



CENTRE FOR LAW  
AND DEMOCRACY

*Maintaining Human Rights during  
Health Emergencies:*

**Brief on Standards Regarding the Right to  
Information**

**May 2020**

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## ***Executive Summary***

# ***Maintaining Human Rights during Health Emergencies: Brief on Standards Regarding the Right to Information***

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The COVID-19 pandemic has brought unprecedented changes to life for much of the world’s population and presented enormous challenges to governments, which are charged with both combating the disease and trying to minimise the negative economic fallout from it. In addition to placing heavy demands on at least some public authorities, the pandemic has imposed severe constraints on the operations of most public authorities.

Some governments have responded to the pandemic by placing limits on the right of individuals to access information held by public authorities, or the right to information. Government transparency, including via right to information laws, is more important during an emergency than ever, given both the incredibly important decisions being made, often very rapidly, by governments and the limited ability of traditional accountability institutions – such as parliament, the courts and horizontal oversight bodies – to hold public actors to account due to emergency operational constraints.

The right to information is recognised as a human right but it is not absolute. Instead, it may be restricted by law where this is necessary to protect the rights or reputations of others, or national security, public order, public health or public morals. During an emergency which “threatens the life of the nation”, the existence of which has been “officially proclaimed”, international law envisages the possibility of derogations from rights but only where they are “strictly required by the exigencies of the situation”.

In their responses to the COVID-19 pandemic, many States did not adopt legal measures to limit to the right to information, while other States did.<sup>1</sup> Authoritative international

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<sup>1</sup> These changes are being captured on the RTI Rating COVID-19 Tracker. Available at: <https://www.rti-rating.org/covid-19-tracker/>.

actors such as the UN Human Rights Committee, the Inter-American Commission on Human Rights and the special international mandates on freedom of expression at the UN, OSCE and OAS, have made it clear that freedom of expression and the right to information remain vitally important at this time and that any new limits which are justified by reference to the emergency should be very limited in nature.

Based on an analysis of international standards relating to both restrictions on the right to information and emergency derogations from rights, we propose the following key principles to govern State actions in the area of the right to information during public health emergencies:

- General public health emergency legislation should not allocate broad discretion to public authorities to limit the right to information through subordinate legal rules but should, instead, subject this to a requirement that any restriction is either “necessity” or “strictly required by the exigencies of the situation”, and is also quite clear regarding how the right to information is being limited.
- No blanket suspensions of the right to information, including blanket time limit extensions for responding to requests for information, should be imposed during emergencies. Instead, emergency provisions should establish the conditions for extending time limits on a case-by-case basis in response to individual requests.
- No limits should be imposed on requests for information related to the emergency and government responses to it, especially where the purpose of the request is to disseminate this information to the public. Better practice is to prioritise these requests, for example by responding more quickly than the law requires.
- Any limits on the right to information should be reviewed regularly and limited in duration to the period during which emergency conditions justify them.
- During a health emergency, necessary changes to the way in which information is recorded and stored should be introduced to ensure that there is no loss of continuity in the recording of government decisions and actions.
- Where an emergency continues for more than the short term, any limits to the right to information that were introduced early on should be lifted or downgraded as soon as possible.
- Governments and oversight bodies should communicate clearly about any changes to right to information rules and how individuals can make requests, and also how public authorities can continue to process requests efficiently taking into account emergency measures. Public authorities should also engage in extensive proactive disclosure relating to the emergency and allocate the necessary resources to respond robustly to requests for information related to it.

## ***Introduction***

The COVID-19 pandemic has brought unprecedented changes to the lives of ordinary people around the globe and placed challenging new demands on governments to respond to the public health risks and the severe economic repercussions. As governments make challenging and yet vitally important policy choices, citizens have an overriding interest in maintaining both accountability and public participation so as to ensure that both the decisions and their implementation are well tailored to meet the needs of the situation. These interests require strong transparency around background considerations and rationales for decisions taken, the nature of those decisions and the way they are rolled out in practice. This is in addition to the need for public authorities to provide individuals with detailed and reliable information about health risks, the spread of the disease and how to protect themselves and their loved ones.

In this context, the value of individuals being able to access government information, or the right to information (RTI), is especially high. Maintaining protection for this right, including through the nearly 130 right to information laws which are in place in countries around the world, is crucial during this time. This is particularly true given that many of the other systems for public accountability – including parliaments, courts, oversight bodies and even civil society organisations – are either not operating or are operating with diminished capacity.

With these considerations in mind, this Brief explores the implications of public health emergencies in terms of legal standards governing the right to information. Based on the COVID-19 pandemic in particular, it sets out standards for public health emergencies which require strong measures to address a highly contagious and severely impactful disease, along the lines of the social distancing and stay-at-home measures which have been adopted in the face of COVID-19. It outlines the human rights standards involved and the circumstances in which the right to information may be derogated from or limited. It then provides an overview of some of the types of measures governments have taken to suspend or limit established right to information rules. The Brief then assesses the appropriateness of these measures and sets out the key principles that should underpin government action when amendments to right to information obligations are being considered during public health emergencies.

## ***Right to Information as a Fundamental Human Right***

Freedom of expression is recognised as a fundamental human right in the major human rights treaties. This includes not only the right to share or impart information and ideas but also the right to seek and receive them.<sup>2</sup> Underpinning this is the core idea of promoting the free circulation of

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<sup>2</sup> Universal Declaration of Human Rights (UDHR), Article 19 (“seek, receive and impart”), available at: <https://www.un.org/en/universal-declaration-human-rights/>; International Covenant on Civil and Political Rights (ICCPR), Article 19 (“seek, receive and impart”), available at:

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information and idea in society. Originally thought to protect primarily the right of individuals to share information among themselves, since the 1990s an international consensus has emerged that freedom of expression also covers the right to access information held by public authorities or the right to information. A key milestone in this shift was the landmark decision of the Inter-American Court of Human Rights in 2006, *Claude Reyes v. Chile*, which held that Chile was obligated to provide access to public information.<sup>3</sup> This was followed by decisions of other international courts, such the European Court of Human Rights,<sup>4</sup> and regional standard-setting documents, such as the Declaration on Principles on Freedom of Expression in Africa.<sup>5</sup> In its 2011 General Comment No. 34, the United Nations (UN) Human Rights Committee also explicitly acknowledged that freedom of expression embraces the right to information.<sup>6</sup>

Giving effect to this right depends on having a clear legal framework for it and, as of today, 129 countries around the world have adopted right to information laws. The Centre for Law and Democracy and Access Info Europe have pioneered the RTI Rating,<sup>7</sup> which ranks the quality of legal frameworks for the right to information according to a set of 61 indicators derived from international human rights standards.

Strong right to information regimes set out two main means for disclosing information to the public. First, they require public authorities to disclose key information proactively, without waiting for a specific request for it. Second, they establish systems for the reactive disclosure of information, whereby individuals and organisations can make requests for specific information and governments are required to respond to those requests according to set rules.

This Brief focuses primarily on reactive disclosure regimes, how they have been adapted in light of the COVID-19 pandemic and the standards that should apply in such circumstances. This is not to suggest that proactive disclosure is not very important, including during this time. Proactive

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<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; African Charter on Human and Peoples' Rights (ACHPR), Article 9 ("the right to receive information . . . the right to express and disseminate his opinions"), available at: <https://www.achpr.org/legalinstruments/detail?id=49>; European Convention on Human Rights (ECHR), Article 10 ("to receive and impart"), available at: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf); and American Convention on Human Rights (ACHR), Article 13 ("seek, receive and impart"), available at: [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm).

<sup>3</sup> *Marcel Claude Reyes v. Chile*, 19 September 2006, Series C, No. 151. Available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_151\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf).

<sup>4</sup> *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application No. 37374/05. Available at: <http://hudoc.echr.coe.int/eng?i=001-92171>.

