Ecuador:

How to dismantle the culture of secrecy?

Shadow report about the Sostainable Development Goals (SDG) 16.10.02

Access to Public Information: Report on compliance with this right in Ecuador

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By:

FUNDAMEDIOS

MIL HOJAS FOUNDATION

Index

EXECUTIVE SUMMARY

The following report presents synthesized information from civil society about access to public information in Ecuador. FUNDAMEDIOS and the MIL HOJAS FOUNDATION present in this document data that exposes the status of this right and the compliance with the ¨Organic Law of Transparenc¨ and Access to Public Information (LOTAIP), dating from 2004.

The legislation guarantees all citizens, as a fundamental right, free access to information generated and guarded by the public administration or by institutions that have State funds. However, it is a fact that officials at all hierarchical levels violate it. The Ombudsman Office is responsible for compliance with the LOTAIP, but can only suggest to the public servants its correct use.

Although the Law and the regulation establishes principles conducive to guarantee the right of access to information, its normative development often reduces it to certain similar areas. For example, the principle of transparency is limited to the obligation imposed on public entities to maintain an online web portal where a minimum of information corresponding to administrative, financial and missionary tasks must be published.

The Declaration of Principles on Freedom of Expression of the Inter-American Commission on Human Rights (IACHR) determines that the Law must guarantee the most effective and widest possible access to public information. In this context, the LOTAIP does not guarantee the right in the terms established in the international standard.

The Law establishes that requests for access to information must be answered within the peremptory period of ten days, which can be extended for five more days for duly justified reasons and informed to the petitioner. The requested entity should not exceed 15 days to respond; however, in Ecuador there is a registry of institutions that do not respond.

The lack or awareness of the authorities on the right of access to information is evident. In addition, despite new technologies, the administrative, bureaucratic mechanisms and the submission of applications for access to quality physical processing violates the Law. A regulation and update of the regulatory framework is urgently required.

According to the rendering of accounts of the Ombudsman Office 2018, during 2017, 100,910 requests for access to information were received, 95,864 of those were answered with information delivery. It is unknown if the information delivered was correct.

The number of responses and the time of delivery can be encouraging. According to the most recent report of the Ombudsman Office, public institutions take 10 days to do deliver. The most frequent causes for denying information are: the institution lacks data, is not in charge of processing it, or the information belongs to the reserved category. Regarding this, many entities indicate that the information is reserved, but that does not appear on the website even though it is required by Law.

In 2018, the Ombudsman Office created five strategies for the LOTAIP to be fulfilled: 1) A document that compiles international standards and minimum essential contents regarding this right; 2) It was proposed that the requests be physical and electronic; 3) Approach of Human Rights, gender and diversity was incorporated;
4) It was ordered that the entities of the public sector implement programs of dissemination and training of the right to access information; 5) It was proposed that goal 8 of the National Development Plan 2017-2021 be met.

This Plan is based on six policies and two goals. The second policy directive and the second goal are related to the right to access public information. It is determined: "Strengthening transparency in the management of public and private institutions and the fight against corruption, with better dissemination and access to quality public information, optimizing accountability policies and promoting participation and social control". The second goal states: "Improve the rates of citizen perception of corruption in the public and private sectors: improve the Public Transparency Index (citizen dimension) to 2021."

This policy contemplates five fundamental aspects:

1. Strengthening institutional transparency
2. Fight against institutional corruption
3. Better dissemination and access of quality public information
4. Optimization of accountability policies
5. Promotion of participation and social control

Regarding the first point, public institutions distort the concept and guidelines of transparency, without having a permanent monitoring on the management's publicity, using the institutional web site with minimum information as the only transparency mechanism. There is no effective mechanism for verifying the content of that information.

Regarding the fight against corruption, Ecuador has several institutions that have competence in that area. The most recent is the Anti-Corruption Secretariat, created in February 2019. Among these entities there are agreements to work, however, logistical limitations, lack of staff training and political influences impede work and do not generate confidence in the citizenry.

INTRODUCTION

The Organic Law of Transparency and Access to Public Information, LOTAIP, was created in 2004 aiming to give any citizen the right to access the information that rests in the entities that receive funds from the State. In parallel, the growing restrictions on access to information are incompatible with the consolidation of a democratic system and the fight against corruption.

In article 11, the Law establishes that without prejudice to the powers that the Laws assign to other public institutions to request information and the powers conferred on them by their own legislation, the Ombudsman Office is the body that promotes the exercise and compliance of this right. It also has the promotion, surveillance and guarantees established in the Law; and, in this context, promote or sponsor actions of access to public information when it is denied; as well as issuing the technical parameters for compliance with the obligations of active transparency.

The LOTAIP stipulates that all entities that are part of the public sector will implement dissemination and training programs on the right of access to information. These should be aimed at both civil servants and civil society organizations to ensure greater and better citizen participation in the State.

Officials are not the owners of the information, but its custodians. It is necessary to urge the servers of the different public institutions to respect the requests for access and guarantee compliance with the Law, which in turn guarantees the exercise of citizens' rights. It is important to rescue the obligation that officials have to render accounts and to answer doubts about their management.

By Law, all public institutions and those that receive state funds must submit to the Ombudsman Office, until the last working day of March of each year, an annual report on compliance with the right of access to public information. For this, there is a computer system called MLOTAIP - through which online reports are presented.

METHODOLOGY

In 2018, civil society organizations, unions, journalists and media representatives denounced the growing restrictions on access to information.

