

Written Comments
on the Case of
*In the Matter of Constitutionality
of Article 13 of the Constitutional
Organic Law on the General
Bases of State Administration*

*A Submission from the Open Society Justice Initiative to the
Constitutional Tribunal of Chile*

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In the Matter of Constitutionality of Article 13 of the Constitutional Organic Law on the General Bases of State Administration (No. 18.575)

WRITTEN COMMENTS OF THE OPEN SOCIETY JUSTICE INITIATIVE

I. Introduction and Statement of Interest

The Open Society Justice Initiative provides this submission to assist the Constitutional Tribunal in its understanding of the laws and practices of other nations with respect to access to information, particularly commercial information. This submission highlights the standards and procedures that best serve the goals and policies underlying access to information regimes, while accommodating the interests of both submitters and requesters of business information. This submission draws on relevant international and comparative law and practice from the Americas and other leading jurisdictions in exploring the scope of the right to information and the principles that underlie its protection.

The Justice Initiative, a worldwide legal program of the Open Society Institute, pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in four priority areas: national criminal justice, international justice, freedom of information and expression, and equality and citizenship. Its offices are in Budapest (Hungary), New York (United States) and Abuja (Nigeria).

In the area of access to information, the Justice Initiative has extensive experience in promoting the adoption and implementation of freedom of information laws in Eastern Europe, Latin America, and elsewhere. It has also contributed to international standard-setting and monitoring of government transparency around the world. The Justice Initiative files amicus curiae briefs with national and international courts and tribunals on significant questions of law where its thematically focused expertise may be of assistance. In the area of freedom of expression and information, the Justice Initiative has provided pro bono representation before, or filed amicus briefs with, all three regional human rights systems and the UN Human Rights Committee. In particular, the Justice Initiative, jointly with four other groups, filed amicus curiae briefs with both the Inter-American Commission and the Inter-American Court of Human Rights in the landmark case of *Claude Reyes et al v. Chile*.

II. Public access to government information is integral to government openness and accountability

A. Overview of policy

Access to information held by public authorities is fundamental to maintaining an informed public, which, in turn, is necessary for the proper functioning of a democratic and free society and a vital free marketplace. Around the world, at least sixty-five countries have enacted laws that provide mechanisms for individuals and other entities to request and obtain information from the government.¹ Although Chile has implemented legal requirements affording some measure of access to information, the provisions are complex and largely inaccessible because they are dispersed throughout multiple sources of law. The present case raises issues of great significance for the development of freedom of information law in Chile and the Americas.

The ability of citizens to request and receive information about their government is vital to transparency and accountability, which are hallmarks of an open and democratic society. Enabling citizens to access and comment upon government-held information enhances respect for the government, encourages compliance with the law, and engenders public trust.

In free societies, access to information is integral to combating corruption and abuse and guarding against arbitrary or wasteful acts. Access to information laws expose governments to public scrutiny, allowing citizens to inform themselves about the costs and efficacy of government actions and to hold government officials accountable for their decisions. In the words of a United States Supreme Court Justice, “[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman.”² As discussed in Section II below, access to information also provides a foundation for a healthy free market economy by enabling businesses to obtain information about competitors and markets, allowing consumers to make informed choices, and promoting accountability and preventing fraud in transactions between the government and the private sector.

The Mexican Federal Transparency and Access to Public Government Information Law (the “Mexican Access Law”) sets forth general principles that illustrate the fundamental goals of freedom of information laws; three of those are: making public administration transparent by disclosing the information generated by the government; encouraging accountability to citizens, so that they may evaluate the government’s performance; and contributing to the democratization of society and the full operation of the rule of law.³ These general principles, which touch upon the importance of freedom of information in a democratic government and free market, are common to many freedom of information regimes.

B. The public’s right to know under international law and state practice

Individuals have a basic human right to request and receive information under international law. In its first session in 1946, the United Nations General Assembly adopted Resolution 59(I), stating that “[f]reedom of information is a fundamental human right and . . . the

¹ Open Society Justice Initiative, *Transparency & Silence: A Survey of Access to Information Laws and Practices in 14 Countries* 22 (2006) [hereinafter *Transparency and Silence*].

² *Olmstead v. United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

³ Ley Federal De Transparencia y Acceso a La Información Pública Gubernamental [Federal Transparency and Access to Public Government Information Law], Art. 4 (2002).

touchstone of all the freedoms to which the United Nations is consecrated.”⁴ The Council of Europe adopted its first recommendation on the right of access more than twenty years ago, providing that “[e]veryone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities.”⁵ The European Union’s (“EU”) Charter of Fundamental Rights grants a right of access to documents held by EU institutions to “[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State.”⁶

The right of access to information held by public authorities has become widely accepted in the democratic world, including in the Americas, as a basic political right: “there is growing international recognition that the right to seek, receive and impart information encompasses a positive obligation of states to provide access to official information in a timely and complete manner.”⁷ The right of everyone to access government information has been recognized by both regional and international organizations.⁸

The Inter-American human rights system is perhaps the most advanced in guaranteeing, at a regional level, the right of the public to access information in the possession of the government. The Inter-American Court of Human Rights has acknowledged that the rights of listeners and receivers of information and ideas are on the same footing as the rights of the speaker: “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.”⁹ In 2000, the Inter-American Commission on Human Rights (the “Commission”) expressly recognized that “access to information held by the state is a fundamental right of every individual.”¹⁰ In the 2005 case of *Claude Reyes et al v. Chile*, the Commission held that Article 13 of the American Convention on Human Rights includes a right of access to public information, which “places a positive obligation on governments to provide such information to civil society.”

In September 2006, the Inter-American Court of Human Rights issued a landmark judgment in *Claude Reyes* that confirmed and expanded upon the Commission’s ruling in the following terms:

⁴ G.A. Res. 59(1) (Dec. 14, 1946) (cited in TOBY MENDEL, FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY 1 (UNESCO 2003)).

⁵ Council of Europe, Recommendation No. R (81) 19 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities (Nov. 25, 1981).

⁶ *Charter of Fundamental Rights of the European Union*, art. 43 (Dec. 7, 2000).

⁷ Human Rights Watch, *Lost in Transition: Bold Ambitions, Limited Results for Human Rights Under Fox* 36 (2006) (citing publications of the United Nations, Organization for Security and Co-operation in Europe, Organization of American States, and the Inter-American Commission on Human Rights), <http://hrw.org/reports/2006/mexico0506/mexico0506web.pdf>.

⁸ *Id.*

⁹ Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Nov. 13 1985, para. 32.

¹⁰ *Inter-American Declaration of Principles on Freedom of Expression*, adopted at the Commission’s 108th regular session, Oct. 19, 2000, para. 4.

[T]he Court finds that, by expressly stipulating the right to “seek” and “receive” “information,” Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information. . .¹¹

The Court underscored the “indispensable” presumption in a democratic society that “all information is accessible,” subject only to restrictions that can be imposed on a case-by-case basis.¹²

In addition, the public’s right to know is grounded in the constitutions of many nations. For example, in Sweden, the right to government information has been constitutionally guaranteed for more than 200 years.¹³ In addition, the constitutions of Bulgaria, Estonia, Hungary, Lithuania, Malawi, Moldova, Poland, the Philippines, Romania, the Russian Federation, South Africa, and Thailand explicitly include freedom of information provisions.¹⁴ The right to information is also reflected in laws, regulations, and decrees, many of which will be addressed below.¹⁵

III. Government disclosure of business information benefits the smooth functioning of a free market economy

Businesses and government are inextricably intertwined as a result of government regulation, contracting, procurement, licensing, subsidies, and myriad other government-business interactions. Governments regulate businesses primarily for social and economic reasons, such as protection and support of consumers, the environment, and health; promotion of fair trade

¹¹ *Claude Reyes et al. v. Chile*, Judgment of Sept. 19, 2006, para. 77.

¹² *Id.* at para. 92.

¹³ Steven Goldberg, *Public Access to Government Information*, Freedom Paper No. 6 (1994), <http://usinfo.state.gov/products/pubs/archive/freedom/freedom6.htm>.

¹⁴ MENDEL, *supra* note 4, at 18.

