional consensus … about the importance of access to public information and the need to protect it").

[22] Office of the Special Rapporteur for Freedom of Expression, I/A Comm. H.R., Inter-American Legal Framework Regarding the Right to Access to Information (2010).

[23] *See* Organization of American States, Inter-American Model Law on Access to Public Information of 2010 ("Inter-American Model Law"), adopted at fourth plenary session, 8 June 2010, by OAS General Assembly Resolution 2607 (XL-O/10). The Model Law was elaborated by the Group of Experts on Access to Information (coordinated by the Department of International Law of the Secretariat for Legal Affairs), pursuant to OAS General Assembly Resolution 2514. *See also* Commentary to the Inter-American Model Law.

[24] Inter-American Model Law, note 23 above, Art. 2.

[25] *Draft resolution: Access to Public Information and Protection of Personal Data*, CP/CAJP-2965/11 rev. 3 of 11 May 2011.

[26] *Claude Reyes v. Chile*, note 7 above, para. 92. 2004 Joint Special Rapporteurs Declaration, note 6 above. Most of the OAS Member States' legal frameworks incorporate the principle of maximum disclosure or maximum transparency directly or indirectly. *See* Office of the Special Rapporteur for Freedom of Expression, Annual Report of the Inter-American Commission on Human Rights, 2001, pp. 73, 198-211.

which operate with public funds or which perform public functions."[27] The public should presumptively have access to all information produced or collected by the State, or in the care, possession, or administration of the State.[28] The Inter-American Model Law also applies to all public authorities, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory authorities, non-state bodies owned or controlled by the government, and also to private organizations that operate with substantial public funds or benefits (directly or indirectly) or perform public functions and services, but only concerning those funds, public functions or public services.[29]

21. The right of access to information mandates a corresponding **duty of public authorities to disclose** information. In response to a request for information, a public authority must confirm or deny the existence of the information requested, and disclose information unless an exception is warranted.[30] A denial must be in writing and identify both the reasons for the denial and the specific harm to a protected interest.[31] The burden of proof to justify any withholding rests with the public authority.[32] If an exception legitimately applies to justify withholding only some information in a record, the public authority is obliged to disclose the part of the record containing the information not subject to the exception.[33] The information provided, and the process for accessing it, should be free, or low-cost, and accessible.[34]

22. The right to access information is not absolute. Freedom of information is subject to limitations to protect certain types of information from disclosure. However, these restrictions on access must be **narrowly drawn exceptions necessary to protect legitimate interests**, and strictly interpreted in line with the presumption of access.[35] Under Article 13 of the American Convention and the jurisprudence of the Inter-American Court, limitations on the right to information must comply with a three-part test:

    - First, there must be a clear and precise **legal foundation for the limitation**.[36] The principle of legality ensures a reasonable expectation of the interpretation of the law, and that the limitation is not a result of discretionary state action.[37] The requirement that a restriction be prescribed by law refers to both the existence and quality of the law, which must prevent arbitrary interference with the right to information.[38]
    - Second, the limitation on the right to information must respond to a **legitimate purpose** recognized by Article 13 of the American Convention. The only legitimate purposes recognized

[27] *See, e.g.*, Inter-American Juridical Committee, Principles on the Right of Access to Information, adopted 7 August 2008 at the 73rd Regular Session (Rio de Janeiro), Principle 2. Inter-American Model Law, note 23 above, Art. 3.
[28] *See* Inter-American Legal Framework Regarding the Right to Access to Information, note 22 above. Inter-American Juridical Committee Principles on the Right of Access to Information, note 27 above, Principle 3. Inter-American Model Law, note 23 above, Art. 2.
[29] *See generally* Sandra Coliver, *The Right to Information and the Increasing Scope of Bodies Covered by National Laws Since 1989* (2011), *available at* http://www.right2info.org/resources/publications/coliver-scope-of-bodies-covered-by-rti-laws. Some of the newest laws, including that of India (2005), Liberia (2010), and Nigeria (2011), are among the most expansive.
[30] *See Claude Reyes v. Chile*, note 7 above, para. 120.
[31] *See, e.g.*, *Ibid.*, at para. 77. Commentary to Inter-American Model Law, note 23 above, Ch. 2(A), 2(D).
[32] Inter-American Juridical Committee, Principles on the Right of Access to Information, note 27 above, Principle 7.
[33] *See* Inter-American Model Law, note 23 above, Art. 42.
[34] *See* Inter-American Legal Framework Regarding the Right to Access to Information, note 22 above, para. 26. 2004 Joint Special Rapporteurs Declaration, note 6 above. Inter-American Juridical Committee, Principles on the Right of Access to Information, note 27 above, Principle 5.
[35] *Claude Reyes v. Chile*, note 7 above, para. 92. General Comment No. 34, note 5 above, para. 11.
[36] *Ibid.*, at para. 89,
[37] *Ibid.*, at paras. 89, 98.
[38] General Comment No. 34, note 5 above, para. 25. *See also De Telegraaf v. The Netherlands*, ECtHR, Judgment of 22 November 2012, para. 90.

by Article 13(2) of the American Convention are "respect for the rights or reputations of others," and "the protection of national security, public order, or public health or morals."[39]

- Third, the limitation must be **necessary in a democratic society to satisfy a compelling public interest**[40] **and proportionate to the interest that justifies it**.[41]

23. In terms of the third part of this test, for a limitation to be **necessary** it must be the least restrictive means for achieving the legitimate aim.[42] Limitations "must be subjected to an interpretation that is strictly limited to the 'just demands' of 'a democratic society,' which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention."[43]

24. For a restriction on freedom of information to be **proportionate**: (i) the restriction must be related to a legitimate aim; (ii) the public authority must demonstrate that disclosure of the information threatens substantial harm to the aim;[44] and (iii) the public authority must demonstrate that the harm to the legitimate interest is greater than the public interest impeded.[45] The state must show, with a "justified decision in writing" the reasons for limiting access "in a specific case."[46]

25. The so-called harm and public interest tests flow from the requirement that restrictions on the right of access to information be proportionate and necessary. Pursuant to the **harm test**, a public authority must demonstrate that a disclosure threatens to cause harm to a protected interest to justify withholding.[47] Specifically, the Inter-American Model Law requires that an exception to disclosure "would create a clear, probable and specific risk of substantial harm" to identified public interests.[48]

26. The evolving trend in national laws is to consider the harm that disclosure would cause to the protected interest in judging whether a classification is legitimate. Various countries in the region, including Guatemala and Nicaragua, have a harm test incorporated into their laws governing classification or withholding of information, thereby limiting the justification for the non-disclosure of information to situations where the "damage or harm that could occur with the release of the information is greater than the public interest in knowing the information."[49] At least ten European

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[39] *Claude Reyes v. Chile*, note 7 above, at para. 90. The ICCPR designates an exhaustive list of legitimate aims for exceptions to freedom of expression, including the right to information. These are for (i) national security, (ii) public safety, (iii) public order, (iv) the protection of public health or morals, or (v) the protection of the rights of others. ICCPR, Arts. 19, 21. General Comment No. 34, note 5 above, para. 22.