<sup>5</sup> This includes the 2002 version and the updated 2019 version. African Commission on Human and Peoples' Rights, *Declaration of Principles on the Freedom of Expression in Africa*, adopted at the 32<sup>nd</sup> Ordinary Session, 17-23 October 2002, available at: <http://www.achpr.org/sessions/32nd/resolutions/62>; *Declaration of Principles on Freedom of Expression and Access to Information in Africa*, adopted at the 65<sup>th</sup> Ordinary Session, 21 October – 10 November 2019, available at: <https://www.achpr.org/legalinstruments/detail?id=69>.

<sup>6</sup> UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/G/GC/34, para. 18. Available at: <http://undocs.org/ccpr/c/gc/34>.

<sup>7</sup> See [www.rti-rating.org](http://www.rti-rating.org).

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disclosure of information related to the crisis, including information about the virus and its symptoms, the number of cases and deaths, testing procedures and government responses are all crucial to enable people to make decisions about how to protect their own health and to hold governments accountable for protecting the public's health. However, there has already been significant discussion around the types of information governments should be releasing at this time.<sup>8</sup> Furthermore, the main changes governments have made to right to information regimes is in relation to the processing of requests for information. These are monitored and reflected on the COVID-19 Tracker,<sup>9</sup> which we are maintaining on the RTI Rating website.

## ***Human Rights During Times of Emergencies***

Under international human rights law, many human rights are not absolute. There are two aspects to this. First, some rights, including freedom of expression, may be limited even during normal times to protect overriding public or private interests. Second, during states of emergency, States may derogate from certain of their human rights obligations, again including freedom of expression, due to the overwhelming needs of responding to the emergency. Clear standards apply to both of these systems for limiting rights.

### **Restrictions on Freedom of Expression**

Under international law, freedom of expression is not an absolute right. This is in recognition that certain expressive actions can cause harm, for example to the reputation of individuals (addressed by defamation laws) or privacy (sometimes addressed by privacy and/or data protection laws). The ICCPR outlines a specific three-part test for restrictions on freedom of expression which is broadly similar to analogous requirements found in regional treaties and, as such, reflects a common global articulation of the standards for this. The ICCPR test is as follows:

- 1) Any restriction must be provided by law
- 2) Any restriction must seek to protect a legitimate interest set out in international law, which are specifically listed as the rights or reputations of others, national security, public order, public health or public morals.
- 3) Any restriction must be necessary to protect that interest, which incorporates a proportionality requirement.

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<sup>8</sup> See, for example, Institute for Development of Freedom of Information, Proactive Publication of Information by Governments during Covid-19 Crisis, April 2020. Available at: [https://idfi.ge/en/guidelines\\_on\\_the\\_proactive\\_publication\\_of\\_information\\_by\\_governments\\_during\\_the\\_covid-19\\_crisis\\_and\\_on\\_covid-19\\_related\\_public\\_procurement](https://idfi.ge/en/guidelines_on_the_proactive_publication_of_information_by_governments_during_the_covid-19_crisis_and_on_covid-19_related_public_procurement).

<sup>9</sup> The Tracker only maps changes to the system for reactive disclosure, in line with the main RTI Rating. See <https://www.rti-rating.org/covid-19-tracker/>.

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The first requirement of the test, that the restriction be provided by law, means that there must be a basis in domestic law for any restriction on the right to freedom of expression. The UN Human Rights Committee has indicated that, “a norm, to be characterised as a ‘law’, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly”.<sup>10</sup> Any law containing a restriction must therefore be accessible and give clear direction as to the nature of the restriction. Furthermore, a generic provision delegating the power to executive or other authorities to restrict freedom of expression at their discretion will not be legitimate. However, legislatures may delegate restrictive powers provided that they do not thereby allocate “unfettered discretion” to others to restrict rights.<sup>11</sup>

During an emergency, these standards would likely permit emergency orders restricting rights as long as the power to adopt such orders was clearly based on duly enacted legislation which: a) restricted the exercise of this power to what was reasonably necessary, taking into account the overall conditions during which the order was adopted, to address the conditions creating the emergency; and b) allowed for court oversight of the exercise of this power.<sup>12</sup>

Public health is explicitly listed as one of the legitimate grounds for restricting freedom of expression in the ICCPR. In addition, protection of the rights of others includes the right to health. The International Covenant on Economic, Social and Cultural Rights requires States to take progressive steps to ensure the rights of everyone to the attainment of physical and mental health, including via the “prevention, treatment and control of epidemic” diseases. States must also ensure the right of everyone to “safe and healthy working conditions”.<sup>13</sup>

Importantly, any restrictions on expression, including to protect health, must be necessary, which includes a proportionality element. Courts have outlined a number of key principles when assessing the necessity of restrictions. First, restrictions should be carefully tailored to the needs of the situation. This means, among other things, that overbroad restrictions are not appropriate and that if there are alternative means of protecting the interest (public health) which are less restrictive of freedom of expression (and the right to information), these alternatives should be pursued instead.<sup>14</sup> Second, in considering the proportionality of a restriction, the contribution of the right to promoting public health should be weighed against the benefits of the restriction in terms of protecting health and, only where the latter clearly outweighs the former, will the restriction pass muster under this part of the test. In other words, when considering restrictions on the right to information during a pandemic, the authorities should take into account the potential public health benefits of transparency as well as the administrative and other costs of providing information.

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<sup>10</sup> UN Human Rights Committee, General Comment No. 34, note 6, para. 25.

<sup>11</sup> *Ibid.*, para. 25.

<sup>12</sup> *Ibid.*

<sup>13</sup> International Covenant on Economic, Social and Cultural Rights, Articles 7 and 12. Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

<sup>14</sup> UN Human Rights Committee, General Comment No. 34, note 6, paras. 33-34.

## Derogations from Rights During Emergencies

Article 4 of the ICCPR, dealing with emergencies, only permits such derogations from rights as are “strictly required by the exigencies of the situation” during a public emergency which “threatens the life of the nation” and the existence of which has been “officially proclaimed”. In addition, when derogating from rights, States must “immediately inform” other States by notifying the UN Secretary-General of which obligations are to be derogated from and the reasons for that derogation. Any derogations cannot be inconsistent with States’ other international law obligations, cannot involve discrimination solely on the basis of race, colour, sex, language, religion or social origin, and may not involve certain “non-derogable” rights, such as the rights to life and to be free from slavery. The European and American Conventions on Human Rights permit derogations under similar conditions.<sup>15</sup>

A first issue that arises here is whether and if so under what circumstances does a public health emergency “threaten the life of a nation” and hence justify emergency derogations from rights. On the one hand, “not every disturbance or catastrophe qualifies as a public emergency”.<sup>16</sup> However, international standards suggest that an emergency may be present if it threatens the “physical integrity of the population” or “the existence or basic functioning of institutions indispensable to protecting human rights”.<sup>17</sup> A global pandemic could meet these requirements. In a recent statement on derogations based on COVID-19, the UN Human Rights Committee stated: “States parties confronting the threat of widespread contagion may resort, on a temporary basis, to exceptional emergency powers and invoke their right of derogation ... provided this is required to protect the life of the nation”.<sup>18</sup> Whether a threat is sufficiently serious in any given country must be assessed at the time and in light of all of the circumstances but the threat posed by COVID-19 in many jurisdictions would appear to justify at least some derogations from international human rights.

A second issue is what constitutes proper notice to the UN Secretary General. In terms of how quickly States must submit a notification, the ICCPR requires it to be given “immediately”. Given the speed of communication in the modern era, it is hard to imagine interpreting this to mean more than a few days, even where normal government functions are disrupted seriously due to an

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<sup>15</sup> ECHR, note 2, Article 15 and ACHR, note 2, Article 27. In contrast, the African Charter on Human and Peoples’ Rights does not have a derogation provision.

<sup>16</sup> UN Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), 31 August 2001, para. 3. Available at: <https://undocs.org/CCPR/C/21/Rev.1/Add.11>.

<sup>17</sup> Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 1 July 1984, Principle 39. Available at: <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>.

<sup>18</sup> Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic, 24 April 2020, para. 2. Available at: <https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatement.docx>.



