Draft Inter-American Implementation Guide on Access to Information

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Department of International Law -- Secretariat for Legal Affairs

Organization of American States

Chapter 1: Adoption of Comprehensive Framework

It is widely acknowledged that access to information laws don't stand on themselves in a good-governance, transparent and democratic realm. In fact, an access to information law is only one of many steps. This section describes how to build a comprehensive legal and policy framework considering the elements that an access to information regime will require in order to function efficiently.

Subsection a. starts with the need to scan and study all the existing laws and policies, or portions within them that deal with classification and disclosure of information, transparency principles, accountability, public servants' professional secret and sanctions to public officials regarding records management and release of information. In subsection b. and c. it is explain the process of adoption of the new model law and the need to amend or rescind existing law that clashes with the access to information principles and procedures. Subsection d. presents a not exhaustive but complete list of the supporting legislation that will contribute to the best compliance of the model law and promote further openness. In the final point e. it is elaborated on a phased in approach to plan implementation of the Model Law.

a. Study of existing laws and policies

The enactment of a new law always requires scanning and analyzing the existing legislation and policies related to the matter of the prospect law. For the sake of an effective implementation, the new law should be ideally incorporated to the existing scenario and rules, rather than create new ways to proceed and manage administrative procedures.

By scanning it is meant to review, among the norms to be enforced of the complete legal system of a country, those that could impact in any way the coming into force of the new law. The scan is primarily needed in order to *localize* the law by applying the right terminology and to make sure that the existing public institutional structure, procedures and coercive mechanisms of the national legal system are take up. The norms that would impact the new law are basically the following:

1) Legislative decrees that define the nature and operation of the State powers and autonomous bodies that would be under the law' scope. In order to fully cover the powers of the State and all those bodies that receive public expenditure, it has to be study the State's organization of certain country and the public interest institutional terminology used in the legal system.
2) Norms that establish administrative procedures, or legislation that uniforms procedures in each of the powers and organisms and where the new law must be coherent as long as the *expedito* principle of the right to information is protected.

3) Royalties. Laws that establish the cost of the government royalties for photo-copies or reproduction of documents in various formats, also known as *Leyes de Derechos.*

4) Administrative silence. In most countries the legal concept already exists and it's procedures and sanctions, so the new law would have to incorporate those for the actions where government does not responds AI requests.

5) Norms that establish administrative responsibility. The existing system of sanctions, penalties and fines corresponding to administrative misconduct must be observed and entrenched in the new law. For instance, norms that sanction the conduct of leaking or sharing documents without the official consent are often spread in several laws.

6) Norms that include any provision to classify or disclose government documents under the request bases (usually known as petition laws). In many countries, the right to petition poses certain obligations and procedures to public servants in answering publics' petitions. The new AI law' procedures must not be mix up with those, rather, public servants should be clear about the new process and be able to handle differently petitions and AI requests.

7) Norms that create special secrets, such as fiscal, bank, fiduciary, commercial, and industrial. The AI new law should, in any case, define more accurately these preexisting secrets in relation to the categories it presents (exempt or public information).

8) Norms that establish judicial or quasi-judicial procedures. The independent AI body will review citizens' complaints and this procedure should match that of the Ombudsman, or will be similar to the administrative appeals courts, or for an information commission. Disregarding this element could diminish legitimacy of the AI oversight body actions.

9) Rights balancing tests / constitutional control. When existing, this mechanism is found in the countries' higher-level legislation. In constitutional legal systems, the new AI law must not install such tests if there is no public interest or rights balance control provided by the constitution.

10) Constitutional and legal provisions on data protection or *Habeas Data,* since AI laws create a different administrative procedure to handle requests and also, distinct protection of the documents and data, a close look must be assigned to preexisting provisions on this subject.

11) Regulation on records management. Implementing an AI law without a records management regulation in place creates endemic problems that reverberate in legal efficacy. This legislation must be differentiated from that of historic records.

b. Adoption of new model law and amendments to existing law

Experience has shown that adoption processes of AI laws are better if governments, civil society and media work together with congress leaders. This type of alliance often leads to AI laws that are more protective to the citizens' interests in access to information, but also to a law that is publicly debated and shared with the rest of society thanks to the dissemination role of the media. Indeed, a law enactment process that has been publicized and socialized enshrines a merit of transparency in itself, when citizens learn about the right to seek information and the obligation of the governmental organizations to share it. All over, brings about a more legitimate and democratic final outcome, and even public servants become more convinced of how good they do by complying with the new regime.

Once the law is passed, it is important to keep the credibility of the law as high as possible among citizens and stakeholders, even when the implementation is problematic and slow. Specially, public servants must remain confident on the law and its future benefits, despite the work that represents to them.

The Model Law responds to a need to set standards of AI protection in the region, therefore, existing AI legislation that contradicts the principles set forward by this Model Law must be amended. Reformation of existing AI laws in the line of the Model Law must be seen as a sensitive democratic step towards meliorate and dignify peoples life and bureaucratic relationship with citizens. Nevertheless its' moral justification, countries are obliged to comply with resolution of the Claude Reyes Vs. Chile case, where the Interamerican Court of Human Rights mandates to amend existing legislation contrary to the principles of the right to access to information.

