

ACCESS TO ENVIRONMENTAL INFORMATION IN CHILE

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ABSTRACT

The article provides a review on some issues related to public access to environmental information in Chile. It begins with analyzing the notions of public information and environment, and their interpretation in the case law of the Chilean Council for Transparency and in the teachings of leading authors; in addition, it identifies the kind of information that is most frequently the subject of a complaint before the Council. Next, it deals with the bodies and organizations that are obligated to provide access to environmental information. Finally, it concludes by reviewing the cases of refusal to give access, which can be divided into two main groups: those based on the grounds for refusal mentioned in the legislation and those arising from factors other than the aforesaid causes (e.g. Delay). The aim of the article is to identify the most relevant points of domestic Chilean legislation and case law regarding access to environmental information, in order to draw some parallels and identify the most relevant differences that exist between the Chilean legal system and comparative or international law.

Keywords: access to environmental information; Council for Transparency; refusal to give access.

*EL ACCESO A LA INFORMACIÓN
AMBIENTAL EN CHILE*

RESUMEN

El artículo desarrolla un estudio sobre algunos temas relacionados con el acceso a la información ambiental en Chile. Parte con analizar las nociones de información pública y medio ambiente, y su interpretación en la jurisprudencia del Consejo para la Transparencia chileno y en la doctrina; además, identifica el tipo de informaciones que más frecuentemente es objeto de una reclamación ante el Consejo. Enseguida, examina la categoría de sujetos obligados a entregar la información. En fin, se concluye revisando los casos de denegación de acceso, que son divididos en dos grandes grupos: los que se fundan en las causales de reserva o secreto previstas en la legislación y los que originan de factores distintos de las causales (ej. retraso). El objetivo del artículo consiste en identificar los puntos más relevantes de la normativa y jurisprudencia nacionales en materia de acceso a la información ambiental, para poder trazar algunos paralelismos e identificar las diferencias más destacadas que existen entre el ordenamiento jurídico chileno y el derecho comparado o internacional.

Palabras clave: *acceso a la información ambiental; Consejo para la Transparencia; denegación de acceso.*

FOREWORD

In Chile, access to environmental information is specifically established in Article 31 *bis* of Law n. 19,300 (General Base Law for the Environmental, hereinafter also LBGMA), where, according to the European Aarhus Convention¹ (BERMÚDEZ, 2010, p. 577) and the Escazú Agreement² – “Everyone”, whether an individual or a legal entity is granted the right to access environmental information³ without the need for stating or qualifying an actual and concrete interest⁴; this notion includes “any written, visual, acoustic, electronic information or information recorded in any other way the Government has access to” and that refers to heterogeneous categories of environmental content⁵.

In addition to the above-mentioned provision and others in the sector regulations⁶, the Chilean ruling in matters of publicity and access to information is included in Article 13 of the American Convention on Human Rights⁷; in the Chilean Republic Constitution⁸, particularly in Articles 8 and (implicitly, according to the Constitutional Court)⁹, with undertones of agreement with law theory, see BERMÚDEZ; MIROSEVIC, 2008, p. 454-455) in Article 19, item 12, which refers to freedom of information, in the State Administration Law¹⁰; and, above all, in Law 20,285 on access to public information, which Law 19,300 itself refers to. This latter law actualized the call for Government bodies to make information public¹¹ on its two approaches: active¹² and passive¹³ transparency, which we will deal with in this paper.

1 Convention on access to information, public participation in the decision-making process and access to justice in environmental matters (Aarhus, June 25, 1998), also known as the Aarhus Convention.

2 Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean (New York, September 27, 2018), hereinafter referred to as the Escazú Agreement.

3 Article 31 *bis*, paragraph 2, Law n. 19,300.

4 See CplT, Roll n. C33-10, recital 10.

5 Article 31 *bis*, paragraph 1, Law n. 19,300.

6 See in particular D.S. 40 from 2013, Ministry of the Environment, Environmental Impact Assessment System Regulations (hereinafter referred to as RSEIA), especially Article 22.

7 American Convention on Human Rights (San José de Costa Rica, November 7 to 22, 1969).

8 On constitutional provisions, we refer *inter alia* to FERNÁNDEZ 2005; ISENSEE; MUÑOZ 2013, p. 59 ff; DÍAZ DE VALDÉS, p. 82 ff.

9 *Inter alia*, see STC Roll n. 1990-11-INA, recital 25 in particular.

10 D.F.L.-1 19653 from 2001 lays down the established and systematized text of Law 18,575, General Constitutional and Organic Basis of State Administration, see in particular Article 13.

11 See Article 5, Law 20,285 in detail.

12 Heading III, Law 20,285.

13 Heading IV, Law 20,285.

One of the achievements already mentioned in the legislation (FERREIRO, 2013; GUILLÁN 2012; CAMACHO, 2012, p. 557) was the establishment of the Transparency Council (hereinafter referred to as Council or CplT), an *ad hoc* body charged –*inter alia*– with settling complaints filed by petitions in case of refusal or expiration of deadline for delivery of public information¹⁴. The case law of this body, which in some instances clashed with the administrative law theory and the standing of the Chilean Constitutional Court, was particularly relevant to the drafting of this article, in particular to identify the type of environmental information that is required the most, and the reasons behind refusal or non-delivery of the requested information.

