

## CONCEPT NOTE:

### Drafting a Model Law and Implementation Guide on Access to Public Information for the Americas

June 29, 2009  
AG/RES. 2514 (XXXIX-O/09)

Department of International Law -- Secretariat for Legal Affairs  
Organization of American States

#### **Purpose:**

To draft a Model Inter-American Law and Implementation Guide on Access to Public Information.

#### **Mandate:**

The General Assembly of the Organization of American States, via resolution AG/RES. 2514 (XXXIX-O/09), adopted June 4, 2009 in San Pedro Sula, Honduras, instructs the Department of International Law to coordinate the drafting a Model Inter-American Law on Access to Information and an accompanying Implementation Guide, with the participation of the relevant organs, agencies and entities of the OAS, participation by OAS Member States, and participation of civil society organizations.<sup>1</sup>

#### **Contents:**

The Model Law will provide the elements necessary for creating a functioning legal framework on access to information. This model will serve as a basis for drafting legislation in those countries without a law and as a benchmark for evaluation in those countries in which legislation currently exists.

The Implementation Guide will provide detailed instructions for the proper implementation of current or new legislations and for the operation and enforceability of a fully functioning access to information system.<sup>2</sup>

The Model Law will be composed of the following six sections:

- Principles and Scope
- Presumption of Publicity
- Making a Request
- Answering a Request
- Exceptions to Disclosure
- Oversight and Appeals

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<sup>1</sup> OAS General Assembly resolution AG/RES. 2514 (XXXIX-O/09) is attached as Annex 1. Specific mandate for drafting of the Model Law and Implementation Guide is contained in Operative Paragraph number 9.

<sup>2</sup> A summary of the content and structure proposed for the first draft of the Model Law and Implementation Guide is attached as Annex 2.

The Implementation Guide will be composed of the following six sections:

- Adoption of comprehensive access to information framework
- Allocation of resources necessary to create and maintain effective systems and infrastructure
- Adoption of effective information management policies and systems to properly create, maintain, and provide access to public information
- Capacity building for information users
- Capacity building for information providers
- Monitoring enforcement/effectiveness of law

**Methodology:**

Drafting will be completed by a working group composed of OAS entities, government participants, and civil society organizations, as required by resolution 2514, under the coordination of the Department of International Law. The drafting process will consist of three stages, each culminating in a meeting of the participants of the working group. The first stage (initial drafting stage) will require participants to author one chapter/section of the Model Law and Implementation Guide for presentation to the working group. Individual chapters will be assigned based on member interest and expertise. Working group members will present their respective contributions at the first meeting of the working group, during which they will also have the opportunity to make verbal comments on all other chapters, as well as on the content and process for incorporating them into a consolidated draft.

During the second and third stages of the drafting process, working group members will present revised drafts that incorporate the comments from previous meetings. Additionally, working group members who drafted sections of the Model Law will draft commentary that will elaborate on the factors to consider in tailoring each portion of the Model Law to different regulatory systems.

At both the second and third meetings of the working group, two representatives of nongovernmental organizations not already participating as members of the working group will be invited to provide external comment on the draft text.

**Working Language:**

The working language of the working group will be English. Documents will be presented and meetings will be held in English

**Timetable:**

Drafting of the Model Law and Implementation Guide will follow the due dates and meeting dates set forth below:

|            |                |  |
|------------|----------------|--|
| Stage One: | 07/07/2009:    | Confirmations for working group invitees |
|            | 07/14/2009:    | Chapter assignments                      |
|            | 08/24/2009:    | Initial chapters due                     |
|            | 09/02-03/2009: | First working group meeting              |

|              |                |  |
|--------------|----------------|--|
| Stage Two:   | 10/02/2009:    | Revised chapters due   |
|              | 10/19/2009:    | Consolidated draft distributed                                   |
|              | 11/20/2009:    | Comments on consolidated draft                                   |
|              | 12/01-02/2009: | Second working group meeting                                     |
| Stage Three: | 01/12/2010:    | Distribution of second draft                                     |
|              | 02/18/2010:    | Comments on second draft   |
|              | 03/02-03/2010: | Third working group meeting                                      |
|              | 03/26/2010:    | Preparation and circulation of final draft                       |
|              | 04/07/2010:    | Final comments   |
|              | 04/15/2010:    | Presentation to OAS Committee on Juridical and Political Affairs |