In this context, FUNDAMEDIOS and FOUNDATION MIL HOJAS, civil society organizations, determined the importance of preparing a report that works as an input to diagnose compliance with the right to access of public information in Ecuador, lead by international instruments. For this, five axes of analysis were developed:

1. Context: Information that emerges from the management reports of the Ombudsman Office.
2. Comparative: Advances / Setbacks between the last two periods
3. Compliance with the Strategic Plan that includes transparency in its objective 8
4. International Standards and LOTAIP
5. Iconic cases

The two most recent reports (2016-2017) published by the Ombudsman Office show the data presented in this report.

In addition, a series of emblematic cases that account for the situation in the country were selected and that information was checked against what international standards dictate. In that sense, the conclusions of the present analysis are derived from the official information provided by the entity responsible for exercising and fulfilling the right of access to public information.

NATIONAL CONTEXT

The LOTAIP in 2017, according to a report from the Ombudsman Office. -

The 2018 Annual Report, presented at the end of last year by the Ombudsman Office, states that in 2017 1,325 entities within the five branches of government (Executive, Legislative, Judicial, Electoral and Transparency and Social Control) showed updated information on their respective web sites, as required by Law.

Sixty-four point fifty-four percent (64.54%) of the entities that make up Executive Function , that is to say ninety-one entities, disseminate their information through its portals. Thirty-one point ninety=one percent (31.91%), fourty-five institutions, does not record the way in which their information is transparent. Three point fifty-five (3.55%) that is five entities, disseminate their information through "other mechanisms".

The Legislative Branch reported that it disseminates its information through its website. This implies 100% compliance. The same happened with the Electoral Function and that of Transparency and Social Control.

Two of the three entities that make up the Judicial Branch transmit public information through websites. The office of the Attorney General (FGE) does it "through other mechanisms". It does not specify which ones.

Of the Decentralized Autonomous Governments (GAD), 356 (33.62%) report through their website. However, 678 (64.02%) did not register how they disseminate their information. Twenty five (2.36%) make it public through "other media".

Requests for access to information reported in 2017 for the 2018 report.-

In 2017, 100,910 requests for access to public information were received. It is an increase of 3.17% in relation to 2016.

	2016		2017	
Characteristics	Cantidad	%	Cantidad	%
Información delivery	95.135	97.4%	95.864	95.0%
Denial of information	1.519	1.5%	1.303	1.3%
Unanswered Requests	728	0.7%	3.651	3.6%
Total valid requests	97.382	99.6%	100.818	99.9%
Reported Requests with errors	321	0.4%	92	0.1%
Total	97.703	100%	100.910	100%

Of the 100,910 access requests reported in 2017, 95,864 were answered by delivering the requested information. That is, 95%. The percentage is lower than that reported in 2015 and 2016, which was 95.2% and 97.4%, respectively.

Of the 100,910 applications received nationwide in 2017, 0.1% was reported with errors. This translates into 92 requests.

A 1,303 requests were answered with negative information; that is, 1.3%. When comparing the data with those of 2015 and 2016, a reduction was observed. In those years, the percentage was 2.2% and 1.5%, respectively.

Another 3,651 access requests were not answered. Three point six percent (3.6%) of total requests. This represents an increase in relation to 2015 and 2016, when 1.1% and 0.7% were reported, respectively.

With this background, for the following analysis presented in this report, only valid requests for access to information are considered. The 100,818 requests registered without errors, corresponding to 99.9% of the most recent annual record.

During this period, 1,303 negatives were reported to access requests. The causes were:

Grounds for refusing	Number of requests	Porcentage
Information is not produced or available	364	27,9%
Confidential Information	197	15,1%
Request of Informationis unclear	251	19,3%
Reserved Information	32	2,5%
Information corresponding to another institution	90	6,9%
Does not report cause of denial	369	28,3%
Total	1303	100%

Zonal 9 (Metropolitan District of Quito) shows the reception of the largest number of requests for access to public information on a national scale, with 76.9% of the total reported in 2017. This variable is justified by the presence of the largest congregation of obligated entities have its headquarters in the capital. Therefore, it is in this city where most requests are generated.

The provinces with the lowest number of requests for access to public information are: Los Ríos, with 2 requests (0.001%); and Santo Domingo de los Tsáchilas, with 13 orders (0.01%).

The national average of time used to answer the requests for access to public information in 2017 was 7.77 days. It is less than the average lapse recorded in 2016 of 9.50 days.

Rank of time	2017	Porcentage
Up to 10 days	80.525	79,87%
11 to 15 days	6.319	6,27%
16-30 days	6.228	6,18%
1 to 6 months	3.806	3,78%
More than 6 months	288	0,28%
Unanswered requests	3.652	3,62%
Total	100.818	100%

In 2017, 80,525 (79.87%) applications were answered within the period established by Law: up to ten days from the date of receipt. 6,319 (6.27%) requests were answered by making use of the five extendable days authorized by the standard.

Now, in relation to requests for access to information that were responded to after the deadline corresponded to 10.24%.

On the reserved information, in 2017, 57 entities reported their information index listing, with a total of 2,896 reserved topics.

According to the conformation of the State, the reserved information was presented as follows:

Function	Reported Themes	%
Executive Function	2660	91,85%
Legislative Function	3	0.10%
Judicial Function	8	0,28%
Electoral Function	0	0%
Transparency and Social Construct Function	142	4,91%
Decentralized Autonomous Government	16	0,55%
Other Institutions	67	2,31%
Total	2896	100%

It has been made visible that many entities do not clearly determine the topics considered reserved. Codes or nomenclatures are established. Although the content of this information is reserved, it is not the index listing that is subject to the principle of publicity and maximum disclosure. This must comply with the requirements of accessibility, clarity and sufficiency.