Finally, for the efficient implementation governments must consider that a process of "cleaning the house before opening the door" should take place. Administrative rules that allow state secrets, secret budget items and the no conflict of interest prohibiting laws, are the type of measures to be removed before adopting the AI law, since they entrench principles contrary to good governance and rights respect.

c. Rescinding of laws and policies contrary to access to information regime

Inconsistent legislation causes confusion between the past reserved information legislation and the new grounds of refusal that the AI law provides. Public servants, who are the day-to-day applicants, need to implement this law under a safe ground of predictability and certainty, therefore, rescinding and amending an information regime contrary to the limited exemptions in the AI law is essential. There are two ways to proceed here: a) either the new AI law overrides all other secret or classification of information laws and provisions within special legislation, or; b) rescind or amend those norms contrary to AI new law. Legislation that conflicts with this Model Law is mostly the following:

i. State secret laws, official secret laws have a long history in the penal codes of the region. They sanctioned the revelation of "state secrets", meaning any information that could harm economic or military activities of a State, consisting in "national offence" (*delito contra la patria*). The laws characterized also by using the grounds of "national security" as a broad shield to hide information from public knowledge.

ii. Ministerial certificates are laws that permit a minister to issue a conclusive certificate that cannot be questioned by appeal body or courts ordering that a document is secret. Lower level legislation must not undermine or contradict the high-level AI law. This also subtracts credibility in government's implementation and mainly in the law.

iii. Privacy and data protection, or *Habeas Data* laws contrary to AI regime. The rights to privacy and to access information should exist in harmony. Many countries in the region have *habeas data* provisions previous to the AI laws, so a classification procedures and protection is already familiar to the government. Caution must be kept when denying information under the grounds of each different law.

iv. Second level laws or regulations that create other categories of classification of documents than the ones listed in the law. Agencies and organisms under the AI law, because of reasons of autonomy, can develop secondary legislation to incorporate the law's principles to their own system. Second level legislation must not be contrary or exceed the AI law' mandate, where is often seen to appear new classification categories or different procedures for requesting and classifying information.

d. Enacting supporting laws which promote openness

The supporting legislation not only is recommended to promote openness in the various areas of government' actions. Most importantly, is to grant the effectiveness of a transparent and rights protection regime.

i. Whistleblower protection, they encourage public officials to denounce wrongdoing of other officials providing effective punishment to offenders and protection to the reporters in order to remain in their positions without the risk of being judged or isolated internally.

ii. Open meetings, not all meetings must be open, but strict policies should be established to withhold "executive meetings". In any case, a minute of the latter should be released.

iii. Public records, the standardization of records management must be in place along with the AI regime.

iv. Data protection regime should live harmoniously with the AI legislation.

v. Civil service laws. In many countries, the implementation of AI laws fails because of the hierarchical way of working of offices and the decision making that the hierarchical relations absorb the new law needs.

v. Constitutional control or rights balancing tests. Because AI is a right that must live harmoniously with other rights, like privacy and security rights, a balancing mechanism must exist. The harm tests and public interests tests must develop special criteria to be applied by courts and administrative tribunals. This should be established by the constitution or the higher-level legislation. These are substantial tools for the oversight bodies to balance conflicting rights on a case-by-case practice. The burden of these tests should not fall in the petitioner.

vi. Legal electronic procedures and electronic documents feasible to be used as judicial evidence and also that allow requesters to file an AI request by internet.

e. Phased in approach

Once the law is enacted, governments need to develop a plan of action. The plan must have key activities, responsible areas for actions, and timelines for completion of the implementation of the law. Consequences of not having an implementation plan are mayor. Without a plan, responsibility of implementation blurs and each agency will try to implement the law on it's own convenience. Also, it is likely that if no high-level political will is leading the initiative, although the law came into force, actions for implementation will certainly not be taken. Overall, an implementation plan contributes to keep implementation homogeneous among the offices and ensuring that the same service is provided to requesters within the government, at the same time, reassures that the government is ready to comply with the legal mandate.

There are various ways to design a phased in approach plan. In some countries, the implementation was simultaneous among all offices under the law, after a *vacatious legis* period of at least a year. But others have adopted a stagger plan allowing the most ready offices to comply with the legislation rapidly, while allowing those mainly concerning security and vast administrative records storage to the end. In any case, this basic plan should be clearly established in the AI law.

Chapter 2: Allocation of resources necessary to create and maintain effective systems and infrastructure

Reception Pending for Second Working Group Meeting

Chapter 3: - Adoption of effective information management policies and systems to properly create, maintain, and provide access to public information

Introduction

Providing appropriate access to information begins with establishing an effective information management policy. A central tenet of this policy will be to protect designated information and make it accessible to the public. While the underlying components of an information management policy may be the same from organization to organization, what a particular policy will ultimately look like will depend on the organization's function, business needs and legal requirements. The policy must be tailored to fit the needs and the objectives of the organization and should be developed by balancing the competing interests of providing prompt and easy access to information with controlling the increasing amount of information being created within the organization. Various technology solutions are available that may help address and automate these issues. However, no tool will be able to do all that is required to develop and implement an information management system. To successfully accomplish this task, organizations will need to utilize internal human resources to define the goals, build the policy and develop consensus. Once this has been accomplished, technology solutions can be leveraged to implement and maintain the information management policies.

Archives/Record Keeping

Information is being created today at an unprecedented pace. More and more official communication is done via email, and documents are often created electronically and never printed. Much of the information being created may be stored in locations outside of the organization's network (e.g. a personal file storage device or personal email account), increasing the risk of loss and the complexity in trying to recover this data.

In order to support a public access to information law, an effective system for creating, managing and archiving this information is imperative. Without such a system, it will be more difficult and time-consuming to locate and identify information and provide it within the timeframes mandated by applicable law. In addition, lack of an effective system can create suspicion as to the transparency and legitimacy of public officials and their actions. "Any Freedom of Information legislation is only as good as the quality of the records to which it provides access. Such rights are of little use if reliable records are not created in the first place, if they cannot be found when needed or if arrangements for their eventual archiving or destruction are inadequate." *Draft UK Code of Practice on the Management of Records.*

Assess the Current Process

In order to implement an effective information management policy that allows for improved access to public information, an organization must begin by reviewing its current information management and record keeping practices. Information exists in many different forms – paper documents, electronic documents, emails, notes, presentations, audio files, video files, etc. A "record" of the organization is a subset of information that has a distinct value to the organization. This value may be proscribed by law or regulation (e.g. the emails of a public official), or it may be due to the business nature of the communication. In most cases, the media on which the information appears is irrelevant, as it is the content of the information itself that determines whether something is a "record" of the organization. Retention policies will identify the types of information that must be retained, the appropriate length of time, and whether and when the information may be expired or destroyed. The importance of properly identifying and maintaining these records for the public interest is paramount in order to facilitate the purpose and intent of an access to information law.