[40] *Claude Reyes v. Chile*, note 7 above, para. 91. *Compulsory Membership Opinion*, note 7 above, paras. 39, 46 (proving the "necessity" of restrictions requires a showing of "compelling governmental interest … that clearly outweigh[s] the social need for the full enjoyment" of Article 13 rights).

[40] *Compulsory Membership Opinion*, note 7 above, para. 39.

[41] *Claude Reyes v. Chile*, note 7 above, paras. 89-91. *See also* Office of the Special Rapporteur for Freedom of Expression, Annual Report of the Inter-American Commission on Human Rights, 2011 ("2011 OAS Special Rapporteur's Report"), Ch. III, paras. 342-43, 347.

[42] *See Claude Reyes v. Chile*, note 7 above, para. 91.

[43] *Compulsory Membership Opinion*, note 7 above, para. 67.

[44] *See* Commentary to Inter-American Model Law, note 23 above, p. 10. For a comparative example, *see also Kuijer v. Council*, a case of the Court of First Instance of the European Communities; the Court ruled in favor of a requester seeking information, stating the public authority failed to consider the practical effects that the disclosure would have, in this case, on EU's relations with those third countries.

[45] Inter-American Legal Framework Regarding the Right to Access to Information, note 22 above, p. 53.

[46] *Claude Reyes v. Chile*, note 7 above, para. 95.

[47] Commentary to Inter-American Model Law, Ch. 2(F) & Inter-American Model Law, Arts. 41(b), 44, note 23 above.

[48] Inter-American Model Law, note 23 above, Art. 41(b).

[49] Law on Access to Public Information (Guatemala), Decree No. 57/2008, at http://www.scspr.gob.gt/docs/infpublic.pdf, Art. 26. Law on Access to Public Information, Law 621 of 2007 (Nicaragua), available at http://legislacion.asamblea.gob.ni/NormaWeb.nsf/($All)/675A94FF2EBFEE9106257331007476F2?OpenDocument, Art. 3(7).

states[50] require the government to prove either actual or probable harm resulting from disclosure in order for any penalty to be imposed for unauthorized disclosure of government information; and an additional three countries[51] allow the lack of harm to be raised as a defence or mitigating circumstance. Several other countries similarly require proof of actual or likely harm.[52]

27. The **public interest test** requires that a public authority, or oversight body, weigh the harm that disclosure would cause to the protected interest against the public interest served by disclosure of the information. The public's interest in disclosure is heightened where the information concerns wrongdoing, "including [by] members of the secret services," and including, particularly, information concerning corruption.[53] Further, the right of the public to information is inviolable where it concerns gross human rights violations or serious violations of international humanitarian law.[54] This follows from the Inter-American Court's recognition of an autonomous right to truth under the American Convention.[55] The Inter-American Model Law,[56] and laws of various countries in the region,[57] have recognized that exceptions to disclosure do not apply in the case of information related to human rights violations or crimes against humanity.

28. The European Court of Human Rights has also recognized "little scope … for restrictions on debate on questions of public interest," reasoning that "the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion."[58] The Parliamentary Assembly of the Council of Europe has identified various grounds – aside from where there is demonstrated wrongdoing – constituting an "overriding public interest" compelling disclosure despite an otherwise "legitimate exception" to access to information. These grounds include where the information would "make an important contribution to an ongoing public debate; promote public participation in political debate; … improve accountability for the running of public affairs in general and the use of public funds in particular; [and] benefit public health or safety."[59]

29. The existence of a public interest test in an access to information law is generally considered a sign of the strength of the right. Nearly half of the laws surveyed in a recent comparative analysis included a public interest test.[60] This recent analysis of 93 national right to information laws identified that public interest tests are strong and effective when they (i) are mandatory, (ii) apply to

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[50] Albania, Czech Republic, Germany, Italy, Moldova, the Netherlands, Norway, Romania, Spain, and Sweden. *See generally* Amanda Jacobsen, *National Security and the Right to Information in Europe* (Mar. 2013) (survey of the University of Copenhagen, in collaboration with the Open Society Justice Initiative).

[51] Denmark, France and Hungary. *Ibid.*

[52] Chile provides for criminal penalties for unauthorized disclosures only where such disclosure results in actual and "serious" harm. Paraguay requires that the disclosure exposes the state to a "risk of serious harm to its external security."

[53] *See, e.g.*, Parliamentary Assembly of the Council of Europe, Resolution 1838 (2011) on the abuse of state secrecy and national security, adopted 6 October 2011, para. 8.

[54] OHCHR, *Study on the Right to the Truth*, 8 February 2006, para. 20. *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, Resolution 2005/81, UN Doc. E/CN.4/2005/102/Add.l, 8 February 2005, Principles 2, 16.

[55] *See, e.g.*, *Gomes Lund v. Brazil*, IACtHR, Judgment of 24 November 2010, Series C No. 219.paras. 200-01; *Gelman v. Uruguay*, IACtHR, Judgment of 24 February 2011, paras. 118, 192, 243.

[56] Inter-American Model Law, note 23 above, Art. 44 (exceptions to the right of access provided for in the law "do not apply in cases of serious violations of human rights or crimes against humanity").

[57] Transparency and Access to Public Information Act No. 27806 of 2002 (Peru), Art. 15. Federal Law on Transparency and Access to Public Information of 2002 (Mexico), Art. 14. Law on Access to Public Information, adopted by Congressional Decree 57-2008 of 2008 (Guatemala), Art. 24. Law on Access to Public Information, Law No. 12.527 of 2011 (Brazil), Art. 21. Right of Access to Public Information Act No. 18.381 of 2008 (Uruguay), Art. 12.

[58] *Guja v. Moldova*, ECtHR (GC), Judgment of 12 February 2008, at paras. 72, 74. *See also Palamara-Iribarne v. Chile*, IACtHR, Judgment of 22 November 2005, at para. 88.