Thus, this allowed for the rebuilding of the Chilean law on access to environmental information and highlighting the friction points both within the same Chilean domestic legal system and between it and the international texts.

1 ENVIRONMENTAL INFORMATION

The concept of environmental information in Chile is based on two definitions: “public information”, contained in Article 5 of Law 20,285, and the environment, in turn, stated in Article 2, item m) of Law 19,300, to which the closing clause in letter g) of article 31 *bis* of the same law refers to.¹⁵

1.1 The concept of public information

The first provision defines as “public information”

“The acts and resolutions of the State Administration bodies, their bases, the documents that support or directly and essentially supplement them, and the procedures that are used for their enactment... the information prepared using public funds and all other information maintained by the Government bodies, regardless of their format, support, creation date, origin, classification or processing, unless they are subject to the exceptions noted.”

¹⁴ Article 8 and 25 ff, Law 20,285.

¹⁵ This charter mentions “all other information on the environment or on the elements, components or concepts defined in article 2 of the Law”.

Two standings were developed in relation to this definition: On the one hand, CplT, at first, with the exception of private cases¹⁶, adopted an expanded interpretation of Article 5 of Law 20,285, particularly its second paragraph (CAMACHO 2012, page 555; ALIAGA 2015, page 16-18 ff, 88; and BERMÚDEZ, 2010), by considering that all information gathered using public funds or that is in the possession of the Government or that should be in its possession is public, since it is a legal or infra-legal source (ALIAGA 2015, pp. 92 ff.) Then, it stresses that this is regardless of the medium or physical location where it can be found¹⁷, its origin or kind¹⁸. According to this theory, information generated by private individuals (e.g., reports, studies) would also be included in the concept of public information if such documents were drawn up using public funds or if they were delivered (or should be delivered) to the government authorities.

This position, which has been reflected in some rulings of first instance courts¹⁹, however, departs from the gap in the case law of the Constitutional Court²⁰ and the more authoritative law theory²¹. Fernández González, for instance, following the constitutional text, the history of Law 20,285, and to constitutional reform of 2005 (Law 20,050), reaffirms that the principle of publicity includes only what can be described as an act, resolution, basis (understood as “reasons, considerations, justifications or precedents”) and the procedures for dictating them (FERNÁNDEZ, 2014, pp. 47-63; likewise, CORDERO, 2013, pp. 217-219). Therefore, information that, in the hands of the Government, belongs to and/or comes from private persons would be excluded. In particular, this author emphasizes that “any extensive interpretation of article 5... would be unconstitutional, since... a particular document does not lose this nature... due to the fact of being transferred to the State” (FERNÁNDEZ, 2014, p. 49, 61).

16 For the non-environmental area, see CplT, Rolls n. C567-09 and C625-09, both filed against the Chilean National Economic Attorney General’s Office.

17 CplT, Roll n. C457-10, recital 10.

18 Among others, see CplT, Paper n. A165-09 (on standards and authorizations related to the import, use and release in the environment of transgenic seeds), recitals 10 – 16; CplT, Paper n. C515-11, recital 16 (concerning health company contracts with unregulated customers).

19 See Court of Appeals of Santiago, Case n. 9347-2011, in particular recital 12, and among the oldest case law, the 25th Civil Court of Santiago, Roll n. C-2755-2002.

20 See STC, Rolls Nos. 2907-15–INA and n. 3111-16-INA.

21 In the debate that led to the enactment of Law 20,285 and, in particular, the concept of “public” information, we refer to CAMACHO 2012, pp. 555 ff. and ALIAGA 2015, pp. 14 ff.

However, if, at the outset, the Council considered that all information produced by private players became public once delivered to the Government²², later²³, as we shall now explain, a more moderate interpretation was adopted, according to which any precedent transferred to the Government authorities in the exercise of their powers is subject to Law 20,285.

This way, the divergence between the two interpretations²⁴ remains, albeit watered down, and can be analyzed in the environmental context in cases related to the data on the supplying of antibiotics in salmon breeding farms, information that was provided by the companies themselves to the inspection agency. CplT (and with it the Santiago Court of Appeals²⁵) ignores the matter of the nature of the information required, merely reviewing the applicability of causes for reserve, while the constitutional judges concluded that this information is not public.²⁶ In particular, regarding the requirement of inapplicability due to unconstitutionality, the Constitutional Court determines that Article 31 *bis* of Law 19,300

“goes beyond when it comes to Article 8 of the Constitution. Firstly, because it is not connected to acts or grounds. As already indicated in this sentence, the representative to the Constitutional Convention did not want all information to be made “public”. That is why they are extremely cautious to point out which one will be. Secondly, it requires the information to be kept by the Government, regardless of how it has been obtained, or whether this is private information provided by the companies. Thirdly, the information requested is information from specific companies.”²⁷

According to this pronouncement, only what the constitutional text expressly and exhaustively states, that is, “acts and resolutions, basis and procedures that use them” can be considered as public.

