



Access Now submission to the United Nations Human Rights Council, on the Universal Periodic Review 2018 Cycle for Chile

About Access Now

1. Access Now (www.accessnow.org) is an international organisation that works to defend and extend digital rights of users globally. Through representation in 10 countries around the world, including engagement with stakeholders and policymakers in South America, Access Now provides thought leadership and policy recommendations to the public and private sectors to ensure the internet's continued openness and the protection of fundamental rights. We engage with an action focused global community, and our Technology Arm operates a 24/7 digital security helpline that provides real time direct technical assistance to users around the world.
2. Access Now advocates an approach to digital security that promotes good security policies that protect user rights, including privacy and freedom of expression. Access Now has worked extensively in South America on digital rights including on free expression and web blocking, protection of Net Neutrality and data protection regulation.

Domestic and international human rights obligations

3. This is the third Universal Periodic Review for Chile, having been reviewed in 2009 and 2014. In 2009 the government received 71 recommendations.¹ In their second Universal Periodic Review the government received 184 recommendations.²
4. Article 19 of the Chilean Constitution recognizes, protects, and guarantees the right to privacy of all people.³
5. In 1999, Chile passed Law No. 19.628 and became the first South American country to adopt a comprehensive data protection regulation. This law applies personal data held in government and third party registries and databases. Personal data is defined as information pertaining to a natural person, whether identified or identifiable.⁴
6. This law also establishes responsibilities and limitations to the processing of personal data. The regulation defines processing to include "any operation,

¹ UN Human Rights Council General Assembly, "Report of the Working Group on the Universal Periodic Review: Chile," (Universal Period Review, June 2009) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/139/22/PDF/G0913922.pdf?OpenElement>

² UN Human Rights Council General Assembly, "Report of the Working Group on the Universal Periodic Review: Chile," (Universal Periodic Review, April 2014) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/128/97/PDF/G1412897.pdf?OpenElement>

³ "State of Privacy Chile," (Privacy International, January 2018) <https://privacyinternational.org/state-privacy/28/state-privacy-chile>

⁴ DLA Piper, "Data Protection Laws of the World," (January 2017, p. 92) (<http://www.straightlineinternational.com/docs/Data-Protection-Full.pdf>)



- whether automated or not, that recalls, displays, accesses, saves, records, organizes, selects, extracts, confront, interconnects, dissociates, communicates, deletes, transfers, transmits or cancels personal data, or the use of personal data in any other form or manner.” Specifically, Law No. 19.628 requires that natural persons, legal entities, or public bodies who control personal data protect the personal data they collect, process, and store.⁵
7. This data protection framework provides the data subject the right to demand information about data that third parties hold on them; this includes the source, any recipients, the purpose, as well as detailed information on any person or entities to whom the data subject’s personal information is sent. If a third party does not respond to the data subject within two days, the data subject may file a complaint with a civil law judge. A judge may impose a fine ranging from USD\$80 to USD\$800. If the data relates to commercial information, the fine may be as high as USD\$4,000.⁶ This law also tasks Chilean courts with data protection oversight.⁷
 8. This data protection law does not require data subject breach notifications.
 9. Law No. 19.812 states that personal data may no longer be used to discriminate against individuals in hiring decisions.⁸
 10. The country’s Criminal Procedure Code restricts the manner in which communications may be intercepted. Article 218 of this code grants the government the power to seize all forms of correspondence, including emails. Article 222 of the Criminal Procedure Code outlines the protocol of communication interception. This article also protects attorney- client privilege.
 11. On June 16, 2018, the government promulgated Law No. 21.096 and established the protection of personal data as an autonomous right. However, Chile has not yet created a data protection authority to ensure the enforcement of this constitutional right.⁹
 12. Chile is also a signatory of several international regulatory frameworks, including the Universal Declaration of Human Rights, International Covenant on Civil and

⁵ DLA Piper, “Data Protection Laws of the World,” (January 2017, p. 92-96) (<http://www.straightlineinternational.com/docs/Data-Protection-Full.pdf>)

Claudio Magliona, Nicolás Yuraszeck and Carlos Araya, “Data Protection and Privacy,” (Getting the Deal Through, September 2017) <https://gettingthedealthrough.com/area/52/jurisdiction/3/data-protection-privacy-chile/>

⁶ DLA Piper, “Data Protection Laws of the World,” (January 2017, p. 92-96) (<http://www.straightlineinternational.com/docs/Data-Protection-Full.pdf>)

⁷ DLA Piper, “Data Protection Laws of the World,” (January 2017, p. 92-96) (<http://www.straightlineinternational.com/docs/Data-Protection-Full.pdf>)

⁸ Rodrigo Velasco Alessadri, “Data Protection in Chile: Overview,” (Thomson Reuters Practical Law, May 2018) [https://uk.practicallaw.thomsonreuters.com/w-012-7178?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-012-7178?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)

⁹ Oscar Molina, “Personal data protection is a constitutional right in Chile,” (International Association of Privacy Professionals, June 22, 2018) <https://iapp.org/news/a/personal-data-protection-is-a-constitutional-right-in-chile/#>