¹⁵ The basic purpose of the U.S. Freedom of Information Act, which establishes one of the oldest, most comprehensive statutory access systems, is, according to the U.S. Supreme Court, “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

practices; prevention of monopolies; and promotion of corporate accountability.¹⁶ In addition to performing regulatory and licensing functions, governments also act as consumers, entering into contracts and business arrangements with private businesses. Because of the extensive relationship between governments and businesses, government records provide a rich source of information of immense importance to businesses.¹⁷ Moreover, governments are often the best – and sometimes only – source of certain information, such as employment, housing, healthcare, and education data; import and export data; public procurement and construction records and contracts; land records; both historical and projected macro- and micro-economic data relating to the nation’s economy; information concerning the environment; records on compliance with and administration of laws; and records on the activities, budgets, decisions, and guidance documents of the governmental entities themselves.

Not surprisingly, the business community has been a primary user of access to information laws.¹⁸ Government entities may be important sources of information not only about government, but about other businesses. Both kinds of information, which may be relatively inexpensive to acquire from a governmental source, may have great value for business decision-making and may even be marketable by the requester.¹⁹ Access to business information maintained by a government levels the playing field for businesses with fewer resources to draw upon for independent information collection. In addition, companies often derive benefits when other businesses imitate and compete with them. Imitation encourages innovation and therefore increases the likelihood of profitable discoveries at a later time.²⁰

In a free market economy, information allows individuals to make informed private economic decisions.²¹ Information about price, quality, and other attributes of commercial goods enables consumers to make informed choices, creating an incentive for companies to compete on price and quality.²² Business information obtained through the government can also help increase public safety. For example, requests for safety information under the United States

¹⁶ Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 *Hastings L.J.* 577, 601 (1990).

¹⁷ MENDEL, *supra* note 4, at iv (emphasizing that “[p]ublic bodies hold a vast amount of information of all kinds, much of which relates to economic matters and which can be very useful for businesses”).

¹⁸ For example, businesses are the primary users of the Freedom of Information Act in the United States. Thomas M. Susman and Harry A. Hammitt, *Business Uses of the Freedom of Information Act*, The Bureau of National Affairs, Inc., Corporate Practice Series, No. 14-3rd, A-1 (2004); MENDEL, *supra* note 4, at iv (noting that, in many countries, “[c]ommercial users are . . . one of the most significant user groups”).

¹⁹ *Id.* at A-8.

²⁰ James Bessen and Eric Maskin, *Sequential Innovation, Patents, and Imitation*, Massachusetts Institute of Technology Department of Economics Working Paper Series 3 (2000).

²¹ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

²² Howard Beales, Richard Craswell, and Steven Salop, *The Efficient Regulation of Consumer Information*, 24 *J.L. & ECON.* 492 (1981).

Freedom of Information Act (the “U.S. FOIA”) were instrumental in uncovering the dangers of certain defective automobile tires, resulting in a massive recall of those tires.²³

Although disclosure of government-held business information is often beneficial, virtually every law governing access to information recognizes that some business information merits protection from disclosure. Governments universally recognize the importance of protecting legitimate trade secrets; likewise, affording protection to certain kinds of proprietary commercial information encourages businesses to share their data with government and appropriately recognizes the need to safeguard information of competitive value to the businesses.

IV. Access to business-related information under freedom of information laws is widely guaranteed, subject to exemptions recognizing the commercial proprietary interests of businesses

The starting point under most freedom of information regimes is a presumption in favor of disclosure, which means that “the onus [is] on the public body seeking to deny access to certain information to show that it may legitimately be withheld.”²⁴ The Mexican Access Law, for example, requires that when interpreting the law, “the principle of publicity of information possessed by [the government] must be favored.”²⁵ Similarly, *Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents* (the “EU Access Regulation”) provides that, “[i]n principle, all documents of the [EU] institutions should be accessible to the public.”

This general right of access to government information may be qualified, but to make the right of access meaningful, any exemptions should narrowly and clearly delineate the public and private interests to be protected by nondisclosure.²⁶ As discussed above, it has become widely recognized that the public should have a right to know what the government knows and does, and any exceptions should be both narrow and compelling.

The Inter-American Court held in *Claude Reyes* that, in line with the general structure of the American Convention, any restrictions on the right of access must (i) be clearly established by law; (ii) pursue one of the legitimate aims listed in Article 13.2 of the Convention (respect for the rights or reputations of others; or the protection of national security, public order or public health or morals); and (iii) be necessary in a democratic society. The third part of this test has been interpreted as including a requirement of proportionality and minimal encroachment of

²³ Alan Marzilli, *Open Government: An American Tradition Faces National Security, Privacy, and Other Challenges* 24 (2005). An illustrative list of “Top FOIA Examples” from the US are collected at http://www.sunshineingovernment.org/foia_examples_fed.html.

²⁴ MENDEL, *supra* note 4, at 28.

²⁵ Mexican Access Law, art. 6.

²⁶ MENDEL, *supra* note 4, at 29 (arguing that exceptions or exemptions to the duty to disclose “should be clearly and narrowly drawn and subject to strict ‘harm’ and ‘public interest’ tests” and emphasizing that “a complete list of all aims which may justify withholding information should be set out in the law”).

rights in the pursuit of a “compelling public interest.”²⁷ The Court added that “it is essential that the State authorities are governed by the principle of maximum disclosure, which establishes the presumption that all information is accessible, subject to a limited system of exceptions.”²⁸

An unequivocal statement of the right to access information held by the government is found in Ireland’s Freedom of Information Act, 1997 (the “Irish FOIA”).²⁹ The Irish FOIA establishes a general right of access to any record held by a public body by creating “a broad presumption that the public can access all information held by government bodies.”³⁰ The Irish FOIA has been lauded for “playing ‘an important role in promoting openness, transparency and accountability in Government.’”³¹ Likewise, the Freedom of Information (Scotland) Act, 2002, (A.S.P. 13) (the “Scottish FOIA”) provides that, “[a] person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.”³² This provision, thus, establishes “a presumption that all information held by public bodies should be subject to disclosure.”³³ A public authority may withhold information only if it falls within one of the exemptions set forth in the Act.³⁴

The lists of exemptions established by freedom of information laws are generally closed-ended. Thus, the U.S. FOIA prohibits an agency from withholding information unless the information is specifically covered by one of the nine exemptions to the statute.³⁵ In addition, U.S. government agencies³⁶ and European Union institutions,³⁷ among others, have no inherent

²⁷ *Claude Reyes et al. v. Chile*, Judgment of Sept. 19, 2006, paras. 89-91.

²⁸ *Id.* at para. 92.

²⁹ Freedom of Information Act, 1997 (Act. No. 13/1997) available at <http://www.irishstatutebook.ie/front.html> (last visited April 3, 2007).

³⁰ David Banisar, *Freedom of Information and Access to Government Records Around the World 2006* 59 (2006), available at www.freedominfo.org (quoting Freedom of Information Act, 1997 (Act. No. 13/1997) available at <http://www.irishstatutebook.ie/front.html> (last visited April 3, 2007), as amended by Freedom of Information (Amendment) Act, 2003 (Act. No. 9/2003) available at <http://www.irishstatutebook.ie/front.html> (last visited April 3, 2007) (the “Irish FOIA”) and noting that it describes itself as “[a]n act to enable members of the public to obtain access to the greatest extent possible consistent with the public interest and the right to privacy, to information in the possession of public bodies . . .”).

³¹ Maeve McDonagh, *Freedom of Information in Ireland: Five Years On* (2003), available at www.freedominfo.org [hereinafter *Five Years On*] (quoting Report of the High Level Review Group on the Freedom of Information Act 1997 (2003), http://www.taoiseach.gov.ie/attached_files/Pdf%20files/hlrgReportOnFOI.pdf).

³² Freedom of Information (Scotland) Act, 2002, (A.S.P. 13), s. 1. Freedom of Information (Scotland) Act, 2002, (A.S.P. 13) (the “Scottish FOIA”) encompasses “any kind of information from a Scottish public authority however old the information is.” *Your Right to Know: A Guide to Freedom of Information Law in Scotland*, <http://www.itpublicknowledge.info/Documents/YourRighttoKnow.pdf> [hereinafter *Your Right to Know*].

³³ KEVIN DUNION, FREEDOM OF INFORMATION (SCOTLAND) ACT 2002 AND THE PUBLIC’S RIGHT TO KNOW (2005), <http://www.scotinfo.org.uk/documents/promoting/media/articles/KDFOIandhumanrights23Sep05.pdf> (explaining that, “[t]he applicant does not have to give a reason why the information is wanted” and adding that the right is “applicable to anybody, anywhere in the world”).

³⁴ *Id.*

³⁵ 5 U.S.C. § 552(d).

