WRITTEN SUBMISSION AS *AMICUS CURIAE*

BY THE
OPEN SOCIETY JUSTICE INITIATIVE

PRESENTED BEFORE THE CONSTITUTIONAL COURT OF COLOMBIA

Intervention Concerning the Constitutional Review of Colombia's Proposed Transparency and Access to Information Law
(Draft Law 156 of 2011 of the Senate, 228 of 2012 of the Lower House)

Honorable Justices
Constitutional Court of Colombia
Opinion by Justice María Victoria Calle Correa

INTRODUCTION

1. This submission is presented to the Constitutional Court of Colombia by the Open Society Justice Initiative ("Justice Initiative"), in collaboration with Roxanna Altholz, Associate Director of the International Human Rights Law Clinic of the University of California at Berkeley.[1]

2. The issue before the Court is whether the Colombian Draft Law on Transparency and Right to National Public Information[2] ("Draft Access to Information Law" or "Draft ATI Law") is constitutional.[3] In June 2012, the Colombian Senate approved the Draft ATI Law in order to give effect to Articles 20 and 74 of the Constitution. Article 20 guarantees, in relevant part, the "freedom to express and diffuse … thoughts and opinions, to transmit and receive information that is true and impartial." Article 74 provides that "[e]very person has a right to access public documents except where established by law."

3. This submission addresses the international and comparative law aspects central to this Court's consideration of the Draft ATI Law. While Colombia was the first country in the region to draft an access to information law, Law 57 of 1985, Colombia's current Draft ATI Law now follows on a dramatic growth around the world in the recognition of access to information as a *right*, as well as an increasing global consensus about the content of the right.

4. The Draft ATI Law reflects many of the core requirements for the protection of the right to information established in the international human rights treaties to which Colombia is a party. However, specific deficiencies in the Draft ATI Law threaten to undermine its effectiveness and compliance with Colombia's obligations under these treaties. This submission provides an overview of the relevant law and then examines three issues:

    - *A. Compliance of Colombian Draft ATI Law with International Law.* The Draft ATI Law is in large part consistent with the international requirements for the protection of the public's right to access information, if interpreted in line with the principles of maximum disclosure, transparency, and good faith. International standards can be utilized to interpret the provisions establishing the public interest test and judicial review or oversight in order that they comply

[1] Affiliation included solely for the purpose of identification.
[2] Law on transparency and right to access national public information and enacting other provisions.
[3] This brief is submitted pursuant to Articles 152 and 153 of the Constitution, requiring the Court's constitutional review prior to the enactment of a law related to a fundamental right and permitting interventions to defend or oppose legislative proposals; and Decree 2067 of 1991 enacting the procedural rules for the suits and proceedings before the Constitutional Court.

with human rights law. Authoritative guidance from this Court should require such an interpretation.

- *B. Exclusions from the Scope of the Law.* The absolute exclusion of information related to defense and national security, public order, and international relations from the scope of the Draft ATI Law is inconsistent with Colombia's international treaty obligations. Such a limitation on the right of access to information is neither necessary nor proportionate, violates the principle of maximum disclosure, allows for perpetual secrecy, and exempts the withholding of information in these categories from independent oversight.
- *C. Supremacy of Law Provision.* The Draft ATI Law does not include a provision which ensures the supremacy of the Law in the case of a conflict with other statutes. This is inconsistent with best practices internationally and risks that competing laws will undermine access to information.

5. In light of this analysis, we respectfully conclude that the scope-limiting provision in Paragraph 2 of Article 5 of the Draft ATI Law violates Colombia's international treaty obligations and should be removed. Further, the Court should recommend explicit language, or provide an interpretation, that ensures the supremacy of the ATI Law in the event of a conflict of statutes. The Court should also provide interpretive guidance on the Draft ATI Law's public interest test (Article 21) and mechanisms for a review of denials of access to information (Article 28), to ensure that public authorities, including implementing and oversight bodies, interpret these provisions in line with fundamental access to information principles. Thus, Article 21 may not allow for the provision of false or misleading information, and Article 28 should guarantee access to adequate and effective oversight and review mechanisms. Aside from these limitations, the Draft ATI Law is in large part in compliance with Colombia's international treaty obligations, if interpreted in line with accepted access to information principles.

STATEMENT OF INTEREST

6. The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. The Justice Initiative fosters accountability for international crimes, combats racial discrimination and statelessness, supports criminal justice reform, addresses abuses related to national security and counterterrorism, expands freedom of information and expression, and stems corruption linked to the exploitation of natural resources. In the field of freedom of expression and information, the Justice Initiative has provided pro bono representation before, or made amicus curiae submissions to, all three regional human rights systems and the UN Human Rights Committee. Among others, the Justice Initiative made amicus curiae submissions to both this Court and the Inter-American Commission on Human Rights (the "Inter-American Commission") in the landmark cases of *Claude Reyes et al v. Chile*,[4] and to the Inter-American Court in *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*[5] and *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*.[6]

7. Roxanna Altholz has litigated a leading case within the Inter-American system for the protection of human rights in the area of access to information. Through the case, *Diario Militar*, the Inter-American Court of Human Rights is expected to clarify the meaning of State obligations in connection with the right of access to information.

[4] *Claude Reyes v. Chile*, IACtHR, Judgment of 9 September 2006, Series C No. 151.
[5] *Gomes Lund v. Brazil*, IACtHR, Judgment of 24 November 2010, Series C No. 219.
[6] Decision forthcoming.

RELEVANT LEGAL STANDARDS: THE RIGHT TO INFORMATION IN INTERNATIONAL HUMAN RIGHTS LAW

8. Pursuant to the Constitution, Colombia is bound by human rights treaty obligations, and this Court has recognized the relevance of international and comparative law as persuasive authority in the interpretation of Colombia's obligations. The right of access to information is well-established in international law, including in international treaties binding on Colombia. There is broad consensus as to the content of that right, which includes at its core the principle of maximum disclosure, a requirement that any restrictions to the right be limited, and consequently necessary and proportionate, and a right to independent and effective oversight and review of any limitations on the right of access to information.

1. The Constitutional Status of International Human Rights Standards

9. The Constitutional Court should take into account Colombia's international human rights treaty obligations to determine the scope of the right to access information within its judicial review of the Draft ATI Law. Article 93 of the Constitution establishes that international human rights treaties ratified by Colombia "have priority domestically" and that all rights and duties enshrined in the Constitution "will be interpreted in accordance with international treaties on human rights ratified by Colombia."[7]

10. This Court has affirmed that international human rights treaties ratified by Colombia are part of the "constitutional block."[8] Colombia has signed international treaties that explicitly protect the right to access information—the American Convention on Human Rights,[9] the International Covenant on Civil and Political Rights (ICCPR),[10] and the Convention against Corruption.[11] The right of access to information also serves as a precursor to the protection of other human rights, such as the right to truth and the right to political participation, which are enshrined in international treaties ratified by Colombia.[12] As part of the constitutional block, these treaty provisions are binding, have the same legal force as provisions of the Colombian Constitution and invalidate conflicting legislative provisions.[13]

[7] *See also* Constitution, Articles 53, 94, and 214 (referencing the incorporation or interpretation of international agreements). *See* Judgment C-191/98, Constitutional Court of Colombia, 6 May 1998; Judgment C-155/07, Constitutional Court of Colombia, 7 March 2007.