22 CplT, Roll n. C1129-11 (information regarding authorization and management of a landfill).

23 In fact, there are also previous statements adopting the same standing, see ALIAGA 2015, pp. 112-114.

24 See also case law in CAMACHO, 2013, pp. 85 ff.

25 Santiago Court of Appeals, Roll n. 11771-2015.

26 CplT, Roll n. C1536-15; see particularly, recital 2. They maintain the same CplT line, Roll n. C1407-15, regarding the information on the antiparasitic treatments in salmon breeding farms, and CplT, Roll n. C1003-18.

27 STC, Roll n. 2907-15-INA, recital 47, and n. 3111-16-INA.

From another viewpoint, it should also be mentioned that only information that constitutes the “formal expression of government activity” and that “has legal consequences” should be classifiable as public information for purposes of Law 20,285 (CORDERO, 2013, pp. 227-229). However, such considerations should not be construed as forbidding access to records that – although matching Government activity – are not strictly related to a specific and finalized procedure. If the legislator’s intention had been to restrict access only to documents (preparatory work, minutes, etc.) of completed procedures, they would not understand the reason for including the reservation grounds in Article 21, (1) (b) d of the Law, which implicitly allows for the possibility of delivering information regarding pending cases or, according to the interpretation of the CplT, not completed within a reasonable period of time.²⁸

In the same vein, access to deliberations that form the basis for other administrative acts conducive to producing legal effects should also be admitted. The aforementioned has its relevance within the scope of the Environmental Impact Assessment System (hereinafter also referred to as SEIA), thus the Environmental Qualification Resolution (RCA), which approves or rejects a project submitted for assessment, is based *inter alia* on previous statements of different state bodies with environmental powers.²⁹

1.2 The concept of “environment”

The concept of “environment” is explained in LBGMA as:

“The global system constituted by natural and artificial elements of a physical, chemical or biological nature, with sociocultural elements and their interactions, constantly altered by human or natural action, and which rules and conditions the existence and development of life in its manifold manifestations.”

As can be seen, Chilean law accepts a comprehensive definition of environment (BERMÚDEZ, 2015, page 62), which encompasses not only purely natural elements but also artificial elements, such as those belonging to cultural heritage in its multiple

²⁸ CplT, Roll n. C2436-14, recital 12.

²⁹ Article 8, paragraph 2, RSEIA.

aspects (architectural, historical, landscape, etc.). This was also interpreted by the Office of the Comptroller General of the Republic (CGR)³⁰ and the common courts, both in decisions on environmental protection resources (BERTELSEN, 1998)³¹ and in trials on environmental liability³².

This way, the aforementioned complicated the analysis of CplT case law, because it required limiting the scope of the investigation in advance. The express reference to Law 19,300 cannot be used as the only search parameter, as the percentage of cases where LBGMA was explicitly called upon was scarce when compared to the number of CplT statements on environmental matters. The scope of the study has therefore been broadened, excluding the following: information on tender or contracting procedures for environmental services (e.g., names of individuals or legal entities involved, technical and economic offers, etc.), grants (e.g., landmines, aquaculture, etc.) or leases of fiscal property, issues related to native people lands but not linked to natural or cultural heritage (e.g., legalization of land), information on territorial planning instruments, urban interventions and works of a different sort (e.g., hospitals, roads, airports, etc.), where such data refer solely to economic or technical issues, without a study of the environmental situation they existed in. On the other hand, the cases in question were considered as territorial planning instruments (Community Regulatory Plans, Regional Development Plans, and so forth) and/or in individual constructions when the subject matter of the request for access had a broader focus and more largely when they included data on the environmental impact assessment of such plans or projects. This inclusion seemed valid to us, considering, on the one hand, how extensive the legislative concept of environment is, as it also includes the urbanized and built environment (an idea that brings us back to the classic tripartite definition in GIANNINI, 1973), and secondly, the role that measures in matters of territorial organization play in the country's environmental development.

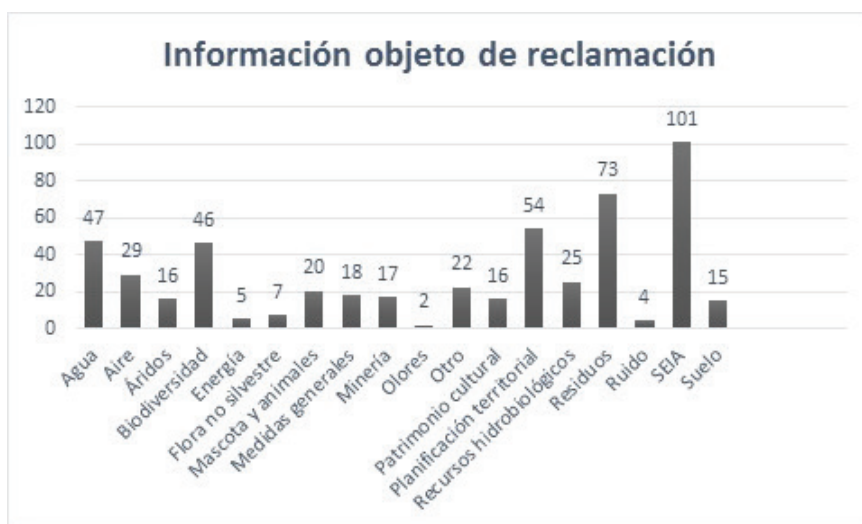
30 CGR, Opinion n. 4,000 from January 15, 2016.