Until July 31, 2018, the date on which the M-LOTAIP application was closed, 1,461 reports of compliance with the Law were reported in full. This corresponds to 97.34% of the universe of obligated entities.

- Seventeen institutions submitted an incomplete report. They represent 1.13% of the total.

- twenty-three entities, 1.53%, did not enter the application. They did not submit reports.

The LOTAIP in figures for years.-

Compliance of public entities on the annual reports of the LOTAIP:

State of the Report	2012	2013	2014	2015	2016	2017
Completed	1.181	1.119	1.324	1.445	1.480	1.461
Incompleted	37	41	38	24	11	17
Not presented	293	334	111	41	13	23

Institutions that comply with the updated information in their web pages:

Amswers	2015	%	2016	%	2017	%
Yes	1307	91%	1338	88%	1325	90%
No	136	9%	150	12%	144	10%
Total	1443	100%	1488	100%	1469	100%

Means used by public institutions to disseminate their information:

Medios	2015	%	2016	%	2017	%
Web Page	601	41,57%	619	50,5%	590	40,16%
Others	66	4,65%	64	6,3%	40	2,72%
No Information	776	53,78%	805	43,2%	839	57,12%
Total	1443	100%	1488	100%	1469	100%

Status of requests for access to information:

	2015		2016		2017	
Characteristics	No.	%	No.	%	No.	%
Information Delivered	132.331	95,2%	95.135	97,4%	95.864	95,0%
Information Denied	3.037	2,2%	1.519	1,5%	1.303	1,3%
Requests not approved	1.512	1,1%	728	0,7%	3.651	3,6%
Valid Requests	136.880	98,5%	97.382	99,6%	100,818	99,9%

Requests for access to information received by conformation of the State:

State Function	2016	Porcentaje	2017	Porcentaje
Excecutive	56.745	58,2%	67.126	66,6%
Legislative	175	0,2%	163	0,2%
Judicial	6.189	6,4%	4.664	4,6%
Electoral	1.486	1,6%	932	0,9%
Transparency and Social Control	223	0,2%	543	0,5%
Decentralized autonomous governments	13.810	14,2%	14.692	14,6%
Other public institutions	18.754	19,2%	12.698	12,6%
Total	97.382	100%	100.818	100%

COMPLIANCE WITH THE STATE STRATEGIC PLAN

The National Development Plan 2017-2021 in accordance with the provisions of Article 280 of the Constitution, develops the parameters of public policies, programs and projects on which the development of the State is based with nine objectives divided into three axes. The Plan sets global development strategies in the universal and regional context. In this regard, it is important to highlight that in various stages of the Plan: diagnostic spaces, objectives, policies and goals including aspects linked to transparency, mainly as a tool for the fight against corruption. Objective 8 is aimed to promote transparency in a broader context that even incorporates citizen responsibility for the achievement of what is described as a new social ethic.

The Objective gives an account of the proposals of the round tables in relation to the fight against corruption, specifically against tax havens and the development of international instruments for the exchange of information that allows fiscal justice, transparency in public works contracts or military spending.

With the development of the concept of corruption, the objective is based on the preferential attention of public policies in aspects such as the fight against corruption, understood as a mechanism for the consolidation of a new policy towards the goals established in the Agenda of the States 2030, which promotes just, peaceful and inclusive societies. To this end, the goal is set to significantly reduce corruption and bribery in all its forms, create effective, responsible and transparent institutions at all levels.

The National Plan recognizes within the analyzed objective the presence of acts of corruption for decades, contractual relations of companies with the State and officials of different levels and instances as protagonists of these acts; but it also establishes the mechanisms adopted by the State to guarantee the fight against corruption, having as its main strategy the signing of normative instruments of an international nature, such as the United Nations Convention against Corruption and the Inter-American Convention against Corruption, mechanisms of the universal and regional planning respectively.

It is important to highlight the conjugation that is carried out in the objective on the international instruments and the constitutional norm, that establishes the primary duty of the State to guarantee its inhabitants the right to a culture of peace, to integral security and to live in a democratic society free of corruption; but also the interaction between the State and society to guarantee the fight against corruption, mutual obligation that is established in article 83.8 of the Constitution and the National Plan which is translated with the following text: "In spite of the normative advances to eradicate corruption, citizens are needed to respect and enforce the norms, as well as institutions that control their compliance and, in the case they are broken, apply sanctions". Establishing the defeating corruption requires "a great national pact that has the backing of a vigilant, informed and participatory society that recognizes the co-responsibility of all actors in society, both public and private".

Another aspect of relevance to measure the compliance of the Plan is that it lands the international normative and the constitutional provision previously stated in the sub-constitutional scenario throughout the different competencies assigned to various institutions for the promotion of transparency and fight against corruption. Then the strengthening of institutions that support the rules with clear and efficient procedures to detect, investigate and punish corruption is proposed.

The Plan proposes as a strategy, Education that focuses on transparency, honesty, solidarity and respect for others. On the other hand, it considers that the efficient coordination between institutions with specific competencies to detect, investigate and punish corruption allows the detection of acts of corruption so these do not remain in impunity; considering for the development of these strategies, principles like ethics, co-responsibility, participation and citizen control.

The Plan proposes six policies and two goals that are transcribed below to facilitate review of the progress:

Policies:

1. Promote a new secular ethic, based on honesty, solidarity, co-responsibility, dialogue, equality, equity and social justice as values and virtues that guide the behavior and actions of society and its various sectors.

2. Strengthen transparency in the management of public and private institutions and the fight against corruption, with better dissemination and access to quality public information, optimizing accountability policies and promoting participation and social control.