[8] *See, e.g.,* Judgment C-225/95, Constitutional Court of Colombia, 18 May 1995; Judgment C-337/93, Constitutional Court of Colombia, 19 August 1993; Judgment C-358/97, Constitutional Court of Colombia, 5 August 1997; Judgment C-148/05, Constitutional Court of Colombia, 22 February 2005.

[9] Ratified 28 May 1973, Article 13 of the American Convention establishes that the right to freedom of expression includes the freedom to seek and receive information.

[10] Ratified 29 October 1969, Art. 19(2), requiring State parties to guarantee the right to freedom of expression, including the right to seek and receive information.

[11] Ratified October 27, 2005, Arts. 2, 9, 10, 13, obligating State parties to ensure effective access to information about public finances and public administration.

[12] *See, e.g., Gomes Lund v. Brazil*, note 5 above, paras. 200-01. Judgment C-491/07, Constitutional Court of Colombia (Full Chamber), 27 June 2007, p. 1 (concerning the link between the right of access to information and the right to truth). Judgment T-473/92. Constitutional Court of Colombia (First Chamber of Review), 14 July 1992 (Consideration A) (concerning the link between the right of access to information and the right of political participation).

[13] Judgment C-191/98, Constitutional Court of Colombia, 6 May 1998; Judgment C-155/07, Constitutional Court of Colombia, 7 March 2007.

11. This Court has also recognized that rulings from international courts, such as the Inter-American Court of Human Rights[14] and other regional courts,[15] non-binding decisions issued by treaty bodies, and international guidelines[16] are important tools that may be considered to understand the content of treaty obligations, although these sources of international standards are not part of the constitutional block. Moreover, the Court has referred to comparative law as persuasive authority.[17] By considering the laws and rulings of other countries regarding the right to access information, the Court will locate itself within the global trend towards recognizing the essential role this right plays in a democratic system.

2. Access to Information As a Well-Established Right in International Law

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

13. The right to access information, including information in the hands of the government, is well-established in international human rights law and is widely recognized in democratic states. The right to seek and receive information is protected expressly in Article 13 of the American Convention and Article 19 of the ICCPR. In 2011, the UN Human Rights Committee, tasked with authoritatively interpreting the obligations imposed on States by the ICCPR, adopted a General Comment finding that Article 19 of the Covenant guarantees the right of access to government-held information.[18] Also, the Special Rapporteurs on freedom of expression of the United Nations (UN), the Organization of American States (OAS), the Organization for Security and Cooperation in Europe (OSCE), and the African Commission on Human and Peoples' Rights (ACHPR) have repeatedly affirmed that freedom of expression includes the right to government-held information.[19]

14. Of the three regional human rights systems, the Inter-American System is the most developed in recognizing the right of access to information, and corresponding state duties. In the 2006 landmark ruling of *Claude Reyes v. Chile*, the Inter-American Court re-affirmed that Article 13 of the American Convention "protects the right of the individual to receive information and the positive obligation of the State to provide it."[20] The fundamental nature of the right of access to information

[14] Judgment C-355/06, Constitutional Court of Colombia, 10 May 2006, para. 8.4, concluding that "case law of international institutions is a relevant guideline for the construction of the regulatory provisions set forth in international instruments that are part of the constitutional body of law."
[15] *See e.g.*, Judgment C-203/05, Constitutional Court of Colombia, 8 March 2005, observing that "the rulings of the [European] Court are relevant." *Claude Reyes v. Chile*, note 4 above, paras. 81-82.
[16] Judgment T-511/10, Constitutional Court of Colombia, 18 June 2010. The Court highlighted the relevance of particular non-binding instruments related to the right to access information—the Declaration of Chapultepec, the Statement of Principles on Freedom of Expression of the Inter-American Commission on Human Rights, the Johannesburg Principles, and the Lima Principles.
[17] Judgment C-355/06, Constitutional Court of Colombia, 10 May 2006.
[18] UN Human Rights Committee, *General Comment No. 34 on Article 19*, UN Doc. CCPR/C/GC/34, 12 September 2011.
[19] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, Dec. 6, 2004 ("2004 Joint Special Rapporteurs Declaration"). Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression, and the ACHPR Special Rapporteur on Freedom of Expression, 20 December 2006.
[20] *Claude Reyes v. Chile*, note 4 above, para. 77. *See also Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, IACtHR, Advisory Opinion OC-5/85, 13 November 1985, Series A No. 5, para.

has also been recognized by the Inter-American Commission,[21] and by States in the region in their endorsement of relevant declarations, including the Chapultepec Declaration[22] and the Inter-American Declaration of Principles on Freedom of Expression.[23]

15. The European and African regional institutions have similarly recognized that the right to freedom of expression includes a separate right to access information. In recent decisions, the European Court of Human Rights has recognized that Article 10 of the European Convention, which protects freedom of expression, gives rise to an independent right to receive information held by public authorities and relevant to public debate—irrespective of any personal interest of the requestor in the information other than an interest to contribute to public debate.[24] The Council of Europe has also put forth a Convention on Access to Official Documents, the first treaty of its kind, guaranteeing a binding right of access,[25] and the Charter of Fundamental Rights of the European Union grants a right of access to documents held by Union institutions.[26] The African Commission on Human and Peoples' Rights, for its part, has held that Article 9 of the African Charter on Human and Peoples' Rights [27] protects not only the free speech rights of the speaker, but also the rights of those interested in *receiving* information and ideas from all lawfully available sources.[28]

16. The recognition of a fundamental right of access to information is increasingly reflected in constitutions,[29] statutory laws, state practice and national jurisprudence.[30] More than ninety

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32 ("For the average citizen it is at least as important to know the opinion of others or to have access to information generally as is the very right to impart his own opinion.").

[21] *Inter-American Declaration of Principles on Freedom of Expression*, adopted by the IACommHR, 108th regular session, 19 October 2000, para. 4.

[22] *Chapultepec Declaration*, adopted by the Hemisphere Conference on Free Speech (Mexico City), 11 March 1994, Preamble and Principle 2.

[23] *Inter-American Declaration of Principles on Freedom of Expression*, note 21 above, preamble.

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

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

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

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

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

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

[30] *See, e.g.*, In the Matter of Constitutionality of Article 13 of the Constitutional Organic Law on the General Bases of State Administration (No. 18.575) ("*Casas Cordero* case"), Constitutional Tribunal of Chile, Judgment of 9 August 2007. Regulation of the Supreme Court of Justice (Argentina), No.1/2004, Record 315/2004 Gral. Adm.. For cases outside of the Americas: *see, e.g., S.P. Gupta v. Union of India*, Supreme Court (India), Judgment of 30

countries and major territories around the world, including at least twenty in the Americas, have adopted freedom of information laws that provide for access to state-held information.[31] As of May 2012, when Brazil's law entered into force, more than 5.5 billion people worldwide live in countries that provide in their domestic law for an enforceable right to obtain information from their governments.