³⁶ *Mobil Oil Corp. v. F.T.C.*, 406 F. Supp. 305, 309 (S.D.N.Y. 1977) (noting that “neither regulations nor guidelines promulgated by a federal agency, can override the language and purpose of a statutory enactment”).

authority or equitable discretion to deny access for reasons that are not explicitly set forth in an exemption from the access regulation.

A. Business information exemption

In most freedom of information regimes, trade secrets and certain competitively sensitive confidential business information are exempt from mandatory disclosure by the government. For example, the U.S. FOIA “does not apply to matters that [constitute] trade secrets and commercial or financial information obtained from a person and [that are] privileged or confidential.”³⁸ Decades of judicial interpretation have resulted in a common understanding in the U.S. regarding the various categories of information protected by this exemption: information may be withheld if it constitutes (i) a trade secret *or* (ii) information that is (A) commercial or financial, (B) obtained from a person, *and* (C) privileged or confidential.

Trade secrets are recognized as a separate, and narrow, category of business information that may be withheld under the U.S. FOIA, the Mexican Access Law, United Kingdom’s Freedom of Information Act 2000, Ch. 36 (the “U.K. FOIA”),³⁹ the Irish FOIA,⁴⁰ and the Scottish FOIA.⁴¹ The Scottish Information Commissioner set forth the following factors, which “should be considered in determining whether something is a trade secret”: (1) whether “the information [is] used for the purpose of trade”; (2) whether “the release of the information [would] cause harm”; (3) whether “the information [is] common knowledge”; and (4) “[h]ow eas[ily could] competitors . . . discover or reproduce the information for themselves”.⁴² The term “trade secret,” as used in the U.S. FOIA, has been defined by the courts as “a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”⁴³

Also, within a decade of enactment of the U.S. FOIA, courts generally accepted that information could only satisfy the test for “confidential commercial information” warranting nondisclosure if disclosure would (i) be likely to impair the government’s ability to obtain the

³⁷ Under the EU law, “all of the exceptions to disclosure contained in the Access Regulation are to be construed and applied strictly, in a manner not defeating the application of the general rule.” *WWF UK*, 1997 E.C.R. II-313, para. 56.

³⁸ 5 U.S.C. § 552(b)(4).

³⁹ Freedom of Information Act 2000, Ch. 36, s. 43 (stating that, “[i]nformation is exempt information if it constitutes a trade secret”).

⁴⁰ Irish FOIA, s. 27(1)(a) (exempting from disclosure “trade secrets of a person other than the requester concerned”).

⁴¹ Scottish FOIA, s. 33(1)(a) (stating that, “information is exempt information if . . . it constitutes a trade secret”). Under the Scottish FOIA, trade secrets are exempt from disclosure regardless of the level of harm which the release may cause. However, as shown in *infra*, note 42, information is likely to be considered a trade secret only if its disclosure would cause harm.

⁴² Information Commissioner Decision Notice 180/2006, Mr. Alfred Weir and Fife Council, <http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/Decision180-2006.pdf>

⁴³ *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C. Cir. 1983).

necessary information in the future *or* (ii) cause substantial harm to the competitive position of the person from whom the information was obtained.⁴⁴ An additional basis for withholding was recognized 17 years later by the same court that set out the initial test: if the information had been voluntarily provided to the government, it could be withheld if it was “of a kind that the provider would not customarily release to the public.”⁴⁵

Judicial determinations regarding disclosure or nondisclosure of business information under the U.S. FOIA are highly fact-specific and dependent on factors including the nature and level of competition, the circumstances under which the information was submitted to the government, and the age of the data. While it is difficult to make generalizations about the types of information that will or will not be disclosed, a few specific examples illustrate the kinds of information that U.S. courts have held to warrant withholding from disclosure as confidential commercial information under the U.S. FOIA: business sales statistics, research data, technical designs, overhead and operating costs, and financial conditions;⁴⁶ data revealing assets, profits, losses, and market shares;⁴⁷ and information concerning a company’s development of drugs and medical devices.⁴⁸ On the other hand, courts have ordered (or approved) disclosure of the following information: a report generated by General Electric that criticized its own nuclear reactor;⁴⁹ information pertaining to government contractors’ use of “Small Disadvantaged Business” subcontractors;⁵⁰ unit price data,⁵¹ and the total price charged under a sole source contract.⁵²

In *Martin Marietta Corp. v. Dalton*, Martin Marietta sought to prevent the Department of the Navy’s Naval Air Systems Command from disclosing (1) cost and fee information, (2) component and configuration prices, and (3) technical and management information.⁵³ The court

⁴⁴ National Parks & Conservation Ass’n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

⁴⁵ Critical Mass Energy Project v. Nuclear Regulatory Comm’n, 975 F.2d 871 (D.C. Cir. 1992).

⁴⁶ Washington Post Co. v. Department of Health & Human Services, 690 F.2d 252 (D.C. Cir. 1982).

⁴⁷ Sterling Drug, Inc. v. FTC, 450 F.2d 698 (D.C. Cir. 1971).

⁴⁸ Public Citizen Health Research Group v. FDA, 185 F.3d 898 (D.C. Cir. 1999).

⁴⁹ Gen. Elec. v. Nuclear Regulatory Comm’n, 750 F.2d 1394, 1403 (7th Cir. 1984) (concluding that the claimed competitive harm was too speculative and noting that the company was the primary maker of nuclear reactors, that some of the information in the report already had been released publicly and that the report was five years old).

⁵⁰ GC Micro Corp. v. Def. Logistics Agency, 33 F.3d 1109 (9th Cir. 1994) (finding that (1) the agency failed to show that disclosure of the information would cause substantial competitive harm to the contractors and (2) the information was not the type of detailed information that would allow competitors to estimate and undercut the contractors’ bids in the future).

⁵¹ CC Distribs., Inc. v. Kinzinger, No. 94-1330, 1995 U.S. Dist. LEXIS 21641 (D.D.C. June 28, 1995) (finding that the agency’s decision to release information was not arbitrary and capricious because the submitter failed to explain with particularity the substantial competitive harm it would suffer upon release of the information).

⁵² U.S. News & World Report v. Department of Treasury, No. 84-2303 (D.D.C. March 26, 1986) (allowing agency to withhold information concerning prices charged for engineering services, labor, manufacturing overhead, and general and administrative expenses in records pertaining to purchase of two armored limousines for the president but concluding that disclosure of the total price charged under the contract would not permit competitors “to accurately calculate . . . future bids or pricing structure . . . or to engage in selective pricing. . .”).

⁵³ *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997).

found that Martin Marietta failed to show how it would be injured by disclosure of the information, stating that:

[I]n perhaps no sphere of government activity would [the statutory purpose of shedding light on agency performance] appear to be more important than in the matter of government contracting. The public, including competitors who lost the business to the winning bidder, is entitled to know just how and why a government agency decided to spend public funds as it did; to be assured the competition was fair, and, indeed, even to learn how to be more effective competitors in the future.⁵⁴

For these and other reasons, the court ultimately ordered the release of the contracts at issue in the case.

Although, as in the U.S., the disclosure or withholding of business information in other jurisdictions also turns on specific facts, examples of the kinds of information falling into these two categories help illustrate the importance of a focused evaluation of the information in issue. For example, various tribunals have ordered the disclosure of the following information: an internal audit report relating to a review of a system purchased by a university from an external supplier;⁵⁵ parts of a government manual concerning the procedures for assessing the financial viability of tenderers for contracts;⁵⁶ and the price and composition of a winning bid for a contract with a state-owned transportation company.⁵⁷ On the other hand, the brands and the

⁵⁴ *Id.* at 41.

⁵⁵ Information Commissioner Decision 134/2006, *Mr. K and Glasgow Caledonian University*, <http://www.itspubliknowledge.info/appealsdecisions/decisions/Documents/Decision134-2006.pdf>. The University alleged that the release of the audit report and related documentation would “prejudice substantially” its commercial interests and, to a certain extent, the commercial interests of its third party suppliers. The Scottish Information Commissioner rejected the University’s contention, explaining that the University failed to specify “the type of commercial activity that it feels would be substantially inhibited by release of the detailed computer audit report”. *Id.* at para. 48 (emphasizing that an entity’s “commercial interests” are likely to be narrower than its “financial interests”).