3. Promote measures for prevention, control and sanction of conflicts of interest and opacity in the contracting and services of the State.

4. Fight against impunity, strengthening inter-institutional coordination and effectiveness of the processes for the detection, investigation, prosecution, punishment and execution of sentences.

5. Promote a national and international ethical pact to achieve economic justice, the elimination of tax havens, the fight against tax fraud and global fair trade.

6. Promote transparency in the private and popular-solidary sectors, promoting the adoption of criterion integrity that strengthen the principles of cooperativism and corporate governance, to deter acts that violate national development objectives.

Goals:

- Improve the discrimination and exclusión awareness percentages until 2021.

- Improve citizen awareness rates of corruption in the public and private sectors: improve the Public Transparency Index (citizen dimension) to 2021.

To verify compliance with the Plan, a previous synthesis is necessary, especially the policies and goals, since these are the ones that determine the effective development of the Plan. The analysis of this report focuses on policy 2:

"Strengthen transparency in the management of public and private institutions and the fight against corruption, with better dissemination and access to quality public information, optimizing accountability policies and promoting participation and social control."

This policy contemplates five fundamental aspects:

1. Strengthen institutional transparency
2. Fight against institutional corruption
3. Better dissemination and access of quality public information
4. Optimization of accountability policies
5. Promotion of citizen participation and social control

Regarding the first point, public institutions distort the concept of transparency guidelines, without having a real and permanent monitoring of management advertising, being the institutional web pages the only transparency mechanism with minimum information that is by Law subject to the principle of publicity. However, there is no effective mechanism for verifying the content of the information published in these media, remaining at institutional discretion. This is the reality in recent years: the total lack of mechanisms and norms that allow the effective application of international instruments as well as the constitutional content. Undoubtedly, in relation to transparency, the Plan has been unnoticed.

After the failed government initiative called the National Anti-Corruption Strategy, which basically had among its objectives the application of the United Nations Convention against corruption and the formation of the Transparency and Anti-Corruption Front in a Civil-State society partnership, The National Plan was presented as a generator and guiding element of the anti-corruption policy, in which the inter-institutional articulation has been considered an integrating factor of great value for the objective; However, the public perception of corruption in public entities has generated distrust and a negative image.

Ecuador has several institutions that have competence in the fight against corruption: State Attorney General Office (FGE), National Court of Justice (CNJ), Financial and Economic Analysis Unit (UAFE), National Assembly, General Comptroller of the State (CGE)), the entities of the Transparency Function, among others. The newest is the Anti-Corruption Secretariat, created in February 2019.

In the last two years, cooperation agreements between these institutions have been common, routed to develop anti-corruption mechanisms. On September 19, 2018, the FGE, the National Assembly, the UAFE and the CGE signed an inter-institutional cooperation agreement. On January 21, 2019, the same entities signed a new agreement with similar objectives: to strengthen their legal and constitutional competences within a framework of fight against corruption and the recovery of assets.

These initiatives have collapsed in the face of an untreated reality that has become an institutional constraint related to the ownership of the criminal investigation, which is the responsibility of the State Attorney General, an institution in which hundreds of cases against diverse authorities-mostly originated with criminal responsibility report issued by the Comptroller.

The logistical limitations, the lack of personnel training and above all the political influences have subjected the State Attorney General to the point that, being the reference of the fight against corruption, before the public perception is the organism of least credibility. The one that generates the most distrust in the country. The lack of a reference institution accounts for the few efforts made to comply with the Plan.

Another aspect raised in the policy analyzed is: better dissemination and access to quality public information. The incorporation of the quality standard is the tacit recognition of the ineffectiveness of the mechanisms that guarantee access to information, since these are limited to a minimum list of data that must be published on institutional portals (website) without a mechanism for verifying the content.

The other scenario of Access to public information is direct from the citizen to the custody institution of the information. In this case, the reality is more alarming because the institutions, especially the Decentralized Autonomous Governments (GAD), have generalized, the lack of response, as a practice. Citizens can insist on the requirements, but, simply, they do not give an answer. What is worse, tax rates are generated for the presentation of the application, confusing the right of access to information with the right of petition.

In the judicial scenario, the judicialization of the Law, through the action of access to public information, could be understood as if the right is not fulfilled by administrative means, the judicial constitutional way would guarantee it in an effective and more immediate sense. The experience of these last years is proof of the contrary, the fearful judicial tangle of political currents hardly fails against public institutions; it is even worse when the required information would expose citizens to the knowledge of acts of corruption, making permanent the condition of reservation of certain information or granting the condition to it, even when it does not apply.

Although the institutions have the obligation to submit an annual report to the Ombudsman Office regarding compliance with the right of access to public information, as in the other cases, there are no mechanisms or methodologies to verify the contents of these reports. In summary, no measure or mechanism has been adopted to comply with the Plan.

To complete the elements of the policy on strengthening of transparency, we find the optimization of accountability strategies and the promotion of citizen participation and social control, two elements that are at cross purposes to transparency and fight against corruption. Accountability, in accordance with the governing body, the Council for Citizen Participation and Social Control (CPCCS), is a participatory, periodic, timely, clear and truthful process, with accurate, sufficient information and affordable language on institutional management which is delivered to the public on the formulation, execution and evaluation of public policies. These are proposed as a two-way exercise that includes the obligation of the public entity to put to public consideration, public scrutiny, the management carried out over a determined period of time. It also includes the right of citizens to access this information, consequently the promotion of citizen participation.