31 Temuco Court of Appeals, Roll n. 150–2011.

32 2nd Civil Court of Puerto Montt, case n. 612–1999, recital 18; see also Supreme Court, case n. 1911–2004. The first sentence states that “The concept of environment... is that laid down in the Law of Environmental Bases, which is encompassed in those broad notions... and that is why the scope of protection against damages suffered is not limited only to biological or physical aspects, but rather extends its protection to those elements that relate to the environment in its sociocultural aspect; that is to say, it also protects the urban aspect, monuments, the landscape, engineering accomplishments, and all social and cultural aspects in general.”

1.3 Complaints Topics in CpIT

Once the definitions were clarified and based on the investigation carried out, which included over 500 complaint procedures that concluded with an essential ruling, from the start of CpIT coming into effect until January 31, 2019, it was possible to rebuild the following table, related to the content of the requested information. We found out that, in some cases, the requirement included more than one topic, and therefore it had to be classified in two columns.



As can be seen, the vast majority of complaints report back to the Environmental Impact Assessment System, and are related to assessments of specific projects, the permits already granted (or yet to be granted), the statements by the sectoral agencies involved and, in short, the supervisory and sanction measures regarding the projects themselves. On the one hand, the result of the investigation is not strange considering the high level of conflict of certain significant projects, such as HidroAysén or Alto Maipo, and the interest of the community in obtaining more information about them. (INSTITUTO NACIONAL DOS DIREITOS HUMANOS and CAMACHO 2012, p. 549). By the way, let us not forget a historical case of denial of information about a forestry project, which caused a litigation, was awarded against Chile by the Inter-American Court of Human Rights

(IACHR)³³. On the other hand, the high number of complaints is surprising, when we consider the case records of the administrative assessment process and, in the case of approved activities, the possible sanction procedures are now available online at the Environmental Assessment Service website³⁴. Secondly and thirdly, there are complaints regarding information on waste (including sewage and sludge) and their treatment and disposal, for example, on landfills and in urban planning and construction; the latter category covers everything related to the “built” environment, including, for example, stormwater management projects, with the exception of cultural heritage. It can also be seen that there are a large number of claims related to water resources (both land and sea water), their pollution, management and use³⁵, and biodiversity (fauna, flora, and protected areas), their protection and mode of use³⁶.

It should only be noted that the column “Soil” includes all information on what could be described as “other discharges into the environment”, an expression used both in Article 31a *bis* and in European legislation³⁷, and which refers, *inter alia*, to the use of pesticides and other aerial application phytosanitary products. In the European system, the concept has been the subject of an interpretative debate, mainly because data on these emissions or releases are not covered in order to protect confidentiality of commercial and industrial information³⁸, a solution also indicated in part of the Chilean law theory (BERMÚDEZ, 2010, p. 580), but which, however, has not yet been explicitly acknowledged by Chilean legislation.

As expected, in the vast majority of cases before the CpIT there

33 CtIDH. Case of Claude Reyes et al. vs. Chile Judgment of September 19, 2006 (Merits, Reliefs, and Costs).

34 See “Acesso ao Sistema de Avaliação do Impacto Ambiental” at <https://sea.gob.cl/>.

35 This category also included claims associated with information on access to drinking water, construction of reservoirs, interventions in natural river beds, flows of surface water bodies and, water quality in general.

36 Among others, this group included pleas involving requests for information related to authorizations to import and grow genetically-modified living organisms; approval of management plans and work plans for wetlands provided for in Law 20,283 on Native Forest Recovery and Forest Development; interventions based on Article 19 of the above-mentioned Regulations (this provision forbids the cutting, elimination, etc. of specimens belonging to native plant species that are in different categories of special protection, and at the same time allows intervention under certain conditions); fires, etc.

37 Article 2(1), subparagraph b of Directive 2003/4/CE from January 28, 2003 of the European Parliament and the Council on public access to environmental information and which repeals Directive 90/313/CEE of the Council (in the following Directive 2003/4/CE). We want to point out in this respect that these specifications are included neither the Aarhus Convention nor in the Escuzú Agreement.

38 See also Article 4 (2), subparagraph d of Directive 2003/4. On the relevance of this exclusion, see KRÄMER, 2003, p. 18.

is no reference to Article 31 *bis* of Law 19,300. In part, this omission is explained due to LBGMA itself, except to specify what is understood as “environmental information”, refers *in toto* to the general regime of Law 20,285; also, the objective field of the general regulations is broad enough to include environmental information, which led part of the law theory to conclude that in Law 19,300 the lawmaker did not go beyond highlighting a specific category of information (ALIAGA 2015, pp. 115 ff.).

2 OBLIGATED SUBJECTS

In accordance with the constitutional mandate in Article 8 of the CPR (FÉRNANDEZ 2013, p. 258), Law 20,285 limits the field of disciplines required to respond to requests for access to public authorities, as laid down in its Article 2.