⁵⁶ *Sec’y, Dep’t of Workplace Relations & Small Business v. Staff* (2001) 114 F.C.R. 301, 2001 WL 1192284 (Fed. Ct. of Australia 2001) (upholding the Administrative Appeals Tribunal’s decision to allow access to documents, where the disclosure of the documents would not entail the disclosure of “trade secrets” nor “other information having a commercial value”; remanding the issue of whether the documents were exempt under Freedom of Information Act, 1982, s. 43(1)(c), which exempts from disclosure “information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organization or undertaking, being information: (i) the disclosure of which would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organization or undertaking in respect of its lawful business, commercial or financial affairs; or (ii) the disclosure of which under th[e] Act could reasonably be expected to prejudice the future supply of information to the Commonwealth [of Australia] or an agency for the purpose of the administration of a law of the Commonwealth or of a Territory or the administration of matters administered by an agency”).

⁵⁷ *Transnet Ltd. & Another v SA Metal Machinery Co (Pty) Ltd* 2006 (4) BCLR 473 (SCA) (S. Afr.), 2005 SACLR LEXIS 44 (Nov. 29, 2005) (noting that the lower court concluded that the information related to the bid was not exempt under the Promotion of Access to Information Act, 2000, sec. 36(1)(b), because its release was not “likely to cause harm to the commercial or financial interests” of the winning bidder; remarking that the appellant did not appeal this portion of the lower court’s judgment).

prices paid for bouillon products purchased by a public authority,⁵⁸ and the development agreements governing the disposal of an ammunition factory and surrounding land⁵⁹ illustrate the types of information that have been withheld.

The Mexican Access Law exempts “commercial, industrial, tax, bank, and fiduciary secrets” and other information designated by law as “confidential, classified, commercial classified or government confidential.”⁶⁰ “Industrial secrets” are defined under Mexican law as “information of industrial or commercial application that is protected . . . as confidential, in the meaning that it obtains or maintains a competitive or economic advantage over third parties in the realization of economic activities and in relation to which [the owner] has adopted measures and systems sufficient to preserve its confidentiality or restricted access.”⁶¹

In *Juan Gabriel Gutierrez Orozco v. Mexican Petroleum*, the Mexican Federal Access to Information Institute (“IFAI”) ordered disclosure of (1) the names and addresses of liquefied petroleum gas (“LPG”) distributors that had purchased LPG from Pemex, a state company in charge of all exploitation and first sale of such products, and (2) Pemex’s sales volumes. The Mexican Access Law allows submitters of confidential information to designate the information as such and states that the government may disclose the confidential information “only with the express consent of the individual to whom that confidential information belongs.”⁶² However, the confidential information may be withheld on these grounds only if it falls within one of the statutory exemptions. With respect to names and addresses of LPG distributors, because LPG distribution was licensed by the federal government, which was required to make public its list of licensees under the Access Law, the IFAI determined that the information should be disclosed. With respect to sales volumes, the IFAI recognized that specific sales information “might be of utility” to the distributors’ competitors and that Pemex had taken steps to maintain confidentiality of the information. But because petroleum is national patrimony under the Mexican Constitution and because Pemex’s aggregate sales data are indicative of its use of public resources, the IFAI concluded that disclosure of such aggregate data “would contribute to

⁵⁸ Information Commissioner Decision 233/2006, *Mr. Mike Portlock and Glasgow City Council*, available at <http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/decision6233.htm> (concluding that the “commercial interests” exemption applied, because “the commodity purchase [wa]s used at least in part to supply a commercial catering function”).

⁵⁹ *ADI Residents Action Group and Dep’t of Finance and Admin. & Anor* [2001], Administrative Appeals Tribunal of Australia 45 (29 January 2001), available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/aat/2001/45.html?query=ADI%20residents%20action%20group> (holding that the information in the documents requested to be released, such as the profit and risk sharing arrangements of the parties, incentives, funding proposals, and the particular methodology for managing the contract from which the parties expect to derive commercial benefit, had commercial value to the contracting parties that could be reasonably expected to be diminished upon disclosure, therefore the exemption in the Freedom of Information Act, 1982, s. 43(1)(b) applied).

⁶⁰ Mexican Access Law, art. 14.

⁶¹ Mexican Industrial Property Law (1991), art. 82; available at: <http://www.diputados.gob.mx/LeyesBiblio/doc/50.doc>.

⁶² Mexican Access Law, art. 19.

the objectives of the Access Law to enhance the transparency and accountability of public administration.”⁶³

Similarly, the EU Access Regulation exempts documents, the disclosure of which “would undermine the protection of [the] commercial interest of a natural or legal person.”⁶⁴ Section 27 of the Irish FOIA sets forth an exemption for trade secrets, information “whose disclosure could reasonably be expected to result in a material financial loss or gain to the person to whom the information relates, or could prejudice the competitive position of that person in the conduct of his or her profession or business or otherwise in his or her occupation,” and “information whose disclosure could prejudice the conduct or outcome of contractual or other negotiations of the person to whom the information relates.”

The Scottish FOIA exempts information, the disclosure of which “would, or would be likely to, prejudice substantially the commercial interests of any person”⁶⁵ A “commercial interests” exemption under the U.K. FOIA provides that a government authority may withhold information the disclosure of which “would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”⁶⁶ The term “commercial interests” has been interpreted in the U.K. to relate to “a person’s ability to successfully participate in a commercial activity, such as the purchase and sale of goods or services.”⁶⁷ The

⁶³ *Juan Gabriel Gutierrez Orozco v. Mexican Petroleum*, File No. 2717/06 (2006).

⁶⁴ EU Access Regulation, art. 4(2) (subjecting this exemption to a public interest test, which is discussed in Part IV.B).

⁶⁵ Scottish FOIA, s. 33(1)(b).

⁶⁶ U.K. Freedom of Information Act 2000, Ch. 36, s. 43. The risk of prejudice “must be established at the time of the making of the request.” Information Commissioner Decision Notice FS50066753, *Derry City Council* (Feb. 21, 2006), http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50066753.pdf. The risk of prejudice “being suffered should be more than a hypothetical or remote possibility; there must [be] a real and significant risk.” Information Commissioner Decision Notice FS50073979, *Invest (Northern Ireland)* (July 24, 2006), http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50073979.pdf (citing *R (on the application of Lord) v. Secretary of State for the Home Office* [2003] EWHC 2073 (Admin)); see Information Commissioner Decision Notice FS50066753, *Derry City Council*, *supra* (rejecting the authority’s assertion that disclosure is likely to prejudice the commercial interests of a low cost airline, where the authority did not provide any specific evidence of potential prejudice, but merely stated that the airline operated in a “highly competitive” sector, and that disclosure of the airline’s contract with the authority would undermine its competitive position).

Note that, the “prejudice” test under the U.K. FOIA is lower than the “substantial prejudice” test under the Scottish FOIA. As a result, information that could not be disclosed under the U.K. FOIA may be disclosed under the Scottish FOIA. Freedom of Information (Scotland) Act 2002 Briefings Series, Commercial Interests and the Economy (Section 33), *available* at <http://www.itspublicknowledge.info/legislation/briefings/section33.htm> [hereinafter Scottish Commercial Interests Briefing].

⁶⁷ Freedom of Information Act Awareness Guidance No. 5, Commercial Interests 4, *available* at www.ico.gov.uk [hereinafter Awareness Guidance 5] (emphasizing that the concept of “commercial interests” is separate and distinct from that of “financial interests”); see also the Scottish case of *Mr. John Robertson, Aberdeen Journals Ltd. and the Chief Constable of Northern Constabulary*, Information Commissioner Decision 066/2006 (Apr. 20, 2006), <http://www.itspublicknowledge.info/appealsdecisions/decisions/Documents/Decision066-2006.pdf> (distinguishing between commercial and financial interests and noting that “[f]inancial interests will generally relate to the financial affairs of an organisation, and will include, but will not be limited to, the revenue generated by an organisation and the management of its financial assets,” while “[c]ommercial interests[] will relate more directly to trading activity

U.K. Information Commissioner, in determining whether the disclosure of the information would, or would be likely to, prejudice a commercial interest, takes the following factors into account: (1) whether the information relates to or could impact a commercial activity; (2) the level of competition in the particular industry;⁶⁸ (3) whether the release of the information would “damage a company’s reputation or the confidence that customers, suppliers or investors may have in a company” (mere embarrassment to a company is not sufficient); (4) whose commercial interests are affected; (5) whether the information is commercially sensitive (*i.e.*, information that shows how a company is able to offer a certain price for its goods or services is “likely to be commercially sensitive”); and (6) the likelihood of prejudice resulting from the disclosure.⁶⁹ In the U.K. and in Scotland, the commercial interest exemption is a “qualified exemption”: first, it is subject to the (substantial) prejudice test and second, as discussed more fully below, even if disclosure would, or would be likely to, result in (substantial) prejudice to someone’s commercial interests, the information may, nevertheless, be disclosed on public interest grounds.