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emergency.<sup>19</sup> Furthermore, the ICCPR requires States to identify those provisions from which they are derogating and the reasons for this.

In practice, as of 22 May 2020, 15 States had notified the UN Secretary General of COVID-19-related states of emergencies and related derogations under the ICCPR, namely Armenia, Chile, Colombia, Ecuador, El Salvador, Estonia, Georgia, Guatemala, Kyrgyzstan, Latvia, Moldova, Peru, Romania, Palestine and San Marino.<sup>20</sup> Of these, only one – namely Colombia – included Article 19, with its freedom of expression guarantees, on the list of rights derogated from during the emergency. As a result, under international law, only Colombia could claim a right to derogate from the right to information.<sup>21</sup>

Third, any derogations must be temporary in nature. Specifically, they should come to an end as soon as the conditions which justified them – the specific requirements of the emergency which necessitated the derogation – no longer apply.<sup>22</sup>

Fourth, and most importantly, the mere existence of an emergency does not necessarily justify a derogation from the right to freedom of expression, including the right to information. Derogations must be “strictly required by the exigencies of the situation”. This has implications concerning “the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to”.<sup>23</sup> The UN Human Rights Committee made it clear that this incorporates a proportionality element, just as this is incorporated into the necessity part of the test for restrictions on freedom of expression, stating: “[T]he obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality

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<sup>19</sup> The European Court of Human Rights and European Commission of Human Rights have accepted a two-week delay but said that four months was too long. See *Lawless v. Ireland*, Application No. 332/57, 1 July 1961 (European Court of Human Rights) and *Greece v. United Kingdom*, Application No. 176/56, 2 June 1956 (European Commission of Human Rights). However, the European Convention does not include the “immediate” language contained in the ICCPR. See a discussion of this issue at Kustrim Istrefi and Isabel Humburg, “To Notify or Not to Notify: Derogations from Human Rights Treaties”, *Opinio Juris*, 18 April 2020. Available at: <http://opiniojuris.org/2020/04/18/to-notify-or-not-to-notify-derogations-from-human-rights-treaties/>.

<sup>20</sup> Depository Notifications (CNs) by the Secretary-General, United Nations Treaty Collection, search conducted on 25 May 2020. Available at: <https://treaties.un.org/Pages/CNs.aspx?cnTab=tab2&clang=en>.

<sup>21</sup> As of 25 May 2020, only 10 countries had provided notice under the European Convention on Human Rights. See Council of Europe Treaty Office, Reservations and Declarations for Treaty No. 005 – Convention on the Protection of Human Rights and Fundamental Freedoms. Available at: [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p\\_auth=oC00wpDO](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=oC00wpDO). Another 13 countries had provided notice under the American Convention on Human Rights. See OAS, Inter-American Treaties, Recent Suspensions of Guarantees regarding Multilateral Treaties. Available at: [http://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_suspension\\_guarantees.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_suspension_guarantees.asp). None of these expressly reference the freedom of expression protections in the respective regional treaties.

<sup>22</sup> General Comment No. 29, States of Emergency (Article 4), note 16, para. 2.

<sup>23</sup> *Ibid.*, para. 4.

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which is common to derogation and limitation powers.”<sup>24</sup> As such, the benefits of any derogation must be weighed against the harm done to the right which is being limited.

Fifth, the requirement that derogations must be “strictly required by the exigencies of the situation” does not in any way waive the rule of law.<sup>25</sup> This at least means that a system of remedies for breaches must be provided for, as required by Article 2(3) of the ICCPR.<sup>26</sup> But, if it is to have any direct relevance, it must also mean that derogations must themselves meet certain conditions of legality. Procedurally, derogations must at least formally be authorised in the sense that they are legally valid under the national legal system within which they were adopted. International standards may also have some implications in terms of which authorities may adopt derogations (so that delegating powers normally exercised by the legislature would be valid only where this was also “strictly required by the exigencies of the situation”). And those standards also have implications for the legal quality of derogations, for example requiring them to be clear regarding exactly which rights are being restricted and how.

### Emerging Norms Regarding the Right to Information

The unprecedented nature of the COVID-19 pandemic in recent history means that human rights law has not had the opportunity to develop clear standards around either derogations from or restrictions (referred to herein, collectively, as limits) on human rights obligations during health emergencies, let alone specific standards regarding the right to information. However, a number of international authorities have made relevant statements on this issue.

A number of statements have explicitly affirmed the general importance of freedom of expression and the right to information during the crisis. The UN, Organization for Security and Co-operation in Europe (OSCE) and Organization of American States (OAS) special international mandates on freedom of expression issued a Joint Statement on 19 March 2020 which explicitly affirmed the importance of the right to information and called on governments to “robustly implement their freedom of information laws to ensure that all individuals, especially journalists, have access to information.”<sup>27</sup> In a special report on freedom of expression during pandemics, the UN Special Rapporteur on Freedom of Expression indicated that, due to the crucial role of freedom of expression and information in supporting efforts to address a public health crisis, States should

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<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, para. 16.

<sup>26</sup> *Ibid.*, para. 14.

<sup>27</sup> UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media and IACHR Special Rapporteur for Freedom of Expression, Joint Statement, COVID-19: Governments must promote and protect access to and free flow of information during pandemic, 19 March 2020. Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25729>.

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avoid derogating from it.<sup>28</sup> In its statement on COVID-19 derogations, the UN Human Rights Committee stressed that freedom of expression and the right to information are crucial safeguards for ensuring that States comply with their human rights obligations.<sup>29</sup>

Some statements have also addressed the issue of derogations from the right to information. The Council of Europe, in a “toolkit” for Member States on respecting human rights during the COVID-19 crisis, noted that even during the COVID-19 pandemic, access to official information should be managed in accordance with the case law of the European Court of Human Rights, and that “any restriction on access to official information must be exceptional and proportionate to the aim of protecting public health.”<sup>30</sup> Once again we see the reference to the need for proportionality.

In his report on freedom of expression and pandemics, the UN Special Rapporteur on Freedom of Expression, after discussing the importance of the right to information generally and the need to communicate information related to the health crisis proactively, made some comments specifically about limiting responses to requests for information:

It may be expected that, during the pandemic, some Governments may face resource constraints that interfere with their capacity to carry out their obligations to provide access to public information. To a certain extent, temporary disruptions may be expected and will generally not constitute a violation of article 19 of the Covenant, given the potential inability of staff to meet in person or for hearings to be held. However, such disruptions should only take place when necessary for public health and should not be an excuse for failing to carry out activities for which there is no limited-capacity justification. Indeed, given the likelihood that social distancing measures may continue for some time, or may recur, Governments should be developing approaches to access to information that enable them to continue their programmes during the crisis.<sup>31</sup>

The Inter-American Commission on Human Rights (IACHR) set out several principles governing the right to information in Resolution 1/2020 of April 2020 on human rights during the pandemic, as follows:

- States should not set general limits on the right to information based on national security or public order grounds.
- Priority should be given to requests for information related to the public health emergency.
- States should proactively report in detail on the “impact of the pandemic and emergency spending”, and in a format which is open and accessible to vulnerable groups.

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<sup>28</sup> UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Report on Disease pandemics and the freedom of opinion and expression, 23 April 2020, para. 17. Available at: [https://freedex.org/wp-content/blogs.dir/2015/files/2020/04/A\\_HRC\\_44\\_49\\_AdvanceEditedVersion.pdf](https://freedex.org/wp-content/blogs.dir/2015/files/2020/04/A_HRC_44_49_AdvanceEditedVersion.pdf).

<sup>29</sup> Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic, note 18, para. 2(f).

<sup>30</sup> Council of Europe, Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: a toolkit for member states, 7 April 2020, Information Documents SG/Inf(2020)11, para. 3.3. Available at: <https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40>.

<sup>31</sup> UN Special Rapporteur on freedom of expression, note 28, para. 21.