In relation to companies the State is a in, by virtue of paragraph 3 of the aforementioned provision, only expressly stated provisions apply to public companies created by law, government companies, and companies in which the government holds more than 50% of the shares or a majority on the board of directors. From the foregoing, we can concluded that, among other things, the powers of the CpIT to accept grounds for refusal does not extend to said players³⁹, among which, due to their relevance in the environmental sector, it is worth mentioning the National Corporation of the Copper, Chile⁴⁰, the National Petroleum Company (ENAP)⁴¹ and the State Railroad Company⁴² (RAJEVIC, 2009, page 37).

On the other hand, legal rules are applicable to the provisions in Law 20,285, including on the CpIT, the National Forestry Corporation (CONAF), is subject “the functional administration of the government”, despite being incorporated as a private law company (BERTELSEN, 1992, pp. 557-558).

As expected, by means of its case law, the CpIT expanded the field of application of the regulations, together with the verbatim text of legislative provisions and the Constitution, concluding also information on the discipline about access coming from private operators not expressly

³⁹ This conclusion is also backed up by the common courts case law, see Court of Appeals of Santiago, case n. 608-2010.

⁴⁰ CpIT, Roll n. C2016-14.

⁴¹ CpIT, Roll n. C506-09.

⁴² CpIT, Roll n. A4-09.

included in Law 20,285 among obligated subjects. Now, the “functional” criterion that has been imposed in recent years – which was already described above – for con and pro votes from the Jaraquemada Council (PAVÓN, 2017, p. 235) determines that information produced by private parties is made public when the Government comes into play to exercise its power. According to this interpretation, the documents, reports, etc. submitted by private players as part of an authorization procedure would become “public information”, provided the Government should adopt or is in the process of adopting a ruling on the matter; besides that, they themselves may therefore qualify as grounds for an act or an administrative resolution. A concrete example is given by the previous records delivered to SAG in the procedure for granting permission to import and release transgenic seeds (LMOs, Living Modified Organisms)⁴³. Contrarily, should the Government not exercise its powers due to outside factors, for example, in case of the project owner that is the subject matter of the administrative procedure withdrawing, the information delivered by the private party will not lose its private nature⁴⁴.

Likewise, the CpIT publicly considers all information produced by private operators and acquired by the Government in the exercise of its surveillance on regulated activities, including inspection minutes, data prepared by the private parties themselves, data obtained from monitoring programs, and the results of inspection activities carried out in general⁴⁵.

The previous thesis, which in any case is considered unconstitutional (FERNÁNDEZ, 2013, p. 259), has a considerable impact in the subject matter of the present paper, since the Chilean environmental legislation or the environmental management instruments that are based on it include several obligations to send environmental information of a distinct nature to the authorities with jurisdiction on the matter. As an example, within the SEIA framework, during the evaluation and authorization stage the project owner must provide detailed information on the activity, the impacts that can be generated or presented, the area of influence⁴⁶, etc.; and once the project has been approved, provide the results of (regular

43 CpIT, Roll n. A165-09, recital 16. Information was requested on the exact location of transgenic seed growing and storage, the name of the companies involved, the genetic modification, and the exact location of the transgenic crops and trees, including the property, commune and region.

44 See a case relating to an application for a geothermal energy grant, CpIT, Paper n. C2177-13, in particular recital 6.

45 CpIT, Roll n. C1129-18; CpIT, Roll n. C1532-13 (confirmed by the Court of Appeals of Santiago, case n. 3864-2014). The same standing, in a previous decision: CpIT, Paper n. C1129-11 (landfill).

46 For details, see Articles 18 and 19, RSEIA.

or extraordinary) control activities carried out or entrusted to them by the authority with jurisdiction, which is the Supervisory Board on the Environment (SMA). Also, the data collected are under the authority of the Government, by means of periodic monitoring or measurement programs that the holder must carry out⁴⁷. Of course, in order to gain access to these data and, in short, to ensure that the right to access is not denied, it is also important that the authorities fully and timely comply with the reporting obligations laid down in the legislation.

In any case, it should be pointed out that, although the extensive standing of the CplT is adopted, it is always information that hinders Government Administration. As a consequence, private operators are not obligated to provide information that does not come from their field of work. In this respect, the Chilean legal system remains far from the provisions on matters relating to obligated subjects contained in European legislation⁴⁸ and in international law⁴⁹. The regime on the same matter laid down in the Escazú agreement is broader, referring to:

“private organizations, to the extent that they directly or indirectly receive public funds or benefits, or perform public functions and services, but only in respect of public funds or benefits received or public functions and services performed.”⁵⁰

According to this norm, concessionaires of public services of environmental interest (for example, utility companies for drinking water, energy, sewage, etc.⁵¹) are obliged to deliver the information in their possession within the limits stated; however, under the laws currently in effect in Chile, they are excluded from the scope of Law 20,285, as has also been confirmed in the Council case law⁵².

47 See especially Article 105, RSEIA, concerning the monitoring plan for environmental variables.

48 See Article 2, paragraph 2 (c) of Directive 2003/4/CE, which deals with: “Any other individual or legal entity taking on public responsibilities or functions or providing public services relating to the environment under the authority of an entity or person falling within the categories referred to in items a) or b).”