17. The right of access to information is fundamental on its own, but has also been recognized as a precondition for the exercise of the basic rights of political participation and representation, as well as the right to truth. The Inter-American Court has held that "access to information held by the State may permit participation in public governance by virtue of the social oversight role that can be exercised through such access."[32] Similarly, the right to truth can only be satisfied if appropriate mechanisms for access to the relevant information are adopted. A 2006 study by the UN High Commissioner of Human Rights concluded, after an extensive review of international law and practice, that legislation on access to information constitutes an important step to ensuring the right to truth, and "[a]ccess to information and, in particular, official archives is a crucial exercise of the right to truth."[33]

3. Content of the Right of Access to Information

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

19. Jurisprudence of the Inter-American Court, as well as decisions of the Inter-American Commission and declarations and reports of the OAS Special Rapporteur for Freedom of Expression, support a regional consensus on the content of the right of access to information.[34] In 2010, the Special Rapporteur produced the Inter-American Legal Framework regarding the Right of Access to Information, a summary of the state of the right in the region drawing on the decisions of the Inter-American Court and the Inter-American Commission, and other regional authorities.[35]

20. Also in 2010, the General Assembly of the OAS adopted an Inter-American Model Law on Access to Information ("Inter-American Model Law"),[36] "establish[ing] a broad right of access to information, in possession, custody or control of any public authority … based on the principle of

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December 1981, AIR [1982] (SC) 149, at 232 ("[w]here a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing").

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

[32] *Claude Reyes v. Chile*, note 4 above, para. 86. *See also* Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, OAS Special Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media, 26 November 1999.

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

[34] *See Claude Reyes v. Chile*, note 4 above, para. 78 ("regional consensus … about the importance of access to public information and the need to protect it").

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

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

maximum disclosure" with limited exceptions.[37] The Assembly encouraged the States to design, execute and evaluate their ATI laws in light of the Model Law,[38] and recent laws in the region, including the Colombian Draft ATI Law, have been informed by the provisions of the Inter-American Model Law.[39]

21. As rooted in these instruments and body of jurisprudence, the right to access information derives in part from the fact that the state holds a significant part of the public information a properly informed citizenry requires. That body of information is produced, collected and processed using public resources, and it ultimately belongs to the public. Thus, the right has at its core the principle of **maximum disclosure**—the presumption that all government-held information (or privately held information related to the performance of government functions) should be subject to disclosure *unless* there is an overriding public or private interest justifying non-disclosure. Disclosure is the rule, withholding the exception, and any doubts must be resolved in favor of disclosure.[40] This Court has held that the principle of maximum disclosure requires limited restrictions on the right to access information and "all limits must be adequately reasoned."[41]

22. The right of access to information mandates a corresponding **duty of public authorities to disclose** information. In response to a request for information, a public authority must confirm or deny the existence of the information requested, and disclose information unless an exception is warranted.[42] A denial must be in writing and identify both the reasons for the denial and the specific harm to a protected interest.[43] The burden of proof to justify any withholding rests with the public authority.[44] If an exception legitimately applies to justify withholding only some information in a record, the public authority is obliged to disclose the part of the record containing the information not subject to the exception.[45] The information provided, and the process for accessing it, should be free, or low-cost, and accessible.[46]

23. The right to access information is not absolute. Freedom of information is subject to limitations to protect certain types of information from disclosure. However, these restrictions on access must be **narrowly drawn exceptions necessary to protect legitimate interests**, and strictly interpreted in line with the presumption of access.[47] Under Article 13 of the American Convention and the jurisprudence of the Inter-American Court, limitations on the right to information must comply with a three-part test:

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[37] Inter-American Model Law, Art. 2.
[38] *Draft resolution: Access to Public Information and Protection of Personal Data*, CP/CAJP-2965/11 rev. 3 of 11 May 2011.
[39] *See below*.
[40] *Claude Reyes v. Chile*, note 4 above, para. 92. 2004 Joint Special Rapporteurs Declaration, note 19 above. Most of the OAS Member States' legal frameworks incorporate the principle of maximum disclosure or maximum transparency directly or indirectly. *See* Office of the Special Rapporteur for Freedom of Expression, Annual Report of the Inter-American Commission on Human Rights, 2001, pp. 73, 198-211.
[41] Judgment T-074/97, Constitutional Court of Colombia, 18 February 1997. Judgment C-491/07, Constitutional Court of Colombia, 27 June 2007, Legal ground 11.
[42] *See Claude Reyes v. Chile*, note 4 above, para. 120.
[43] *See, e.g., Ibid.,* at para. 77. Commentary to Inter-American Model Law, note 36 above, Ch. 2(A), 2(D).
[44] Inter-American Juridical Committee, Principles on the Right of Access to Information, adopted 7 August 2008 at the 73rd Regular Session (Rio de Janeiro), Principle 7.
[45] *See* Inter-American Model Law, note 36 above, Art. 42.
[46] *See* Inter-American Legal Framework Regarding the Right to Access to Information, note 35 above, para. 26. 2004 Joint Special Rapporteurs Declaration, note 19 above. Inter-American Juridical Committee, Principles on the Right of Access to Information, note 45 above, Principle 5.
[47] *Claude Reyes v. Chile*, note 4 above, para. 92. General Comment No. 34, note 18 above, para. 11.

- First, there must be a clear and precise **legal foundation for the limitation**.[48] The principle of legality ensures a reasonable expectation of the interpretation of the law, and that the limitation is not a result of discretionary state action.[49]
- Second, the limitation on the right to information must respond to a **legitimate purpose** recognized by Article 13 of the American Convention. The only legitimate purposes recognized by Article 13(2) of the American Convention are "respect for the rights or reputations of others," and "the protection of national security, public order, or public health or morals."[50]
- Third, the limitation must be **necessary in a democratic society to satisfy a compelling public interest**[51] **and proportionate to the interest that justifies it**.[52]

24. In terms of the third part of this test, for a limitation to be **necessary** it must be the least restrictive means for achieving the legitimate aim.[53] Limitations "must be subjected to an interpretation that is strictly limited to the 'just demands' of 'a democratic society,' which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention."[54]

25. For a restriction on freedom of information to be **proportionate**: (i) the restriction must be related to a legitimate aim; (ii) the public authority must demonstrate that disclosure of the information threatens substantial harm to the aim;[55] and (iii) the public authority must demonstrate that the harm to the legitimate interest is greater than the public interest impeded.[56] The state must show, with a "justified decision in writing" the reasons for limiting access "in a specific case."[57]

