



**Comment**  
on the  
**Draft Bill on Access to Information of Brazil**  
**November 2009**

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This Comment provides an analysis of the changes to the draft Bill on Access to Information of Brazil (amended Bill)<sup>1</sup> introduced by the Special Commission of the Brazilian Congress. The original Bill was prepared by the government and published on 3 May 2009. In July 2009, ARTICLE 19 published a Memorandum analysing the original draft and making a number of recommendations for reform.<sup>2</sup> This Comment should be read in conjunction with that Memorandum.

## **1. Positive Changes**

The amended Bill includes a number of positive changes. Indeed, all of the changes it introduces are positive, with one exception. We note, first of all, that the changes address three of our recommendations head-on:

### **1. Public Bodies**

We had strongly urged that the law include a definition of public bodies. The original Bill completely lacked any definition of what bodies it would cover. This would clearly be a serious lacunae in a right to information law and almost all of the over 80 such laws around the world do include such a definition.

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<sup>1</sup> This analysis is based on an unofficial translation of the draft Policy produced by ARTICLE 19.

<sup>2</sup> Our analysis is available at: <http://www.article19.org/pdfs/analysis/brazil-memorandum-on-the-draft-bill-on-access-to-information-of-brazil.pdf>.

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The amended Bill now defines the bodies it covers, in Articles 1 and 2. Together, they cover executive, legislative and judicial bodies, including the prosecutor's office, autonomous state bodies, including public and mixed companies funded by the State, and non-profit private entities which receive public funds to conduct public functions, to the extent of that funding. This is generally a broad definition, although it does not include private bodies conducting public functions without public funding.

### **2. List of Classified Bodies**

The original Bill provided for the publication of information which had recently been declassified, as well as the number of documents that remained classified at each level of secrecy. We recommended that a list of the documents which were classified be published. This is now provided for in the amended Bill (Article 29).

### **3. Central Promotion**

The original Bill did not identify any central body with responsibility for undertaking promotional activities. We recommended that such a body be appointed, and that it be given, in addition to a general promotional role, specific responsibility for public awareness-raising and training for public officials. We also recommended that provision be made for a central body to report annually to the National Assembly on implementation of the law.

Article 40 in the amended Bill obliges the Federal Executive Branch to appoint an "organ from the Public Administration" to promote public awareness, to develop training activities for officials, to monitor implementation and to report annually to the National Congress.

We also note a number of other positive measures included in the amended Bill as follows:

- A new Article 3 has been added setting out a number of positive principles underpinning the law (in addition to those found in Article 4 of the original Bill, now Article 6 of the Amended Bill).
- New provisions have been added to Article 8, paragraph 3, which are designed to ensure that data, and particularly electronic data, are made available in useful formats for users.
- Article 10, paragraph 2 requires public bodies to enable requests to be made via their Internet sites.
- The rules on internal appeals have been clarified and enhanced (see below) (Articles 15-16).
- Pursuant to Article 30, paragraph 3, consent is no longer required for the disclosure of personal information where the information is needed for the defence of human rights.
- All states, the Federal District and all municipalities must create citizen's information bureaus (Article 44, in conjunction with Article 9).

## **2. Omissions and Setback**

While we welcome the positive changes introduced by the amendments to the Bill, we also note that the majority of our recommendations, including most of our key recommendations, have still not been addressed. There is, furthermore, one change introduced by the amendments which is unfortunate.

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The list of grounds for classifying information, set out in Article 22, includes one new ground, namely where disclosure of the information might “harm or put at risk scientific or technological research and development projects, as well as systems, properties, facilities or areas of strategic national interest.” This might appear superficially legitimate but it is not an exception found in other right to information laws. Furthermore, it is simply too broad and vague to serve as an exception to the right to access. There is no definition of what might be deemed to harm research or development projects, and the latter, in particular, is an almost impossibly broad term.

We do not repeat here all of the recommendations and analysis from the original Memorandum; those interested in a full assessment of the Bill can read that document. But below we reiterate some of the most important recommendations, along with a brief statement of why they are important.

### **Routine Disclosure:**

- Consideration should be given to providing for more extensive routine disclosure obligations, and for the levering up of these obligations over time.

Routine or proactive disclosure is one of the two key systems for disclosing information under a right to information law. Many modern laws provide for extensive proactive publication obligations, in recognition of the importance of this. The Bill does include important obligations in this area (see, in particular, Article 8 in the amended Bill), but they are modest compared to many recent laws.

### **Processing of Requests**

- Consideration should be given to providing for a central set of fees for standard charges, and for fee waivers for requests in the public interest.

If, as is the case under the Bill, each public body is left to determine their own fee structure for reproducing documents (see Article 2 in the amended Bill), this may lead to a patchwork of different fees across the public sector. Furthermore, the Bill does not require fees to be reasonable or based on commercial rates, so that some public bodies might charge excessive fees.

### **Regime of Exceptions:**

- The right to information law should override secrecy provisions in other laws.

An important purpose of a right to information law is to change pre-existing practices of secrecy and to replace them with a new regime of openness. If the new law leaves in place existing secrecy laws, its ability to effect this important change is seriously undermined. In almost every case, secrecy laws are not drafted in a manner that is consistent with the key principles underlying the right to information, instead being unduly focused on secrecy. It is thus important for the right to information law to override inconsistent provisions in other laws.