Regarding the account performance process, it is appropriate to recognize its generalization and enforceability as a positive practice. The CPCCS has reported that 97% of the obligated institutions comply; however, citizen participation is divorced from the account performance process (accountability) because in practice, institutions call forums, workshops, conferences in which they are exposed, exchange opinions and receive suggestions. But this does not stop being formal. Citizenship remains a guest public, since tools and methodologies that enable their participation in the formulation, execution and evaluation of public policies generated in institutions have not been designed.

In 2018, the authorities of the Ombudsman Office saw the need to design new strategies to guarantee compliance with the Law. For example:

- A document about the theoretical framework of the human right of access to public information, aimed at citizens and officials was developed. Based on this material, which compiles international standards and essential minimum content, it was planned to design a virtual classroom by 2019 that will allow training in the right to access public information and the principle of transparency.

- A resolution proposal was created that establishes the guidelines for the treatment of requests to access to public information that enter the entities, through physical or electronic requests. Approved processes were established to be executed in all the institutions required by the LOTAIP. The concept of electronic government, principles of speed and informality are included and developed.

- The human rights, gender and diversity approach was incorporated into the requirements established in the M-LOTAIP platform, in order to make visible the status of the exercise and fulfillment of this right in priority attention groups and in possible vulnerable situations.

- To guarantee greater and better citizen participation in the life of the State, the Week of Transparency and Access to Public Information was held for the seventh consecutive year. National and international master conferences were organized to exchange experiences with representatives of international organizations and experts in the field.

¿IS THE LOTAIP ADJUSTED TO INTERNATIONAL STANDARDS?

Both the Universal System and the Inter-American System for the protection of rights have established standards and parameters for the guarantee and full exercise of access to public information. Access freely to the information generated and guarded by the public administration or State funds private institutions was not always considered a right. This faculty correlated to freedom of expression is framed in the context of the recognition of fundamental rights as a basis for the development of democratic societies, a fundamental instrument for the fight against corruption, a mechanism for citizen participation and a way to exercise other rights.

The Universal Declaration of Human Rights, the American Convention on Human Rights, the Inter-American Convention against Corruption, the Declaration of Principles on Freedom of Expression and the International Covenant on Civil and Political Rights, among other instruments, enshrine and guarantee the right to access, search and exchange of information, but these instruments land in the legislation and in internal organisms of control protection and promotion of the right.

In Ecuador, the rule that regulates and guarantees this fundamental right is the LOTAIP, which dates from 2004, and the institution responsible for compliance and promotion is the Ombudsman Office. There is a gap between the norm and the Constitution, approved in 2008, which in article 18 states that:

"All individuals, individually or collectively, have the right to: Search, receive, exchange, produce and disseminate truthful, verified, timely, contextualized, plural information, without prior censorship about events and processes of general interest, and with subsequent responsibility.

Access freely to the information generated in public entities, or in the private ones that manage state funds or carry out public functions. There will not be reservation of information except in the cases expressly established in the Law. In case of violation of human rights, no public entity will deny the information."

The Constitution poses a very broad scenario for the development of the Law. In this line, it is necessary to determine if Article 2 of the LOTAIP, which points out its purpose, is framed in its principle:

"Art. 2.- Object of the Law. - This Law guarantees and regulates the exercise of the fundamental right of people to information in accordance with the guarantees enshrined in the Political Constitution of the Republic, International Covenant on Civil and Political Rights, Inter-American Convention on Human Rights and other international instruments in force, of which our country is a signatory. It pursues the following objectives:

a. Comply with the provisions of the Political Constitution of the Republic regarding publicity, transparency and accountability to which all State institutions that make up the public sector, dignitaries, authorities and public officials, including the entities mentioned in the previous article, are subjected to legal persons of private Law that perform works, services, etc. with public allocations. For this purpose, they will adopt the measures that guarantee and promote the organization, classification and management of the information that accounts for public management;

b. The fulfillment of the international conventions that our country has legally subscribed on the matter;

c. Allow the oversight of public administration and public resources, becoming a true social control;

d. Guarantee the protection of personal information held by the public and / or private sector;

e. The democratization of the Ecuadorian society and the full validity of the rule of Law, through a genuine and legitimate access to public information;

f. Facilitate effective citizen participation in the decision making of general interest and its control ".

The broad scope of action in relation to the subject is clear from the object of the Law. The guarantee of supra-constitutional compliance supposes a guaranteed norm that does not infer in the exercise of constitutional rights, in spite of the distance between the publication of the two. However, the object incurred in the article transcribed is necessary to observe principles, mechanisms, procedures and even sanctions, as those aspects ensure compliance in practice.

International principles -

Maximum disclosure

The Inter-American System, through the American Convention on Human Rights (Art.13) and the jurisprudence of the Inter-American Commission on Human Rights (CIDH), recognizes as the guiding principle of exercise the right to access to information, the maximum disclosure. This means that transparency in public management and full access to information about it is inherent to all citizens as a general rule.

From this principle the following consequences are derived:

1 The right of access to information must be subject to a limited regime of exceptions, which must be interpreted restrictively, in such a way as to favor the right of access to information.

2 Any negative decision must be motivated and, in this sense, the State bears the burden of proving that the information requested can not be disclosed.

3 When faced with a doubt or a legal vacuum, the right of access to information must prevail.

Principle of good faith.-

Compliance with the Law can be guaranteed only to the extent that the obligated parties act in good faith ensuring the application of the right, with diligence, efficiency, institutional loyalty, promoting transparency in such a way that public management can ensure the general interest.