26. The so-called harm and public interest tests flow from the requirement that restrictions on the right of access to information be proportionate and necessary. Pursuant to the **harm test**, a public authority must demonstrate that a disclosure threatens to cause harm to a protected interest to justify withholding.[58] Specifically, the Inter-American Model Law requires that an exception to disclosure "would create a clear, probable and specific risk of substantial harm" to identified public interests.[59]

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[48] *Ibid.*, at para. 89,
[49] *Ibid.*, at paras. 89, 98.
[50] *Ibid.*, at para. 90. The ICCPR designates an exhaustive list of legitimate aims for exceptions to freedom of expression, including the right to information. These are for (i) national security, (ii) public safety, (iii) public order, (iv) the protection of public health or morals, or (v) the protection of the rights of others. ICCPR, Arts. 19, 21. General Comment No. 34, note 18 above, para. 22.
[51] *Claude Reyes v. Chile*, note 4 above, para. 91. *Compulsory Membership Opinion*, note 20 above, paras. 39, 46 (proving the "necessity" of restrictions requires a showing of "compelling governmental interest … that clearly outweigh[s] the social need for the full enjoyment" of Article 13 rights).
[51] *Compulsory Membership Opinion*, note 20 above, para. 39.
[52] *Claude Reyes v. Chile*, note 4 above, paras. 89-91. *See also* Office of the Special Rapporteur for Freedom of Expression, Annual Report of the Inter-American Commission on Human Rights, 2011 ("2011 OAS Special Rapporteur's Report"), Ch. III, paras. 342-43, 347.
[53] *See Claude Reyes v. Chile*, note 4 above, para. 91.
[54] *Compulsory Membership Opinion*, note 20 above, para. 67.
[55] *See* Commentary to Inter-American Model Law, note 36 above, p. 10. For a comparative example, *see also Kuijer v. Council*, a case of the Court of First Instance of the European Communities; the Court ruled in favor of a requester seeking information, stating the public authority failed to consider the practical effects that the disclosure would have, in this case, on EU's relations with those third countries.
[56] Inter-American Legal Framework Regarding the Right to Access to Information, note 35 above, p. 53.
[57] *Claude Reyes v. Chile*, note 4 above, para. 95.
[58] Commentary to Inter-American Model Law, note 36 above, Ch. 2(F). *See* Inter-American Model Law, note 36 above, Arts. 41(b), 44.
[59] Inter-American Model Law, note 36 above, Art. 41(b).

27. The **public interest test** requires that a public authority, or oversight body, weigh the harm that disclosure would cause to the protected interest against the public interest served by disclosure of the information. The existence of a public interest test in an access to information law is generally considered a sign of the strength of the right. Nearly half of the laws surveyed in a recent comparative analysis included a public interest test.[60] This recent analysis of 93 national right to information laws identified that public interest tests are strong and effective when they (i) are mandatory, (ii) apply to all exceptions, (iii) are structured to favor disclosure, and (iv) set out the relevant factors to consider.[61]

28. The Inter-American Model Law,[62] and laws of various countries in the region,[63] have also recognized that **exceptions to disclosure do not apply in the case of information related to human rights violations or crimes against humanity**. This follows from the Inter-American Court's recognition of an autonomous right to truth under the American Convention, including a state duty to provide access to information related to gross violations of human rights or serious violations of international humanitarian law.[64]

29. Further, **non-disclosure must be time-limited**, as any legitimate justifications for the non-disclosure of records become progressively weaker over time.[65] Excessively long classification periods undermine the very essence of the Article 13 right of access to information. For these reasons, most democratic countries have adopted regimes for the periodic or automatic de-classification of reserved information. In this respect, the Inter-American Model Law provides that exceptions to disclosure "do not apply to a record that is more than [12] years old," unless extended "by approval of the Information Commission."[66] The domestic laws of virtually all countries in the region contemplate maximum periods for maintaining classified information secret,[67] and "once that period has expired, the information must be made available to the public."[68]

30. A requester should have a **right to independent and effective oversight** and review of any denials of the right of access to information.[69] The ultimate decision on whether to disclose or withhold information cannot be left to the discretion of the public authorities, but must be subject to independent review by "a competent court or tribunal."[70] Indeed, "[s]afeguarding the individual

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[60] Maeve McDonagh, *The public interest test in FOI legislation* (on file), p. 6 (44 of 93 countries).
[61] *Ibid.*, at p. 19.
[62] Inter-American Model Law, note 36 above, Art. 44 (exceptions to the right of access provided for in the law "do not apply in cases of serious violations of human rights or crimes against humanity").
[63] Federal Law on Transparency and Access to Public Information of 2002 (Mexico), Art. 14; Transparency and Access to Public Information Act No. 27806 of 2002 (Peru), Art. 15. Law on Access to Public Information, adopted by Congressional Decree 57-2008 of 2008 (Guatemala), Art. 24. Law on Access to Public Information, Law No. 12.527 of 2011 (Brazil), Art. 21. Right of Access to Public Information Act No. 18.381 of 2008 (Uruguay), Art. 12.
[64] *See, e.g.*, *Gomes Lund v. Brazil*, note 5 above, paras. 200-01; *Gelman v. Uruguay*, IACtHR, Judgment of 24 February 2011, paras. 118, 192, 243.
[65] *See also Turek v. Slovakia*, ECtHR, Judgment of 14 February 2006, para. 115 (Court rejected an assumption "that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes").
[66] Inter-American Model Law, note 36 above, Art. 43. Most categories of reserved or classified information should be made public after a period of 12 years. For the most sensitive records, the initial classification could be extended by another 12 years, subject to the approval of an independent information authority.
[67] 2011 OAS Special Rapporteur's Report, note 52 above, Ch. III, para. 357.
[68] *Ibid.*, at para. 348 ("[M]aterial may be kept confidential only where there is a certain and objective risk that, were the information revealed, one of the interests that Article 13.2 of the American Convention orders protected would be disproportionately affected.").
[69] *See, e.g.*, Inter-American Legal Framework Regarding the Right to Access to Information, note 35 above, paras. 26-31.
[70] *Claude Reyes v. Chile*, note 4 above, para. 129.

from the arbitrary exercise of public authority is the main purpose of the international protection of human rights."[71] In the context of the right of access to information, independent and effective oversight should include a "simple, effective, rapid, and unburdensome recourse that allows the convention of the decisions of those public officials who deny the right of access to some specific information, or who simply fail to provide a response to the request."[72] The remedy must be adequate to protect the right; and effective – that is, capable of achieving the intended result.[73]

31. In addition to the right to request information, and the duty incumbent on the public authority to respond to such requests, there has also been a growing recognition of the importance of **proactive disclosure**.[74] Many leading freedom of information regimes, in the Americas and beyond, require public authorities to proactively collect, generate and publish information on a number of issues that are considered important to democratic accountability.[75] Similar language in the Inter-American Model Law recommends requiring public authorities to proactively publish and regularly update 16 different categories of information, which relate to their respective internal policies, services and operations, financial management, senior officials, and record-keeping systems.[76]