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- If deadlines “for requests for information on matters not linked to the pandemic” must be extended, governments should explain the denial, set a time period for responding to the request and permit appeals against such decisions.<sup>32</sup>

This makes it clear that the IACHR is calling for priority to be given both to proactive disclosure relating to the pandemic and to requests for information relating to it. Indeed, the IACHR does not seem to envisage any possibility to delay responses to requests relating to the pandemic since its statement about extensions specifically excludes that sort of request.

Importantly, the Human Rights Committee noted that, for rights like freedom of expression, which already incorporate the possibility of restrictions, where public health goals can be met in accordance with the regime for restrictions, States should not adopt emergency derogations from those rights.<sup>33</sup> For a derogation to be warranted, “the exigencies of the situation” would need to strictly require a State to breach at least one of the parts of the three-part test to be able to respond to an emergency need (otherwise, it could address the situation while continuing to respect the three-part test). The analysis below suggests that this will rarely be the case, taking into account the context-responsive nature of the three-part test for restrictions on freedom of expression outside of emergencies. It would also seem to be the case that, even if breach of one of the parts of the test was strictly required, engaging the regime of derogations, those derogations would still need to respect the other parts of the test insofar as this were possible.

The first part of the test sets standards for the nature and clarity of laws restricting the right to information. This is perhaps the one part of the test that could arguably legitimately need to be derogated from, where the situation really did demand this, during an emergency, for example due to the difficulty of passing legislation and/or the urgent need to pass legal rules. In practice, as the overview below shows, limits on the right to information during COVID have often been based on quite general emergency laws which grant authorities a wide measure of discretion to take action, including to limit rights. These sorts of enactments would likely not pass muster under this part of the test (i.e. outside of an emergency) due to the fact that they grant unduly broad discretion to authorities to limit the right to information. They might be justified as derogations during an emergency, depending on the circumstances, but only insofar as relaxing the normal “provided by law” requirement was itself “strictly required by the exigencies of the situation”. Even in this case, however, the authorising laws should place conditions on the substance of any derogations, specifically that they are themselves “strictly required by the exigencies of the situation”.

Furthermore, even an emergency would not appear to justify any relaxation of the rules in terms of the requirement of clarity regarding any subordinate legal rules which are used to impose actual restrictions on rights. In practice, during the COVID-19 pandemic, while many of the limiting

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<sup>32</sup> Inter-American Commission on Human Rights, Resolution No. 1/2020, Pandemic and Human Rights in the Americas, 10 April 2020, para. 32. Available at: <http://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf>.

<sup>33</sup> Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic, note 18, para. 2(c).

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measures do not seem to be justified by the situation, they have, for the most part, been adequately clear inasmuch as they either extend deadlines or suspend the right altogether.

The second part of the test requires restrictions to serve one of the legitimate grounds which is listed. Inasmuch as this clearly covers health, both explicitly and implicitly as part of the right to health, there does not appear to be any reason to claim a derogation based on the impossibility of respecting this part of the test at least during a health emergency (since any derogation would, by definition, aim to promote health). Beyond this, any derogation, to be “strictly required”, would need to serve an important public interest. The interests listed in Article 19(3) of the ICCPR are those that were deemed to be important enough potentially to override freedom of expression. It is unclear whether an emergency context could ever change this (i.e. throw up an additional interest that required a limit on freedom of expression). Any limit during the other common emergency situation, namely armed conflict, would serve the legitimate aim of national security (or at least public order). As such, it is unclear whether a derogation could ever be based on a failure to meet this part of the test for restrictions.

The third part of the test requires restrictions to be “necessary”. It is not clear that this is a higher standard than the “strictly required” one which applies during emergencies. It incorporates a proportionality requirement, like the “strictly required” standard for derogations. Furthermore, the necessity assessment takes into account all of the circumstances which are relevant at the time a restriction is applied. Consequently, this part of the test has the flexibility both to respond to special needs during an emergency and to be limited in duration to the period of an emergency. As such, there would not appear to be much scope, if any, for going beyond the necessity requirement when limiting freedom of expression in response to an emergency.

### ***State Practice: Right to Information During COVID-19***

This section of the Brief outlines the main ways States have (or have not) altered their right to information systems in response to the COVID-19 pandemic. It is informed by the COVID-19 Tracker which has been added to the RTI Rating (see above).<sup>34</sup> The first sub-section examines the kind of changes which have been introduced while the second sub-section reviews the various legal means used to enact these changes.

#### **Main Alterations to Right to Information Systems**

As a preliminary matter, while this sub-section focuses on legal alterations to ‘normal’ right to information rules, it should be noted that many countries have not introduced any such changes.

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<sup>34</sup> The Tracker is not comprehensive in mapping all legal changes to RTI systems in light of the COVID-19 pandemic but we believe we have captured a significant cross-section of these changes.

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Indeed, oversight bodies in several countries have explicitly affirmed that the legal obligations governing the right to information remain in force. However, a number of these statements have also indicated that these bodies will interpret the relevant law in light of the ongoing crisis. Some examples of such statements by oversight bodies include:

- The Office of the Australian Information Commissioner suggested measures which public authorities might use to help them meet statutory deadlines during the COVID-19 pandemic. It also noted that it will decide on requests to extend the time limits for processing requests, part of their normal operation, on a case-by-case basis.<sup>35</sup>
- The Canadian Information Commissioner issued a statement confirming that it would continue to process complaints. The statement also noted that the Commissioner did not have the authority to extend deadlines for responding to requests but that the office would be “as flexible as reasonably possible” about this.<sup>36</sup>
- New Zealand’s Chief Ombudsman, the entity responsible for right to information oversight, issued a statement noting that his Office would take “extenuating circumstances into account when deciding how to deal with complaints about delays”. He noted that public authorities should keep the public informed about arrangements for dealing with information requests. The statement also noted that the office would prioritise complaints about information related to public health and safety or which would impact an individual’s financial, housing or family circumstances.<sup>37</sup>

**Example: Ireland**

Ireland’s Freedom of Information portal provides detailed guidance to public authorities on how to continue to meet right to information obligations while noting that the law remains in force and that no legal changes to deadlines have been adopted. This represents a better practice approach by offering assistance to aid public authorities in continuing to meet their legal obligations. For example, the statement:

- Urges authorities to disclose proactively information which is likely to be requested, such as about emergency measures, so as to reduce the burden of responding to requests.
- Suggests that, if postal mail cannot be collected, authorities should advise requesters to use electronic channels, including by posting this information on their websites.

<sup>35</sup> Office of the Australian Information Commissioner, How can agencies meet statutory timeframes during the COVID-19 pandemic?, 18 March 2020. Available at: <https://www.oaic.gov.au/freedom-of-information/frequently-asked-questions/how-can-agencies-meet-statutory-timeframes-during-the-covid-19-pandemic/>.

<sup>36</sup> Information Commissioner of Canada, Statement from the Office of the Information Commissioner on the Impact of the COVID-19 Pandemic, 20 March 2020. Available at: <https://www.oic-ci.gc.ca/en/resources/news-releases/statement-office-information-commissioner-impact-covid-19-pandemic>.

<sup>37</sup> Ombudsman New Zealand, Chief Ombudsman’s Statement on Official Information Response Times during the COVID-19, 24 March 2020. Available at: <https://www.ombudsman.parliament.nz/news/chief-ombudsmans-statement-official-information-response-times-during-covid-19-emergency>.

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- Suggests measures authorities can take to communicate and work collaboratively with requesters to address COVID-19-related information challenges.
- Provides guidance on making redactions and disclosing records while working remotely.
- Reminds authorities struggling to process requests that they can reach out to the FOI Central Policy Unit or contact the Information Commissioner for advice.