Thus, while public-access laws generally recognize that there may be need for protection of certain types of commercial information, they do not provide a blanket exemption. These laws recognize that such terms as “commercial” or “business” or “confidential” information cannot determine per se what information should be withheld, consistent with protecting business interests, and what information should be disclosed, consistent with advancing public and governmental interests. Such disclosure decisions must be reached pursuant to a careful weighing, on a case by case basis, of the likely prejudice to the protected commercial interests and the public interest in publication of the information at issue.

Use of vague standards for defining business information that merits protection, unquestioning deference to a business’s claim that its documents should be kept confidential, or according government officials broad discretion to withhold information simply because it relates to a commercial interest – all of these can render meaningless the public’s right of access. They can deprive the public of an important and valuable source of information to aid decision-making. And they can ultimately erode public confidence in governmental institutions.

undertaken by an organisation, and will include activity relating to the ongoing sale and purchase of goods and services by that organisation, frequently for the purpose of revenue generation”). The Scottish Information Commissioner added that, to satisfy the test under Section 33(1)(b) of the Scottish FOIA, “the interests which are at risk of harm must go beyond those relating solely to the purchase by a Scottish public authority of goods and services which are required for the effective fulfilment of its functions, statutory or otherwise.” *Robertson, supra*.

⁶⁸ The factors suggest that in the absence of competition, disclosure is not as likely to adversely affect a commercial interest. However, the competitiveness of the particular market, without more, is insufficient to “meet the test of prejudice.” Information Commissioner Decision Notice FS50073979, *Invest (Northern Ireland)* (July 24, 2006), http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50073979.pdf.

⁶⁹ Awareness Guidance 5, *supra* note 67, at 7 (explaining that “prejudice” from the disclosure need not be substantial, but must be more than trivial and adding that “there must be a significant risk rather than a remote possibility of prejudice”); *see also* Information Commissioner Decision Notice FS50105734, *Maritime and Coastguard Agency* (Sept. 25, 2006), http://www.ico.gov.uk/upload/documents/decisionnotices/2006/fs50105734_dn.pdf (requiring “real and significant risk of prejudice” and noting that the prejudice “does not need to be substantial but it must be more than trivial”).

B. Public interest override

While there are sometimes strong policy and practical arguments against disclosure of government-held trade secrets or competitively sensitive confidential commercial information that has a tenuous relationship to government activities, the argument for disclosure becomes more compelling where the third-party business information relates to public expenditures or commercial interests or activities of a government entity, or commercial activities on public land. Simply stated, there is a strong, counter-balancing public interest in holding the government publicly accountable for these expenditures and activities. Thus, although some categories of proprietary commercial information should usually be kept confidential, taxpaying citizens and businesses generally should be entitled to obtain information about public expenditures, government contracts, and other transactions and relationships between the government and private business entities.

Likewise, some nations also provide that the protection of public health, safety, and the environment or the need to avert imminent harm to persons may outweigh business interests in confidentiality.⁷⁰ This approach reflects a recognition by some jurisdictions that even valuable private commercial interests must give way to disclosure in the interests of public health and safety.

For example, in *Trustees For the Time Being of the Biowatch Trust v. Registrar: Genetic Resources*,⁷¹ the South African High Court ordered the registrar of genetically modified crops to release information pertaining to the use of genetically modified organisms (“GMO’s”) in South Africa, including certain risk assessment data, to Biowatch. The registrar initially refused to disclose the information to Biowatch, alleging “commercial confidentiality of the information sought by Biowatch” and arguing that the disclosure of such information would harm the commercial and financial interests of Monsanto and several other companies.⁷² The court placed

⁷⁰ See, e.g., SCOTTISH MINISTERS’ CODE OF PRACTICE ON THE DISCHARGE OF FUNCTIONS BY PUBLIC AUTHORITIES UNDER THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002, para. 46 (2004), <http://www.scotland.gov.uk/Resource/Doc/25725/0025717.pdf> (noting that, “there will be circumstances where adverse commercial impacts are not a sufficient justification for non-disclosure; emphasizing that, “[w]here disclosure is necessary for the protection of public health, public safety or the environment, for example, such considerations may outweigh financial loss or prejudice to the competitive position of a third party”); LAWRENCE REPETA, BUSINESS CONFIDENTIALITY VERSUS HUMAN HEALTH: THE ROLE OF JAPAN’S INFORMATION DISCLOSURE LAWS (2006), available at <http://www.opengovjournal.org/article/view/382/383> (stating that, Japan’s national and local access to information laws “establish ‘public interest overrides’ requiring that human health and certain other public interests prevail in cases of [] conflict” between “the interest in protecting business confidentiality” and the “strong public interest in disclosure of the same information”). In Japan, the following are some of the types of information that have been disclosed, because the public interest in disclosure was deemed to outweigh the interest in protecting confidential business information: “the names of companies with large numbers of complaints for fraudulent sales practices, details of the disposal of industrial wastes, and a wide variety of information concerning real estate.” REPETA, *supra* at 3-4 (pointing out that, in one of the most important cases interpreting the public interest override under Japanese freedom of information law, the national administrative appeals board recommended the disclosure of “a list of hospitals that had distributed a blood coagulant tainted with hepatitis viruses,” despite the risk of “severe economic injury to the listed entities”).

⁷¹ *Trustees For the Time Being of the Biowatch Trust v. Registrar: Genetic Resources*, No. 23005/2002 (T.P.D.) (S. Afr.), <http://www.biowatch.org.za/docs/judgement.pdf>.

⁷² *Id.* at 20, 42.

the burden “of establishing that a refusal of a request for access is justified” on the parties “claiming the refusal.”⁷³ The court noted the potential dangers to “public health and environmental safety” that result from GMO experimentation⁷⁴ and upheld the right of access to information, which is set forth in the South African Constitution. Furthermore, while the court acknowledged that the right of access to information is not absolute, it concluded that disclosure of most of the requested information was in the public interest.⁷⁵

In *Futaki v. Japan Tobacco Company Biotechnology Center* (2002), the Osaka High Court held that the interest in public health outweighed the interest in business confidentiality and ordered the disclosure to Mr. Futaki of requested documents. These included floor plans and specifications of the Japan Tobacco Company (“JT”) Biotechnology Center, a major genetic laboratory, “where disease is cultivated and injected into lab animals and where gene-splicing and other biotechnology experiments take place,” constructed “in the midst of a crowded residential area.”⁷⁶ The government officials had rejected Mr. Futaki’s request, claiming that the disclosure of the documents would “result in significant injury to [JT’s] competitive position.”⁷⁷ The Osaka District Court upheld the city’s decision to withhold the information, concluding that “the documents qualified for protection under” the relevant law and that the risk of harm to the community if the documents are not disclosed was insufficient to warrant disclosure.⁷⁸ On appeal, the Osaka High Court overturned the lower court’s decision. The High Court “agreed with the lower court determination that release of the documents would cause competitive injury to JT Real Estate [an affiliate of JT Biotechnology Center],” but concluded that “the level of ‘risk of injury to human life, the human body or health’ was sufficient to override the business interest and require disclosure.”⁷⁹

⁷³ *Id.* at 46.

⁷⁴ *Id.* at 9-10.

⁷⁵ *Id.* at 53-65. Section 36 of the Promotion of Access to Information Act, 2000 (Act No 2 of 2000), <http://www.info.gov.za/gazette/acts/2000/a2-00.pdf>, sets forth an exemption for “financial, commercial, scientific or technical information . . . of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party.” It further provides that access to a record may not be refused if it consists of information “about the results of [any] investigation” performed by or on behalf of a third party, “and its disclosure would reveal a serious public safety or environmental risk.” Promotion of Access to Information Act, 2000, s. 36.

⁷⁶ REPETA, *supra* note 70, at 4-6, 9 (explaining that Mr. Futaki requested the information shortly after the Great Hanshin Earthquake, which caused massive structural damage to several buildings in Mr. Futaki’s area, with the hope that the “documents would provide some comfort regarding the threat of biohazards in his community”).

⁷⁷ *Id.* at 6-7 (JT and its real estate development affiliate argued that disclosure would enable “competitors to learn details of the design and construction of the facility”).