32. The **scope of entities and type of information covered** under access to information laws should be broad. The scope of access to information laws should include all public bodies, "and organizations which operate with public funds or which perform public functions."[77] The public should presumptively have access to all information produced or collected by the State, or in the care, possession, or administration of the State.[78] The Inter-American Model Law also applies to all public authorities, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory authorities, non-state bodies owned or controlled by the government, and also to private organizations that operate with substantial public funds or benefits (directly or indirectly) or perform public functions and services, but only concerning those funds, public functions or public services.[79]

ANALYSIS OF THE DRAFT LAW

33. With certain exceptions outlined below, the Draft ATI Law is largely consistent with the right to information under international law. However, the Draft Law must be interpreted in line with the principles of maximum disclosure, transparency, and good faith, and the Court should provide authoritative guidance that certain provisions be interpreted in accordance with these principles. In addition, the absolute exclusion of entire categories of information from the scope of the law

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[71] *Ibid.*, at para. 129.
[72] Office of the Special Rapporteur for Freedom of Expression, Annual Report of the Inter-American Commission on Human Rights, 2009, para. 29. *Claude Reyes v. Chile*, note 4 above, para. 137.
[73] *See Serrano-Cruz Sisters v. El Salvador*, IACtHR, Judgment of 23 November 2004 (Preliminary Objections), Series C No. 118, para. 134. *Gomes Lund v. Brazil*, note 5 above, para. 231.
[74] *See* 2004 Joint Special Rapporteurs Declaration, note 19 above.
[75] *See generally* Helen Darbishire, *Proactive transparency: the future of the right to information?* (World Bank Institute Governance Working Paper Series), 2010.
[76] Inter-American Model Law, note 36 above, Art. 12.
[77] *See, e.g.*, Inter-American Juridical Committee Principles on the Right of Access to Information, note 44 above, Principle 2. Inter-American Model Law, note 36 above, Art. 3.
[78] *See* Inter-American Legal Framework Regarding the Right to Access to Information, note 35 above. Inter-American Juridical Committee Principles on the Right of Access to Information, note 44 above, Principle 3. Inter-American Model Law, note 36 above, Art. 2.
[79] *See generally* Sandra Coliver, *The Right to Information and the Increasing Scope of Bodies Covered by National Laws Since 1989* (2011), *available at* http://www.right2info.org/resources/publications/coliver-scope-of-bodies-covered-by-rti-laws. Some of the newest laws, including that of India (2005), Liberia (2010), and Nigeria (2011), are among the most expansive.

violates Colombia's international treaty obligations. Similarly the lack of a provision to ensure the supremacy of the Law in the case of a conflict with other statutes is inconsistent with international best practice and risks that competing laws will undermine access to information.

A. General Principles of Access to Information in Colombia's Draft ATI Law

34. The Colombian Draft ATI Law is an important development in achieving full implementation of the fundamental right to access information in Colombia. Numerous relevant and influential judicial decisions have advanced the constitutional right to access information, with the Constitutional Court recognizing an independent right to access information, and its link to other fundamental rights.[80] The Draft ATI law provides statutory protections for this right.[81]

35. With the exception of two significant caveats (detailed in Parts B and C below) the Draft ATI Law is largely consistent with international law concerning the protection of the public's right to information. Two provisions in the Draft ATI Law – the public interest test, and the judicial oversight and review obligations – raise concerns about the potential for an interpretation inconsistent with fundamental access to information principles. The Constitutional Court should ensure that the Draft ATI Law, and these provisions in particular, are interpreted and applied in line with these underlying principles, including maximum disclosure and good faith.

1. State Obligations Established by the Draft ATI Law Consistent with International Law

36. A number of features of the Draft ATI Law reflect international human rights standards. In particular, the Law conforms to key international human rights law standards and comparative best practices as it recognizes key general principles of access to information and the duty to disclose. It also recognizes that restrictions must be exceptional and narrowly-tailored; includes a requirement that substantial harm must be demonstrated in order to override the presumption of disclosure; prohibits withholding information in cases of human rights violations; includes temporal limitations for exceptions to disclosure; and provides for proactive disclosure.

37. *General principles.* The Draft ATI Law recognizes central principles of the right to information, and a duty to disclose information.[82] These include the principles of maximum disclosure,[83] transparency, and good faith.[84] The Draft Law also recognizes that information must be free,[85] of high quality, and accessible.[86]

38. *Narrow restrictions.* Article 4 of the Draft ATI Law also requires, as a general matter, that any of the contemplated restrictions on the right to access information be exceptional – that access be denied only where necessary and proportionate, where established in law, and in accordance with the principles of a democratic society.[87] The exceptions delineated in Articles 18 and 19 of the Draft ATI Law, to protect harm to private interests and public interests respectively, reflect those in

[80] *See e.g.*, Judgment T-472/92, Constitutional Court of Colombia, 23 July 1992, establishing the independence of the right to information. *See also* Judgment C-491/07, Constitutional Court of Colombia, 27 June 2007.
[81] Law 57 of 1985 provided a right to information pursuant to the Constitution of 1886; however, as one of the earliest laws, and under the prior Constitution, the protection of the right of access to information within this law was less robust than are modern standards.
[82] Draft ATI Law, Art. 4.
[83] *Ibid.*, at Art. 2.
[84] *Ibid.*, at Art. 3.
[85] *Ibid.*
[86] *Ibid.*, at Art. 8.
[87] *Ibid.*, at Art. 4.

the Inter-American Model Law.[88] These include, among others, exceptions for the protection of defense and national security,[89] public security,[90] and international relations.[91]

39. *Demonstrated harm requirement.* Article 29 of the Draft ATI Law requires a showing of "present, probable and specific harm exceeding the public interest in access to information" for an exception to be upheld and disclosure to be denied. This standard ensures that when assessing whether the harm to a protected interest outweighs the public interest in disclosure, a proper showing is made of the alleged harm that would result from the disclosure. The application of this standard is consistent with international human rights principles on access to information, and is central to a determination of whether an exception is necessary and proportionate to achieve a legitimate aim.[92]

40. *Human rights override.* Importantly, Article 21 of the Draft ATI Law states that none of the exceptions apply to, or may prevent the disclosure of, information "in cases of human rights violations or crimes against humanity."[93] This is consistent with the requirement that a State protect the right to truth, recognized in Colombian courts,[94] as well as by international tribunals and human rights mechanisms, which have helped define the contours of the right to truth either as an autonomous entitlement or one emerging from a combination of other rights.

41. *Temporal limitations.* The Draft ATI Law includes temporal limitations – of 15 years for Article 19 exceptions – with the possibility of an extension for the same period "[w]hen a public authority believes it necessary to keep information confidential for an additional period."[95]

42. *Proactive disclosure.* The Draft ATI Law provides for proactive disclosure.[96] Articles 3 and 4 of the Draft Law set out the principle of proactive disclosure, and Articles 9-12 outline categories of information that must be disclosed by public or private authorities subject to the law.