Source: <https://foi.gov.ie/continuity-of-foi-services/> (as updated on 29 April 2020)

In those countries where formal changes have been made to normal right to information rules, the predominant approach has been to extend or suspend time limits. In some cases, this relates to the processing of requests while in others it focuses on the processing of appeals by oversight bodies. A more tailored approach is to grant increased discretion to suspend or extend timeframes, ideally based on an appropriate justification. Scotland's Coronavirus Act permitted the Information Commissioner to decide that an authority was not in breach of the law if an apparent lack of compliance was due to COVID-19 and permitted individual Ministers to extend deadlines (in consultation with the Commissioner).<sup>38</sup> However, the rules on deadline extensions have since been repealed and an additional requirement has been placed on the Information Commissioner to consider the "public interest" when deciding whether a public authority's COVID-19 related lack of compliance is permissible.<sup>39</sup>

Different approaches have been taken in terms of setting extended time limits. Some States have simply set new limits (such as 30 instead of 20 days). Others have multiplied existing timeframes; Romania, for example, doubled the deadlines in the right to information law.<sup>40</sup> Other countries have pegged time limits to the end of the state of emergency. Serbia and France permit time limits to run until 30 days or one month, respectively, from the end of the state of emergency.<sup>41</sup>

Some States have gone further and suspended right to information obligations, sometimes in relation to requests and sometimes for oversight bodies. As an example of the former, the Honduran right to information oversight body issued a statement to the effect that while requests

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<sup>38</sup> Coronavirus (Scotland) Act, Schedule 6. Available at: <https://www.legislation.gov.uk/asp/2020/7/contents/enacted>.

<sup>39</sup> Coronavirus (Scotland) (No. 2) Act, 20 May 2020, Schedule 6. A version of the bill as it was passed is available at: <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/coronavirus-scotland-no2-bill/stage-3/coronavirus-scotland-no2-bill-as-passed.pdf>.

<sup>40</sup> President of Romania, Decree No. 195 of 16 March 2020. Available at: <http://legislatie.just.ro/Public/DetaliuDocument/223831> (in Romanian; described in English at <https://www.rti-rating.org/covid-19-tracker/>).

<sup>41</sup> Ivana Nikolic, *et al.*, Central and Eastern Europe Freedom of Information Rights 'Postponed', Balkan Insight, 6 April 2020, available at: <https://balkaninsight.com/2020/04/06/central-and-eastern-europe-freedom-of-information-rights-postponed/>; and France, Ordonnance 2020-306 of 25 March 2020, available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041755644> (in French).

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could still be submitted through the electronic portal, they would not be processed until staff returned to work.<sup>42</sup> As an example of the latter, all procedures and hearings at El Salvador's Access to Information Agency were suspended.<sup>43</sup> In the United Kingdom, appeals from the decisions of the Information Commissioner, which are handled by a lower-level tribunal, were stayed as of 1 April 2020.<sup>44</sup> Suspensions of this sort have a broader impact than merely extending time limits. For one thing, in some cases they effectively represent an undefined extension of time limits. In addition, they may create a backlog once processing resumes again.

A more tailored approach, taken in a number of countries, is just to tweak the rules, as necessary, to accommodate the remote working or other alternative working arrangements that have been introduced in many countries. Colombia and Scotland, for example, have permitted electronic notice in right to information matters.<sup>45</sup> Some countries have made changes so as to enable video or electronic hearings, in some cases just for priority matters. India's Central Information Commission issued an order stating that hearings would be deferred while the office was closed but that urgent hearings would proceed via audio conference.<sup>46</sup> The US state of Michigan has adapted its time limits for the physical processing of requests, starting time limits when an employee actually physically accesses a request (i.e. takes it from an envelope or removes it from a fax machine).<sup>47</sup> Hungary, on the other hand, has limited the format in which requests may be lodged, issuing a Decree ruling out the in-person or oral submission of requests.<sup>48</sup> In Honduras, this is framed in the reverse, with electronic requests being authorised despite a general suspension of the right to information.<sup>49</sup> A number of other information commissions and public authorities have issued statements clarifying that electronic portals or systems are still receiving requests.

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<sup>42</sup> Honduras, Institute of Access to Public Information (IAIP), Communication, 29 March 2020. Available at: <https://pbs.twimg.com/media/EUVCoAjWsAAv4gX?format=jpg&name=medium> (in Spanish).

<sup>43</sup> As reported to CLD and documented at RTI Rating, COVID-19 Tracker. Available at: <https://www.rti-rating.org/covid-19-tracker>.

<sup>44</sup> United Kingdom, First-Tier Tribunal General Regulatory Chamber (Information Rights), Directions for a General Stay, 1 April 2020. Available at: <https://www.11kbw.com/content/uploads/ICO-stay-1-April-2020.pdf>.

<sup>45</sup> In Colombia's case, this is a general administrative provision which also applies to RTI proceedings. Decreto 491 de 2020, available at: <http://www.suin-juriscal.gov.co/viewDocument.asp?ruta=Decretos/30039011> (in Spanish); Coronavirus (Scotland) Act 2020, Schedule 6, available at: <https://www.legislation.gov.uk/asp/2020/7/contents/enacted>.

<sup>46</sup> India, Central Information Commission, Order, 25 March 2020. Available at: <https://cic.gov.in/sites/default/files/CICorder.pdf>.

<sup>47</sup> State of Michigan, Executive Order No. 2020-38, 5 April 2020. Available at: [https://content.govdelivery.com/attachments/MIEOG/2020/04/05/file\\_attachments/1419787/EO%202020-38.pdf](https://content.govdelivery.com/attachments/MIEOG/2020/04/05/file_attachments/1419787/EO%202020-38.pdf). A first level court has upheld this rule. See <https://www.mlive.com/public-interest/2020/05/judge-sides-with-whitmer-in-lawsuit-over-relaxation-of-foia-requirements-during-coronavirus-outbreak.html>.

<sup>48</sup> Decree No. 179/2020 (available in Hungarian at <https://magyarkozlony.hu/hivatalos-lapok/8kGGfNvTeu9K9vNICUoB5eab3bea8b653/dokumentumok/008772a9660e8ff51e7dd1f3d39ec056853ab26c/1etoltes>), as described in English at Dóra Petrányi, Katalin Horváth and Márton Domokos, Hungarian Government Overwrites the GDPR in its COVID-19 State-of-Emergency Decree, Lexology, 7 May 2020. Available at: <https://www.lexology.com/library/detail.aspx?g=e8a01f55-caf3-43c5-b07e-c73fb41eb675>.

<sup>49</sup> Honduras, Institute of Access to Public Information (IAIP), Communication, 29 March 2020. Available at: <https://pbs.twimg.com/media/EUVCoAjWsAAv4gX?format=jpg&name=medium> (in Spanish).



Even better tailoring of measures is reflected in countries which have adopted an “exception to the exception” approach, with certain kinds of requests being prioritised. For example, Italy’s suspension of right to information requests included an exception for requests which are urgent and cannot be postponed. A later statement indicated that requests for information related to the pandemic would not be included in the suspension.<sup>50</sup> This aligns with the call by the IACHR to prioritise this sort of request.<sup>51</sup>

### **Example: Brazil**

On 23 March 2020, Brazil passed a “provisional measure”, a temporary executive decree which may be issued in emergencies but which expires after 60 days, renewable once, if Congress does not convert it into a law.<sup>52</sup> Provisional Measure 928 of 2020 amends the normal rules governing the right to information in several key ways:

- Requests related to the public health emergency will be prioritised.
- Any requests which are lodged with public authorities which are subject to remote working where either the request is dependent on in-person answers or the public authority is primarily involved in the emergency response are permanently suspended, although requesters may resubmit them starting from ten days after the end of the emergency period. There is also no right of appeal in relation to these requests.
- Requests may only be submitted via the Internet and in-person assistance to requesters is suspended.
- Appeals against a denial will not be recognised.<sup>53</sup>

Some of these rules are unclear or contradictory. It is not clear exactly how requests related to the public health emergency will be prioritised and the suspension of requests where public authorities are involved in emergency response would appear to seriously undermine this rule. A further problem is the lack of any definition of which public authorities qualify as being primarily involved in emergency response.