49 See Article 2 (2), subparagraph c) of the Aarhus Convention, which is drafted in virtually identical terms to those laid down in Directive 2003/4/CE, mentioned in the previous footnote.

50 Article 2 (b).

51 See the law theory, although not in strictly environmental matters, YÁÑEZ 2014, pp. 191-197.

52 In this regard, see CplT, Rolls Nos. C1316-12 and C2299-17.

3 NON-DISCLOSURE OF THE INFORMATION REQUESTED

Briefly, we will devote some considerations to situations in which the request for access is not received in a manner satisfactory to the applicant, but considering also that a broader study on the causes for holding back or secrecy mentioned in Article 21 of Law 20,285 will be left the subject of another paper.

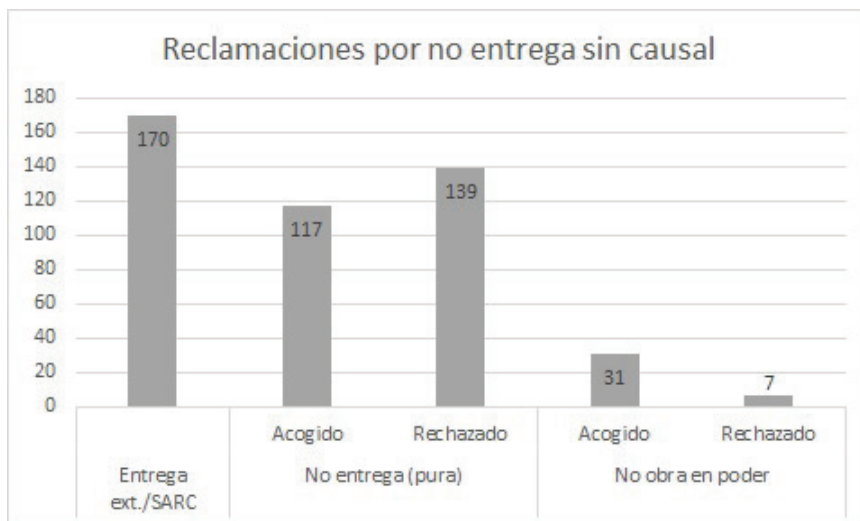


This first chart shows us the claims that originate from a “pure and simple” non-delivery of the information requested (we will clarify this notion later on) and those based on the invocation of one of the causes for holding back or secrecy, mentioned in Article 21 of Law 20,285, by the requested authority or by third parties whose rights would be affected. It should be noted that, for an individual request, the reasons might have been different, depending on the type of data required. Therefore, it is possible that a single claim before the CPT is in fact broken down and classified based on different criteria. The large number of cases where none of the exceptions to the principle of publicity laid down in the Transparency Act has been invoked immediately stands out.⁵³ (464 vs. 158).

⁵³ Keep in mind that Law 20,285 is not the only one that could determine holding back or secrecy of certain information; see in this regard the STC Paper n. 1990-11-INA, particularly recital 48, commented on ARELLANO 2014.

3.1 Non-delivery without invocation of a cause

In turn, non-disclosure “without cause” can be classified under the categories detailed in the table below, which also indicates whether the request was received by the CpIT or whether the information was disclosed late.



First, the Council criticizes the action of the requested authority when the lack of information requested was not reliably established or the investigation was considered inadequate or insufficient.⁵⁴

Please note that the agency the request for access is submitted to must state the specific reason why the information requested is not in its possession or is non-existent, an assessment that is subject to a strict “plausibility” scrutiny by the Council. For example, non-existence is considered to have proper grounds when:

- the information was requested from an authority (in the specific case of the Supervisory Board for the Environment), but – by legal provision – it is in the hands of another agency (the Ministry of Environment, MMA)⁵⁵. However, in that case, there is a duty not only to notify the applicant, but also to refer the request to the authority with jurisdiction⁵⁶, which

⁵⁴ CplT, Roll n. C2101-17, recital 12. See also CAMACHO, 2010.

⁵⁵ CplT, Roll n. C799-17.

⁵⁶ See Article 13, Law 20,285.

is often not done or is done in an invalid way, because the requested agency does not correctly name the authority with jurisdiction, as can be seen in section 3;

- the minutes of a meeting are requested as part of an environmental impact assessment procedure (more precisely, an environmental qualification session) which did not take place⁵⁷;
- the delivery of the requested information would demand an elaboration effort by the authority (ALIAGA 2015, pp. 21-23).

However, in relation to this latter point, it is necessary to differentiate between the creation of new information and the systematization or processing of existing – albeit contained in other media – data. In environmental matters, the central agencies (MMA, SEA or SMA) receive various records and databases in SQL and EXCEL format, from which, by the application of filters and search criteria, the specific information can be generated in an expeditious manner in the format and/or detail required by the applicant⁵⁸. The authority cannot also be excused when the delivery of information requires the mere deletion of data in existing files, especially to make them anonymous⁵⁹. On the other hand, the allegation of non-existence would be justified if the request could be met only after the compilation of new data or the preparation of further studies, which would entail considerable efforts by the authority⁶⁰. (In the latter case, we consider that the grounds in Article 21 (c) could also be invoked regarding applications which are generic or take officials away from the exercise of their jobs.)