Political Rights, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

Developments in digital rights

13. Chile has one of the highest internet usage rates in Latin America. In 2015, the country's internet users totalled 12.3 million. Chile has leveraged their high level of internet connectivity to create a vibrant startup community. The government's tech accelerator programs bring between 250-300 companies per year to Santiago, Chile.
14. In 2010, Chile passed the world's first net neutrality law. This law imposed two responsibilities on internet service providers (ISP); "[...]first to provide information to users and second to refrain from interfering in communication thereof."¹⁰
15. In March 2018, Michelle Bachelet - Chile's outgoing president - would propose constitutional amendments providing individuals with the right to challenge in court violations to their constitutional rights, including free education and the representation of indigenous people.
16. On April 3, 2018, the Chilean senate debated the country's data protection draft bill. This bill applies to private parties and government agencies and would: (i) regulate the processing of personal data; (ii) create a Personal Data Protection Agency in Chile as well as the National Registry of Compliance and Sanctions, administered by the Personal Data Protection Agency; (iv) impose liability of governmental agencies regarding personal data processing; and (v) provide for sanctions in the case of violations.¹¹

Violations of the Right to Privacy

17. On July 6, 2015, the Chilean Investigative Police Force (PDI) confirmed the purchase "Phantom," a software program of Hacking Team, a surveillance technology vendor. The government's statement occurred after hackers exposed emails relating to the purchase of this software. The PDI explained that this

¹⁰ Alberto Cerda, "An evaluation of the net neutrality law in Chile," (Digital Rights Latin America & The Caribbean, 17 July 2013)<https://www.digitalrightslac.net/en/una-evaluacion-de-la-ley-de-neutralidad-de-la-red-en-chile/>

¹¹"Law Projects in process," (Camara de Diputados de Chile)https://www.camara.cl/pley/pley_detalle.aspx?prmID=11661&prmBoletin=11144-07
Jones Day, "Global Privacy & Cybersecurity Update Issue 18," (Jones Day Supra, June 2018)
<https://www.jdsupra.com/legalnews/global-privacy-cybersecurity-update-64979/>
Guillermo Carey and Paulina Silva, "Chile: The Bill Amending The Data Protection Act Was Approved in General Terms: This Is Its Content," (Mondaq, 23 April 2018)
<http://www.mondaq.com/x/694540/data+protection/The+bill+amending+the+data+protection+act+was+approved+in+general+terms+this+is+its+content>



purchase was intended to increase its operational abilities to investigate organized crime.¹²

18. Since August 2015, two municipalities in the wealthy districts in the capital of Chile used surveillance balloons. This military-grade technology can capture images from a 360-degree camera and identify a moving person at a distance of more than 1.5 kilometres. Several communities, after learning about the use of these balloons, filed a suit with the Court of Appeal of Santiago, demanding that these municipalities remove these balloons. The Court of Appeal of Santiago and the Chilean Supreme Court held that this technology poses a threat to privacy rights. Further, the Supreme Court's order imposed certain controls on the balloon's use, including: limiting the use of this technology to public spaces, requiring that a municipal inspector supervise the operation, access to these recordings must be given to those affected, and mandating that recordings must be deleted after 30 days.¹³
19. In March 2017, one district in Santiago implemented the use of remote-controlled drones equipped with high-resolution cameras to monitor the parks and streets of their communities to reduce crime.¹⁴
20. In August 2017, the Ministry of Internal Affairs and Public Security issued Decree 866, modifying Article 222 of the Chilean Code of Criminal Procedure. This decree requires that ISPs store personal data for two years, including Internet Protocol (IP) information and websites visited, along with the date, time, and duration of the visit. Access Now expressed our concerns with this decree given that it expands data retention measures to encompass all communication activities in Chile.¹⁵

Recommendations

21. Mass surveillance is intrinsically inconsistent with human rights. Chile should refrain from using surveillance technology in a manner that undermines the human right to privacy. The government should also prevent municipalities from using surveillance technologies that threaten individuals' right to privacy.

¹² Valentina Hernández, "Hacking Team in Chile: Does the software comply with the minimum quality standards established by the Chilean legal system?" (Digital Rights Latin America & The Caribbean, 24 August 2015). <https://www.digitalrightslac.net/en/hacking-team-en-chile-cumple-el-software-con-los-estandares-minimos-de-legalidad-establecidos-en-el-sistema-juridico-chileno/>

¹³ "Case Study: Surveillance Balloons in Chile," (Catalysts for Collaboration, 2016) <https://catalystsforcollaboration.org/casestudy/chileballoons.html>

¹⁴ "Chile empleará drones en la vigilancia municipal" (Infodefensa) <https://www.infodefensa.com/latam/2017/03/01/noticia-chile-empleara-drones-vigilancia-municipal.html>

¹⁵ Javier Pallero and Veronica Arroyo, "Chile's "Spy Decree" threatens to make data retention even more dangerous," (Access Now, 3 October 2017) <https://www.accessnow.org/chiles-spy-decree-threatens-make-data-retention-even-dangerous/>



22. The government should pass the data protection bill, create a data protection authority, and impose more severe sanctions of violations of user's data protection rights. With the growth of the internet of things coming at the same time as more government and commercial services move online and bring personal data along with them, it is imperative that Chile update its data protection laws.¹⁶
23. The government should also refrain from adopting legislation that requires broad data retention.
24. For additional information, please contact Access Now General Counsel Peter Micek (peter@accessnow.org).

¹⁶ For one suggestion, see "Data Protection in the United States: Where do we go from here?" <https://www.accessnow.org/data-protection-in-the-united-states-where-do-we-go-from-here/>.