Other rules restrict the right to information much further than is necessary. For example, requiring requesters to resubmit suspended requests after the emergency places an undue and

<sup>50</sup> Italy, Decree-Law 17 March 2020, n. 18, Article 67(3). Available at: <https://www.gazzettaufficiale.it/eli/id/2020/03/17/20G00034/sg> (in Italian); Ministry of Public Administration, Comunicato del Dipartimento della Funzione Pubblica, 9 April 2020, available at: <http://www.funzionepubblica.gov.it/articolo/dipartimento/27-03-2020/comunicato> (in Italian; described in English at <https://www.rti-rating.org/covid-19-tracker/>).

<sup>51</sup> See note 32.

<sup>52</sup> Constitution of Brazil, Article 62. English translation available at: [https://www.constituteproject.org/constitution/Brazil\\_2017.pdf?lang=en](https://www.constituteproject.org/constitution/Brazil_2017.pdf?lang=en).

<sup>53</sup> Brazil, Provisional Measure 928, of 23 March 2020. Available at: [http://www.planalto.gov.br/ccivil\\_03/\\_ato2019-2022/2020/Mpv/mpv928.htm](http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/Mpv/mpv928.htm) (in Portuguese).

inappropriate burden on requesters. It would be preferable to maintain the requests on file and to reactivate them automatically once the emergency is over.

However, the Brazilian Supreme Federal Court issued a preliminary injunction suspending enforcement of the Provisional Measure on the basis that the Constitution recognises openness as an essential attribute of public administration which applies unless, exceptionally, the public interest dictates otherwise. The Provisional Measure risks inverting the exception and making it the rule.<sup>54</sup> At the time of writing, a decision of a full panel of the Supreme Court was pending.

### Entities Responsible for Altering Right to Information Obligations

During the COVID-19 pandemic, changes to right to information laws have been introduced in different ways. Some emergency laws or decrees explicitly amend right to information rules. The Coronavirus (Scotland) Act, for example, set out a number of explicit changes to the right to information law.<sup>55</sup> Italy's Decree-Law No. 18/2020, which is also a general COVID-19 emergency response, also specifically suspends right to information requests.<sup>56</sup>

In other cases, emergency laws or decrees put in place general rules which cover the right to information even though it is not explicitly mentioned. For example, El Salvador issued an emergency decree suspending most administrative procedures, apparently including those applicable to the Access to Information Agency.<sup>57</sup> In Honduras, the executive decree declaring a state of emergency restricted a number of rights, including freedom of expression, and ordered the suspension of all public sector work.<sup>58</sup> As a result, the Honduran information oversight body indicated that it would cease operations.<sup>59</sup> Spain's Royal Decree 463/2020, establishing a state of

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<sup>54</sup> Medida Cautelar Na Ação Direta De Inconstitucionalidade 6.351 Distrito Federal (Precautionary Measure in the Direct Action for Unconstitutionality), Decision, 26 March 2020. Available in Portuguese at: <https://www.conjur.com.br/dl/moraes-concede-liminar-suspende.pdf>.

<sup>55</sup> Coronavirus (Scotland) Act 2020, Schedule 6, available at: <https://www.legislation.gov.uk/asp/2020/7/contents/enacted>.

<sup>56</sup> Italy, Decree-Law 17 March 2020, n. 18, Article 67(3). Available at: <https://www.gazzettaufficiale.it/eli/id/2020/03/17/20G00034/sg> (in Italian).

<sup>57</sup> As reported to CLD and documented at RTI Rating, COVID-19 Tracker. Available at: <https://www.rti-rating.org/covid-19-tracker>.

<sup>58</sup> Honduras, Executive Decree No. PCM-02-2020, 15 March 2020. Available at: <https://www.presidencia.gob.hn/index.php/sala-de-prensa/7016-decreto-ejecutivo-numero-pcm-021-2020> (in Spanish).

<sup>59</sup> Honduras, Institute of Access to Public Information (IAIP), Communication, 29 March 2020. Available at: <https://pbs.twimg.com/media/EUVCoAjWsAAv4gX?format=jpg&name=medium> (in Spanish).

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emergency, suspended public sector procedural deadlines, leading the information oversight body to announce that processing of complaints might be delayed.<sup>60</sup>

These general suspensions of normal administrative procedures can lead to confusion over whether and to what extent the measures apply to the right to information. In Bulgaria, for example, the relevant emergency provisions did not refer directly to the right to information but one authority, the National Health Insurance Fund, extended the timelines for responding to requests for information until civil society objected, on the basis that there was no legal ground for this.<sup>61</sup> In North Macedonia, civil society organisations were reportedly concerned that the Law on Public and Administrative Procedures, which froze administrative procedures generally during the emergency, would be applied to requests for information. However, ministries did not indicate that they would process requests differently, leading to some confusion.

In some cases, information commissions have issued their own rules on deadlines for responding to requests. For example, Mexico's National Institute for Transparency (INAI, by its Spanish acronym), issued a resolution suspending the deadline for responding to information requests.<sup>62</sup> The legal authority for such statements varies from country to country. For example, in the Philippines, the right to information support body is not an independent statutory institution but part of the President's Office. As a result, its Advisory suspending normal timelines for processing requests likely had legal authority.<sup>63</sup> On the other hand, in the Canadian province of New Brunswick the Ombudsman, who is responsible for right to information oversight, issued a memo indefinitely suspending the processing of complaint files and most other right to information operations, without clear legal authority.<sup>64</sup>

Under international law, restrictions on the right to information should be provided by law, while rule of law principles mean that provisions in national laws apply unless they are repealed, amended or otherwise rendered ineffective. As a result, rules on the right to information cannot be changed via mere policy decisions or *ad hoc* operating procedures.

**Example: Argentina**

<sup>60</sup> Spain, Royal Decree 463/2020, of 14 March, available at: <https://www.boe.es/buscar/doc.php?id=BOE-A-2020-3692>; Transparency Council, Advisory on the Activity of the Council, 17 March 2020, available at: [https://www.consejodetransparencia.es/ct\\_Home/comunicacion/actualidadynoticias/hemeroteca/2020/Primersemestre/20200313.html#.XoWDzYhKi00](https://www.consejodetransparencia.es/ct_Home/comunicacion/actualidadynoticias/hemeroteca/2020/Primersemestre/20200313.html#.XoWDzYhKi00) (in Spanish).

<sup>61</sup> As reported to CLD and documented at RTI Rating, COVID-19 Tracker. Available at: <https://www.rti-rating.org/covid-19-tracker>.

<sup>62</sup> Mexico, INAI, Acuerdo ACT -EXT -PUB/20/03/2020.02, 20 March 2020. Available at: <https://www.rti-rating.org/wp-content/uploads/2020/04/ACT-EXT-PUB-20-03-2020.02.pdf>.

<sup>63</sup> Philippines, Presidential Communications Operations Office, Freedom of Information Advisory No. 01, s. 2020, 16 March 2020. Available at: [https://www.foi.gov.ph/downloads/FOI\\_Advisory\\_No1\\_s2020.pdf](https://www.foi.gov.ph/downloads/FOI_Advisory_No1_s2020.pdf).

<sup>64</sup> New Brunswick (Canada), Memorandum from the Acting Ombudsman, 17 March 2020. Available at: <https://ombudnb-aip-aivp.ca/wp-content/uploads/2020/03/Memo1.pdf>.

Argentina enacted a decree in March 2020 that generally suspended the deadlines for administrative procedures. However, it allowed oversight bodies which were responsible for those procedures to reinstate the deadlines. In response, Argentina's Access to Public Information Agency issued Resolution 70/2020, indicating that the suspension would not apply to information procedures. The Agency, in articulating its reasons for issuing the Resolution, noted that while there might be exceptional circumstances which justified a suspension of the right to information, in this case the relevant Argentine authorities had not actually decided to suspend the right. In the absence of a specific suspension, the Agency considered that the right remained in full force. In other words, a mere general suspension of administrative deadlines could not have the effect of completely suspending this right.<sup>65</sup>

### ***Special Measures Governing the Right to Information during Health Emergencies: Legal Analysis***

To be valid under international law, any limit on the right to information must either meet the three-part test for any restriction on freedom of expression or be justified as an emergency derogation from a right. Since, as noted above, only one State, namely Colombia, has so far notified the UN Secretary General of an emergency derogation from the right to freedom of expression under the ICCPR, the actions of other States in terms of the right to information stand to be assessed through the lens of the Article 19(3) three-part test for restrictions.