Consider a Data Map

Before an organization can determine an appropriate information retention policy, it needs to understand what information is being created every day by its employees and the systems they use to do it. Having this high-level understanding of how information is created and where it is used will help inform decisions around how to organize and maintain this information. The product of this effort is often referred to as a "data map" as it maps the information within an organization.

The data map typically includes the types of information that exist within an organization, where this information is located and who is responsible for maintaining it. The data map can be as detailed or as simple as the organization desires and should be updated on a regular basis to reflect any changes. It is often beneficial to designate one individual who can lead this initiative and coordinate among the many people that may be involved with identifying systems and information within the organization. Undertaking the process to understand what exists on your systems is not easy and may take some time to work through. However, if done correctly, this process will effectuate better decision making and will facilitate the eventual information retrieval process.

Determine Appropriate Retention Policies

Once record information has been identified, clear and established retention rules should be established detailing the various records that need to be preserved and how long these records should be retained. This analysis should include not only electronic information, but any paper records that may exist as well. The determination and application of retention rules will depend on the laws and regulations of the country and the local jurisdiction, and the business needs of the organization. When dealing with information management, the simplest approach is often the best as it promotes compliance. Fewer retention categories mean fewer decisions that must be made about particular information or a particular record.

An important part of the information management lifecycle is the destruction of information that does not need to be kept for legal, regulatory or other business purposes. Without a methodical approach to expiring information, systems become clogged with data that no longer has any value to the organization. This overload makes searching for particular or relevant information difficult and it can delay efforts to respond to a request within required timeframes. As the creation of electronic information continues to accelerate, the lack of routine expiration can overwhelm an information management process and stymie public access to information.

Once determined, these retention policies should be memorialized and published, and a schedule should be created for reviewing and updating the policies on a regular basis. If changes are made to the policy or if there are deviations from the policy in practice, this should be recorded with notes explaining why such actions were taken.

Officials and employees should be trained on the retention process to understand its purpose and its functionality. When users are educated as to why a process is being implemented and the end goal, they often alter the way they create information to align with the intent of the policy. There are various training methods and approaches that can be employed depending on the audience. For some employees who may be responsible for managing records, training will need to be detailed. For others, the training may be conducted at a higher level. In all events, officials and employees should understand the intent of the access to information law so they can help promote its principles through information management. Establishing and implementing a policy across an organization will help ensure consistency and compliance with the applicable law.

Suspension of Routine Destruction

In some countries, it may be necessary to suspend normal information expiration or destruction practices in response to pending litigation or some other legal request for information. In the United States, this process is often referred to as a "legal hold." For instances where this is required, steps should be taken to document the request and what information was placed on "legal hold" or otherwise withheld from the normal expiration process. In these cases, the distinction between "information" and "records" is often irrelevant, as a legal request will require the production of all information that may be available, not just records.

Easing the Implementation of Retention Policies

If this is the first time an organization has undertaken to implement a retention policy, it should consider creating a timeline detailing by when the implementation will be completed. In many cases, this will need to occur in phases.

There are various technology solutions available that can help automate the classification of and enforce the retention of information. Tools like email and file archiving can place information into a centralized repository where more granular retention policies can be applied. Using an archive, information can automatically be run through its lifecycle. In addition, an archiving tool can suspend these destruction practices in the event that information needs to be preserved pursuant to a legal or other request for information. As mentioned above, there are a variety of tools that can help make this process more efficient.

Although the process of assessing an organization's information management strategy may be time-consuming at the outset, the benefits derived from this undertaking will far exceed the initial investment. Enabling this process not only helps control the amount of information on existing systems, it will also facilitate the identification of and access to information by making the process more efficient. Failing to implement such a process can undermine an organization's ability to respond to requests for information and may hinder public access to information.

Information Production

When dealing with a request to produce information, whether it be in the context of a public access request or in response to litigation, an organization will need to be able to do the following: 1) identify potentially relevant information; 2) collect that information; 3) produce the information in a format that is usable by the requestor; and 4) maintain a record of the information produced and when a response was provided.

Identifying Relevant Information/Collection of Information

In order to identify relevant information, an organization will need to implement a system by which records may be searched and ultimately retrieved. The approach to this will differ depending on whether the information is kept electronically (e.g. email, electronic files, etc.) or whether it is retained in hard copy.

When dealing with information kept in hard copy documents, organizations typically create some sort of index depicting what categories or types of files exist and where they are located. This can be done by filing structure, author, department, etc. What is most important is that the organization understands what documents exist and implements a practical way to locate them.

Although the amount of electronic information can be exponentially greater than what exists in hard copy, the electronic nature of this information makes it easier to categorize and identify.

Indexing tools can quickly "read" information and make it accessible to electronic search methods. When evaluating how to proceed, an organization will want to evaluate what information within a particular piece of data will need to be searched. For example, for emails, will the organization need to search the author and recipient fields, the content of the email, or the content of any attachments to the email? There are various ways to approach this and differing degrees of complexity involved. To assess this, it may be helpful for the organization to review the types of requests for information it typically receives. The level of detail within these requests will help inform the level of granularity to which the search capability will need to be developed. When determining these parameters, the organization should keep in mind that the information will need to be produced in a timely manner, often with very little lead time. To that end, search functionality should be enabled to accommodate identification and production within a short timeframe.

Production Format

In addition to the search methodology and timing issues, it is important to consider the ultimate output of the search and how this information will be used. There may be specifications within the law regarding the format in which information should be produced. If such specifications exist, the organization will need to ensure that the system it uses to search and produce information is able to conform to these requirements. In many cases, a requester may not have access to a particular system in which information was created within the organization, for example, a particular database. If that is the case, the organization will need to take steps to produce the information in a format that is readable by the requestor, unless there is some circumstance which makes this unreasonable or impractical.