[59] PACE, Resolution 1954 (2013), adopted 2 October 2013, para. 9.5. *See also* Tshwane Principles, *see* note 4 above, Principle 3, Note ("factors favoring disclosure").

[60] Maeve McDonagh, *The public interest test in FOI legislation* (on file), p. 6 (44 of 93 countries).

all exceptions, (iii) are structured to favor disclosure, and (iv) set out the relevant factors to consider.[61]

30. Further, **non-disclosure must be time-limited**, as any legitimate justifications for the non-disclosure of records become progressively weaker over time.[62] Excessively long classification periods undermine the very essence of the Article 13 right of access to information. For these reasons, most democratic countries have adopted regimes for the periodic or automatic de-classification of reserved information in order to promote release of information even when not expressly requested.[63] In this respect, the Inter-American Model Law provides that exceptions to disclosure, including the national security exemption, "do not apply to a record that is more than [12] years old," which period may be extended once, "by approval of the Information Commission" not the original classifying authority.[64] The domestic laws of virtually all countries in the region contemplate maximum periods for maintaining classified information secret,[65] and "once that period has expired, the information must be made available to the public."[66]

31. **Information originating in the security services of a prior authoritarian regime should be subject to presumptive disclosure obligations** as the non-disclosure of information over a lengthy period is particularly unjustifiable for records related to violations of human rights implicating the security sector of prior authoritarian regimes. The Inter-American Court of Human Rights, expanding upon its jurisprudence concerning the right to truth and the duty of states to disclose information about human rights violations, has emphasized the heightened obligation on states following a repressive regime to disclose information about all human rights violations committed by the repressive regime, including and often especially records held by the security sector and identified as either classified or destroyed.[67] In *Turek v. Slovakia*, the European Court of Human Rights found that "it cannot be assumed that there remains a continuing and actual public interest in

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[61] *Ibid.*, at p. 19.

[62] *See also Turek v. Slovakia*, ECtHR, Judgment of 14 February 2006, para. 115 (Court rejected an assumption "that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes").

[63] In the region, Chile, Colombia, Guatemala, Nicaragua and Panama provide for a maximum period of classification. 2011 OAS Special Rapporteur's Report, note 41 above, Ch. III, para. 357. Law on Access to Public Information (Nicaragua) (2007), Arts. 28, 29, at http://legislacion.asamblea.gob.ni/NormaWeb.nsf/($All)/675A94FF2EBFEE9106257331007476F2?OpenDocument. Law on Transparency in Public Administration (Panama) (2002), Art. 7, at http://www.presidencia.gob.pa/ley_n6_2002.pdf. Law on Transparency in Public Administration and Access to information in the Administration of the State (Chile) (2009), at http://www.leychile.cl/Navegar?idNorma=276363. Law on Access to Public Information (Guatemala), Art. 44, at http://www.scspr.gob.gt/docs/infpublic.pdf. Organic Law on Transparency and Access to Public Information (Ecuador, Art. 9(2), at http://www.informatica.gob.ec/files/LOTAIP.pdf. Law on Access to Information of Uruguay, Law No. 18.381, Art. 18, at http://www.informacionpublica.gub.uy/sitio/descargas/normativa-nacional/ley-no-18381-acceso-a-la-informacion-publica.pdf. Law on Transparency and Access to Public Informatio (Peru), Art. 11, at http://www.peru.gob.pe/normas/docs/LEY_27806.pdf. Federal Transparency and Access to Governmental Public Information Act (Mexico), Art. 44, at http://www.ifai.org.mx/English. Law 57 of 1985 (Colombia), Art. 13. Law 594 of 2000 (Colombia), Art. 28 (establishing that classifications regarding any legal document will end after 30 years from their issue); Law 1097 of 2006 (Colombia), Art. 5 (establishing a period of classification of 20 years for "classified expenses"). The trend in member states of the Council of Europe has been to establish declassification procedures that provide a time limit, trigger event, or mandatory period of review to ensure that publicly-held information does not remain indefinitely classified. A study of laws and regulations governing classification and declassification in European countries found that 13 (of 19) have mandatory maximum classification periods. Three others require review of the classification decisions at least every five years. *See generally* Amanda Jacobsen, *National Security and the Right to Information in Europe* (Mar. 2013) (survey of the University of Copenhagen, in collaboration with the Open Society Justice Initiative) & communication with country experts.

[64] Inter-American Model Law, note 23 above, Art. 43. Most categories of reserved or classified information should be made public after a period of 12 years. For the most sensitive records, the initial classification could be extended by another 12 years, subject to the approval of an independent information authority.

[65] 2011 OAS Special Rapporteur's Report, note 41 above, Ch. III, para. 357.

[66] *Ibid.*, at Ch. III, para. 348 ("[M]aterial may be kept confidential only where there is a certain and objective risk that, were the information revealed, one of the interests that Article 13.2 of the American Convention orders protected would be disproportionately affected.").

[67] *See Myrna Mack v. Guatemala*, IACtHR, 25 November 2003, para. 180; *Gomes Lund v. Brazil*, note 55 above, paras. 200, 202.

imposing limitations on access to materials classified as confidential under former [authoritarian] regimes", especially when such records are "not directly linked to the current functions and operations of the security services."[68]

32. State practice is increasingly consistent with the principle that information related to the actions of prior authoritarian regimes – and especially human rights violations committed by those regimes – should be subject to mandatory or presumptive disclosure. Thus, governments have declassified *en masse* records from prior authoritarian regimes in, among others, various countries throughout Latin America and Europe.[69]

33. Experience from various transitional justice processes has shown that classification of old records served little or no genuine national security interest, and was often invoked only to shield perpetrators from truth and justice.[70] The objective reconstruction of the truth about past abuses is essential to enable nations to learn from their history and take measures to prevent future atrocities.[71] At the same time, the passage of time diminishes any legitimate justification for classification.

34. **Information important to prevent, and hold people accountable for, corruption should also be disclosed.** The international recognition of the fundamental right to access information concerning corruption is apparent in the growth of international and regional instruments, and national laws and regulations, to protect authorized and unauthorized disclosures of information related to corruption publicly or to designated entities, even when there would otherwise be duties to protect the confidentiality of information for national security or other reasons.

35. International and regional instruments increasingly require the disclosure of such information and recommend or require states to protect employees and members of the public from sanction for providing information about corruption.[72] None distinguish security sector employees as not being entitled to access protections. This is due to the great public interest in its disclosure. Even where there are normally requirements for employee confidentiality of such information, the international

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[68] *Turek v. Slovakia*, ECtHR, 14 February 2006, para. 115 (involving lustration proceedings against the applicant). *See also Jalowiecki v. Poland*, ECtHR, 17 February 2009, para. 37.