2. Public Interest Test

43. The Draft ATI Law incorporates a public interest test to determine whether information which falls into a category which might be exempt from disclosure should be withheld in any particular case. The public interest test as drafted is in line with international law, and is indeed nearly identical to the language used in the Inter-American Model Law. Nevertheless, it should be interpreted to ensure maximum disclosure and prohibit the provision of misinformation.[97]

44. Article 21 of the Draft ATI Law includes an explicit public interest test:

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[88] *See* Inter-American Model Law, note 36 above, Ch. IV. The Article 19 exceptions resemble those in Article 41(b) of the Inter-American Model Law. The Draft ATI Law also includes (e) due process of law and equal treatment of the parties in court proceedings," (f) "effective administration of justice," (g) "the rights of children and adolescents," and (i) "public health."

[89] Draft ATI Law, Art. 19(a) ("national defense and security").

[90] *Ibid.*, at Art. 19(b) ("public safety").

[91] *Ibid.*, at Arts. 19(a) ("national defense and security"), 19(b) ("public security"), & 19(c) ("international relations").

[92] *See* Commentary to Inter-American Model Law, note 36 above, p. 11.

[93] This provision resembles Article 45 of the Inter-American Model Law: "The exceptions … do not apply in cases of serious violations of human rights or crimes against humanity." Commentary to the Model Inter-American Law establishes that the court should look to the Rome Statute of the International Criminal Court for the definition and interpretation of the crimes against humanity. Commentary to Model Inter-American Law, p. 11.

[94] *See, e.g.*, Judgment C-872/03, Constitutional Court of Colombia, 30 December 2003.

[95] Draft ATI Law, Art. 22.

[96] *Ibid.*, at Art. 3.

[97] Concerns have been raised by some in Colombia about an interpretation of this provision not in line with international law, or with the intent of the language as developed in the Inter-American Model Law.

> "A public authority may not refuse to indicate whether or not it holds a record, or refuse to disclose that record, unless the harm to the interest protected by the relevant exception outweighs the general public interest in disclosure."

Access to information laws, including the Draft ATI Law before the Court, generally include a series of reasons which allow that certain information may be exempt from disclosure – limited exceptions from the general principle of disclosure. A public interest test serves to ensure that the decision maker must balance the interest to be protected by the potential exception against the public interest in the disclosure of the information, before authorizing any withholding of the information.[98]

45. The public interest test in the Draft ATI Law is derived directly from the Inter-American Model Law. The language of the Inter-American Model Law's public interest test is intended to ensure that the burden to demonstrate the harm to the protected interest, and to disclose the record if the public interest in disclosure warrants it, remains with the public authority.[99]

46. The Inter-American Model Law language does not authorize the public authority to provide false or misleading information regarding the existence of information under any circumstances, but envisions only that – in exceptional circumstances – the public authority may refuse to confirm or deny the existence of information sought. A response refusing to confirm or deny the existence of information is a particularly severe restriction of the right to access information. Thus, proportionality of means requires that it should be limited to those exceptional cases in which even confirming the existence of information would cause significant harm to national security. That is the general practice in democracies authorizing such a response.[100]

47. The Draft ATI Law should be interpreted in accordance with the drafting history of the identical language of the Model Inter-American Law, as well as with international law and best practice, and to require a mandatory public interest analysis, applicable to all exceptions, favoring disclosure of the existence and content of information sought, and without the possibility that a public authority may provide misinformation to a requester. This is also a mandatory interpretation for internal coherence of the Draft ATI Law given that several of its provisions require a truthful and transparent response to requests for information.[101] Thus, it would be useful for this Court to provide an authoritative constitutional interpretation of this provision along these lines.

3. Independent Oversight of Restrictions on Access

48. Different mechanisms for review may be adequate and effective for enforcement and oversight of the right to access information, such as the inclusion of independent oversight authorities followed by full review by the courts, or judicial review on its own.[102] Nonetheless, pursuant to international law obligations, the Draft ATI Law should provide for adequate safeguards against abuse, including prompt, full, accessible and effective judicial scrutiny of the validity of any restriction on access to information.

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[98] *See* paragraph 18 above.
[99] *See* Commentary to Inter-American Model Law, note 36 above, Ch. 2(F).
[100] For instance, this is called the "Glomar Response" in the United States, after an earlier case, and courts allow its invocation in extremely limited circumstances.
[101] Draft ATI Law, Arts. 3, 4, 31. The Draft Law establishes a "duty of good faith" to respond to requests for information "with honest intentions" and "truthful" information, and imposes criminal sanctions for concealing information once requested.
[102] *See* Commentary to Inter-American Model Law, Ch. 3, considering advantages and disadvantages, as well as structure and function, of information commissioners with a mandate to make either binding orders or recommendations, and judicial review.

49. The Draft ATI Law appears to establish a different system for oversight and review of particularly sensitive exceptions compared to ordinary exceptions. For the review of decisions to withhold information on most grounds, a robust action for the protection of constitutional rights is available – the standard review mechanism established in the Constitution for violations of fundamental rights and freedoms as a result of an act or omission of a public authority.[103]

50. However, denials of information related to defense and national security or international relations do not seem appealable – either immediately or at all – through an action for the protection of constitutional rights. Instead, exceptions on these grounds appear subject to a less robust review mechanism.[104] Article 28 distinguishes cases in which a public authority "invokes secrecy on the grounds of national security and defense or international relations." In these cases, "the requesting party may file a motion for reversal" before an "Administrative Court," a procedure described in detail in that provision.[105] There is no explicit mention of recourse to an action for the protection of constitutional rights for these designated cases if the "motion for reversal" proves inadequate or ineffective. In contrast, Article 28 expressly provides for an action for the protection of constitutional rights in response to the invocation of other exceptions—"for those cases not provided for in this section, once the motion for reversal provided for in the Code of Administrative Litigation has been exhausted."[106] Even if a *tutela* action is presumed available for this subset of exceptions—national security, defense and international relations—Article 28 suggests that a *tutela* action must follow the exhaustion of the administrative review mechanism.

51. Such a bifurcated judicial review mechanism is highly unusual in comparative law, and suggests a lesser right to know applies to information concerning national security, defense and international relations. This is particularly concerning as these classes of exceptions tend to be those most often invoked where information is sought related to human rights violations.[107] Given that the Draft ATI Law provides no justification as to why a *tutela* action would not be appropriate as an immediate review mechanism for all potential exceptions, even if an alternative review mechanism could also be available, such a mechanism must not be permitted to become a barrier to accessing this option in practice.

52. This Court's constitutional review of the Draft ATI Law should affirm that international law requires oversight mechanisms that review restrictions on the right of access to information to be prompt, accessible, adequate and effective. This must be true for all asserted exceptions, including those deemed particularly sensitive. Thus, the Court should clarify that a *tutela* action should be available for the review of *all* exceptions to the right to access information. Further, any alternative mechanism must not be implemented in such a way that makes the overall review process, including a *tutela* action where applicable, unduly burdensome or delayed.

