SECOND MEETING
GROUP OF EXPERTS ON
ACCESS TO INFORMATION
December 1 and 2, 2009

MINUTES OF THE SECOND MEETING OF THE GROUP OF EXPERTS ON ACCESS TO INFORMATION

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Draft Model Inter-American Law on Access to Information

- Scope (Article 2):
  - There was consensus on adjusting the heading of the provision in order to include not only information "possessed" by the government, but also information in "custody of" or "control by" the government.
  - There was general consensus on eliminating recital 2 (c) from the body of the law, and on flagging the issue raised by that provision (the issue of private parties falling within the scope of the law in matters where the disclosure of information is required for the exercise or protection of human rights) as a commentary to the law or as a recommendation contained in the implementation guide.
  - There was consensus that 2 (b) should be limited to the extent of funding.
  - As for recitals 2 (a) and 2 (b) there was some consensus on rephrasing the provisions along the lines of the text of the Inter-American Juridical Committee's Principles on Access to Information, setting forth the scope of the law in the following manner:
    - Including all branches of the government, with some disagreement regarding the Judicial Power.
    - Including all levels of government, although there were some expressions of concern over the differences between national and municipal authorities and the bearing that these differences have on the extent of the application of the law.
    - Including all public authorities acting on the basis of constitutional or statutory authority.
    - Including all organizations property of or controlled by public authorities.
    - Including all organizations that receive substantial public funds (there were some reservations as to the inclusion of organizations that receive public "benefits") or perform significant public functions, insofar as the public funds received or the public services performed.
      - Reference was made to the need of exempting non-governmental authorities from some of the requirements of the law, particularly from the proactive disclosure requirements under the publication schemes.
      - Mention was made to the possibility of encompassing international bodies receiving public funds within the scope of the law.
  - It should be noted that a different and more casuistic approach was introduced to the table, under which the provision would set forth a laundry list of authorities and organizations that would fall within the scope of the law (instead of a conceptual determination of the kind of institutions that would be covered by the law).
- Terminological discussion:
  - There was consensus on using the term "public authority" instead of "public body" in the law. The Spanish version would use the term "organo publico."
  - It was agreed that the word "records" would be used to describe the kind of information subject to the law, which would be translated into the Spanish word

"documentos" – this Spanish word would be defined in a broad manner as to include all forms of documents and not only the ones in paper format.
    - The requests for information would be termed "complaints" in the English version and "reclamos" in the Spanish one.
    - The party requesting information would be named "requestor" in English and "solicitante" in Spanish.
    - The addressee of proactive disclosure would be termed "the public" in English and "cualquier persona" or "toda persona" in Spanish.
- Discussion on the right of access (Article 3):
    - There was wide consensus on relocating this provision into a more general section of the law, since it transcends the issue addressed by the section ("measures to promote openness") and affects the very essence of the law.
    - As for the substance of the provision, the following issues were discussed:
        - The reference to "citizenship" in the heading of the provision conveys the idea that only natural persons are afforded the right of access, when legal entities are also holders of the same right. It is also underinclusive, since it does not state that the right is also independent on the nationality and residence of the holder. Thus, to clarify that any kind of person or entity has the right, regardless of citizenship, nationality or residence, the phrase "regardless of citizenship" will be deleted and the wording of the provision will be left general and all-encompassing.
        - It was also stressed that the law should state that the right should be afforded with independence of the interest invoked and the motives of the request. However, it was agreed that the statement was unnecessary because the general wording of the provision makes no such requirement and because other sections of the law deal with this issue.
        - Mention was made to the fact that the provision only refers to public authorities, when the scope of the law also covers non-public entities. However, since the latter would not be covered to the full extent of the law, it was decided that this issue would be addressed in other provisions of the law, and that article 3 would not be amended in this respect.
- Discussion on proactive disclosure and the Publication Scheme (Articles 4 to 8):
    - It was widely agreed that this section of the law should be reformulated.
    - The term "publication scheme" was regarded as unclear by the table, even though it is used by the laws of some countries, and even though its meaning was explained at the meeting as a program, plan or schedule of disclosure that would be set by each public authority which is subject to the law.
    - The re-drafting of the section would be done by Damian.
    - The guidelines for such re-drafting mentioned by the group were the following:
        - There was a proposal to base the provision on article 13 of the UN's Convention on Transparency and Corruption, although in a broader way.
        - There was general agreement on the need to include the requirement that the information disclosed should be clear and understandable to the most vulnerable groups.
        - It was suggested that D. Pavli could come up with two options for the publication schemes and that the group could pick one of them.