[69] Emi MacLean, Archives of State Security Service Records (2013), available at http://www.right2info.org/resources/publications/publications_nat-sec_archives-of-state-security-service-records.

[70] *See, e.g.*, Dale McKinley, *The State of Access to Information in South Africa*, prepared for the Center for the Study of Violence and Reconciliation, p. 23; Annual Report of the Office of the Special Rapporteur for Freedom of Expression, Inter-American Commission of Human Rights (2010), Ch. III, at http://www.oas.org/en/iachr/expression/docs/reports/access/Right%20to%20Access%20Araguaia%202010.pdf, pp 316-317. *See generally* Peter Kornbluh, The Pinochet File: A Declassified Dossier on Atrocity and Accountability (The New Press), 2004.

[71] UN Commission on Human Rights, Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Resolution 2005/81, adopted 2005 ("Updated Principles on Impunity"), Principles 2, 3.

[72] UN Convention Against Corruption, adopted 31 October 2003, entry into force 14 December 2005 (167 State parties), Arts. 8(4), 10, 32-33. Inter-American Convention Against Corruption, adopted by the Organisation of American States 29 March 1996, entry into force 3 June 1997,Arts. III(8). Organisation of American States, Model Law Protecting Freedom of Expression Against Corruption, 2002 (to implement the Inter-American Convention Against Corruption provision protecting public servants and members of the public from retaliation for disclosing corruption), Art. 2. Civil Law Convention on Corruption, adopted by the Council of Europe 4 November 1999, entry into force 1 November 2003, Art. 9. Parliamentary Assembly of the Council of Europe, Resolution 1729, adopted 29 April 2010, Art. 6.1.2 (whistleblower protection legislation "should therefore cover both public and private sector whistle-blowers, including members of the armed forces and special services"). African Union Convention on Preventing and Combatting Corruption, adopted 11 July 2003, entered into force 5 August 2006 (ratified by South Africa 2005), Arts. 1, 5(5), 5(6) (requiring state parties to adopt measures to "ensure citizens report instances of corruption without fear of consequent reprisals"). For comparative law and practice, see generally Venkatesh Nayak, *Public Interest Disclosure and Protection to Persons Making the Disclosures Bill (India's Whistleblower Bill): A comparison with International Best Practice Standards* (2010) (comparative study of whistleblower protection legislation in 20 countries considered to have "best practice"); Benjamin Buckland & Aidan Wills, *Blowing in the Wind? Whistleblowing in the security sector*, 2012, available at http://www.right2info.org/resources/publications/pretoria-finalization-meeting-april-2013-documents/whistleblowing-and-security-sector-buckland-and-wills/view.

instruments recognize clearly that the public interest outweighs even such duties of loyalty and confidentiality.

36. Some countries prevent the classification of information concerning corruption,[73] or provide a justification for the unauthorized disclosure of information where done in the public interest – either as an element of prosecutorial discretion or a defence to any charges.[74] Other countries even *require* the reporting of corruption or the commission of a crime (or of certain kinds of crimes), usually through disclosure to the authorities, and in some cases penalize public servants who fail to do so.[75]

37. Romania's whistleblower protection law, for instance, applies to public authorities and institutions within the central public administration and does not exclude the security sector. It protects disclosures concerning corruption, incompetence, or legal breaches related to good administration and the protection of the public interest. Protected disclosures may be made internally, to oversight bodies, judicial authorities, parliamentary commissions, or publicly, including to the media, trade unions and non-governmental organizations.[76] The law provides for criminal penalties for failure of public servants to report information concerning the commission of a crime.[77]

38. A requester should have a **right to independent and effective oversight** and review of any denials of the right of access to information.[78] The ultimate decision on whether to disclose or withhold information cannot be left to the discretion of the public authorities, but must be subject to independent review by "a competent court or tribunal."[79] Indeed, "[s]afeguarding the individual from the arbitrary exercise of public authority is the main purpose of the international protection of human rights."[80] In the context of the right of access to information, independent and effective oversight should include a "simple, effective, rapid, and unburdensome recourse that allows the convention of the decisions of those public officials who deny the right of access to some specific

[73] Albania's State Secret Law provides that information may not be classified if its aim is to cover up government inefficiencies or errors, to limit improperly the access to information that should not be classified in the interest of national security. Law No. 8457, on information classified "state secret" (Albania), 1999, Art. 10.
[74] Criminal Code (Argentina), Art. 155. Law No. 8.122, Providing a legal framework for civil servants (Brazil), 1990, at http://www.planalto.gov.br/ccivil_03/leis/l8112compilado.htm, Art. 126-A. Criminal Code (Denmark), 2008, Art. 152, at https://www.retsinformation.dk/Forms/R0710.aspx?id=142912#Kap13, Art. 152(e)(2). Public Servants Status Act (*Beamtenstatusgesetz*), 2008, at http://www.gesetze-im-internet.de/bundesrecht/beamtstg/gesamt.pdf, Sec. 38(2); Service Restructuring Act (*Dienstrechtsneuordnungsgesetz*), 2008 (cited in Jacobsen, *National Security and the Right to Information in Europe*, note 354). Criminal Code (Germany), 1998 (as of 2 October 2009), at http://www.gesetze-im-internet.de/stgb/BJNR001270871.html, Sec. 93(2). Whistleblower Act, Act 720/2006 (Ghana), at http://www.parliament.gh/assets/file/Acts/Whitsleblwer%20Act%20720.pdf, Arts. 1, 3. Freedom of Information Act (Nigeria), 2011, at http://www.noa.gov.ng/attachments/article/140/Freedom%20Of%20Information%20Act.pdf, Art. 27(2) (providing that the state cannot prosecute under the Official Secrets Act or criminal code any public officer who discloses without authorisation to any person information "he reasonably believes to show (a) a violation of any law, rule or regulation, (b) mismanagement, gross waste of funds, fraud and abuse of authority; or (c) a substantial and specific danger to public health or safety…"). ntegrity and Prevention of Corruption Act (Slovenia), 2011, Art. 23(4). Whistleblowers Protection Act (Uganda), 2010, at http://igg.go.ug/static/files/publications/Whistle_blowers_Act.pdf, Arts. 1-4. Crown Prosecution Service, Code for Crown Prosecutors 2.6, 3.4 (2010) (U.K.).
[75] Criminal Code (Argentina), Art. 277(d). Criminal Code (Mexico), Art. 215. Jacobsen, *National Security and the Right to Information in Europe*, p. 54 (referencing Italy).
[76] Law on the protection of public officials complaining about violations of the law (Whistleblower Law), Law 571/2004 (Romania), 2004, Arts. 1, 5, 6.
[77] Criminal Code (Romania), Art. 263.
[78] *See, e.g.*, Inter-American Legal Framework Regarding the Right to Access to Information, note 22 above, paras. 26-31.
[79] *Claude Reyes v. Chile*, note 7 above, para. 129.
[80] *Ibid.*

information, or who simply fail to provide a response to the request."[81] The remedy must be adequate to protect the right; and effective – that is, capable of achieving the intended result.[82]