B. Exclusions from the Scope of the Law

53. As highlighted above, the Draft ATI Law is largely consistent with international law and best practice if it is interpreted according to the principles it explicitly incorporates, favoring maximum disclosure with restrictive interpretations regarding exceptions to disclosure, and where there is effective judicial oversight. However, the limited scope of the Draft ATI Law presents a serious concern and runs counter to these same principles and to international and comparative law on the right to information, as it excludes important and expansive classes of information from the application of the Law.

[103] Draft ATI Law, Art. 28, Parágrafo.
[104] *Ibid.*, at Art. 28.
[105] *Ibid.*
[106] Draft ATI Law, Art. 28, Parágrafo.
[107] See below, para. 63.

54. While the Draft ATI Law applies to a broad range of public and relevant private entities,[108] it limits the scope of the law to completely exclude "information, documents, databases and contracts related to defense and national security, public order and international relations."[109] This is a violation of international law and is inconsistent with the trend in comparative law. Indeed, it appears to be exceptional: the authors of this submission have not encountered such a broad exclusion of classes of information in any other law, including fifty national right to information laws examined for the preparation of this submission.[110]

55. The exclusion is all the more unusual because the classes of information that are excluded from the scope of the law are also protected in the Draft ATI Law under the ordinary and balanced system of exceptions (see paragraph 34 above). Under this system, a public authority must identify specific harm to a protected interest resulting from the disclosure; the potential harm to the protected interest that disclosure would cause must be assessed and balanced against the public interest in disclosure; and there are time limitations to disclosure and independent oversight of a refusal to disclose information. None of these protections against abuse would apply to those categories of information excluded from the scope of the Law.

56. By establishing broad and categorical exclusions of classes of information from its scope, the Draft ATI Law disregards the requirement that limitations of the right of access to information must be both necessary and proportionate to a legitimate aim, and undermines the obligation of maximum disclosure. It also creates the possibility of perpetual secrecy, and leaves the disclosure of large classes of information entirely at the discretion of the public authority, without any independent oversight.

1. Limitations of the right of access to information must be *necessary and proportionate*.

57. Any limitation on access to information must be necessary in a democratic society and proportionate to the protected interest that justifies it, with as minimal interference as possible with the exercise of the right. The exclusion of broad categories of information from the scope of the Law is neither necessary nor proportionate. Other, less restrictive, options are available to protect the same interests, including alternative protections already incorporated in the Draft ATI Law. The restricted scope of the Draft ATI Law brings about an absolute limitation of the right of access to

[108] Pursuant to Article 5 of the Draft ATI Law, the following entities are subject to the Law: "(a) All public entities, including those belonging to all branches of government, at all levels of the central government structure or of the government structure decentralized by services or territorially, at the national, departmental, municipal or district level; (b) Independent or autonomous and supervisory bodies, agencies and entities; (c) Individuals and public or private legal entities that carry out activities in the nature of public services in respect of the information directly related to the provision of the public service; (d) Individuals, legal entities or agencies of a legal entity that carry out activities in the nature of public services or act as public officials or public authorities, in respect of the information directly related to the performance of their duties; (e) Public companies created by law, state-owned companies and partly state-owned companies; (f) Political parties or movements and significant groups of citizens; (g) Agencies managing quasi tax collection institutions, funds or resources that have a public nature or origin. Individuals or legal entities receiving or serving as an intermediary for national and territorial public funds and benefits that do not meet any of the other requirements to be considered bound thereby must only comply with this law in respect of such information as is created in connection with the public funds received by them or for which they serve as an intermediary."

[109] Draft ATI Law, Art. 5, Paragraph 2. "Excepted from the application of this law and therefore confidential by law are the information, documents, databases and contracts relating to national defense and security, public policy and international relations, pursuant to Article 74 of the National Constitution, Section 12 of Law 57 of 1985, Section 27 of Law 594 of 2000, Law 1097 of 2006, Section 2(4)(d) of Law 1150 of 2007, Law 1219 of 2008, Section 2 of Law 1266 of 2008, Section 24 of Law 1437 of 2011 and other provisions that may be added to them, or that amend or replace them."

[110] Open Society Justice Initiative, Partial Comparative Survey of Scope Limitations in Access to Information Laws, on file. This includes 18 laws from OAS countries, as well as laws from Africa, Asia, and Europe.

information, as there is no case-by-case analysis and no balancing of the public interests in each decision to withhold information. The exclusion of large classes of information from the application of the Draft ATI Law undermines democratic accountability and the effectiveness of the right of access to information.

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

59. In the access to information laws of other countries, the protection of interests related to national security, defense, public order, and international relations is adequately addressed through narrowly-construed exceptions, rather than by excluding entire categories of information from the scope of the law. The Inter-American Model Law also envisions exceptions for national security, public safety, and international or intergovernmental relations. Notably, even in the Colombian Draft ATI Law, these exclusions from the scope of the law are *also* protected by the existing system of exceptions, in Articles 19(a) (defense and national security), 19(b) (public safety) and 19(c) (international relations).[111]

60. Under international law, **restrictions on the right of access to information should be neither absolute nor categorical, and they should require oversight and a case-by-case analysis** of the propriety of withholding disclosure. The State is obliged to justify withholding the information, with specific reasoning, in cases where exceptions apply. In this way, restrictions on disclosure will not be arbitrary.[112] The burden of proof to justify any decision refusing to provide information "lies with the body from which the information was requested."[113] Exceptions also allow partial disclosure where appropriate, rather than blanket withholding of all information, and temporal limits on secrecy (see below). An absolute exclusion of information cannot satisfy these requirements. Given that these less restrictive options have proven adequate in multiple other laws, and have been endorsed by OAS States in the Inter-American Model Law, the more restrictive course of excluding entire categories from the scope of the law is not necessary.

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

62. The classes of information targeted for exclusion – defense and national security, public order and international relations – cover some of the fundamental decisions made by the State that are central to democratic decision-making. There are well-founded justifications for the withholding of information in these classes to protect legitimate interests in appropriate circumstances. Indeed, national security provides the most significant public ground for withholding information.

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[111] Title III of the Draft ATI Law governs exceptions to information access. The law differentiates between information subject to exceptions to protect "individual or private rights" when "legitimate and necessary," labeled confidential and delineated in Article 18; and information subject to exceptions to protect "public rights," labeled reserved and delineated in Article 19.

[112] *Claude Reyes v. Chile*, note 4 above, paras. 58, 77.

[113] Inter-American Juridical Committee, Principles on the Right of Access to Information, note 44 above, Principle 7.

