**Case Information**

1. **Case Title:** President Jair Messias Bolsonaro vs. Federal Council of the Brazilian Bar Association (OAB)
2. **Meta Data**
3. **Case Number**: ADI 6351
4. **Corresponding Law Reference**: Brazil, Federal Supreme Court (STF), Direct Unconstitutionality Action (ADIN) nº 6.351. Justice Rapporteur Alexandre de Moraes. Federal Gazette publication on 04-30-2020
5. **Date of Decision**: 04-30-2020
6. **Featured Case**: n/a
7. **Region**: Latin-America and Caribbean
8. **Country**: Brazil
9. **Mode of Expression**: Electronic / Internet-based Communication; Public Documents
10. **Judicial Body**: Supreme Federal Court (Constitutional Court);
11. **Type of Law**: Administrative Law; Constitutional Law;
12. **Main Theme**: Access to Public Information; Privacy, Data Protection and Retention; Public Order
13. **Outcome**: Decision - Injunction or Order Granted and Confirmed; Access to Information Granted
14. **Status**: Closed
15. **Tags**: Access to public information, Public Interest, Exceptions to the Right of Access to Information
16. **Excerpt**:

**Case Tracking - url?**

**Case Analysis**

1. **Summary and Outcome**
   1. **Summary**: Due to the spread of COVID-19 in Brazil, Brazilian President Jair Bolsonaro issued a Provisional Measure restricting provisions of the Access to Information Act. It suspended deadlines for public bodies to respond to information requests and demanded information requests to be presented again after the state of public calamity is over. The Federal Council of the Brazilian Bar Association (CFOAB) questioned the provisional measure, defending Brazilians’ right to access public information.
   2. **Outcome**: Justice Rapporteur Alexandre de Moraes of the Supreme Federal Court (STF) granted a preliminary injunction, which suspended the Provisional Measure. He understood that the Provisional Measure would turn the exception - confidentiality of public information - into the rule - access to public information -, thus damaging the public administration principles of disclosure and transparency. Thereafter, the full session of STF confirmed the preliminary decision delivered by Justice Rapporteur Alexandre de Moraes.
2. **Facts**
   1. **Facts giving rise to cause of action**

Law no. 13,979/2020, published in Brazil on February 6th, set forth several measures for the country to face the COVID-19 pandemic. On March 20nd, Legislative Decree no. 6/2020 officially declared a state of emergency in the country. Within this context, on March 23rd, Brazilian President Jair Bolsonaro issued the Provisional Measure no. 928/2020, which regulated requests for public information guaranteed by the Brazilian Access to Information Act (Law no. 12,527/2011) during the state of emergency.

Provisional Measure no. 928/2020 suspended the deadlines for responding to information requests by public administration bodies or entities whose staff is subjected to quarantine, working from home or in similar situations and usually relies on face-to-face contact with the public. Additionally, the suspension applied for public agents or sectors primarily concerned with measures to deal with the emergency situation caused by the spread of COVID-19. Moreover, the provisional measure demanded pending requests to be presented again after the state of public calamity is over and ruled out the possibility of appealing against negative responses to information requests.

* 1. **Cause of action or law at issue**

As a result, the CFOAB understood that the Provisional Measure no. 928/2020 was formally unconstitutional, as it fails to respect the separation of powers and does not meet the relevance and urgency requirement which are necessary for the edition of provisional measures. Additionally, CFOAB considered the measure materially unconstitutional, since it restricts the rights to information, transparency and disclosure of public information. Thus, CFOAB filed a Direct Unconstitutionality Action with an injunction request before the STF.

* 1. **Procedural history**

After analyzing the case, Justice Rapporteur Alexandre de Moraes granted the injunction, which was confirmed in a later ruling by the full session of the STF.

1. **Decision Overview**
   1. **Deciding judge & type of opinion**

The injunction order was analyzed by Justice Rapporteur Alexandre de Moraes, who based his decision on the analysis of injunction requirements: *fumus boni iuris* (the probability of the claimant being right) and *periculum in mora* (actual risk to the proceeding's outcome in case there is no quick answer from the court). After that, the full session of the STF confirmed the injunction granted by Justice Moraes.

* 1. **Issue statement**

The main issue before the court was whether the Provisional Measure resulting from the pandemic was excessively restricting the right of access to public information, based on the principle of publicity in the public administration. The Brazilian Law on Access to Information, aiming to promote transparency in public bodies determines that advertising is the rule, and confidentiality, the exception.