39. In addition to the right to request information, and the duty incumbent on the public authority to respond to such requests, there has also been a growing recognition of the importance of **proactive disclosure**.[83] Many leading freedom of information regimes, in the Americas and beyond, require public authorities to proactively collect, generate and publish information on a number of issues that are considered important to democratic accountability.[84] Similar language in the Inter-American Model Law recommends requiring public authorities to proactively publish and regularly update 16 different categories of information, which relate to their respective internal policies, services and operations, financial management, senior officials, and record-keeping systems.[85]

C. Access to Information and National Security

40. The right of access to information, and the underlying justifications for the right, apply to guarantee public access to information held by security sector institutions and information related to national security.[86] Although the state may impose necessary and proportionate restrictions on the right to information on the ground of national security in certain circumstances, any national security restriction must comply with the above principles.[87]

41. The Inter-American Court of Human Rights, European Court of Human Rights, and UN Human Rights Committee have repeatedly recognized that information related to national security, including where classified, is not exempt from public access for that reason alone – decisions to classify it must be justified and the public must be able to request declassification.[88] This principle is increasingly being recognized in national law and practice. For instance, in a recent 2013 decision, the Colombian Constitutional Court rejected as unconstitutional and a violation of binding international law a proposal to exclude information related to defence and national security from the scope of a new access to information law.[89] Both the African and Inter-American model laws apply to all public authorities without limitation.[90]

42. The UN Human Rights Committee has stated authoritatively that it is not compatible with Article 19(3) of the ICCPR for a state to invoke state secrecy laws to "withhold from the public information of legitimate public interest that does not harm national security," and that public

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[81] Office of the Special Rapporteur for Freedom of Expression, Annual Report of the Inter-American Commission on Human Rights, 2009, para. 29. *Claude Reyes v. Chile*, note 7 above, para. 137.
[82] *See Serrano-Cruz Sisters v. El Salvador*, IACtHR, Judgment of 23 November 2004 (Preliminary Objections), Series C No. 118, para. 134. *Gomes Lund v. Brazil*, note 55 above, para. 231.
[83] *See* 2004 Joint Special Rapporteurs Declaration, note 6 above.
[84] *See generally* Helen Darbishire, *Proactive transparency: the future of the right to information?* (World Bank Institute Governance Working Paper Series), 2010.
[85] Inter-American Model Law, note 23 above, Art. 12.
[86] General Comment No. 34, note 5 above, paras. 7, 18.
[87] *See, e.g.*, Parliamentary Assembly of the Council of Europe, Resolution 1551 (2007), Resolution on espionage and divulging State secrets, 19 April 2007, paras. 1, 9 ("the State's legitimate interest in protecting official secrets must not become a pretext to unduly restrict the freedom of expression and of information").
[88] *Gomes Lund v. Brazil*, note 55 above. *Turek v. Slovakia*, ECtHR, Judgment of 14 February 2006, para. 115. *Toktakunov v. Kyrgyzstan*, Human Rights Committee, Decision of 28 March 2011, UN Doc. CCPR/C/101/D/1470/2006, paras. 7.7-7.8 (finding a violation of Article 19 of the ICCPR where the State party classified and withheld on national security grounds death penalty statistics, given the public's "legitimate interest in having access to information on the use of the death penalty"). Human Rights Committee, General Comment No. 34 on Article 19, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 30.
[89] Case No. D-9095, Sentence C-262/13, Constitutional Court (Colombia), 8-9 May 2013, para. 16, http://www.corteconstitucional.gov.co/comunicados/No.%2018%20comunicado%2008%20y%2009%20de%20mayo%20de%202013.pdf (rejecting as unenforceable proposed Article 5, paragraph 2).
[90] Model Law on Access to Information for Africa, adopted by the ACHPR, 6 May 2013, Arts. 1, 2(a), 12(1) Inter-American Model Law, note 23 above, Art. 1(e), 3.

disclosure should be subject to punishment only "where the release of such information would be harmful to national security."[91]

43. The Global Principles on National Security and the Right to Information (or "Tshwane Principles"), referenced above (see para. 6), provide support for limiting restrictions on the right to information on the ground of national security. Tshwane Principle 3 provides that: "No restriction on the right to information on national security grounds may be imposed unless the government can demonstrate that: (1) the restriction (a) is prescribed by law and (b) is necessary in a democratic society (c) to protect a legitimate national security interest; and (2) the law provides for adequate safeguards against abuse, including prompt, full, accessible, and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts."

44. The Tshwane Principles recognize that the right of access to state information, "including information that relates to national security," is necessary for the public to "monitor the conduct of their government and to participate fully in a democratic society, that they have access to information held by public authorities."[92] The Principles define public authorities to include security sector authorities and expressly prohibit the wholesale exemption of any public authority from disclosure obligations.[93]

45. The Principles specifically identify that the public has a right to know about the existence of all security sector entities, the laws and regulations that govern them, and their budgets.[94] Further, pursuant to the Tshwane Principles, governments should never withhold information concerning violations of international human rights and humanitarian law.[95]

46. The Tshwane Principles acknowledge that governments may legitimately withhold information in narrowly defined areas, such as defence plans, weapons development, and the operations and sources used by intelligence services.[96] However, in each instance, the government bears the burden of proof to demonstrate the necessity of restrictions on the right to public information, including a duty on the public authority to "provide specific, substantive reasons to support its assertions" that there is a "risk of harm" from disclosure of identifiable information. A blanket statement that disclosure would harm national security may not be conclusive.[97]

47. Classification, where used, should require the identification of the "narrow category of information" justifying disclosure, as well as "the harm that could result from disclosure."[98] Moreover, information should be classified only as long as necessary, and never indefinitely. Laws should govern the maximum permissible period of classification.[99]