        - In order to facilitate the re-drafting of this section, the three main issues raised by it were made explicit:
            - The type of information that should be disclosed.
            - The manner in which that information should be disclosed (clear and understandable).
            - A minimum list of information that should be disclosed.
                - A few of the experts expressed concern over the excessiveness of the minimum list contained in article 7 and suggested that it should be reduced in order for the Member States to accept it. However, the list should be broader than the one of article 13 of the UN's Convention on Transparency and Corruption.
    - A different but related issue that was raised in the context of discussing proactive disclosure was the need of the authorities to document their decisions, in order to reduce the scope of the obligation to produce information enshrined in article 39 of the law. This requirement to document decisions should be placed somewhere in the law, although the specific location was not determined.
    - As for the obligation set forth in article 39 of the law, there was general agreement on relocating the provision from the section dealing with exceptions to disclosure to a more general section of the law – maybe the one dealing with proactive disclosure – and on softening the obligation of producing information. Since no consensus was reached, the discussion of this issue was deferred to further sessions of the group.
    - It was agreed that the word "delete" in article 8 (b) was inappropriate. A different wording should be analyzed and approved by the group.
- <u>Harmonization with other laws that provide for disclosure of information</u> (Article 9):
    - A discussion arose over whether the law should become the default regulation in matters of access to information already regulated by different laws, or if these laws should prevail in their specific scopes. No consensus was reached on this issue, but a proposal was favored by the group which stated that the law on access to information would not abridge other existing laws, but that in case of conflict, the one that provided for more disclosure would prevail.
- <u>Discussion of the procedure for accessing information held by public bodies</u> (Articles 15 to 33)
    - Article 15 in its current form regulates two different issues, which are the costs of access to information and the sanctions generated by the exercise of the right. Thus it was decided that this provision should be divided into two different articles, each for every issue. As for the second part of the provision, the need to improve the phrasing was emphasized.
    - It was decided that the sanction imposed on article 16 does not correspond to this section of the law, and should be treated separately on the section that deals with sanctions.
    - It was widely agreed that the addressee of a request of access to information made orally or by phone should have the obligation to document the request.
    - Regarding article 18, the group arrived to the following conclusions:
        - The requirements should not be restricted to written request but should be extended to any kind of request.

        - The requirement in recital a) of providing the full name of the petitioner should be eliminated.
            - In this regard it was argued that when a request referred to personal information, the name of the petitioner, as well as her identification, should be required. No consensus was reached over whether this issue should be dealt with in an access to information law, particularly because this is matter of the personal information statutes. However, since many of the requests of access to information refer to personal data (e.g. medical records), it was suggested that a commentary to the law should be placed in order to clarify that these kinds of requests would require a full name and an identification.
        - It was agreed that instead of requiring a "home/office and/or electronic address", the provision in article 18 (b) should only require "contact information".
        - It was also agreed that the requirement of "clear and precise description of the information requested" contained in article 18 (c) was too harsh, and that the wording should be amended with a requirement of "sufficiently precise a request in order to allow the information to be found".
        - There was also consensus on making the requirement of article 18 (d) optional instead of mandatory.
    - Regarding costs of reproduction (articles 19 to 21) the following comments were made:
        - There was general agreement on not incorporating "search fees" to the array of costs that should be paid by the petitioner.
        - Objections were raised to the allusion to "referential value of the same service in the market" on article 20, since this may imply that the addressee of a request would be making a profit. To assure that the fees are not excessive or prohibitive, the solution that was preferred was the beforehand publication of a fee schedule by each entity.
    - As to the information office required by article 23, a preference was expressed to the requirement of an information "officer" instead of an office, particularly because demanding an office from small non-governmental entities would be too expensive. Additionally, holding an officer accountable to answer the requests for information (as opposed to an entity) gives more incentives to comply with the law.
    - An office should be required only when possible, to serve the purpose of contact office for the requestors, liaison with other information offices of other entities, and mediator to attempt the alternative resolution of conflicts.
    - Discussion ensued over the procedure for requesting information from private entities that fall within the scope of the law. It was argued that the request should be directed to the public authority that regulates, supervises or controls the private entity that performs public functions or receives public funds, on the assumption that there will always be such public authority regulating, controlling or supervising a private entity with those characteristics. A counterargument was put forward that it was too complicated and inefficient to ask the state to respond to these kinds of requests. The only consensus reached was that this issue should be addressed via a separate provision of the law.