Maintain a Record of Requests

Transparency is a fundamental principle of an approach to open government and access to information. Developing a system to proactively document and track requests for information and the process and results of these requests will help instill confidence and openness between the organization and the public. Organizations may also consider publishing the requests and results or otherwise making them available to the public. In some cases, an exception or a requirement in the law may prohibit the production of certain information. Where this occurs, it should be documented and explained. Likewise, if requested information is not produced for any other reason, the organization should document and explain the reason.

Proactive Disclosure

An access to information law may contain provisions requiring organizations to proactively disclose certain information and documents. These requirements are generally intended to foster transparency and confidence in government and provide useful information to the public. An added benefit of these policies is that they may reduce the number of requests an organization must process, as the information sought may already be available.

A threshold issue to consider is what information should routinely be disclosed. If the law requires specific information to be proactively disclosed, policies should be memorialized to address the scope of the information to be disclosed and the schedule for doing so. In addition, the policies should define the person or department responsible for maintaining and updating the information. The policies should also specify where the information will be disclosed (i.e. a public website), and how (in html format, Pdf, etc.). The organization may want to publish the policies in this location as well, as this will further aid the efforts at transparent information sharing.

Technology

While the demands of an information management process can seem daunting, there are a number of technology solutions available that can address the various issues that may impede an information management program. Using available tools, an organization can make the information management process more efficient and less costly, and free up human resources to work on other important projects. Most organizations are used to handling paper documents and may be more comfortable developing information management strategies based on this experience. Paper documents should be included in the overall information management strategy, but due to its escalating volume, electronic information requires a different approach. In many cases, it is easier to manage electronic information as its very nature makes it easier to index, categorize and search.

Just as the development of a retention strategy should reasonably conform to the purpose of the organization and its users, so too should the acquisition and implementation of technology enhance the functionality of the organization. When evaluating technology solutions, an organization should identify what issues it needs to address with a tool and prioritize those issues. A solution should be scaleable so it can meet the needs of the organization today and grow with it as needs evolve. Technology should make the process easier, not more difficult.

Archiving technology

Archiving technology provides a central repository for electronic information that allows for categorization, searching, preservation and disposition. Archiving technology provides immediate access to information and allows that information to be preserved in conformance with the organization's policies and legal requirements. When specific information is requested, an archive may be searched using an electronic index of the information within the archive. The use of search technology can have a significant impact on efficiencies and response time, often reducing this time exponentially. Utilizing even basic search criteria can help refine the information potentially relevant to a request. Once relevant information has been identified, it can be reviewed and extracted from the archive in response to a specific request.

Back up technology

Disaster recovery plans that enable back up technology allow an organization to recreate its electronic information systems and continue to operate in the event of an unforeseen system failure. The timeframe that data should be stored for these purposes will vary depending on the organization and the information at issue, but as a general rule, the information should be stored for as short a time period as possible. Back up technology was not designed to function as an

archiving or records management system, as it can be cumbersome to categorize and ultimately retrieve information. In the event back-up technology is called upon to retrieve information or to manage preservation of content for legal hold, organizations would be advised to use a content indexing capability. This can provide some level of targeted search and retrieval and reduce the cost and complexity associated with the back-up environment.

Implementing Technology Solutions

Implementing technology can be a time-consuming process. If installing a new system, an organization may want to establish a timeline by which certain milestones will be reached and the parties who will be involved. If the timeline is made public, it will help keep the implementation team on schedule and will also encourage open communication with the public.

The roll-out of the technology and its use should be monitored so that successes and set-backs can be chronicled and shared with other agencies, providing them helpful guidance on what works and what may best be re-thought. The more communication that flows from this process, the more the spirit of the access to information law is achieved.

Achieving Conformity

Various state agencies and organizations may have different information management methods and processes yet still be subject to the same access to information requirements. In these instances, it may help to facilitate inter-agency communication around methods and process so there is consistency between the agencies or departments. Best practices documents may be drafted and internal websites may be used to disseminate this information, and it may be helpful to conduct regular meetings or audit sessions between organizations to share information.

Chapter 4: Capacity building for information users

Reception Pending

Chapter 5: Capacity building for information providers

Formulating and adopting legal frameworks, though essential, are only the initial steps in the larger process of promoting and ensuring the right of access to public information. This process includes creating institutional mechanisms to implement the existing norms; developing strategies to increase awareness among leaders, public servants and citizens on the importance of the matter, as well as carrying out initiatives to educate and develop capabilities to make those mechanisms and norms function adequately.

The importance of these strategies and initiatives has been taken into account in national and international standards related to access to public information. In accordance with the Inter-American Court of Human Rights Judgment regarding the Case of Claude Reyes *et al*, "the State should provide training to public entities, authorities and agents responsible for responding to requests for access to State-held information on the laws and regulations governing this right; this should incorporate the parameters established in the Convention concerning restrictions to access to this information that must be respected"[4]. As shown in the 2009 Access to Information report of the OAS Special Rapporteur for Freedom of Expression, on the other hand, the States have the obligation to "disseminate among the public in general the existence and methods of exercising the right of access to information". On this matter, the Resolution on Principles on the Right of Access to Information of the Inter-American Juridical Committee states that: "[m]easures should be taken to promote, to implement and to enforce the right to access to information, including creating and maintaining public archives in a serious and professional manner, training public officials, implementing public awareness-raising programs, improving systems of information management…"[5]

Some examples of national standards that include specific norms related to the issues of training and promoting access to public information are the Chilean Law of Transparency of the Public Function and Access to Information Administered by the State (Law 20.285, published: 2008) and the Ecuadorian Organic Law of Transparency and Access to Public Information (Law 24, 2004). In the first case, the Transparency Council, the national oversight agency on the matter, has among its functions: training public officials and carrying out dissemination activities. The second, on the other hand, compels all public institutions to disseminate and to implement training and promotion activities for public officials and civil society organizations. It also instructs the National Archives System to provide training to all government officials in all pertinent matters related to its functions.