48. Recognizing the obligation to disclose the truth concerning abuses by past authoritarian regimes, and the decreasing justifications for secrecy of this historic information, the Tshwane Principles provide that "there is an overriding public interest in disclosure to society as a whole of information regarding human rights violations committed under the past regime," and that "[a] successor government should immediately protect and preserve the integrity of, and release without delay, any records that contain such information that were concealed by a prior government."[100]

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[91] General Comment No. 34, note 5 above, para. 30. *See also* Concluding observations on the Russian Federation (CCPR/CO/79/RUS), 1 December 2003, para. 22. UNHRC, Concluding Observations on United Kingdom (CCPR/CO/73/UK), 6 December 2001, at para. 21.
[92] Tshwane Principles, note 4 above, Preamble.
[93] *Ibid.*, Definitions and Principle 5.
[94] *Ibid.*, Principles 10C, 10F.
[95] *Ibid.*, Principle 10A.
[96] *Ibid.*, Principle 9.
[97] *Ibid.*, Principle 4.
[98] *Ibid.*, Principle 11.
[99] *Ibid.*, Principles 16, 10D.
[100] *Ibid.*, Principle 10A(3).

49. Corruption in the security sector is often particularly concerning, because of the quantity of funds heightened risks in a climate of secrecy.[101] Andrew Feinstein, an expert in the corruption within the arms trade, writes for instance that approximately 40 percent of corruption in world trade is a result of the trafficking of weapons, and that secrecy is a major cause: "The very small number of people who decide on multibillion dollar contracts, the huge sums of money at stake and the veil of secrecy behind which transactions take place (in the interests of 'national security') ensure that the industry is hard-wired for corruption."[102] In recognition of the obligation to disclose information to prevent corruption, and hold perpetrators accountable, the Tshwane Principles require the public disclosure of "information sufficient to enable the public to understand security sector finances, as well as the rules that govern security sector finances."[103]

50. Public access to government information concerning the security sector is notably important because of the discretion that authorities of the executive typically exercise in this area; the sector's great powers, including to wage war and counterterrorism operations, conduct surveillance, detain and interrogate persons; and its oversight of significant public funds. The undue deference to arguments concerning national security secrecy can contribute to human rights violations, corruption, waste and abuses, with accountability hampered by secrecy.[104]

III. COMPLIANCE OF PERUVIAN EXECUTIVE DECREE 1129 WITH INTERNATIONAL LAW

51. This section first elaborates the provisions of the Peruvian Constitution and laws governing the right to information, including the provision in Decree 1129 restricting the right. Relying on the international and comparative law principles outlined above, this section then argues that the limitation on the right of access to information elaborated in Article 12 of Decree 1129 is inconsistent with international law. As stated in paragraph 7 above, this restriction: (1) is neither necessary in a democratic society nor proportionate, (2) violates the principle of maximum disclosure, (3) allows for perpetual secrecy, and (4) exempts the withholding of information in these categories from independent oversight.

A. Peruvian Law

52. Peru's 1993 **Constitution** guarantees the right to information. Pursuant to Article 2(5): "Everyone has the right to request, without identifying any cause, any information required and to receive it from any public entity." Article 2(5) provides for limited exceptions "for national security reasons."[105]

53. Peru's 2002 **Transparency and Access to Public Information Law** requires, as a general matter, that any of the contemplated restrictions on the right to access information be exceptional – that access be denied only where necessary and proportionate, where established in law, and in accordance with the principles of a democratic society. The law recognizes that all State information, in whatever form, and whether "created or obtained" by the State, or "in the possession or under the control" of the State, "is presumed public" unless the information is legitimately subject to "exceptions expressly foreseen" in the law.[106] The Law applies to all "entities of Public Administration," without limitation.[107]

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[101] *See, e.g.*, Enrique Pasquel, *Orgy in the dark: Secrets of national security*, El Comercio (Perú), 24 de octubre, 2013.
[102] Andrew Feinstein, *The shadow world: corruption in the arms trade*, New Internationalist Magazine, Issue 448, 1 December 2011, at http://newint.org/features/2011/12/01/corruption-in-the-arms-trade/.
[103] Tshwane Principles, note 4 above, Principle 10F.
[104] *See, e.g.*, Parliamentary Assembly of the Council of Europe, Resolution 1507 (2006), Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states, at para. 19.5.
[105] Constitution, Article 2(5). *See* Law on Transparency and Access to Public Information, Law No. 27806, 3 July 2002, Art. 1.
[106] *Ibid.*, Article 3(1), 10.
[107] *Ibid.*, Articles 4, 8, 10.

54. Neither a general justification for withholding public information, nor perpetual secrecy, is foreseen under the law. Pursuant to the law, if the State seeks to withhold information from public disclosure "it should be well founded in the Article 15 exceptions of the law, showing expressly and in writing the reasons that the exceptions apply and the period of time of the restriction."[108] Exceptions must be "interpreted in a restrictive manner as they are a limitation on a fundamental right."[109] The Law requires that classification decisions be reviewed every five years, and disclosed if disclosure of the information no longer "puts at risk the security of people, territorial integrity and/or the survival of the democratic system."[110]

55. Article 15 of the Law identifies specific exceptions to the right to information for "information expressly classified as secret, for reasons of national security." To justify withholding information on the ground of national security, the public authority must demonstrate that the information "as a fundamental matter guarantees the security of people and whose disclosure would jeopardize the territorial integrity and/or survival of the democratic system, with respect to the intelligence and counter-intelligence activities of CNI within the framework establishing the State of Law within the function of the situations expressly contemplated in the Law." The provision further delineates the limited sub-categories "exclusively considered" by this national security exception: "(1) information classified militarily whether internally or externally … (2) information classified as intelligence either externally or internally."[111]

56. The law expressly prohibits the classification of information "related to violations of human rights or the 1949 Geneva Conventions committed in whatever circumstance by anyone."[112] Similar provisions exist in other RTI laws in the region.[113] However, the relevant provision in Peru's RTI Law uniquely sits within the provision defining the national security exemption. RTI experts believe this is because the provision was incorporated into the RTI Law as a result of historical concerns in Peru related to the excessive invocation of national security to justify the secrecy of information concerning human rights violations.[114]

57. On 6 December 2012, President Ollantá Humala issued **Decree 1129**, with the stated objective "to regularize the nature, finality, functions and structure of the National Defence System."[115] Article 12 of Decree 1129 explicitly concerns Access to information, and requires that "all information" related to "security and national defence" is secret. It reads:

> "Access to Information: The agreements, acts, recordings, transcriptions and in general, all information or documentation that is generated in the area of subjects referred to as Security and National Defence, and those which contain deliberations from the sessions of the Council of Security and National Defence, are by their nature secret."