However, it is also true that access to information helps safeguard against abuses by enabling public scrutiny of government actions, including in the areas of defense, national security, public order, and international relations, where decisions are often of great public interest and susceptible to undue deference. These classes of information include, for instance, government decisions to engage in war, respond to democratic dissent, and deprive people of their liberty. Therefore, there would need to be a strong – and individually demonstrated – justification for non-disclosure balanced against the public interest justifications for disclosure.[114] Narrowly-tailored exceptions to the right, as found in Article 19 of the Draft ATI Law, demand a case-by-case analysis of whether the restriction is merited, and substantial harm and public interest tests to ensure the requisite balancing of harms and benefits from disclosure or non-disclosure.[115] This system, which has proven adequate in the access to information laws of other countries, and which is found in the Inter-American Model Law, ensures that any restriction on disclosure will be proportionate.

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

> "[T]he most important guarantee of an appropriately functioning constitutional regime is the full publicity and transparency of public administration. Decisions or actions of public servants that they do not want exposed are usually ones that cannot be justified. And the secret and unjustifiable use of State power is repulsive to the rule of law and appropriate functioning of a democratic society."[116]

In the Americas, in particular, the importance of public disclosure in these areas is well-recognized, in light of the gross human rights violations which have been committed in secret with national security as a long-running justification. State secrecy laws long existed to punish disclosure of information detrimental to economic or military affairs as a "national offense," using "'national security' as a broad shield to hide information from public knowledge."[117] According to the Commentary to the Model Inter-American Law, "State secret provisions were derogated from penal codes of Mexico and Peru during the twentieth century, where they were mainly used to cover discretionary actions and maladministration taken by the government."[118]

64. Broad exclusions from the scope of access to information laws also limit the effectiveness of access to information, and undermine the objectives of the right of access to information of ensuring the full exercise of freedom of expression, facilitating public information about and encouraging public confidence in government functioning, fostering democratic accountability and good governance, and reducing corruption and governmental abuses.

2. The Draft ATI Law must adhere to the principle of *maximum disclosure*.

65. An expansive exclusion of broad categories of information from the scope of the Draft ATI Law does not adhere to the requirement that public authorities be "governed by the principle of maximum disclosure."[119] Although Article 2 of the Colombian Draft ATI Law expressly

[114] *See, e.g., Claude Reyes v. Chile*, note 4 above, paras. 77, 86-87, 95.
[115] *Ibid.*, at paras. 77, 95 (requiring a case-by-case analysis of any restriction on access to information). In the Draft ATI Law, Article 29 requires a showing of the actual, likely and specific harm from disclosure ("present, probable and specific damage"). Article 21 requires a balancing of public interest equities—a consideration of "the public interest of obtaining access to the information")—and an absolute prohibition of secrecy where information relates to human rights or crimes against humanity.
[116] Judgment C-491/07, Constitutional Court of Colombia, 27 June 2007, p. 1.
[117] Commentary to Model Inter-American Law, note 36 above, p. 5.
[118] *Ibid.*, at p. 5.
[119] *Claude Reyes v. Chile*, note 4 above, para. 92.

incorporates the principle of maximum disclosure,[120] the categorical exclusion of broad classes of information from the scope of the Colombian Draft ATI Law renders this meaningless. For these classes of information, secrecy rather than disclosure would be the presumption, with no mechanism within the law to override such a presumption.

3. The Draft ATI Law may not allow for *perpetual secrecy*.

66. The Draft ATI Law recognizes the importance of the principle that restrictions on the right must be time-limited. Article 22 of the Draft ATI Law imposes a time limit on any decision to withhold information based on one of the exceptions under Article 19. Such exceptions are limited to a period of fifteen years, with a potential extension of another fifteen years under certain circumstances.[121] However, the exclusion of classes of information from the scope of the law eliminates the requirement that these classes of information should be disclosed after a certain period of time and affords the opportunity for perpetual secrecy.

4. Restrictions on the right to access information must be subjected to *independent oversight*

67. Any limitation on the right to information must also be subject to independent oversight. However, excluding entire categories of information from the scope of the Law precludes any independent oversight over a decision to withhold information. The classes of information excluded from the scope of the Law would not be subject to the review mechanisms mandated by the Law and access to them would thus be entirely at the discretion of the public authority.

C. Lack of Supremacy of Law Provision

68. The Draft ATI Law lacks a provision that ensures the supremacy of the Draft ATI Law in the event of a conflict of laws. The lack of such a provision risks the evisceration of the right to information through competing laws. This is a particular risk with regard to information related to national security and the intelligence sector. The existence of a constitutional provision guaranteeing the right to information in Colombia limits the risk. However, a stipulation of the supremacy of the Draft ATI Law would provide greater clarity.

69. The Inter-American Model Law includes a conflict of law provision which reads: "To the extent of any inconsistency, this Law shall prevail over any other statute." Similar provisions exist in other access to information laws, including those of Nicaragua and Panama.[122] No such guidance exists in the Colombian Draft ATI Law. The inclusion of the conflict of laws provision in the Inter-American Model Law is due to the risk that "inconsistent legislation" would create complications for public authorities tasked to implement the law, and make unclear the scope of the right for requesters.[123]

70. Colombia's constitutional protection recognizes the supremacy of the underlying right to information.[124] However, the inclusion of a conflict of laws provision would add clarity and certainty for both decision makers and the public, and would be consistent with prevailing best practice.[125]

[120] *See* Section A, above.
[121] *See* Draft ATI Law, Art. 22 (*"Dilatory defenses"*).
[122] *See* Commentary to Model Inter-American Law, note 36 above, p. 4.
[123] *Ibid.*, at p. 3.
[124] *Ibid.*
[125] *See, e.g.*, 2004 Joint Special Rapporteurs Declaration, note 19 above.

CONCLUSION

71. The Draft ATI Law is in large part in accordance with international human rights standards that are accepted by Colombia, if interpreted in line with key principles, including maximum disclosure, good faith, and transparency. To this end, we respectfully request that the Court provide guidance on the interpretation of Articles 21 and 28, concerning the public interest test and the mechanisms for a review of denials of access to information, respectively, to ensure that any interpretation of these provisions is in line with these fundamental access to information principles. An interpretation of Article 21 should not allow for any provision of false or misleading information; and an interpretation of Article 28 should ensure access to adequate and effective oversight and review mechanisms.

72. Most concerningly, however, the specific scope-limiting provision identified herein is unenforceable as it would be a violation of Colombia's treaty obligations. For the Draft ATI Law to be consistent with international law, Paragraph 2 of Article 5 must be removed. The exclusions identified in Paragraph 2 are properly identified in Article 19 as exceptions, and are thus already protected through the framework established by the Draft Law. There is no basis to exclude them from the scope of the Law entirely. We respectfully request that the Constitutional Court, in its review of the Draft ATI Law, find that the scope provision is unconstitutional in that it violates international law. Further, the Court should recommend explicit language, or an interpretation, that ensures that in the event of a conflict of statutes, the right of access to information enshrined in the Draft ATI Law would take priority.

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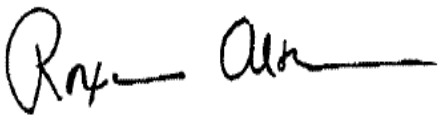

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