⁷⁸ The relevant Takatsuki ordinance protects information “the disclosure of which would cause damage to the competitive standing or other proper interests of a business. Ordinance No. 40, sec. 6(1)(2) (1986) (cited in REPETA, *supra* note 70, at 15). A proviso to Section 6(1)(2) of the Ordinance provides that, “regardless of the competitive injury that may result, information must be disclosed if it concerns ‘business activities that present a risk of injury to human life, the human body or health.’” Ordinance No. 40, Art. 6(1)(2) (1986) (cited in REPETA, *supra* note 70, at 17).

⁷⁹ REPETA, *supra* note 70, at 21. In reaching this conclusion, the Osaka High Court focused on whether the activities conducted by JT Biotechnology Center were “the kinds of activities for which society would require ‘special safety measures.’” *Id.* at 22 (quoting Osaka High Court Decision, 2002, Sec. II.5). The High Court concluded that they were, noting the following: “Because there are aspects [of recombinant DNA technology] for

These cases provide vivid illustrations of why many leading freedom of information regimes allow a public interest in disclosure to override exemptions protecting commercial confidentiality. The public interest override allows disclosure of otherwise exempt information if, on balance, the public interest favors disclosure. While most laws do not define the term “public interest,” it has been interpreted in the U.K. to mean “something which serves the interests of the public” and in Scotland to mean “something which is of serious concern and benefit to the public.” Of course, what constitutes public interest will change over time and will vary depending on the circumstances of each case.

Article 4(2) of the EU Access Regulation provides that, “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of . . . commercial interest of a natural or legal person . . . unless there is an overriding public interest in disclosure.” Similarly, the U.K. FOIA subjects its “commercial interests” exemption to a public interest balancing test: even where a public authority concludes that the release of information would prejudice a legitimate commercial interest, it may only refuse to provide the information if it believes that, “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”⁸⁰ Under the U.K. law, the public interest is served where, among other factors, the release of the information would: “further the understanding of, and participation in the debate of issues of the day”; “facilitate accountability and transparency of public authorities for decisions taken by them” or in relation to “the spending of public money,” as well as help ensure that “authorities do their job properly,” “any misconduct is exposed,” and “the public is not deceived about the way public authorities, or bodies which they regulate, operate.”⁸¹

The Canadian Access to Information Act (the “Canadian ATA”) allows disclosure of confidential commercial information if disclosure is in the public interest “as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party.”⁸² The Inter-American Commission argued in *Claude Reyes* that, in all cases, a restriction of the right of access

which it cannot be said that sufficient experience concerning its safety has been accumulated, it is important that any and all appropriate measures be employed to prevent injury from unforeseeable and unknown dangers before it occurs.” *Id.*

⁸⁰ Freedom of Information Act 2000, Ch. 36, s. 2; *see also* Information Commissioner Decision Notice FS50063478, *National Maritime Museum* (June 20, 2005), <http://www.ico.gov.uk/upload/documents/decisionnotices/2005/63478%20dn.pdf> (emphasizing that “those who engage in commercial activity with the public sector must expect that there may be a greater degree of openness about the details of those activities than had previously been the case prior to the [U.K. FOIA] coming into force”).

⁸¹ Awareness Guidance 5, *supra* note 67, at 8; Freedom of Information Act Awareness Guidance No. 3, The Public Interest Test 5, http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_3_public_interest_test.pdf.

⁸² Access to Information Act, R.S.C., c. A-1, s.1 (1985).

must not only be related to one of the [legitimate] objectives [that justify it], but it must also be shown that disclosure could cause substantial prejudice to this objective and that the prejudice to the objective is greater than the public interest in having the information (evidence of proportionality).⁸³

In the public procurement context, the public interest in transparency and accountability for the spending of public money has been found to outweigh the interest in maintaining the confidentiality of certain business information.⁸⁴ Thus, in *McKeever Rowan Solicitors and the Department of Finance*,⁸⁵ the Irish Information Commissioner ordered the disclosure of certain information regarding a public procurement contract. The requester sought information related to “the tender competition for appointment of advisors to the Minister of Finance on the sale of ICC Bank.”⁸⁶ The Department of Finance refused to provide the records, asserting several exemptions, including the “commercially sensitive information” exemption under Section 27(1)(b) of the Irish FOIA.⁸⁷ On appeal, the Information Commissioner concluded that after the awarding of a procurement contract, fee rates, terms of payment, and other details necessary to understand the nature of the procured services must be made public, even if the disclosure of such information “could reasonably be expected to result” in some competitive harm to the third party submitter of the information.⁸⁸ The Information Commissioner reasoned that, “on balance, the public interest was better served by the release of this information in light of the significant need for openness and accountability in relation to the contract.”⁸⁹

In *Applicant Against the Conduct and the Decision of the Municipality of Radovljica* (2004), the Slovenian Commissioner for Access to Public Information held that the applicant was

⁸³ *Claude Reyes et al. v. Chile*, Judgment of Sept. 19, 2006, para. 58(c).

⁸⁴ The typical factors that are weighed in determining whether the public interest override applies include (1) transparency and accountability for the spending of public money; (2) protection of the public (i.e., where the public authority has the information regarding the quality of a private company’s products or the conduct of a company); (3) circumstances under which the public authority obtained access to the information; and any (4) competition-related issues. Awareness Guidance 5, *supra* note 67, at 8.

⁸⁵ Information Commissioner Letter Decision Case No. 99183 (2003), available at <http://www.oic.gov.ie/en/DecisionsoftheCommissioner/LetterDecisions/Name,1638,en.htm>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* (noting that, “once the successful tenderers’ proposed fees became the contract rates, the Department could not reasonably be expected to keep that information or any of the other contract terms confidential in the absence of exceptional circumstances”).

⁸⁹ *Id.* (concluding that Section 27(1)(b) did not apply). Similarly, in a group of public contract cases, the Information Commissioner ordered the disclosure of invoices paid to telecommunications companies by the Department of Finance and several other agencies. *Eircom Plc and the Department of Agriculture and Food; Mr. Mark Henry and the Department of Agriculture and Food; Eircom Plc and the Department of Finance and Eircom Plc and the Office of the Revenue Commissioners*; Information Commissioner Long Form Decision, Cases Nos. 98114, 98132, 98164 and 98183 (2000). The Information Commissioner concluded that, the significant “public interest in ensuring the maximum openness with regard to the use of public funds, particularly, but not exclusively, with a view to ensuring that public bodies obtain value for money when purchasing telecommunications services” outweighed any public interest in protecting the commercial interests of the telecommunications companies. *Id.*

entitled to view the agreements relating to the management of apartments owned by the Municipality. The municipality had refused to allow inspection because the documents were “trade secrets,” exempt from disclosure under Article 6 of the Slovenian Act on Access to Public Information.⁹⁰ The Commissioner noted that the procedure for awarding a public contract, including eligibility and compliance with contract criteria, cannot be treated as a trade secret. In permitting inspection, the Commissioner held that the applicant's request was a matter of public interest because: (1) “[b]y making the information public, the transparency, the suitability of public funds management and prevention of corruption are ensured,” (2) “[t]he citizens and taxpayers have the right to know how public funds, which have been entrusted to the government, are spent,” and (3) “[c]ompetition among the tenderers on the market is ensured.”

As these laws and decisions illustrate, even the potential for some private harm from disclosure of confidential business information should yield to the broader interests of the public in gaining access where that public interest can be shown to outweigh the asserted private harm. Often, of course, this issue is not reached, as many courts and information officials conclude, in the first instance, that the assertion that disclosure of certain information will cause harm to the business is unfounded, unproven, or exaggerated. Often the argument against disclosure turns on a fear that public access to the information could cause embarrassment to the business implicated. But this is not a fear to which access to information regimes accord much weight. After all, business embarrassment would also be caused by revelations of waste, fraud, corruption, or other illegality – on the part of the business or the government entity. Yet these are precisely the kinds of cases where public disclosure provides the greatest benefits to society.

V. Procedural safeguards are indispensable to a fair and workable access to information regime

A number of procedural safeguards are required to ensure fair and effective administration of access laws; these appear to be integral to all mature legal regimes for providing public access to government information.