As a preliminary matter, it may be noted that an amendment to right to information legislation which, while limiting access to information, did not actually represent a breach of international standards, would not be captured by the analytical framework noted just above (i.e. would not need to be justified in accordance with the three-part test). For example, while it is easy to recognise better practice when it comes to time limits for responding to requests, which the RTI Rating sets at ten working days, it is difficult to say that ten working days is an international standard or that extending a ten-day limit to a 20-day limit would represent a breach of the right to information. Despite this, for current purposes we treat any change of the existing rules which is unfavourable to requesters as a restriction on the right to information. In practice, this point may in any case largely be moot since most changes introduced fairly lengthy delays, granted broad discretion to different actors to set delays or suspended the right entirely until the end of the emergency, all of which are clearly restrictions on the right.

The first part of the test is that restrictions must be “provided by law”. We noted above that emergency laws or decrees which grant broad discretion to authorities to restrict rights through subordinate legal rules may not meet this requirement and yet might be appropriate during

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<sup>65</sup> Argentina, Access to Public Information Agency, Resolution 70/2020, 14 April 2020. Available at: <https://www.boletinoficial.gob.ar/detalleAviso/primera/227825/20200415> (in Spanish).

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emergencies, so may warrant a derogation from the right to information on the basis of a failure to meet this part of the test. This would need to be justified either by the need for rapid introduction of rules during emergencies or by the challenges of convening legislatures (or perhaps a combination of both). However, this would only apply where this qualified as being “strictly required by the exigencies of the situation”.

Even where this condition is met, the impact of broad grants of discretion to authorities to respond quickly in health or other emergencies, where it applies, should be mitigated in three ways. First, the governing emergency legislation which authorises these measures should contain appropriate constraints to the exercise of the power to adopt measures, especially when this impacts on human rights, thereby allowing them to be challenged in court. For example, national legislation should require any restrictions on rights, including the right to information, to meet the international law standards of either “necessity” or “strictly required by the exigencies of the situation” (which we have argued above are similar in nature). While it may be appropriate to assess that in light of the underlying facts of an unfolding emergency – including that authorities may not be able to wait to act until they know all or most of those facts, as they would do in normal times (i.e. that some speculation is needed when responding quickly to an emergency) – it would still rule out measures that were not sufficiently considered or tailored.

Second, any specific (subordinate) rules which apply to the right to information should themselves fully meet the “provided by law” standard. For example, if a general rule suspending administrative deadlines is intended to apply to the right to information, that should be made explicit, either in the rule itself or by requiring a relevant body to indicate this (somewhat along the lines of the Argentine case, mentioned above, although there the onus fell on the oversight body to revoke the suspension of the deadlines). In addition, rules explicitly applying to the right to information should themselves be clear and precise and so meet the “provided by law” standard. In general, cases of the latter did meet this standard.

Third, it goes without saying, although we encountered examples of this, that no public authority, including an oversight body or information commission, should seek to suspend or amend right to information rules unless they have clear legal authorisation to do so. An emergency may require rapid decision-making but it can never justify *ad hoc* measures of that sort, which represent a breach of the rule of law.<sup>66</sup>

The second part of the test is that restrictions must serve a legitimate aim. As long as a restriction is justified as being necessary to protect the health of individuals, this condition will be met. However, an important component of government actions responding to a health emergency will likely be related to rebuilding the economy. While some such measures may serve various

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<sup>66</sup> As noted above, the UN Human Rights Committee has made it very clear that there is no question of the rule of law being suspended during emergencies. General Comment No. 29, States of Emergency (Article 4), note 16, para. 2.

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legitimate aims – such as safeguarding the right to work as one of the rights of others – promoting the economy is not, *per se*, a recognised legitimate aim for restricting freedom of expression under international law. As such, this cannot be relied upon as a reason for restricting the right to information.

The third part of the test is that restrictions must be necessary, and hence proportionate, to protect a legitimate aim, in this case protecting public health and the rights of others. The precise parameters of this will to some extent depend on the individual country context. For example, some countries have stronger online capacity to maintain the right to information, and indeed normal government operations, while working from home. And countries may experience very different levels of threat from a health emergency. At the same time, some general principles apply.

First, blanket measures to suspend the right to information or even to delay response times are almost never appropriate (see below), as they are not sufficiently tailored to meet the necessity requirement. Instead, where necessary, the rules should allow for case-by-case, justified extensions of deadlines, for example because of difficulties in accessing physical records or processing physical requests, or because a public authority really cannot afford to spend time processing requests due to its emergency focus. Thus, public authorities should respond to requests in a timely fashion where doing so is feasible.

There is always value in digital processing of requests due to its efficiency for both requesters and public authorities and it is clear that this is particularly true during health emergencies. In particular, digital systems for submitting requests, whether through a formal platform or simply via email or texts, can continue to function despite social distancing or work-at-home requirements. As a result, public authorities should do all they can to facilitate the making and processing of digital requests, where necessary making tweaks to the rules to enable this.

Exceptionally, a country may genuinely not have sufficient digital infrastructure – whether in terms of Internet access, digital devices or basic capacity – to allow for a meaningful commitment to respond to requests during a COVID-19-type health emergency. Even in that case, however, public authorities should still be required to respond if they do have the digital means to do so, because there is no country today where such capacity is entirely absent. Otherwise, for such countries a blanket extension on processing requests could be valid. However, even then, the point below would apply.

Second, requests for information relating to the health emergency and the government's responses to it should be seen as part of the overall emergency response and hence as an essential service, and, as a result, be maintained, like all essential services. At a minimum, this should apply where the purpose of the request is to hold public authorities to account or to facilitate public participation, on the basis that these two results – accountability and participation – will contribute to strengthening the emergency response and are hence part of the system of responding robustly to it. This could be assessed by looking at whether or not the requester had as his or her aim making

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the information public. Right to information principles do not allow public authorities to ask the reasons for a request, but there is no reason why requesters should not be allowed to give their reasons voluntarily where this will lead to a prioritisation of their requests, as suggested here. Put differently, given the high importance of making this information public, restrictions on access to this information could not pass muster under a proportionality analysis (i.e. the costs of providing the information to health could not, on balance, outweigh the benefits). We note that, for this purpose, it is not appropriate to expect public authorities to assess the specific benefit of every separate emergency-related request. Rather, the analysis here is based on the collective value of these sorts of requests as compared to their collective cost.

We note that privileged treatment of such requests does not raise any discrimination concerns. Discrimination rules protect certain classes of people, for example based on race or religion, against unfavourable treatment. The approach here is based on the nature of the request or the purpose for which the request is made, rather than the identity or any (class-based) characteristic of the requester. And the underlying goal is to protect the flow of relevant information to everyone, with the requester merely serving as a conduit for this. By privileging such requests, States ensure greater transparency for everyone and bolster the spread of accurate information about matters of great public importance, namely the health emergency and government responses to it.

Third, in line with the above, the pandemic does not justify suspending oversight systems for the right to information. The basic system of appeals should, therefore, be retained to the greatest extent possible. Some adjustments may, however, be necessary to accommodate the fact that staff may be required to work from home. This may require new rules to be put in place, where these do not already apply, which facilitate the digital processing of appeals, such as to issue notices electronically.

Where time limits have been adjusted, oversight bodies should scrutinise the justification for any extension carefully, so as to avoid this becoming a standard rather than specifically justified response on the part of public authorities.

Oversight bodies which normally hold in-person hearings may need to postpone them. However, given that this might be tantamount to suspending appeals, it would be preferable if alternative arrangements could be made. These might be to do away with hearings in most cases, noting that this is the dominant practice globally anyway, or making arrangements for remote hearings, whether by video or just audio. At a minimum, a procedure should be in place for hearing priority appeals so that these can continue to move through the system.