[4] Court H.R., Case of Claude Reyes et al. v. Chile. Judgment of September 19, 2006, Series C No. 151. Par. 165
[5] Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights Report 2009. P. 4

Before listing a group of initiatives from different Latin-American countries that could serve as a reference in the process of implementing laws on Access to public information, we will present some basic considerations that should be taken into account when designing and putting into practice capacity building initiatives.

1. Promotion and capacity building should be considered, in the first place, an essential part of a greater strategy that pursues the development and consolidation of a culture of transparency and responsibility among leaders, public servants and citizens. The basis of such strategy is encouraging the adoption of transparency as a primary goal in the public and private realms. Transparency is a precondition for democracy and for achieving a vigorous political culture by virtue of facilitating and encouraging political participation and accountability. It is also an effective means of preventing abuses and corrupt practices.

Since the cornerstone of transparency is assuring access to sufficient, relevant, reliable and good quality information[6], legal frameworks and strategies on Access to Public Information provide concrete and effective mechanisms to achieve higher levels of transparency.

2. In addition to providing training and disseminating information on the different aspects and procedures related to Access to public information, it is crucial to develop a more comprehensive approach when designing and implementing promotion and capacity building initiatives. It is also necessary to integrate people's values, perspectives and behaviors, in order to have a deeper and long lasting impact at the cultural level. This kind of approach implies the adoption of a variety of materials and educational methodologies, including more participative and creative activities, as well as meaningful awareness raising campaigns.

3. Regarding the processes involved in requesting and providing public information, information providers should be trained to guide citizens in formulating and presenting information requests and not only on the specific contents of the norms and on the functioning of the related mechanisms.

[6] See: Prats Catalá Joan. "Ética del oficio politico", Institut Internacional de Governabilitat de Catalunya Universitat Oberta de Catalunya Document included in: Biblioteca Digital de la Iniciativa Interamericana de Capital Social, Etica y Desarrollo - www.iadb.org/etica

4. Basic concepts and elements of transparency and access to public information should be accessible to all members of public institutions at all levels, and not limited only to those directly involved in the processes defined by the ATI norms and mechanisms.

5. Monitoring and assessing play a crucial role in obtaining evidence based information on the results and impact of Access to Information strategies, including awareness raising and training and promotion campaigns. They are also important means for setting goals and generating incentives

6. The combination of having both, government and civil society organizations developing training programs on Access to Public Information is an effective way to ensure that advances in the legislation on this topic are accompanied by an effective cooperation that leads to solid grounds for implementation.

Examples of capacity building initiatives in some Latin American countries

Chile:

The Council for Transparency is the Chilean national oversight agency created as a consequence of the adoption of the Law on Access to Public Information. Among its functions, the Council has the responsibility to implement, directly or through third parties, training and awareness raising activities directed to public officials and general public on topics related to transparency and access to public information. Since its creation, the Council has offered training workshops to public institutions, in particular, those more directly involved with providing information. The workshops include information on the contents of the Law, and on the functions and operation of the Council.

http://www.consejotransparencia.cl/

Training Program for Public Officials on the Law of Probity, Transparency and Access to Public Information (2008-2012): This program was launched by the Secretary of Government with the Civil Service Director in 2008. The program aims to train 160 thousand public officials from 40 public service offices on the rules in matters of probity, transparency and access to information. It includes introductory courses for new members of the public service, specialized courses for selected officials in accordance with their area of responsibility, and general information courses for other officials.

Pro- Acceso Foundation- Training Program (Fundacion Pro-Acceso) This civil society organization has held training workshops and other activities designed to train public officials and members of the civil society on different aspects of the Law 20,285- (Law on Transparency in Public Service and Access to

Public Information) in support to the efforts of other government agencies such as the Agency for Transparency and Integrity.

http://www.proacceso.cl/

Bolivia

Transparency Program: In Bolivia, under the Law of Transparency and Combating Corruption, a program called "The Transparency Program" was established. One of the main goals of this program is access to public information. To this objective, the Ministry for Institutional Transparency and Combating Corruption has undertaken the responsibility of implementing specialized programs and projects designed to promote access to public information through awareness raising campaigns and other initiatives. Other objectives of the Transparency Program include: promoting the development of public ethics, transparency and accountability in the actions of public entities, in connection with the modernization of the state.

http://www.transparencia.gov.bo/

Initiative: "A Bolivia with Honesty and Transparency" This initiative was implemented the Ministry for Institutional Transparency and Combating Corruption in cooperation with the Ministry of Education. It consisted of a folk festival with a "song's contest". Authorities from the two ministries took part on the event and said that "the underling objective of this initiative was precisely to reach through the students to their teachers and parents, many of which were public officials and members of social organizations, thereby also indirectly strengthening ethics and social control in the management of public resources." www.laprensa.com.bo

Communication and Information Municipal Unit for Information Transparency at the local level (Unidad de Comunicación e Información Ciudadana Municipal (UCIM)

As part of the technical assistance project "Democratic Development and Citizen's Participation" (DDPC3) from USAID, this initiative focused on "the generation of more solid, efficient, and transparent municipal governments." One of the goals of this initiative is to promote transparency and access to public information at the level of municipalities in order to address the gaps in terms of adequate communication and information between local government and citizens.
http://www.forodac.org.bo/upload/Municipios-_FAM.pdf

Program of Support for Transparency in Public Administration
Convention ATN/SF-9044-BO-2 (2005-2009)
The Inter-American Development Bank and the government of Bolivia signed in 2005, an agreement for a technical cooperation grant to establish the "Program of Support for Transparency in Public Management". The overall objective is to help improve transparency, accountability and control mechanisms of governance. The program was implemented jointly with the Comptroller General of

Bolivia, and the main actions focused on corruption's prevention through access to information in public institutions by offering training to public officials in urban and rural areas.