- Regarding the process of logging, interpreting and tracking the requests (articles 24 to 27) the following comments were made:
    - There was concern over requests that are too vague or manifestly unreasonable. The need for a safeguard to reject these kinds of requests was stressed.
    - There was discussion over the best way to deal with requests that are addressed to inappropriate authorities. The options were that the original addressee should either orientate the requestor in the search for the right addressee of the request or transfer the request to the latter. The transfer option was easy in electronic requests but could cause problems in written or verbal requests, especially in countries where the mail system was not trustworthy or scantly used. However, the table showed a preference for not requiring the filing of a second request and thus the transfer option was favored, as long as it was an obligation of the original addressee which entails the responsibility of its officers. The orientation option could be suggested in the implementation guide.
    - Whatever the choice, in these cases the offices created by article 23 should communicate directly and act as liaison with the similar office of the entity to which the request should have been addressed in the first place.
    - There was general agreement that article 27 was inappropriate for a model law and that the handling of the order of the requests should be left to the discretion of the addressees. The most that the group of experts could do in this respect was to include a suggestion via the implementation guide.
- In relation to the search for records (article 28), the need to incorporate a safeguard to the addresses was emphasized, especially when the request was too vague or manifestly unreasonable, or when the records could not be found after a diligent search. Another argument put forward was the need of hardening the standard of the search for records from “reasonable” to “thorough and complete”. Additionally, a new proposal was made to include a principle of good faith of the addressees in the handling of requests instead of an article with a standard for that search. The principle, it was argued, would be useful to judge the effort of the addressee on each particular case of unfound records. No agreement was reached on any of those issues and for now, article 28 and the term “reasonable” will remain as the standard for the search of records and as the safeguard for unreasonable requests and for records that cannot be reasonably found.
- Pertaining to the maintenance of records (article 29) there was concern over the burden that this could place on the private entities that fall within the scope of the law. It was agreed that the need to create – and not only maintain - records should be included in the provision. It was argued that the need to keep records in a professional manner, which is already in the implementation guide, should be part of this provision of the law. The adequate maintenance of records reduces the need of recreation of lost records set forth in article 30, and thus it was suggested that administrative sanctions should be imposed for the lack of or inadequate maintenance of records.
- As to article 30, the obligation to “recreate” lost records was regarded as too harsh, and a preference for the obligation to “reconstruct” lost records was expressed.

- Concerning the time limits to respond to requests (articles 31 to 33), the following comments were made:
  - It was argued that it is inappropriate for a model law to state a term and that, rather, it should set a standard such as a "reasonable" term. However, it was counter-argued that it is feasible to set a term expressed in days, and that an average term in the region could be fixed. A general compromise was reached to set the standard "as soon as possible" or "as soon as practicable" as the term to respond to requests for information (since most requests are answered way before the expiration of the term), but to fix a maximum term expressed in days (e.g. 30 working days).
  - The issue of giving notice to third parties who may have interest in the requested information was raised because it is not included in the law. This issue is especially complex when the number of interested parties is high, in which case some mechanism of collective notice should be implemented, some exceptions to this collective notice should be carved out (for instance when the information is already incorporated to databases), and the possibility of the state representing those interests should be established as a default rule when these parties do not appear to invoke their rights.
  - It was agreed that the re-draft of this section of the law would be discussed via email or in a message board in the website of access to information.