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[108] *Ibid.*, Article 13.
[109] *Ibid.*, Article 15.
[110] *Ibid.*, Article 15.
[111] *Ibid.*
[112] *Ibid.*
[113] *See* paras. 55-57 above.
[114] Communications, on file. *See also* Edward Vargas Valderrama, *The right to access public information in* Peru, 9 February 2011, at http://blogs.monografias.com/dextrum/2011/02/09/el-derecho-de-acceso-a-la-informacion-publica-en-el-peru/ ("Nevertheless, in Peru there remains an old 'culture of secrecy' that manifests itself in State Institutions. In response, and as a result of the work of the State together with civil society, the Law on Transparency and Access to Information arose.").
[115] Decree 1129 was enacted pursuant to Article 104 of the Constitution, which permits Congress to delegate to the Executive legislative functions where the subject matter and time period is strictly defined, and *Law 29915*, which delegated to the Executive, legislative authority over, among other things, "reform of the System of Security and National Defence," Law No. 29915, 11 September 2012, Arts. 1, 2(3), 2(4). The preamble to Decree 1129 emphasizes the obligation of the State to "promote the development of the country and guarantee the security of the nation, and the full enjoyment of fundamental rights, well-being and consolidation of the democratic rule of law, contributing to peace, sustainable development and social justice." Legislative Decree No. 1129, preamble.

B. The Excessive Secrecy Mandated by Decree 1129 Is Not Justified by National Security

58. Article 12 of Decree 1129 effectively serves as a limitation on the scope of the RTI Law, excluding absolutely information concerning security and national defense, without requiring any case-by-case justification by the public authority for withholding the information. Further, it does not set a time limit on this exclusion, or any consideration of public interests which might override the secrecy classification. Peru's constitutional and legislative framework guarantees the public right to information with only limited national security restrictions on this right. Decree 1129, in its broad and absolute secrecy not subject to meaningful oversight, takes an extreme step inconsistent with international law.

1) Decree 1129 is neither necessary nor proportionate.

59. Limitations of the right of access to information must be necessary in a democratic society and proportionate to the protected interest that justifies it, with as minimal interference as possible with the exercise of the right. The exclusion of broad categories from the scope of right to information obligations is neither necessary nor proportionate. Other, less restrictive, options are available to protect the same interests, including alternative protections already incorporated in Peru's RTI law. An absolute limitation of the right of access to information, as found in Decree 1129, is in violation of this international law obligation as there is no case-by-case analysis and no balancing of the public interests in each decision to withhold information. The exclusion of large classes of information from the application of the right to information undermines democratic accountability and the effectiveness of the right of access to information.

60. Decree 1129 **directly conflicts with the fundamental right of access to public information**. This right is established by Article 2.5 of the Constitution and the Peruvian Transparency and Access to Public Information Law. The challenged provision clearly contravenes the regulation of exceptions for national security information established by the Transparency and Access to Public Information Law, as well as the international parameters espoused within this report.

61. The broad exclusion of entire categories of information from the scope of the RTI Law is **not necessary, as the information in question is already protected from disclosure, where appropriate, under the existing system of exceptions**. If a less restrictive option is sufficient to achieve the objective, then any additional restrictions are not necessary. The protection from disclosure under the system of exceptions is a narrower restriction on the right to access information than the complete exclusion of categories of information would be.

62. In the access to information laws of other countries, the protection of interests related to security and national defense is adequately addressed through narrowly-construed exceptions, rather than by excluding entire categories of information from the scope of the law. A review of 50 national right to information laws examined by the authors of this report found virtually all included within the scope of the law defense and national security matters, and provided for explicit national security exceptions to protect the public interest in limited circumstances where the public authority can justify withholding.[116] The Inter-American Model Law also envisions case-by-case exceptions for national security, but it does not envision the inapplicability of the RTI regime to this category of information.

63. Notably, in Peru, these exclusions from the scope of the law are protected by the existing system under the ordinary and balanced system of exceptions elaborated in Article 15. Under this system, a public authority must identify specific harm to a protected interest resulting from the disclosure; the potential harm to the protected interest that disclosure would cause must be assessed and balanced against the public interest in disclosure; and there are time limitations to disclosure and independent oversight of a refusal to disclose information. This strikes an appropriate balance and allows the

[116] This includes 18 laws from OAS countries, as well as laws from Africa, Asia, and Europe.

protection of national security information where truly required, subject to the safeguards set out by international law. None of these protections against abuse would apply to those categories of information excluded under the relevant provision of Decree 1129. No justification has been provided as to why any greater restriction would be warranted, and it is submitted that none exists.

64. Under international law, **restrictions on the right of access to information should be neither absolute nor categorical, and they should require oversight and a case-by-case analysis** of the propriety of withholding disclosure. The State is obliged to justify withholding the information, with specific reasoning, in cases where exceptions apply. In this way, restrictions on disclosure will not be arbitrary.[117] The burden of proof to justify any decision refusing to provide information "lies with the body from which the information was requested."[118] Exceptions also allow partial disclosure where appropriate, rather than blanket withholding of all information, and temporal limits on secrecy. An absolute exclusion of information cannot satisfy these requirements. Given that these less restrictive options have proven adequate in multiple other laws, including in Peru's, and have been endorsed by OAS States in the Inter-American Model Law, the more restrictive course of classifying entire categories of information as secret and thereby excluding these entire categories from the scope of the law is not necessary.

65. **An absolute and categorical exclusion also, by definition, cannot satisfy the proportionality test**. Such an exclusion does not require the public authority to demonstrate that the disclosure in question would cause harm to a legitimate aim, and does not provide for balancing any harm to the protected interest against the public interest impeded through withholding the information. Only by reviewing the nature and content of each specific document can the authorities assess the harm that its disclosure might cause and the strengths of the public interest disclosure would serve—requirements for restrictions on the right to be proportionate.

66. The classes of information targeted for exclusion – security and national defense – cover some of the fundamental actions made by the State that are central to democratic decisionmaking. There are well-founded justifications for the withholding of information in these classes to protect legitimate interests in appropriate circumstances. Indeed, national security provides a significant public ground for withholding information.[119]

67. However, it is also submitted that access to information helps safeguard against abuses by enabling public scrutiny of government actions, including in the areas of security and national defense, where decisions are often of great public interest and susceptible to undue deference. These classes of information include, for instance, government decisions to engage in war, respond to democratic dissent, and deprive people of their liberty.