http://www.iadb.org/Projects/loan.cfm?loan=ATN/SF-9044-BO-2

Colombia

Pacts for Transparency: This is an initiative of the Presidential Program of Modernization, Efficiency, Transparency and Combating Corruption, has among its main objectives, promoting a culture of information in local governments. Through this initiative, agreements of understanding were signed between representatives of the government and citizens. The commitment is to implement good management practices that enable the latter access to public information. This agreement also reinforces accountability through progress reports to monitor the implementation of the agreement. This initiative is also sponsored by the Regional Autonomous Corporations (Corporaciones Autónomas Regionales) which actively engage citizens in the monitoring and follow up process.

http://www.anticorrupcion.gov.co/areas/pactos.asp

Peru

National Plan to Combat Corruption (Plan Nacional de Lucha contra la Corrupción): This Plan has seven objectives among which one is training on access to public information and promoting ethics and transparency in public administration. Peru's National School of Control (Escuela Nacional de Control) is the educational entity of the Comptroller General, which is responsible for educating and training public employees on issues of government control.

http://www.contraloria.gob.pe/enc/index.htm

(We are working to provide more examples from other countries)

Chapter 6: Monitoring enforcement/effectiveness of law

Introduction

In instituting a functioning access to information regime, it is critical to pay great attention to the oversight and enforcement mechanisms and to the establishment of tools for determining effectiveness of the system. A national oversight agency monitors and supports implementation of the access to information legislation; may set policy and offer recommendations; assures consistency among agencies; promotes the right of access to information; and can provide requisite training and capacity building for key civil servants.

Assuring a procedure that allows persons to enforce their right to information when a request is ignored or denied, or when their rights are otherwise impeded, is arguably the most important set of provisions within an access to information law.[7] Without an independent review procedure of decisions, the right to information will quickly become discretional and based on the whims and desires of the persons receiving the request. If the enforcement mechanisms are weak or ineffectual it can lead to arbitrary denials, or foment the "ostrich effect", whereby there is no explicit denial but rather the government agencies put their heads in the sand and pretend that the law does not exist. Thus, some independent external review mechanism is critical to the law's overall effectiveness.

The institutional framework and apparatus developed for oversight and enforcement of the right to information vary. As will be discussed below, models for monitoring and enforcement range from more limited oversight and intermediary enforcement mechanisms to those whereby the bodies are mandated and vested with wide-ranging powers and responsibilities. The decision regarding which model will function best depends greatly on the specific political, economic and social context and needs of the jurisdiction. However, what is increasingly clear is that in order to ensure full and continuing compliance with the law, there is a need for statutorily mandated instruments dedicated to the promotion, monitoring and enforcement of the access to information regime.

Finally, access to information statutes should incorporate a mandate and the means for determining the overall effectiveness of the regime. Quantitative and qualitative data related to the use of the law, agency

[7] See Neuman, Laura, "Access to Information Laws: Pieces of the Puzzle," in The Promotion of Democracy through Access to Information: Bolivia, Carter Center, 2004.

responses, costs, and impact will allow governments to identify and resolve challenges and recognize successes and best practices.

Oversight

An oversight body with the responsibility for coordinating implementation efforts across government agencies, promoting training of functionaries and public education, responding to agencies questions, and ensuring consistency and sustainability is critical to the success of any access to information law. Experience indicates that without a dedicated and specialized oversight body the compliance rate is lower, the number of requests more limited, and the right to information eroded.[8] Moreover, without a continuous oversight body, government efforts are dispersed and diluted with no clarity in responsibilities, lack of clear guidelines, and reduced ability to conduct long-term planning and to promote best practices, thus costing governments more in terms of human and financial resources. For those jurisdictions without an oversight body, there is no one for the agencies to contact for support or with questions and concerns, and the weight of implementation and public education falls squarely on their already overburdened shoulders. In these cases, users are forced to navigate the systems on their own and public servants are burdened with additional responsibilities, but often less training and resources.

There are a number of models for establishing an oversight body. For example, in some cases the duties are vested in an existing body, such as the Ombudsman, in others oversight is joined with the same institution responsible for enforcement, while a third model witnesses the oversight body as a fully independent, specialized body. In all cases, the oversight bodies have served to enhance the government's implementation efforts and ensure that the objectives of the law are more fully met.

Regardless of which system is selected, it is vital that the oversight body or unit enjoy a statutory mandate. Where oversight is voluntary, over time the initial units have seen staff reduction, insufficient funding or complete disbandment. Voluntary oversight mechanisms have emerged when the legislature failed to mandate a national coordinating body as part of the law or regulations, but practice dictated the need. In these situations, the lack of a specifically legislated oversight body has resulted in a corresponding low awareness of the law, no tracking or monitoring of implementation, and a dismally low request rate. As experience builds in the field, it points to the need for an oversight body that is specialized, dedicated to the issue, well-staffed and properly resourced. In many cases, this suggests that adding the access to information oversight function to an already stretched Human Rights Ombudsman or like institution with disparate mandates may not serve the overall goal.

[8] Id.

Therefore, in developing statutory language and implementation of a proper oversight mechanism, the access to information law should make specific provision for an agency or individual to be in charge of reviewing the manner in which records are maintained and managed by public authorities; monitoring implementation efforts and the automatic publication of documents by the public authorities; receiving monthly reports and assisting in the annual report to the legislature and public training of public servants and material development. Such an agency additionally would be responsible for public education and promotion campaigns, including raising awareness about the Act and the government's successes. The agency itself should be designed and staffed to ensure capabilities to collate reports and provide statistical analysis, including number of requests and complaints, and to monitor all systems.