Fourth, restrictions on the right to information should be limited in time to the period during which the exceptional measures that have been put in place to address the emergency continue to be necessary. To ensure this, any regulations which restrict the right should have clear time limits on those restrictions, after which they must be revisited and only renewed where this remains justified. Put differently, authorities should regularly assess whether improving circumstances allow for a

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restoration of normal right to information rules. The actual time limits will vary depending on the specific country circumstances but, given the significant unknowns relating to the health emergency, we suggest that emergency measures should be limited to a few weeks, subject to renewal as needed. The precise legal modalities needed to facilitate regular renewals will depend on the legal system in question but this should always be possible, even taking into account the challenges of the health emergency.

Fifth, in many cases, the operations of public authorities will be disrupted during a health emergency, leading to new modes of working. There may be far greater reliance on telephone conversations or meetings being conducted via video-streaming technologies as opposed to in person. It is essentially that, despite the changes, the preparation and storage of records regarding the content of, and especially decisions taken at, meetings is preserved. As noted above, accountability, whether immediately or later on, regarding measures taken during an emergency is of the greatest importance. This can only be delivered if good records are kept of the reasons for decisions, positions taken and so on.

Finally, in many cases it is likely that health emergencies will continue to have a significant impact on the operations of government offices for months if not longer. As a result, governments should aim to transition planning on right to information obligations from any immediate, highly reactive measures they have adopted to a more medium-term, sustainable approach. Ideally, this will involve lifting most or all additional restrictions and finding workarounds for any challenges that remain. One potential challenge will be cases where physical processing of documents is required, although even this can be managed with some planning and social distancing while going to the office (for example on rotas to ensure that only a small number of people are present at any given time). Governments may need to develop new and innovative strategies for processing requests, but the fact that the right to information represents a human right requires them to do this, as needed.

### Better Practices

The last sub-section discussed what steps are necessary, at a minimum, to ensure that any limits on the right to information are proper according to international human rights law. This sub-section focuses on some of the better practice measures different actors have taken to ensure continued respect for the right to information during the COVID-19 pandemic.

According to the IACHR, States should prioritise requests for information related to the public health emergency.<sup>67</sup> We understand this as covering the impact of the emergency, measures taken in response to the emergency, the impact, as far as it is known, of those measures and decision-making around emergency measures. As previously noted, and in accordance with the IACHR

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<sup>67</sup> See note 32.



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position, any derogations from normal right to information rules should not apply to requests for this kind of information, given the overriding importance of public access to this sort of information. Beyond that, however, States should also consider additional measures to prioritise these requests, especially when they come from journalists, civil society actors and others who intend to use the information to raise public awareness about the emergency. As noted above, this sort of prioritisation would not raise any discrimination concerns as it is based on the nature of the request or the purpose for which the request is made instead of the identity of the requester. Prioritisation should involve fast-tracking such requests and also ensuring that the public interest override, which would almost by definition apply to those requests, is applied properly so as to limit the scope of exceptions.

Another better practice is for official actors to communicate clearly and provide guidance at different levels about the right to information. Information commissioners, other oversight bodies or central points of responsibility for the right to information within government should, for example, issue precise, detailed guidance to public authorities on how best to handle requests during a health emergency. This might, among other things, provide guidance and/or technical support on issues such as redaction, accessing documents when working remotely and handling sensitive or confidential data in alternative working arrangements. This can help public authorities adapt more quickly to new and changing circumstances. The same actors should communicate clearly with the public on how to submit right to information requests during the emergency and how any new laws or policies impact right to information rules.

It is clearly of the greatest importance to disclose information related to the health emergency proactively and a lot of governments have done relatively well on this front during the COVID-19 pandemic. While this Brief does not focus specifically on the proactive disclosure of information, increased proactive disclosure can improve the functioning of reactive right to information systems. Actively sharing information that the public is likely to request, such as key information on the health emergency and government responses to it, will reduce the burden on public authorities to respond to individual requests, and thus represents a significant efficiency not to mention the potential it has to mitigate health impacts, including by saving lives. It is more important than ever during emergencies to ensure that this information reaches everyone, since everyone needs to learn about the health emergency and how to address it. New and innovative tools to reach everyone that are developed during an emergency should be retained during more normal times.

Although it is always welcome when governments seek to enhance right to information legislation, a public health emergency is not necessarily the time for this, let alone to reduce right to information commitments. If the fulsome public consultations which should accompany any amendments to rules on the right to information are not possible, no amendments should be introduced. In this case, government should wait until the emergency is over before working on amendments.

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Public authorities need to ensure that an appropriate balancing takes place between disclosing information and protecting those interests which are recognised as exceptions, taking into account the public interest in accessing emergency-related information. The right to privacy may be implicated here, given the public's need to know about the trajectory of cases, and as government employees work remotely and usual data protection regimes are upended. For the former, a careful balancing of the importance of different interests will be required. For the latter, clear protocols on handling right to information requests, as well as handling personal data, can help prevent privacy breaches while still ensuring right to information.

Finally, where there is an increase in right to information requests, and specifically requests about the emergency, governments may need to take measures to ensure the continued supply of this type of information. This may require reassessing staffing, funding and resource needs for certain parts of the right to information system. While some governments may see this as a lower priority during a public health emergency, continued protection and support for the right to information, at least as it relates to the emergency, should be seen as a core element of an effective response. Increased transparency around government decision-making during this time will promote both better decisions and policies, as well as better implementation of those measures, contributing to a stronger overall response. It will also promote public buy-in into those measures, again contributing to their success.

### Governing Principles

Based on the above considerations, the following principles apply during public health emergencies:

- General public health emergency legislation should not allocate unduly broad discretion to public authorities to limit the right to information through subordinate legal rules; instead, it should subject this to certain minimum standards, such as the international law standards of requiring any restrictions to be either “necessity” or “strictly required by the exigencies of the situation”.
- Specific public health emergency rules should be clear and precise regarding whether and if so how right to information rules are being limited.
- No limits should be, or be attempted to be, imposed on the right to information which are not formally authorised by law, such as via policy or *ad hoc* decisions.
- Only limits on the right to information which are justified by reference to a legitimate interest listed in international law should be imposed, which does not include general justifications linked to improving the economy.
- No blanket suspensions of the right to information, including blanket time limit extensions for responding to right to information requests, should be imposed during emergencies as these are not sufficiently tailored to meet international human rights standards. Instead,

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emergency provisions should, as needed, establish conditions under which time limits may be extended or other actions taken on a case-by-case basis, with justification.

- Any changes to right to information rules during an emergency should not apply to requests for information related to the public health emergency and government responses to it, especially where the purpose of the request is to disseminate the information to the public. As a better practice, these requests should be prioritised, for example by responding even more quickly than the legal time limits or by ensuring that public interest overrides for exceptions are applied particularly robustly.
- The right to lodge appeals against failures to process requests in accordance with the legal rules should remain in place, albeit with any procedural alterations which are necessary, taking into account general emergency rules.
- Any restrictions on the right to information should not be indefinite but should be limited to the period during which emergency conditions justify them; restrictions should be reviewed regularly to assess whether they remain necessary.
- During a health emergency, changes should be made to the way in which information is recorded and stored, as needed based on altered working arrangements, so as to ensure that there is no loss of continuity in the recording of government decisions and actions.
- Where an emergency continues for more than the short term, any quick restrictions regarding the right to information that were put in place should be lifted or downgraded as soon as possible and, to facilitate this, governments should find logistical solutions to maintain their ability to respond to requests.
- As better practice, governments and oversight bodies should communicate clearly about how right to information rules have been changed, how individuals can make requests and how public authorities can continue to process requests efficiently taking into account emergency measures. Public authorities should also engage in extensive proactive disclosure relating to the emergency and allocate the necessary resources to respond robustly to right to information requests related to it.