* 1. **Parties’ arguments**

CFOAB claimed that the Provisional Measure was formally unconstitutional, since the Brazilian Access to Information Act already provides rules for crisis scenarios, which are less restrictive to the right to information. Additionally, CFOAB considered that the requirements of relevance and urgency, necessary for the issuance of a Provisional Measure as provided in Brazilian Federal Constitution, were not present.

The CFOAB claimed that the Provisional Measure was also materially unconstitutional because it restricted the constitutional rights to information, transparency and disclosure, considering the measure (i) suspended deadlines for responding to information requests; (ii) violated due process by preventing appeals against negative responses; and (iii) imposed an excessive burden on citizens by demanding them to present requests again after the state of public calamity is over.

* 1. **Court’s preliminary findings**

The Provisional Measure is an instrument to be used by the President in cases of relevance and urgency, since it produces immediate effects after its publication, having the force of law. Thus, Justice Rapporteur Alexandre de Moraes pointed out the court should perform a political convenience judgment when analyzing whether the measure should be suspended, considering the seriousness of its possible consequences.

* 1. **Court’s rulings & legal grounds**

Justice Moraes understood that the requirements for granting the injunction were present, since the Provisional Measure would turn the exception - confidentiality of public information - into the rule - access to public information -, thus damaging the public administration principles of disclosure and transparency. Those principles embody the State’s obligation to provide the requested information, under penalty of administrative, civil and criminal liability - with the exception of constitutional cases of secrecy. Moreover, the Justice highlighted that the Brazilian Constitution expressly mentions the disclosure principle as one of the indispensable norms for public administration.

The Justice also claimed that the citizens’ political participation in a representative democracy can only be strengthened in an environment of total transparency and in which people can express different opinions on public policies adopted by the government. The Justice mentions, in this sense, Justice Holmes, who affirms individuals need to exercise the “politics of distrust” and democratic self-determination, in order to freely exercise their suffrage and opposition rights.

According to the decision, access to information is necessary to full exercise of democratic prerogatives. Therefore, the disclosure of public information may only be exempted in the event of a superior public interest. Thus, except under certain situations, the public administration has a duty of absolute transparency when conducting public affairs.

* 1. **Concluding statement**

Finally, the Justice concludes that the Provisional Measure did not establish exceptional and concrete situations in which it would be justifiable to restrict access to information. On the contrary, it transformed the constitutional principles of disclosure and transparency into an exception, reversing the purpose of constitutional protections to the free access of information by the Brazilian society.

* 1. **Dissenting or Concurring opinions**

**Direction**

1. **Decision Direction**: Expands expression;
2. **Information**: It is common that in times of crisis restrictive measures find popular support, what may cause necessary debates about relevant matters to be put aside. Despite the importance of several measures adopted by the government to address the coronavirus crisis, the Provisional Measure of President Jair Bolsonaro causes excessive harm to access to public information in a moment of great need of public information. It is also worth mentioning that the Brazilian Access to Information Act already provides rules applicable to crisis scenarios, which do not - as intended by the provisional measure - turn secrecy regarding public information into the rule.

**Perspective**

1. **Global Perspective:**
2. **International, Regional, and National Laws or Cases**

Braz., Law on Access to Information no. 12,527/2011, Articles 10 and 11.

Braz., Law no. 13,979/2020, Article 6-B.

Braz., Federal Constitution of 1988, Articles 2; 5, subparagraph XXXIII; 37; 62; 216.

U.S, Cantwell v. Connecticut, 310 U.S. 296, 310 (1940), quoted 376 U.S at 271-72)

1. **Other National Standards, Law or Jurisprudence**
2. **General Notes**:

**Significance**

1. **Case significance**

The case is important because STF prevented a major setback in the exercise of people’s right to information in a context in which having access to public information is very important.

1. **Precedential Effect**

Considering it is the highest Brazilian court, lower courts are expected to follow its understanding.

1. Persuasive Effect
2. Related Cases
3. Additional Citations

**Documents**

1. **Official Case Documents**

<https://www.internetlab.org.br/wp-content/uploads/2020/05/moraes-concede-liminar-suspende-1-1.pdf>

<https://www.internetlab.org.br/wp-content/uploads/2020/05/paginador.pdf>

1. Amicus Briefs and Other Legal Authorities
2. Reports, Analysis and News Articles
3. Relevant Materials in Foreign Languages