Enforcement

Compelling adherence to the tenets and principles of access to information laws through well-designed and implemented enforcement mechanisms is paramount to ensuring the statute's overall effectiveness, particularly in cases with poor implementation or wavering political commitment.[9]

Although jurisdictions around the world have varied in the design of their enforcement mechanisms, there is a growing recognition that the optimal system would be:

- independent from political influence;
- accessible to requesters without the need for legal representation,
- absent overly formalistic requisites,
- affordable,
- timely, and
- preferably specialist, as access to information laws are complex, necessitating delicate public interest balancing tests.[10]

More specifically, advocates have called for legal provisions that guarantee "a right to appeal any decision, any failure to provide information, or any other infringement of the right of access to information . . ."[11] The more recent Americas Regional Findings and Plan of Action for the Advancement of the Right of Access to Information calls on all states to assure that "enforcement mechanisms are accessible and timely, including establishing intermediate appeals bodies, providing necessary human and

[9] See L. Neuman 'Enforcement Models: Content and Context", Access to Information Working Paper Series, World Bank Institute, 2009.
[10] Id.
[11] See Carter Center "Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information," International Conference on Access to Public Information, Atlanta, GA, 2008.

financial resources, and capacitating all judges and any others responsible for resolving access to information claims."[12]

In most jurisdictions with an access to information law, a requester that has received a negative decision, whether it is a complete or partial denial of information, lack of response, or other determination ripe for appeal, may seek internal review[13]. This often entails a review of the decision by a more senior administrator or Minister within the same agency that made the initial negative determination. In many jurisdictions, internal appeals are mandatory before the aggrieved requestor is eligible for external review.

Models of Enforcement

Following an internal review, if still dissatisfied, the information requester is afforded the opportunity for appeal to an external body. The model of enforcement selected for appeals outside of the agency depends highly on the specific context and culture – political, economic and bureaucratic - of the country. As with the oversight mechanisms, there are a number of potential models, including:

1. Judicial Review
2. An Information Commission(er) or Appeals Tribunal with the power to issue binding orders
3. An Information Commission(er) or Ombudsman with the power to make recommendations[14]

In cases where an Information Commissioner is established, the office could join enforcement with oversight responsibilities.

Judicial Review

[12] See Carter Center "Americas Regional Findings and Plan of Action for the Advancement of the Right of Access to Information," Americas Regional Conference on the Right of Access to Information, Lima, Peru, 2009.
[13] There are a few countries that do not provide internal review of initial decisions, such as France, but these are unique cases.
[14] This and the following sections draw largely from L. Neuman "Enforcement Models: Content and Context", Access to Information Working Paper Series, World Bank Institute, 2009.

The first enforcement model provides for appeals directly to the judiciary. When a request for information is denied, the requester must appeal to the federal court or administrative court. The main benefits of such a model are that the courts have the power to order the release of information if inappropriately denied, possess wide-ranging powers of investigation, have clearly established mechanisms for punishing agency non-compliance, and they may determine the procedural and substantive matters *de novo*.

However, in practice there are a number of disadvantages to this model. For most citizens, the courts are neither accessible nor affordable. Often for successful litigation under the judicial model, the information requestor may need to hire an attorney or advocate and pay the many court costs. In most jurisdictions, the court calendars are overwhelmed and it may be months or years before the case is heard and even longer to receive the written decision, perhaps making moot the need for the information.

The cost, the delay, and the difficulty for citizens in accessing the courts serve a chilling effect on the utilization of this enforcement mechanism. With all these obstacles, the deterrent effect that courts often play is minimized and may actually encourage a perverse incentive among some civil servants to ignore the law or arbitrarily deny requests as they recognize that most persons will not be able to effectively question their decisions. Moreover, in many newer democracies there is often a lack of trust in a judiciary that may not yet have matured into a strong, independent branch of the state. Finally, consideration must be given to the litigation costs for the government (and taxpayer) and the burden on the court system[15].

Information Commission(er) or Tribunal: Order-Making Powers

In the second model, external appeals are made first to an access to information commission(er) or specific appeals tribunal with the power to issue rulings and binding orders. This model often is considered the best of the three models in meeting the basic set of enforcement principles. Appeals to bodies such as an Information Commissioner or Tribunal often are more accessible as there is no need for legal representation, it is affordable as there are no court costs or other fees[16], and, in the best cases,

[15] In a 2002 case in South Africa that went to the High Court, the Auditor-General theorized that they had spent over $300,000 Rand (close to $30,000 US) in defending their decision to deny information. See, "The Promotion of Access to Information Act: Commissioner Research on the Feasibility of the Establishment of an Information Commissioner's Office", The Open Democracy Advice Centre, Cape Town 2003.

[16] In some jurisdictions, such as Ireland, there are application fees for submitting certain types of cases to the Information Commissioner for review. For example, if the request is for personal information or the agency has failed to respond then the application fee if waived. In other cases the application fee may be £50 or £150, depending on the nature of the appeal. For comparison, the Circuit Court application fee is £60 or £65, depending on the type of case, £60 for notice of trial plus £11 for every affidavit filed, £50 for official stamp of an unstamped document given as evidence, and £5 for every copy and the Supreme Court application fee is £125 plus additional

highly independent. This system can allow the decision-makers to become specialists in the area of access to information. With the power to order agencies to act or apply sanctions, this model serves as a deterrent to the government and can alleviate the need for further appeals to the Courts. Binding decisions are issued through a written ruling, which in mature jurisdictions creates a body of precedent that can guide future internal agency and commissioner decisions and facilitate settlements.

This model lends itself to the principles of independence, affordability, accessibility, timeliness and specialist, but as with any model, these benefits are not always realized. There are some additional disadvantages. Quasi-judicial proceedings, such as those before a body with order-making powers, may become overly formalistic and legalistic. Decisions contain jargon, which may be challenging for requesters to understand, and the administration may be slower than the Commissioner model with fewer powers as more exhaustive investigations are undertaken, due process requirements must be fulfilled, and lengthy judgments must be written and issued. These models may be more costly for the state as new institutions are established and staffed, and technical procedures (such as summons and notice, in-camera reviews, and hearings) are met to satisfy legal necessities. Finally, although called "binding," in the face of agency non-compliance there remains the need for judicial involvement and in the most extreme cases police engagement.