The “pure” non-delivery category also includes an instance where the information is actually delivered, but in a format or support unlike the one chosen by the applicant⁶¹. We want to point out that, according to Article 17 of Law 20,285, the information must be delivered “in the format and by the means requested by the applicant, provided this does not

57 CplT, Roll n. C485-13.

58 CplT, Roll n. C63-14, recitals 10 and ff.

59 See Santiago Court of Appeals, proceeding n. 5661-2015.

60 See CplT, Case n. C894-15. In the specific case, the requested information could be prepared; however, the delivery required a study involving a year and a half of work and at a cost of not less than M\$ 30,000.

61 According to Article 17 of Law 20,285, the information must be sent “in the format and by the means requested by the applicant, provided this does not result in excessive cost or an expense not provided for in the institutional budget,” subsection 1. See, for instance, CplT, Roll n. C1056-11, recital 10.

result in excessive cost or an expense not provided for in the institutional budget”. In particular, we stress that the Chilean legal option is more favorable to the applicant than the provision on the same matter contained in the Escazú Agreement, which mentions only the mere availability of the format (Article 5, paragraph 11).

This case is unlike what is provided for in Article 15 of Law 20,285, according to which the obligation to deliver can be considered as met because the information is permanently available to the public. Here there is a significant difference between the Chilean and European regulations, since the latter allows for this possibility, but from the point of view of the applicant and taking into account the actual possibility of this access to information, whereas the Chilean provision is slacker, since the authority may just say where the information is located⁶². In any event, the divergence is reduced by the Council’s interpretation, which considers that, for the purposes of Article 15, all the information requested must be made available to the public in a timely manner and without further elaboration. In the environmental field, the above consideration is particularly relevant because there are several online databases and records (e.g., the Pollutant Release and Transfer Register web page)⁶³, the Environmental Assessment Service⁶⁴, the National Information System for Environmental Control⁶⁵ and others), but the information cannot be considered as delivered if the applicant, in order to exactly obtain the subject matter of their search, must process the data made available to them (for example, compiling a ranking of the 10 companies for each region of the Chile that emitted most CO₂ during different years)⁶⁶.

The same category includes complaints accepted by partial delivery of the information, and those rejected for several reasons, including perfect agreement between what is being required and what is delivered; extempore submission of the application for help; presentation at the complaint origin of new requirements not included in the initial request; no payment of reproduction costs, etc. On this point, we want

62 Article 15, Law 20,285. Cf. C197-10 from June 25, 2010, where it was stated that the response from the requested body must be sufficiently detailed, and in particular, it should indicate “the source, place and manner in which the information can be accessed, so as to allow the applicant to find the information in an expeditious manner” (recital 4).

63 Available at: <http://www.retc.cl/>.

64 The official website is at <https://www.sea.gob.cl/>.

65 Available at: <http://snifa.sma.gob.cl/v2>.

66 In order to obtain the necessary information, the applicant had to access the registry and manually write the ranking based on the reports; CplT, Roll n. C63-14.

to mention that the Transparency Law allows for the option to charge for the delivery of information when these values differ from the direct costs of reproduction⁶⁷; however, such a provision must be expressly included in a law. Therefore, a lower-level provision may not validly require the payment of additional fees and duties, nor would a law containing a generic authorization to collect fees and charges for services rendered be in accordance with the law.⁶⁸

We also find in this column the cases where the applicant improperly used the public information access channel to actually exercising his right to petition. This right is acknowledged in the Constitution (Article 19 (14)), but has a different nature and purpose, which consists, in short, not in the delivery of information, but in obtaining a pronouncement from the agency. In any case, we find that in some instances the CPT accepted claims originating from requirements that oscillated between a request for access to information and the exercise of the right to petition.⁶⁹

Finally, the complaints related to late delivery of the information (1st section) were taken into account. The latter group, which collects information spontaneously delivered after the deadline, and the claims settled via the Early Conflict Resolution System⁷⁰, stands out due the large number of items in it. The delays seen could be explained by a lack of preparation or reaction capacity by the Government at the time the Law⁷¹ came into effect, but in order to confirm this hypothesis it would be necessary to run a diachronic analysis, which was not included in this study. On the other hand, the congruence of the deadline laid down in the legislation for the delivery of information can be assessed: it is 20 working days, and can be pushed back a further 10 working days, provided the applicant is notified as soon as possible and, in any case, before the end of the period, on the extension and the reasons for it⁷². In our opinion, despite the delays detected, the deadline should not be

67 Article 18, paragraph 1, Law n. 20,285.

68 CplT, Roll n. A234-09.

69 See, *inter alia*, CplT, Rolls Nos. C764-11 and C3033-16. See also ALIAGA 2015, p. 24.

70 The Early Conflict Resolution System (SARC) was applied as of 2010. For more in depth details, see ROJAS.

71 A monitoring study conducted on access to information in four Latin American countries (Argentina, Chile, Mexico and Peru) in 2004 (before the enactment of Law 20,285) by the Open Society Justice Initiative showed that the degree of silence by the authorities ranged from an acceptable level of 21% in Mexico to a concerning 69% in Chile; DARBISHIRE, 2006, p. 270.