A. Duty of government to respond to inquiries and requests for information

To ensure that public officials and civil servants “respect the right of access to information” and respond to information requests in a timely and efficient manner, freedom of information laws universally prescribe time limits within which agencies must respond to requests.⁹¹ Unreasonable delays of access to information undermine the basic rights reflected in access laws and impede effective use of those laws. As such, under the U.S. scheme, a government agency must respond within twenty business days of the request. The time limit may be extended by ten additional business days in “unusual circumstances.”⁹² Under the Mexican Access Law, a government agency must respond to a request within twenty business

⁹⁰ Access to Public Information Act (ZDIJZ) (Mar. 22, 2003, as amended July 15, 2005), *available at* <http://www.ip-rs.si/index.php?id=520> (English translation).

⁹¹ *Transparency and Silence*, *supra* note 1, at 16; MENDEL, *supra* note 4, at 31 (suggesting that “[t]he law should set out clear timelines for responding to requests, which should be reasonably short”).

⁹² 5 U.S.C. § 552(a)(6).

days, notifying the requester of the cost and form of access. The information must be provided to the requester within 10 business days after the agency has notified the requester that the information is available, and once the requester has paid any fees. To further ensure that government officials comply with the law and respond to information requests in a timely manner, government agencies subject to the Mexican Access Law are required to establish “Information Committees” to “coordinate and supervise” the agency’s activities under the Mexican Access Law. Under the Peruvian Law of Transparency and Access to Public Information, the government agency must respond within seven business days, a deadline that can be extended for five additional business days in exceptional cases.⁹³

Similarly, the U.K. FOIA⁹⁴ and the Scottish FOIA⁹⁵ require that the public authority respond to a request for information within twenty business days.⁹⁶ Under the U.K. FOIA, this timeframe may be extended “to allow for consideration of release on public-interest test grounds as long as it is within a time period that is deemed ‘reasonable in the circumstances,’”⁹⁷ while under the Scottish FOIA, public authorities must respond to all requests, including those that implicate the public interest test, within twenty business days. When a public authority is considering the public interest test, it must, nevertheless, issue a refusal notice to the requestor, providing an estimate of the date by which the authority expects to come to a decision⁹⁸ and timely disclosing the nonexempt information.

B. Duty to give reasons for governmental decisions, including decisions not to disclose information to a person requesting it

Under most access regimes, including those of Mexico,⁹⁹ the United States,¹⁰⁰ the United Kingdom,¹⁰¹ the EU,¹⁰² Australia¹⁰³ and New Zealand,¹⁰⁴ if an agency denies access to requested

⁹³ Ley de Transparencia y Acceso a la Información Pública, LEY N° 27806 [Law of Transparency and Access to Public Information, No. 27806], Feb. 4, 2003.

⁹⁴ Freedom of Information Act 2000, Ch. 36, s. 10(1).

⁹⁵ Freedom of Information (Scotland) Act, 2002, (A.S.P. 13), s. 10.

⁹⁶ Freedom of Information Act 2000, Ch. 36, s.10(1); DUNION, *supra* note 33, at 6-7 (emphasizing the importance of rapid processing of all requests for information).

⁹⁷ Freedom of Information Act 2000, Ch. 36, s. 10(3); *see also* Banisar, *supra* note 30, at 129; Freedom of Information Good Practice Guidance, A Guide to The Lifecycle of Requests Under Section 1 of the Freedom of Information Act 2000 (FOIA), *available at* www.ico.gov.uk (emphasizing that, “public authorities should aim to respond to *all* requests, including where the public interest is being considered, within 20 working days”; adding that, where “the public interest considerations are exceptionally complex it may be reasonable to take longer but . . . in no case should the total time exceed 40 working days”).

⁹⁸ Freedom of Information Act 2000, Ch. 36, s. 17(2).

⁹⁹ Mexican Access Law, art. 45.

¹⁰⁰ 5 U.S.C. § 552(a)(6).

¹⁰¹ Freedom of Information Act 2000, Ch. 36, s. 17.

¹⁰² EU Access Regulation, art. 7(1). In *Jose Maria Sison v. Council of the European Union*, the court stated that, the institution must “provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine.” Joined Cases 110/03, 150/03 & 405/03, 2005

records, the agency must explain the reason for the denial and describe the procedure by which the denial may be appealed. This requirement helps to ensure the agency's compliance with the freedom of information law, because a notice that "does not fully explain an authority's decision may indicate that a request has not been dealt with seriously."¹⁰⁵ The explanation is also necessary to allow meaningful review of the initial decision – whether by an administrative appeal, through judicial review, or by petition to an information commissioner or ombudsperson.

While some differences exist, access laws generally provide that, when refusing a request for information, a public authority must specify the applicable exemption, explain why the exemption applies, and describe the requestor's right to appeal the decision (explaining its internal review procedure, if one exists). A general statement indicating that the requested information is subject to an exemption is not sufficient. The authority must provide a clear explanation of its reasoning regarding the application of the exemption. As the E.U. Court of First Instance ruled, when denying access an institution must "provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine."¹⁰⁶ This is not just a technical requirement; the failure of an institution to give reasons for denying access to every document withheld will result in a judicial annulment of that failure.¹⁰⁷

C. Duty to consult with submitter of business information before any disclosure is made, especially where information is identified in advance as potentially confidential

Although it is not a universal feature, some freedom of information laws include provisions that require a government agency to provide notice to, or consult with, a third-party submitter of confidential or sensitive business information before disclosing the information to a requester. The purpose of these provisions is to protect the due process rights of submitters of information and encourage businesses to share information with the government in the first place. In addition, these provisions often better serve the interests of requesters, because the agency is more likely to carefully review the information and determine which parts of a record can be segregated and disclosed, rather than denying a request altogether because the document contains business information.¹⁰⁸ The government's decision will tend to be better informed after a meaningful consultation with the third-party.

WL 101335, ¶ 60-61 (citing by analogy *Netherlands and Van der Wal v. Commission*, Cases 174/198 P and 89/98 P, 2000 E.C.R. I-1, ¶ 24).

¹⁰³ Freedom of Information Act, 1982, sec. 26.

¹⁰⁴ Official Information Act 1982, part 2, sec. 19.

¹⁰⁵ U.K. Freedom of Information Good Practice Guidance No. 1, Refusal Notices, *available at* www.ico.gov.uk [hereinafter Good Practice Guidance 1] (adding that, a clear and fully explained notice also allows the Information Commissioner to understand why the information was withheld).

¹⁰⁶ *Jose Maria Sison v. Council of the European Union*, Joined cases 110/03 & 405/03, 2005 WL 101335, para. 61.

¹⁰⁷ *Kuijper v. Council*, Case 188/98, 2000 E.C.R. II-01959, para. 36.

¹⁰⁸ JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 10:8 (3d ed. 2000).

The government's duty to consult is not equal to a duty to accede to a request for confidentiality by a third party. In the course of adopting the EU Access Regulation, European institutions considered allowing a third-party veto to operate for documents authored outside the institutions. The first rules allowing public access to Commission and Council documents had been contained in a Code of Conduct that excluded disclosure of documents provided by third parties.¹⁰⁹ This provision was widely criticized – and it was omitted from the subsequent Regulation.

Under the EU Access Regulation, consultation with the third party to which the information pertains is required only when it is not clear whether or not the document falls within one of the exceptions set forth in the regulation.¹¹⁰ If the document is clearly within an exemption or clearly not within an exemption, consultation is not required. Where consultation is required, the third party may reply and provide its views on the matter.¹¹¹ Unless the submitter of the information is a Member State, the submitter's negative opinion regarding disclosure is not binding on the authority (*i.e.*, it may not veto the authority's decision to disclose information).¹¹²

Under the U.K. FOIA regime, while consultation is not required, public authorities are encouraged “to consult with the parties likely to be affected by any disclosure.”¹¹³

Under Section 29 of the Irish FOIA, before a public body may disclose confidential information or commercially sensitive information on public interest grounds, it must – within up to four weeks of receiving the request for information – consult the provider of the information and give it “the opportunity to have an input into the decision whether to release information.”¹¹⁴ The submitter of the information, who has the burden of proving that disclosure is not

¹⁰⁹ Code of Conduct 93/730/EC of Dec. 1993, 1993 O.J. (L. 340) 41.

¹¹⁰ EU Access Regulation, art. 4(4) (stating that, “[a]s regards third-party documents, the institution shall consult the third party with a view of assessing whether an exception in paragraph 1 or 2 [of article 4] is applicable, unless it is clear that the document shall or shall not be disclosed”).

¹¹¹ Special rules apply where the third party submitter of information is an EU Member State (article 4(5) of the Access Regulation), or the request is for a “sensitive” (classified) document (article 9 of the Access Regulation).