The LOTAIP against the principles.-

Article 1 establishes the principle of publicity. Between article 4 of the LOTAIP and article 3 of the Regulations of the Law, the principles of gratuity, transparency, rendering of accounts, favoring the Law and opening the activities of public entities are recognized.

Although the Law and the Regulations establish principles conducive to guaranteeing the right of access to information, the normative development of these principles do not contemplate the

universe of information and, in several cases, reduces it to certain areas of information. For example, the principle of transparency, beyond its definition, is translated into the Law through the obligation imposed on public sector entities to maintain an institutional web portal in which they must necessarily publish a minimum of information corresponding to the work administrative financial and missionary. In practice, this has led to the deviation of the object of the principle, since it is often used as a reason not to deliver information that is found in the portal. Therefore, in most cases the content of the published information is not complete or does not correspond to the truth.

The principle of transparency is denaturalized when it is reduced to the simple publication of information on institutional pages or portals. This mechanism does not guarantee that the information is reliable or complete.

The Declaration of Principles on Freedom of Expression of the IACHR determines that the Law must guarantee the most effective and widest possible access to public information. The LOTAIP, by limiting the advertising mechanisms, reduces the information of mandatory publication and not contemplating efficient mechanisms for wide access, it does not guarantee the right in the terms established in the international standard.

In the Joint Declaration of 1999, the Reporters for the Freedom of Expression of the UN, the OSCE and the OAS declared, "Implicit in the freedom of expression is the right of every person to have free access to information and to know what governments are doing for their people without which, the truth would languish and participation in government would remain fragmented. "Transparency as a guiding principle of Law is the effective mechanism for knowledge of the work of public entities, full guarantee of the truth, consequently the principle can not be reduced to a list in a web portal.

Regarding the principle of publicity, article 9 makes holders of public institutions responsible for sufficient and necessary attention to the public information publicity, as well as their freedom of access. The guarantee for the full exercise of rights goes beyond the simple statement. The Law does not establish an effective mechanism for sufficient and necessary attention and free access to information. In this sense, it is important to emphasize that between the principle of publicity, typical of Ecuadorian Law, and the principle of maximum disclosure contemplated in the Inter-American System, there is a gap that allows the first of these (advertisements) to limit the materiality of the right, in what does not contemplate the maximum extension in the public dimension as does the principle of maximum disclosure.

Procedures.-

The Law establishes the administrative and judicial procedure, being able to access the last of these only when the administrative procedure is exhausted. The administrative procedure, in theory, is fast, simple and direct. Requests for access to information must be answered within the peremptory period of ten days, which may be extended for five more days for duly justified reasons informed to the petitioner. The requested entity should not exceed 15 days to respond. In the LOTAIP there are several articles that indicate that the refusal or omission to deliver public information will result in administrative resources for execution after the refusal or omission of the institution, and that more than delivery of information, it seeks sanctions for the omission or denial of it.

The administrative procedure in practice has not yielded results. The lack of knowledge of the authorities regarding the right of access to public information is notorious. The cumbersome and

bureaucratic administrative mechanisms accompanied by a practice that is generalized without any control of submitting all the requests, including those of information to the quality of the process or processes for which fees are charged, this without doubt violates the Law by what is urgently required to express regulation and update the regulatory framework with a new Law.

The judicial procedure, despite being in the previous Constitution, has a similar process, this procedure is the action of access to public information, however, of the procedural similarities, it is essential to adjust the legal framework to the procedures and principles current constitutional frameworks in the jurisdictional guarantees.

Article 91 of the Constitution establishes that "the action of access to public information shall have the purpose of guaranteeing access to it when it has been denied expressly or tacitly, or when the one provided has not been complete or reliable. It can be filed even if the refusal is based on the secrecy, reservation, confidentiality or any other classification of the information. The reserved nature of the information must be declared prior to the request, by a competent authority and in accordance with the Law. " The jurisdictional guarantee is very broad and its execution under the principles and methods of interpretation of constitutional justice is an efficient mechanism.

Sanctions.-

The objective of the Law is not and must not be the sanctioning aspect, it is indisputable that the breach of which carries consequences. The express or tacit refusal to deliver public information as noted in this analysis prevents the exercise of other rights. Sanctions for non-compliance must be aimed at correcting behavior and generating a culture of transparency, participation and respect for the right of access to information, but like almost all the norm, the sanctioning aspect is ambiguous. Article 23 provides that:

"... will be sanctioned, depending on the seriousness of the fault, and without prejudice to civil and criminal actions that may arise, as follows:

a) A fine equivalent to the remuneration of one month's salary or salary that is being received on the date of the penalty;

b) Suspension of their duties for a period of thirty calendar days, without entitlement to pay or remuneration for the same period; and,

c) Removal of the charge in case, despite the fine or suspension imposed, persists in the refusal to deliver the information. These sanctions will be imposed by the respective authorities or nominating entities. "

The sanctions are progressive according to recidivism and the seriousness of the fault; however, the text of the Law does not establish what are the faults or infractions against the right of access to public information or the degrees of seriousness of the faults. It is understood from the normative text that the faults are: the express or tacit refusal to deliver the information in the stipulated time, lack of clarity in the information that as a rule must be published and / or that the information delivered is not complete, or is imprecise. But these categories are not expressly determined as such in the norm nor in the regulation.

Another limitation for the execution of sanctions is given by the lack of clarity of the established processes, the final part of the same article 23 indicates:

"The sanctions will be imposed once the respective resource of access to public information established in article 22 of this Law has been concluded."