Information Commissioner or Ombudsman: Recommendation Power

Like the system before, the third model utilizes an Information Commissioner or Ombudsman[17], but in this case there are more limited faculties for enforcement. In this design, the intermediary body responsible for enforcement is vested solely with the power to issue recommendations to the relevant administrative agency or public functionary. These Commissioners or Ombudsmen often possess weaker powers of investigation, such as investigating cases *sua sponte*, and with no order-making powers tend to emphasize negotiation and mediation. Benefits of this model include a lack of formalism, encouraging accessibility for complainants, and it can be the speediest, as the investigations are generally limited to unsworn representations[18]. The abridged powers may encourage less adversarial relations between the recommender and the implementer, with the Ombudsmen relying more on resolution through persuasion and dialogue, thus potentially leading to greater compliance. Finally, the independence of an Ombudsman may be augmented by their status as officers of the legislature (Parliament) rather than as a

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costs for filings and copies. See The Court Services of Ireland, Circuit Court Fees, Schedule One and Two and Supreme Court and High Court Fees Order Schedule One Part Two.

[17] For purposes of this paper, I will use the term Information Commissioner with recommendation powers and Ombudsman interchangeably.

[18] In Hungary, the annual report from 2001 indicated that the Information and Data Protection Commissioner took an average of only 52.6 days to fully process a case and issue a recommendation. See Neuman, Laura "Mechanisms for Monitoring and Enforcing the Right to Information Around the World" in Access to Information: Building a Culture of Transparency, Carter Center, 2006.

quasi-independent part of the executive, which often is the case for Information Commission(er)s with order-making powers.

But without the "stick" of order-making powers, recommendations may not be followed[19]. Over time, even those bodies vested with the more limited powers of investigation and recommendation may become increasingly formalistic, contentious and slow. Moreover, with this model a body of rulings may not be created that can serve to guide future agency determinations on disclosure[20], and the Ombud may be prohibited from instigating inquiries without a formal complaint. Emphasis often is placed on mediation and negotiated resolution, notwithstanding that one of the parties (requester or agency) might clearly be correct in its assertions. With fewer powers of investigation and order, there may be more limited resources, and if the Ombudsman has a shared mandate to receive complaints on a variety of issues he or she may have less dedicated time to freedom of information and potentially less specialization. "

Establishment of Commission

In the cases where a Commission(er) has been chosen as the enforcement model, regardless of the extent of its powers, consideration must be given to the establishment and implementation of the office. Paramount to the success of this model is its independence. A series of factors may determine the real (or perceived) independence of this office and its officers, including the manner of selecting the Commission(er)s, their term limit and procedures for dismissal, from which branch of government they receive their powers and to whom they report, and the autonomy in budgeting.

The selection process, and threshold assents for appointment are integral to the perceived legitimacy of the Commission. There are a number of ways in which selection may occur. Most common are through executive appointment, sometimes in partnership with the leader of the opposition. In other cases, appointment is through Congressional or Parliamentary selection. The Commissioner(s) may be elected wholly by Parliament with no Executive branch involvement, or more often, the President presents a closed list of candidates to the Legislature for selection or approval, either through assent or lack of dissent.

[19] This is not always the case. For example, since 1987, there has been 100% compliance with all New Zealand Ombudsmen recommendations on access to official information. Prior to that, non-compliance only was due to individual Ministers exercising the veto power provided in the legislation.
[20] Some jurisdictions, such as New Zealand, may publish "casenotes," which can be relied upon by government agencies as a decision-making guide.

Once appointed, the term and potential for dismissal become foremost considerations for continuing independence. Periods of appointment are in many respects a balancing act. If term limits are too short, then the Commissioner may be more concerned with pleasing those responsible for subsequent appointments than in serving the duties of his or her post. On the other hand, if terms are too long then officers may be less responsive to the shifting trends of openness and needs of all constituencies. The length of term is relevant not just to ensure sufficient independence, but also the functioning of the Commission. As previously noted, enforcing the right of access to information often necessitates some specialization, which takes time to acquire. Thus, shorter terms could signify less proficiency in the body. For dismissal or termination, members of the enforcement body should only be suspended or removed "for reasons of incapacity or behavior that renders them unfit to discharge their duties."[21] The statute or implementing regulations should not provide additional reasons for removal that could in time become politicized or manipulated.

Lastly, budget sovereignty is a significant component to overall independence and autonomy. If the Commission is vested with its own line item in the budget, it is less obliged to a specific ministry or agency for proposing and promoting its financial needs. In cases, for example, where an executive branch ministry must submit the Commission's budget for legislative approval, there is an inherent dependency created with that "host" agency.

Beyond issues of independence, in implementing the enforcement mechanism, attention should be paid to the seniority and expertise of the Commissioner(s), the amount of time dedicated to serving the role, and the staffing of the Commission offices. Increasingly, Access to Information Commissioner, or at a minimum the President of the Commission, is a dedicated full-time position. To ensure the functioning of the Commission, a staff or secretariat may be required. Experience has shown that for intermediary appeal bodies to be successful they must be endowed with appropriate resources, including full-time personnel that can become expert on the intricacies of applying the access to information law and support the Commission in their investigations, mediations, and hearings. Moreover, a professional secretariat is helpful in assisting claimants, particularly when the rules for appeal are quite formalistic.

[21] Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. See also, Principles relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights (Paris Principles), endorsed by the Commission on Human Rights in March 1992 (resolution 1992/54) and by the General Assembly in its resolution A/RES/48/134 of 20 December 1993.

Effectiveness (note: need to complete this section)

The overall effectiveness of an access to information regime – from passage, implementation and enforcement of the law to its ultimate use – will depend on a variety of factors. However, to begin to disaggregate the elements that translate into impact, systems for reporting, analysis and benchmarking must be developed.

As described above, a key role for an oversight body is to receive monthly or annual reports from the public agencies, to systematize the findings and develop recommendations. This, however, only is possible when sufficient reporting requirements are ensconced in legislation and enforced. Once received and analyzed, the oversight body should be mandated to report to the legislature and the public the effectiveness and impact of the right of access to information.