¹¹² EU Access Regulation, art. 4(5). The special veto given to a Member State is consistent with the basic purpose of the access regime, which is to give access to information held by Community institutions, not information held by Member States.

¹¹³ Awareness Guidance 5, *supra* note 67, at 10 (noting that such consultation does not extend the twenty business day period allowed to a public authority to respond to an information request). In a recent decision, the U.K. Information Tribunal expressed its disapproval of the Information Commissioner's failure to contact either party to discuss the complaint with them. The Information Tribunal remarked that “there would be very few complaints where the [Information] Commissioner could only rely on the complaint notice and any accompanying documentation,” without contacting the parties. *Mr. E.A. Barber v. The Information Commissioner*, Appeal No. EA/2005/0004 and Information Commissioner Decision Notice 67001 (cited in Information Tribunal's Early Decisions Lead to Greater Openness, *available at* www.ico.gov.uk).

¹¹⁴ Irish FOIA, s. 29(2) (discussed in MAEVE MCDONAGH, *FREEDOM OF INFORMATION LAW*, ch. 13 (Thomson Round Hall, 2d ed. 2006)).

justified,¹¹⁵ then has three weeks to make submissions to the public authority in relation to the request.¹¹⁶ The public authority must consider any such submissions in deciding whether to grant the request.¹¹⁷ The public authority must reach the final decision within two weeks of receiving the submission (or, if the provider of information does not submit any materials, within two weeks after the end of the three-week deadline for submissions).¹¹⁸ The consultation is mandatory only where the public body decides to disclose the information on public interest grounds. Thus, where a public body intends to disclose records on the ground that the exemption does not apply to the requested records, consultation is not necessary.¹¹⁹

D. Duty to provide notice before the information is disclosed, if the submitter has objected, to allow for appeal or judicial review

In the United States,¹²⁰ Canada,¹²¹ and the EU,¹²² government bodies and agencies are required to notify a third-party submitter of confidential commercial information if the agency concludes that it is required to disclose the information over the submitter's objection. The submitter must be given time to challenge the disclosure decision, and the submitter may challenge the agency's decision to disclose in court. But, in the absence of a judicial challenge, the agency may disclose all or part of the information over the objection of the submitter.

In Australia, where it is "reasonably practical to do so," the decision-maker must give the submitter of information an opportunity to make a submission arguing that the requested information should be exempt.¹²³ If the decision-maker determines that the requested information is not exempt, the decision-maker must notify the submitter (and the requestor) of its decision, and cannot release the requested information until (1) the expiration of the submitter's time to appeal that decision or (2) the submitter appeals the decision and that appeal is either dismissed or denied.¹²⁴

¹¹⁵ Irish FOIA, s. 34(12)(a) (stating, in pertinent part, that "a decision to grant a request to which Section 29 applies shall be presumed to have been justified unless the person concerned . . . shows to the satisfaction of the [Information] Commissioner that the decision was not justified"); *see also* McDONAGH, *supra* note 114.

¹¹⁶ Irish FOIA, s. 29(2)(ii).

¹¹⁷ Irish FOIA, s. 29(3)(a).

¹¹⁸ Irish FOIA, s. 29(4).

¹¹⁹ McDONAGH, *supra* note 114. In the United States, consultation with the party submitting confidential business information is not included in the statute itself, but is required by an Executive Order that is binding on all federal agencies. Exec. Order No. 16,200, 5 C.F.R. 2604 (June 23, 1987).

¹²⁰ Exec. Order No. 16,200.

¹²¹ Canadian ATA §§ 27-29.

¹²² As noted above, Article 4(4) of the Access regulation requires notice to/consultation with a third party submitter of commercial information. If the European Council or the European Commission decides to disclose the documents, the submitter of the documents must be given 10 working days before disclosure to apply for an injunction before the court of First Instance under Article 243 of the EC Treaty. Council Decision 2004/338/EC, 2004 O.J. (L 106), Annex II, art. 2.4.

¹²³ Freedom of Information Act, 1982, § 27(1).

¹²⁴ *Id.* § 27(2). In *Illawarra Retirement Trust v Secretary, Department of Health and Ageing* [2005] FCA 170 (7 March 2005), the Federal Court of Australia held that the Illawarra Retirement Trust was permitted to seek review of

E. Segregability or proportionality

Under the principle of segregability or proportionality, a government entity must release portions of a document that contain nonexempt information after deleting (redacting) the portions that may not be disclosed. This principle ensures that governments will not be able to circumvent disclosure by withholding an entire record when only a portion of the record is exempt. For example, under the U.S. FOIA, “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under [FOIA].”¹²⁵ The Mexican Access Law permits disclosure of documents that contain classified or confidential information, as long as the classified parts or sections can be segregated. When a document is redacted, the “parts or sections that have been withheld must be indicated.”¹²⁶ Similar requirements are found in the Canadian,¹²⁷ U.K.,¹²⁸ Scottish,¹²⁹ Irish,¹³⁰ Australian,¹³¹ and New Zealand¹³² freedom of information laws.

In addition, under most access laws, if an agency refuses to disclose a record, claiming that exempt material in a document cannot be segregated from nonexempt material, the agency must provide an explanation. Courts may review the allegedly exempt information in private to validate the government’s decision.

CONCLUSION

The Open Society Justice Initiative has shown in this submission that the right of access to information – *including* business or commercial information – held by public authorities is

a decision that an edited report containing business information was not an exempt document under Freedom of Information Act 1982, Sec. 43(1), *available at* [http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal_ct/2005/170.html?query="Freedom%20of%20Information"%20NEAR%20"43"](http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal_ct/2005/170.html?query=).

¹²⁵ 5 U.S.C. § 552(b).

¹²⁶ Mexican Access Law, Art. 43.

¹²⁷ Canadian ATA § 29.

¹²⁸ Information Commissioner Decision Notice FA0064579, *Southend-on-Sea NHS Primary Care Trust* (March 15, 2006), http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs0064579.pdf (ordering that the public authority release non-exempt information and “issue a separate refusal notice in relation to the redacted passages”); Information Commissioner Decision Notice FS50064581, *Boston Borough Council* (April 6, 2006), http://www.ico.gov.uk/upload/documents/decisionnotices/2006/decision_notice_fs50064581.pdf (commenting that the authority correctly withheld a portion of the information under the U.K. FOIA, s. 41, while disclosing the remainder).

¹²⁹ *Your Right to Know*, *supra* note 32, at 26. The authority should, where possible, redact or remove the exempt information and provide the requestor with the remainder of the information. *Id.* The authority must set forth the reasons for removing portions of the requested information. *Id.*

¹³⁰ Section 13 of the Act provides, in pertinent part, that where a request for information would be granted “but for the fact that it relates to a record that” includes exempt information, the public body shall, if practicable, prepare a copy of “so much of the record as does not consist of the [exempt] matter” and provide that copy to the requestor.

¹³¹ Freedom of Information Act, 1982, § 22.

¹³² Official Information Act 1982, part 2, § 17.

well established in international law and state practice. Courts and lawmakers throughout the democratic world have determined that the right to receive government information is a basic political right, and, like the right to impart information and ideas, an actual prerequisite for the meaningful exercise of other fundamental rights in a modern democracy. Furthermore, there is a clear trend in the democratic world to consider free access to business-related information, and in particular information about business relations between the government and private entities, as essential to ensuring the integrity of the government and the credibility of the democratic system itself.

In this submission the Justice Initiative has also set forth some of the fundamental tenets of freedom of information systems in major jurisdictions in Europe, the Americas, and elsewhere. Those include a presumption in favor of disclosure; the narrow interpretation of any exemptions from disclosure, including those pertaining to commercial information; a time limit on responding to requests for information; the requirement that denial of access be accompanied by specific reasons justifying the decision; consultation with businesses that submit information and notice to them before data claimed to be confidential is released; and the mandate that information that may be withheld from disclosure be deleted, while the remaining portions of the document are released.

The Inter-American Court in *Claude Reyes* recognized an Article 13 right to receive information held by public authorities. We respectfully urge this Tribunal to take cognizance of the almost universal principles and procedures that accompany the administration of access to information laws. The result will not only bring the Tribunal's jurisprudence into line with prevailing Inter-American and international law, but will also establish a fair and efficient framework governing access to information – including business information – in Chile. Finally, it will highlight this Tribunal's recognition of the importance of access to information as a foundation for a democratic government and free market.

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Respectfully submitted,

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