Article 22 refers to the previous remedy of access to public information, now jurisdictional action of access to public information, it would then be understood that, the imposition of fines, suspension to a server or dismissal thereof is exclusively the power of the judicial authority that knows the action or that ended the judicial process that determines the violation of the right of access to public information can initiate an administrative process to request the corresponding sanction? this is not clearly determined in the Law, but for greater confusion the final part of article 13 of the Law on the lack of clarity of the information that must be published indicates:

"... The Ombudsman Office, will dictate the necessary corrections of mandatory application to the information that is disseminated; To this end, the institution will provide the broad and sufficient facilities, under penalty of dismissal, prior administrative summary, of the authorities that fail to comply with their obligation to disseminate the institutional information correctly. The sanction pronounced by the Ombudsman Office will be executed immediately by the appointing authority. "

According to this article, it is the Ombudsman Office who must take the corrective measures, nor does the Law establish what these corrective measures are so that the undue margin of discretion remains. The determination of the corrective measures and sanctions, in addition, this article imposes itself as a requirement for the sanction of dismissal the administrative summary before the nominating authority itself, which brings us back to the ambiguity and the risk of affecting other rights at the time it is sanctioned, such as the right to due process. This has allowed impunity and lack of guarantee for the full enjoyment of the right, so that from the enactment of the Law until this date there is no record of any sanction either administratively or judicially to officials who have denied information.

The Law with 23 articles emphasizes the systems of ordering and professional public records, including Article 10 states: "... in no case will the absence of technical standards in the handling and filing of information and documentation prevent or hinder be justified the exercise of access to public information, even worse its destruction ". Being of vital importance the technical standards must at all times contemplate the principles and standards and beyond this the knowledge of the Law and its permanent promotion should be the fundamental object of the Law for which purpose this and its regulation should establish clear and feasible procedures to be applied.

Principle 4 of the Declaration of Principles on Freedom of Expression of the IACHR establishes that "access to information held by the State is a fundamental right of individuals. States are obliged to guarantee the exercise of this right. This principle only admits exceptional limitations that must be previously established by Law in case there is a real and imminent danger that threatens national security in democratic societies".

The text of the LOTAIP does not conform to the provisions of the supra-constitutional order, the distance from the Constitution and the lack of clarity in it make necessary and urgent a new Law that guarantees from the Human Rights approach with international standard principles the full access of citizens to public information.

FROM OFFICIAL FIGURES TO REAL CASES

The organizations responsible for preparing this report made 24 requests for information to 11 state institutions, of which nine did not respond. The rest answered incompletely. Specific cases were also attached to the request for information, where the obligated institutions did not comply with the requirements.

Mil Hojas Foundation against the Ministry of Education.-

On May 16, 2018, the representative of the Mil Hojas journalist portal, Martha Roldós, presented a request for access to public information to the Undersecretary for Educational Innovation and Good Living of the Ministry of Education. The request clarifies not to require names or data that can identify victims or relatives. Only disaggregated data is required on each complaint on the 1,623 cases of sexual violence registered in the educational system and on the 1,677 that corresponded to the environment.

The letter stated that "the purpose is to disaggregate the figures presented by the Ministry before the Aampetra Commission."

Objective is to know in each case, the following details:

1. If the complaint was individual or collective
2. The age of the victims at the time of the abuse
3. Type, if it was harassment or sexual abuse
4. Detail of the aggression
5. If there were signs of pornography
6. The number of perpetrators per case
7. If there were accomplices or accessories
8. Type of perpetrator (teacher, custodian, administrative, companion, others)
9. The record of the campus where the crime occurred (Name of the Educational Unit, area, district, city, canton, province)
10. Date on which the event occurred
11. Date on which the complaint was made
12. Where the complaint was filed (Ministry of Education, school authorities, district, zonal coordination, Undersecretary, Minister, Public Prosecutor, Ombudsman Office, Aampetra Commission, NGOs or others)
13. Processing of the complaint (administrative, judicial)
14. State of the complaint
15. If there was reparation ...

On June 1, 2018, by Official Letter No. MINEDUC-SIEBV-2018-00101-OF, the Ministry of Education answered, evading the questions with incomplete and imprecise answers. The representative of the portal, on June 20/2018, presented a new brief protected by the LOTAIP.

On August 2, 2018, by means of Official Letter No. MINEDUC-SIEBV-2018-00160-OF, the Ministry of Education answered the second request, stating that it had already responded to the request.

With the express refusal, Mil Hojas Foundation, on October 31/2018, presented an action of access to public information, which was forwarded to the Judicial Unit for Family, Women, Chil-

dren and Adolescents based in Quito. On November 20, 2018, the judge issued a ruling denying the action on the grounds that the required information was not in the custody of the Ministry of Education and that it was not required to produce it.

The appeal filed by “the portal” was known by the Family, Child, Adolescent and Adolescent Offenders Court of the Provincial Court of Pichincha that, on January 25, 2019, ratified the first level sentence, denying the right of access to public information. In this case, it was argued that it was confidential information because it involved children and adolescents: "... information about girls, boys and adolescents that violates their rights as established in the Organic Code of Children and Adolescents and the Constitution; which makes the access to the requested information not possible ".

The case is currently in the Constitutional Court (CC). Mil Hojas Foundation filed extraordinary protection action on the ruling. This demonstrates the violation of the right in administrative and judicial channels.

National Anticorruption Commission (Guayas) against the Provincial Prosecutor's Office of Guayas and Galápagos:

On July 12, 2018, the Coordinator of the National Anticorruption Commission (CNA) chapter Guayas filed an application with the Provincial Prosecutor's Office of Guayas and Galápagos requesting certified copies of archives fiscal resolution and of the State Comptroller reports with indications of criminal responsibility corresponding to previous investigations dismissed and filed. After 26 days without a reply, on August 9, 2018, by letter FPG-DP-2018-005692-O, the Provincial Prosecutor of Guayas answered, indicating a sequence of consultations on the request. Meaning a lack of knowledge of what public information is.