68. Therefore, there would need to be a strong – and individually demonstrated – justification for non-disclosure balanced against the public interest justifications for disclosure.[120] Narrowly-tailored exceptions to the right, as found in Article 15 of Peru's RTI Law, demand a case-by-case analysis of whether the restriction is merited, and substantial harm and public interest tests to ensure the requisite balancing of harms and benefits from disclosure or non-disclosure.[121] This system, which has proven adequate in the access to information laws of other countries, and which is found in the Inter-American Model Law and Peru's RTI Law, ensures that any restriction on disclosure will be proportionate. Article 12 of Decree 1129 is excessive and cannot satisfy the proportionality requirement under international law.

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[117] *Claude Reyes v. Chile*, note 9 above, paras. 58, 77.
[118] Inter-American Juridical Committee, Principles on the Right of Access to Information, note 27 above, Principle 7.
[119] *See* paras. 22 & 40, above.
[120] *See, e.g., Claude Reyes v. Chile*, note 7 above, paras. 77, 86-87, 95.
[121] *Ibid.*, at paras. 77, 95 (requiring a case-by-case analysis of any restriction on access to information).

69. Further, the exclusion of these classes of information from the scope of the law is not only not necessary in a democratic society, it **undermines the very notion of democratic accountability**. As the Constitutional Court of Colombia has said:

> "[T]he most important guarantee of an appropriately functioning constitutional regime is the full publicity and transparency of public administration. Decisions or actions of public servants that they do not want exposed are usually ones that cannot be justified. And the secret and unjustifiable use of State power is repulsive to the rule of law and appropriate functioning of a democratic society."[122]

70. In the Americas, in particular, the importance of public disclosure in these areas is well-recognized, in light of the gross human rights violations which have been committed in secret with national security as a long-running justification. State secrecy laws long existed to punish disclosure of information detrimental to economic or military affairs as a "national offense," using "'national security' as a broad shield to hide information from public knowledge."[123] The Inter-American Commission, in the Commentary to the Model Inter-American Law, even singles out Peru specifically for improperly asserting a need for national security secrecy to cover up abuses: "State secret provisions were derogated from penal codes of Mexico and Peru during the twentieth century, where they were mainly used to cover discretionary actions and maladministration taken by the government."[124]

71. The classification of broad categories of information as secret and their categorical exclusion from the scope of the public's right to information also **limit the effectiveness of access to information, and undermine the objectives of the right of access to information** of ensuring the full exercise of freedom of expression, facilitating public information about and encouraging public confidence in government functioning, fostering democratic accountability and good governance, and reducing corruption and governmental abuses.

2) Decree 1129 violates the principle of maximum disclosure.

72. An expansive exclusion of broad categories of information from right to information obligations does not adhere to the requirement that public authorities be "governed by the principle of maximum disclosure."[125] Although the RTI Law incorporates the principle of maximum disclosure, the categorical exclusion of broad classes of information from the scope of the RTI Law through Decree 1129 renders this meaningless. For these classes of information, secrecy rather than disclosure would be the presumption, with no mechanism within the law to override such a presumption.

3) Decree 1129 violates the prohibition against perpetual secrecy.

73. As elaborated above,[126] perpetual secrecy is impermissible and inconsistent with the obligations of necessity and proportionality. Peru's RTI Law recognizes the importance of the principle that restrictions on the right must be time-limited, with a requirement of classification review every five years and mandated disclosure if the conditions for classification are no longer met. However, the automatic classification of broad classes of information as secret, and their effective exclusion from the scope of the law through Article 12 of Decree 1129, eliminates the requirement that these classes of information should be disclosed after a certain period of time and affords, indeed arguably even requires, their perpetual secrecy. Pursuant to Decree 1129, this is as true for information concerning past abuses by authoritarian regimes as for current security and national

[122] Judgment C-491/07, Constitutional Court of Colombia, 27 June 2007, p. 1.
[123] Commentary to Model Inter-American Law, note 23 above, p. 5.
[124] *Ibid.*, at p. 5.
[125] *See* paras. 17 & 19 above.
[126] *See* para. 30, above.

defense information, even though, as elaborated above (see paras. 31-32) for the former there is no public interest in its withholding from disclosure.[127]

4) Decree 1129 seeks to remove the secrecy of security and national defense information from independent oversight.

74. Restrictions on the right to access information must be subjected to independent oversight.[128] However, classifying entire categories of information as secret and excluding them from the scope of the RTI Law precludes any independent oversight over a decision to withhold information. The classes of information excluded from the scope of the RTI Law would arguably not be subject to the review mechanisms mandated by the RTI Law and access to them would thus be entirely at the discretion of the public authority.

75. Different mechanisms for review may be adequate and effective for enforcement and oversight of the right to access information, such as the inclusion of independent oversight authorities followed by full review by the courts, or judicial review on its own.[129] But regardless of how it implements this oversight, pursuant to international law obligations, Peruvian law should provide for adequate safeguards against abuse, including prompt, full, accessible and effective judicial scrutiny of the validity of any restriction on access to information. Decree 1129 seems to provide that denials of information related to security and national defense are not reviewable on the merits – either immediately or at all.

IV. CONCLUSION

76. For the reasons elaborated above, Article 12 of Decree 1129 is inconsistent with international law. By establishing broad and categorical exclusions of classes of information from public access, Decree 1129 disregards the requirement that limitations of the right of access to information must be both necessary and proportionate to a legitimate aim, and undermines the obligation of maximum disclosure. It also creates the possibility of perpetual secrecy, and leaves the disclosure of large classes of information entirely at the discretion of the public authority, without any independent oversight.

77. The exclusions identified therein are properly identified in Peru's RTI Law as areas for which case-by-case exemptions to disclosure may be appropriate, and are thus already protected through the established framework. There is no basis to categorically classify them as secret and exclude them entirely from review and, where appropriate either full or limited, or at a minimum eventual, disclosure.

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[127] Tshwane Principles, note 4 above, Principles 16(a), 16(c). *See also* paras. 22, 24 & 29 above.
[128] *See* paras. 38 & 43 above.
[129] *See* Commentary to Inter-American Model Law, note 23 above, Ch. 3, considering advantages and disadvantages, as well as structure and function, of information commissioners with a mandate to make either binding orders or recommendations, and judicial review.