- Discussion on the exceptions to disclosure (articles 34 to 39): the issues discussed were the following:
  - Professor David Stewart mentioned the danger of having a general and conceptual wording for the exceptions (using words like national security, public safety and so forth). Instead, he suggested a laundry list of exceptions in order to narrow down and precise the meaning of the exceptions to disclosure.
  - It was also suggested that a provision should exist that enshrines a strict construction of the language that creates exceptions.
  - In particular, there were objections to the exception of "the protection of financial, economic and monetary stability", because for instance, a corruption scandal could have that effect and that is the kind of disclosure that the law wants to encourage.
  - There were also some reservations to the exception of "protection of parties in court proceedings", because privacy is already protected by the exception in article 34 (a) and because the scope of the information disclosed would be greatly reduced since a large amount of information is part of court proceedings (an idea was introduced to limit the exception to ongoing court proceedings).
  - The exceptions contained in recital (c) of article 34 were also said to be already covered by other exceptions contained in the provision – the "communications between private parties" was already protected by the privacy exception, and the "communications between States" was already protected by the "national defense, public safety or international relations" exceptions.
  - The most contested issue was the possibility of including an exception that provides for an escape valve to addressees of requests for information when the costs and labor-force required for complying with the request outweigh the benefits of disclosing the information. The "public order" ("orden público" in Spanish) exception was rejected as overbroad and overly vague, but since the exception is included in

Article 13 of the InterAmerican Convention, there was consensus on the need of making that rejection explicit – either as a commentary to the law or as a recommendation in the implementation guide. A narrower exception of the "proper functioning of the authority" ("buen funcionamiento del órgano" in Spanish) was proposed but was not accepted by the group. Thus the debate remains open.

- Another issue that was raised was the possibility of exempting the decision making processes of public authorities from the disclosure obligations. However, such an exemption could promote the non-recording of information, and that would defeat the purposes of the law. In case that an exception of the like was incorporated to the law, the protection would be stronger during the decision-making process and weaker thereafter. Nevertheless, the issue also remains open.
- There was a suggestion of distinguishing confidential information ("información confidencial" in Spanish) from classified information ("información reservada" in Spanish). The former would receive permanent protection from disclosure, whereas the latter would be protected as long as the circumstances that justify the protection are valid. Personal information would be considered confidential information.
- The word "refuse" would be eliminated from the heading of article 34.
- The last sentence of article 36 would be eliminated because the idea of placing a time limit expressed in years for the protection of information was disapproved by the group. The protection as long as the circumstances that justify it remain in place was considered adequate and sufficient (notwithstanding the possibility of creating a category of confidential – i.e. permanently protected – information).
- Since this section was hotly debated and no agreement was reached, the group decided that three options would be drafted along the lines of the different suggestions made in the meeting and the group would pick a final version.
- For an analysis of the debate on article 39, see above under "Discussion on proactive disclosure and the Publication Scheme".

- <u>Discussion on oversight and appeals</u> (articles 40 to 58):
  - The first issue that was debated was the model of oversight. The two options were a Commission or an Ombudsman. There was agreement that the choice was very context-specific, but since this is a model law, a choice could be made and the other options could be pointed out in the implementation guide. A preference for the Commission model was expressed.
  - A second debate was whether the oversight organ should have order-making powers or not. Again, this was said to be context-specific and an agreement was not reached over which model to choose in the model law.
  - Regarding the selection process of the members of the oversight organ, there was consensus on establishing a mechanism that enables the participation of the civil society in the process.
  - Concerning the appeals process, the issue that was raised was the internal appeal. Some suggested eliminating the internal appeal altogether, while others favored an internal appeal that was optional rather than mandatory, especially when the authority deciding the appeal is the same one that denied the request for information. This last option seemed to be favored by the table.
- <u>Discussion on sanctions</u> (articles 59 and 60)

- There was agreement on reducing the scope of criminal sanctions to the most egregious cases (like willful destruction of information). Of the array of criminal offenses set forth in article 59 (a), the only one that could remain in force would be the one contained in recital D), and even that one could be eliminated since it is usually a felony under the general penal code of every country. Administrative sanctions were preferred to criminal ones.
- Alternative proposals were introduced to the table, such as establishing training sessions in access to information as a sanction, or creating incentives for disclosure in the form of bonuses for the employees that exceeded certain thresholds of compliance with the law.
- Another suggestion was giving the oversight organ the possibility of publishing a resolution condemning an authority that breached the law as a sanction.
- A different alternative that was suggested was harnessing the economies of scale of the authority in charge of investigating and sanctioning public employees (e.g. a comptroller of civil servants) and "outsourcing" the investigative processes under the law to this authority. The Commissioner of access to information would thus refer an investigative process to the state comptroller. This referee should always be a different authority than the one being investigated.