The CNA insisted on the requirement. On September 4, 2018, by means of letter FPG-DP-2018-006297-O, the Provincial Prosecutor expressly denied the request, indicating that it was confidential information, even though the files were previously filed; consequently, he had prescribed his reservation. Paradoxically, the Prosecutor extended the reservation of information in an infinite manner, a fact that seriously violates the right to access public information and conceals the corruption denounced.

On October 26, 2018, the Commission presented an action of access to public information against the Provincial Prosecutor's Office of Guayas and Galápagos, which fell to the Criminal Judicial Unit 1, in Guayaquil, province of Guayas. With sentence dated December 9, 2018, the judge denied the action, arguing:

"... For the foregoing, given that the requirements established in article 47 of the Organic Law of Jurisdictional Guarantees and Constitutional Control (Logjcc) have not been met and the established grounds for inadmissibility of the third paragraph “ibídem” have been determined ...".

The third paragraph of article 47 of the Logic invoked by the judge says that:

"You can not access public information that has the character of confidential or reserved, declared in the terms established by Law. Neither can you access strategic information sensitive to the interests of public companies.

The judge does not indicate which of the conditions established in the third paragraph of the article is the one that was selected to deny the action. The most serious thing is that it recognizes a personal right in the process:

"SIXTH: With the analysis of the case files it has been established that within the process the debate has focused on whether the reports with indications of criminal responsibility of the Comptroller's Office and of the fiscal resolutions of archives enjoy the reservation principle as we have analyzed it and it is, this information is about personal rights and personal information. "

The ruling covers the denounced acts. The CNA filed an appeal, which fell to the Special Civil Chamber of the Provincial Court of Guayas, which until April 2019 does not issue a ruling although it is a constitutional action.

Citizen against the Cantonal GAD of Milagro.-

Since August 2015, Jacinto Gregorio Peralta Vásquez, president of the Committee of Inhabitants of the neighborhood where he lives, Milagro, province of Guayas, presented three legal documents to the Cantonal GAD of Milagro, requesting a copy of the file 392-2015 containing a municipal procedure that , supposedly, authorizes the overthrow of boundaries and possession of public spaces (a street of vehicular circulation) to private individuals. For the duration of two years, the citizen weekly attended the Municipality to obtain answers and left without results. The information required is public, as it refers to municipal management in public spaces and goods.

In January 2018, the case was brought to the attention of the Ombudsman Office. The GAD responds to this institution. The answer was delivered to the entity and not to the citizen, nor in compliance with the Law. The GAD indicated that the requested file had disappeared.

This case is reiterative in the GADs. They didn't only denied access to information, they also ignored the citizen who had to rely on judicial bodies or the Ombudsman Office.

Christian Zurita, investigative journalist in the portal Mil Hojas..-

For Christian Zurita, accessing public information also became a complex mission. For an investigation carried out on Seguros Sucre S.A., a state insurer, he wrote requests for access to information and delivered them to 16 institutions. Only one responded with 90% of information requested. The rest remain silent.

Diego Castro, former student of the Faculty of the Central University of Ecuador.-

The story of Diego Castro began in 2014, and he has carried his request for information forward for five years. As of April 2019, he has not gotten the answer that he requested from the beginning: What did the Central University of Ecuador (UCE) used the money for that they collected for the Degree Rights ? (Rights that the Law of the Council of Higher Education, CES, prohibits charging). Education up to the third level in public institutions is free).

The request was received in the first instance by the Faculty of Social Communication, an entity that rejected it, claiming that any request should be addressed to the head of the institution. In this case, the Principal. He did the procedure again and did not obtain any response. Then he brought the case to the Ombudsman Office, but in 2016 the procedure was invalidated.

He insisted. When he did not receive a response from the UCE, he presented the case again before the Ombudsman Office. During the new mandate, the request was accepted and in 2018, a hearing was held. In the session the delegates of the University showed reports on the money collected for degree rights, but did not specified where the money went.

At the hearing, the judge stated that his responsibility is to verify that the information is presented, but not to verify its content. To Andrés Solórzano, Lawyer of the Ombudsman Office, who accompanies Castro in the case, this is not correct since the information must correspond to what is requested.

Currently the case is in the Provincial Court of Pichincha.

Jean Cano and Desirée Yépez, independent journalists.-

Jean Cano and Desirée Yépez investigated whether the Ecuadorian government fulfilled its task of rebuilding and building houses for the victims of the earthquake of April 16, 2016. They started from the premise that there were contractors who collected the money without carrying out works. To confirm this, it should be compared to official sources.

The journalists sent a request for access to information to the Ministry of Urban Development and Housing (Miduvi) on the construction of 45,455 works, including houses and repairs. When they did not get an answer, they started a campaign through Twitter. The reply arrived 69 days after the order was placed.

The information Miduvi originally refused to give, contained revealing data. In the report entitled "Two years after the earthquake in Ecuador, the alerts for corruption with funds from the reconstruction are starting to “light up”.

Univisión exposed the following:

- Around 1,000 contracts were not audited
- 44 contractors did not complete the contracts in full
- The economic damage exceeds 15 million dollars
- 75,000 victims registered to receive help, but this only reached 50% of enrollees.

Ecuador:

How to dismantle the culture of secrecy?

Shadow report about the Sostainable Development Goals (SDG) 16.10.02

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