

THE NEW STATUTE ON ACCESS TO PUBLIC INFORMATION



One of the main pieces of legal news in 2009 was the enactment in April 20th, 2009 of the Act No 20.285 (the Act) and its Administrative Regulation about access to public information. The Act embodied the principle of transparency for all acts by governmental bodies, which is established by the Chilean constitution. The Act established specific rights and legal mechanisms to enforce these rights, and created the Transparency Council, an administrative, specialized and independent agency which decides any dispute about access to public information. Its origin was marked by a reaction from the civil society and several authorities to a series of administrative malpractices which had made all constitutional rules about transparency and access to public information unreal.

The enactment of this Act interests investors from two main perspectives. On the one hand, it is a legislative improvement since it creates an effective legal mechanism to guarantee the rationality of administrative agencies' decisions concerning all investment projects. On the other hand, however, the Act entails the risk that competitors may disguise themselves as citizens to access to certain strategic information belonging to a firm which has been dealing with the corresponding public authorities. In the following paragraphs we will describe the main aspects of this new regulation and the safeguards established by the Act to avoid these risks.

Scope of the Act

The Act applies in principle to all governmental bodies and explicitly includes government departments, town councils, regional governments, local councils, the national army, the air force, the navy, the police and all other public bodies and public services created to carry out administrative functions.

Goals

The Act establishes a variety of goals which are useful for the interpretation and integration of all the rules contained in the Act. Its main and ultimate goal is transparency of the public function. It involves a duty of the abovementioned bodies to respect and protect public access to all acts, decisions, proceedings and files in their hands and the grounds on which such acts, decisions, proceedings and files are

based; and a duty to allow any person to access to this information through those mechanisms specifically provided by the Act. This goal has an active and a passive dimension, as we will see below.

The Act also establishes a series of specific goals such as the principle of relevance, freedom of information, openness, full disclosure, facilitation, non-discrimination, opportunity, control, responsibility and free access to public information.

Active Transparency

This is one of the main guarantees of open disclosure as established by the Act. It consists of an obligation to maintain certain data for public access through the corresponding web sites. The data must be full-length and updated on a monthly basis, and must refer to the administrative structure of the corresponding body, the functions and powers of its internal departments, the legislative framework applicable to such body, staff and wages, acquisitions of inputs for the achievement of its tasks, transfers of public funds, acts and decisions affecting third parties, information about any procedure and the requirements for receiving the services, subsidies and other benefits granted by the corresponding body, a list of the current beneficiaries, mechanisms for public participation, budgetary information and reports about budget expenditures, results of any budget audit, and participation of the corresponding authority in other governmental bodies.

Any person is entitled to make a claim before the Transparency Council if the information required is not available in the abovementioned terms.

Passive Transparency or Right to Access to Public Information

This is another right incorporated by the Act. It comprises the right of any person to access the information contained in acts, decisions, files, contracts or agreements issued or entered into by any governmental body or agency, the grounds on which they are based, their direct and essential supporting or complementary documentation, the proceedings for issuing or entering into those acts, decisions, files, contracts or agreements, and all information produced with public funds, whatever its format or support.

There is a fast, effective proceeding to achieve this task, subject to administrative revision by the Transparency Council, and then possibly subject to judicial revision as well. The Act only requires a written request before the corresponding administrative body indicating the information requested, and it is not necessary to mention the reasons for requesting the information. In principle, the administrative body has a maximum period of twenty working days to provide the information, unless one of the exceptions established by the Act applies.

There are two main sorts of exceptions. First, the request may refer to documents or files containing information which may affect third parties' rights. In this case, the administrative body must inform the interested parties and give them a three-day period to oppose the request. In case of objection, the dispute has to be decided by the Transparency Council and meanwhile the corresponding administrative body is prevented from providing the information requested. Clearly, this is one of the legal mechanisms to protect firms from competitors disguised as citizens.

The second exception refers to information declared by the authority as secret or reserved. This is an exceptional declaration and must be based on specific grounds related to national security, national interest, the protection of personal rights and due performance of the authority's functions.

In case of infringement or refusal to grant access to the information requested, the Act

entitles the interested party to file a claim before the Transparency Council. The Act also contemplates an instance of judicial revision of the Transparency Council's decision before the corresponding Court of Appeal.

The Act establishes several administrative sanctions in case of its infringements.

Specific Rules

It is relevant to note that the Act contains certain specific rules for a number of public organizations. In these cases the Act either applies partially or is complemented by other rules.

For instance, State-owned companies are only covered by the principle of transparency and subject to certain requirements regarding active transparency, besides the rules applicable to open corporations (*sociedades anónimas abiertas*) about information duties to the Securities and Insurances Agency (*Superintendencia de Valores y Seguros*).

Certain administrative independent organizations such as the Chilean Central Bank (*Banco Central*) and the National Audit Office (*Contraloría General de la República*) are governed by the principle of transparency and active and passive transparency rules, but they are not under the Transparency Council revision. Therefore, in case of infringement or refusal to supply the information requested, the complaint must directly filed before the corresponding Court of Appeal.

This legal regime also applies to other governmental organizations such as the Criminal Prosecution Office (*Ministerio Público*), the Constitutional Court (*Tribunal Constitucional*) and bodies that form part of the polling services. The Chilean Congress, in turn, is governed by the principle of transparency and active transparency rules with some additional duties. Finally, the Judiciary is subject to active transparency rules and some additional duties related to certain types of decisions.

Conclusion

As can be noted, the Act grants the whole community an effective mechanism of control and accountability with respect to all governmental bodies in order to guarantee the rationality of their decisions. It therefore contributes to the prevention of possible corruption practices thereby protecting the rule of law and the freedom to seek and offer information more effectively. However, firms must be aware of possible attempts of competitors to abuse the Act who, when disguised as citizens, may try to gain access to strategic information by using the legal mechanisms to safeguard free access to public information.

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