72 Article 14, Law 20,285.

extended: the Chilean provision does not deviate significantly from European law⁷³, and in Latin America it was, according to a study by the Economic Commission for Latin America and the Caribbean, one of the longest in the region (CEPAL 2013, Table 6). In addition, offering a more generous deadline might affect the effective exercise of other procedural rights (participation and access to justice in environmental matters). To this effect, it is vital that the necessary information is received in a timely manner.

3.2 Causal denial of holding back or secrecy

In short, Law 20,285 lays down a regime of exceptions, which protects assets and interests of several kinds: from the correct fulfillment of the functions of the requested body (n. 1) to the rights of individuals or legal entities, including private life and economic or commercial rights (n. 2), national security (n. 3) and national interest (n. 4); other exceptions may also be laid down by regulatory instruments other than the Transparency Law (n. 5). Without going into detail, we can say that the grounds for refusal are sufficiently defined in the regulations and have been subject to a restrictive interpretation⁷⁴, and also recommended by national law theory (NAVARRO, 2013, p. 154). That is why we did not find any significant divergences between the Chilean legal system and international texts. At the regional level, the Escazú Agreement, for example, refers in all cases to reasons for holding back or secrecy laid down in national law (Article 5, paragraph 6) and provides only for a regime of exceptions, where the matter is not mentioned in domestic law⁷⁵.

On the other hand, Law n. 20,285 does not contain the “exception to the regime of exceptions” concerning the ban on denying information “on emissions into the environment” that

73 See Article 3 (2) (a) and (b) of Directive 2003/4/CE: the normal time limit is one month, but it is extended to two months “if the volume and complexity of the information is such that it is impossible to fit the term “common”. See also AYARES; GARCÍA, 2015.

74 CplT, Roll. n. C1483-15; Santiago Court of Appeals, Roll n. 2275/2010, recital 6.

75 The exception regime in the Escazú Agreement differs in some instances from the Chilean system as, for example, it does not allow for access denial when the economic and commercial rights of the individuals or legal entities are affected. In any case, this does not affect internal discipline because, as has already been said, the Agreement – should it enter into effect – would only be applied in a supplementary way.

is laid down in the European Union legislation⁷⁶ and the Aarhus Convention⁷⁷.

In addition, the provision which protects the proper performance of duties, like that contained in the European Directive⁷⁸, has an imprecise range of application (ALIAGA 2015, p. 181), since it allows authorities to deny the request for access “in the case of generic requirements, referring to a large number of administrative acts or their history, or answering which would requires employees to be taken away from the regular performance of their usual duties.”⁷⁹ Unlike European law⁸⁰, Chilean law does not provide for any duty on the part of the requested Government body to support the applicant in the task of defining and specifying its application. On the other hand, the sentences “large number of acts...” and “taken away from the regular performance” allow for enough discretion to reject the request, even more so when “scattering of environmental information” is taken into account. (CAMACHO 2012, p. 564).

In any case, according to comparative and international law, the authorities with jurisdiction must perform a damage test (LÓPEZ-AYLLÓN; POSADAS, 2006; RAJEVIC, 2009). In other words, they need first to verify whether the reasons that formally support denial obtain and are sufficiently proven by the party that raised them up (keeping in mind in the Chilean system the number one cause can only be invoked by the Government) and weigh the public interest met by the delivery and disclosure of the information against the interest served by its denial.

CONCLUSIONS

The analysis of the CplT case law has made it possible to identify the type of information whose refusal most often results in a claim before that body. We have noticed a large number of procedures related to the Environmental Impact Assessment System, which can be explained by different factors, including the interest from citizens, the “media” effect of certain projects, the possible inability of the Government to timely and quickly deal with applicant requirements, etc.

76 Article 2 (4) of Directive 2003/4/CE.

77 Article 4 (4) (d), Aarhus Convention.

78 Article 4 (1) (c), of Directive 2003/4/CE.

79 Article 21 (2) (c), Law 20,285.

80 Article 3 (3) of Directive 2003/4/CE.

In addition, we highlight the gap between the constitutional provision in Article 8 of the CPR and the definition of public information contained in Article 5 of Law 20,285, especially in the light of the interpretation this latter provision gave the CplT. This discrepancy influences not only the scope of the notion of public information (and as a consequence, that of environmental information), but also affects the identification of matters whose history, data, and documents can be disclosed. As has been said, individuals in general are not subject to the Transparency Law. However, from the viewpoint of the Council, the government authorities must also provide at least some categories of information of a private nature and provenance that are in their possession.

It is a divergence that can only be cured by means of a reform of the constitutional text or a more restrictive interpretation of the legal provision, but that would be more faithful to the Constitution. The first solution requires time and study, the second has the disadvantage of impoverishing Chilean regulations on access to environmental information, especially in comparison with international legislation on the matter. In fact, the tendency in international texts is to consider publicly the information produced and delivered by individuals to the Government; at least, those are the precedents that are instrumental to the exercise of the several public powers (approval, inspection and sanction *in primis*), as also the now prevalent case law from the Transparency Council maintains in Chile.

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