- The law should make it clear that requests for information will be assessed against the regime of exceptions set out in the law, and not whether or not a document is classified.

The Bill uses classification as the main system for exceptions instead of a list of (harm-based) exceptions. This is a structural problem with the Bill, since a system of classification, even if

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relatively tightly drawn and subject to regular review, does not address the need for the risk of harm to a protected interest to be assessed at the time a request for information is made. Often, timeliness of information is of the essence, and a commitment to review classification is of little use to an individual whose request has been rejected. It may be noted that even reserved information may be classified for up to five years, a considerable period of time, and that the controls over this level of classification are less stringent than for higher levels of classification.

- A public interest override should be introduced into the law, whereby information shall be disclosed in the public interest, even if it poses a risk of harm to a protected interest.

Better practice right to information laws provide for the disclosure of information in the public interest, even where it otherwise falls within the scope of the regime of exceptions. A common test is that information shall be disclosed where the public interest in such disclosure outweighs the risk of harm to the protected interest. The logic behind this is clear and closely aligned with the main idea behind right to information legislation, namely to disclose information in the public interest. The Bill does not include a public interest override.

#### **Appeals**

- The law should establish an independent administrative oversight body to decide on appeals from information requests.

The experience of other countries clearly demonstrates that laws which omit this level of appeal are far less successful in promoting openness than laws which do. Indeed, it could be said that the inclusion of such an appeals body is a key indicator of the potential success of a right to information law.

The amended Bill does at least enhance the system of internal appeals. Whereas in the original Bill, these were referred to but not explicitly provided for, Article 15 of the amended Bill places a clear obligation on public bodies to provide for an internal appeal to a “hierarchically superior” authority.

Interestingly, Article 16 obliges public bodies, where they reject an appeal, to forward their decision, along with reasons, to their respective Audit Offices which shall, if the information is not classified, immediately disclose it.

Where the information requested falls outside of the jurisdiction of the relevant Audit Office, and especially where it concerns human rights, the public body shall forward it to the Public Prosecutor’s Office. Article 16 also provides for judicial bodies and the Public Prosecutor’s Office to forward denied requests to the National Council of Justice and the National Council of Public Prosecution.

These additions do help address the need for an administrative level of appeal but they are problematical for a number of reasons. First, they do not constitute a proper appeal, as such. This would be something that could be invoked by the requester and that would involve a clear complaint and decision-making process, normally involving representations by the parties. Second, although its function was expanded significantly in the 1988 Constitution, the Audit Office is not an ideal body to perform this role. In particular, it does not have specialised access to information expertise. Third, the system as envisaged only covers the executive and judicial branches, leaving out the legislative.

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ARTICLE 19 thus reiterates its call for the Brazilian right to information law to put in place a proper independent appeals system for denials of access to information. This involves creating a new body, which implies costs and other effort, but the experience of countries all over the world demonstrates clearly that this effort is worth it.

### **Sanctions and Protections**

- The prohibition on disclosing confidential information should be removed and, instead, civil servants should be protected against sanction for disclosing information in good faith.

The Bill provides for sanctions for those who disclose confidential information. Better practice right to information laws instead provide protection to those who, in good faith, disclose information pursuant to the law. This is important to give civil servants the confidence to engage positively in implementing the law, and specifically to release information in response to requests.

**About ARTIGO 19 Brasil**

ARTIGO 19 Brasil was registered as a Brazilian NGO in 2008. Since 2007, the organisation's local office in São Paulo has been actively engaged in right to information work in Brazil, through the promotion of right to information legislation at the federal level and through work with civil society organisations and social movements, fostering awareness and activism in the area.

ARTIGO 19 Brasil maintains a leading thematic webportal on the right to information and related topics in the country – [www.LivreAcesso.Net](http://www.LivreAcesso.Net) – which provides general information and daily news on the right to information and provides an interactive section. In March, 2009 ARTIGO 19 launched Marco do Acesso – [www.marco.artigo19.org](http://www.marco.artigo19.org) – a user-friendly online database of Brazilian legal provisions on access to information in different pieces of legislation, aimed at enhancing access to information while a federal law on access to information does not exist.

ARTIGO 19 Brasil enjoys a special position within Brazilian civil society, for it operates as a local organisation – equipped with a team of Brazilian staff, aware of and daily engaged in the domestic socio-political context – while at the same time counting on well established international expertise on the right of access.

The organisation's Latin America Program was established in 2000 and, since that time, has worked on right to information campaigns in Argentina, Mexico, Peru and Paraguay. Right to information laws have since been passed in Mexico and Peru, and legislation is pending in Argentina and Paraguay, as well as Brazil.

**About the ARTICLE 19 Law Programme**

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation. These publications are available on the ARTICLE 19 website: <http://www.article19.org/publications/law/standard-setting.html>.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme's operates the Media Law Analysis Unit which publishes around 50 legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive legal reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at <http://www.article19.org/publications/law/legal-analyses.html>.

If you would like to discuss this Comment further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us at the address listed on the front cover or by e-mail to [law@article19.org](mailto:law@article19.org)