### **Working Group:**

The following participants from the OAS secretariat and entities, OAS Member States and civil society organizations have been invited to serve as members of the working group and have until

#### OAS General Secretariat:

- John M. Wilson, Department of International Law
- Jaime Aparicio, President, Inter-American Juridical Committee
- David Stewart, Member, Inter-American Juridical Committee
- Pablo Saavedra, Inter-American Court on Human Rights
- Diego Garcia-Sayan, Inter-American Court on Human Rights
- Catalina Botero, Inter-American Commission on Human Rights: Rapporteurship on Freedom of Expression
- Maria del Carmen Palau, Senior Specialist, Department of State Modernization and Good Governance

#### OAS Member States:

- Patricia Milagros Guillén Nolasco, Counselor at the Secretariat of Public Management, Peru

- José Villeneuve, Director of Systemic Issues, Policy and Parliamentary Relations, Office of the Information Commissioner, Canada
- Damian Cox, Director, Access to Information Unit, Office of the Prime Minister, Jamaica
- Juan Pablo Olmedo, President, Consejo para la Transparencia, Chile
- Melanie Anne Pustay, Director, Office of Information Policy, Department of Justice, United States

Civil Society Organizations:

- Sandra Coliver, Open Society Justice Initiative
- Darian Pavli, Open Society Justice Initiative
- Karina Banfi, Regional Alliance on Access to Information
- Laura Neuman, Program Manager -- Access to Information, Carter Center
- Issa Luna Pla, Instituto de Investigaciones Jurídicas, UNAM
- Eduardo Bertoni, Director, Center for Studies on Freedom of Expression and Access to Information, School of Law, Universidad de Palermo
- Toby Mendel, Senior Legal Counsel, Article XIX

Other experts and invited Participants:

- Annie Goranson, Discovery Attorney, Symantec Corporation
- Leslie Bar-Ness, Manager, State Government Relations, Symantec Corporation

## **ANNEX 1: OAS General Assembly Resolution**

AG/RES. 2514 (XXXIX-O/09)

### **ACCESS TO PUBLIC INFORMATION: STRENGTHENING DEMOCRACY**

(Adopted at the fourth plenary session, held on June 4, 2009)

THE GENERAL ASSEMBLY,

RECALLING resolutions AG/RES.. 1932 (XXXIII-O/03), AG/RES.. 2057 (XXXIV-O/04), AG/RES.. 2121 (XXXV-O/05), AG/RES.. 2252 (XXXVI-O/06), AG/RES.. 2288 (XXXVII-O/07), and AG/RES.. 2418 (XXXVIII-O/08), entitled “Access to Public Information: Strengthening Democracy”;

HAVING SEEN the Annual Report of the Permanent Council to the General Assembly ( ), on the status of implementation of resolution AG/RES.. 2418 (XXXVIII-O/08), “Access to Public Information: Strengthening Democracy”;

CONSIDERING that Article 13 of the American Convention on Human Rights provides that “[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice”;

CONSIDERING ALSO that Article 19 of the Universal Declaration of Human Rights includes the right “to seek, receive and impart information and ideas through any media and regardless of frontiers”;

RECALLING that the Plan of Action of the Third Summit of the Americas, held in Quebec City in 2001, indicates that governments will ensure that national legislation is applied equitably to all, respecting freedom of expression and access to public information by all citizens;

EMPHASIZING that Article 4 of the Inter-American Democratic Charter states that transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy;

REAFFIRMING the public nature of the acts and decisions of government organs and of the reasons for them, the documents supporting them or that constitute a direct and essential complement to them, and the procedures used to promulgate them, without prejudice to exceptions that may be established in accordance with domestic law;

NOTING that, in the Declaration of Nuevo León, the Heads of State and Government affirmed that access to information held by the state, subject to constitutional and legal norms, including those on privacy and confidentiality, is an indispensable condition for citizen participation and promotes effective respect for human rights, and that, in that connection, they are committed to providing the legal and regulatory framework and the structures and conditions required to guarantee the right of access to public information;

CONSIDERING that the General Secretariat has been providing support to member state governments in dealing with the topic of access to public information;

NOTING the work accomplished by the Inter-American Juridical Committee (CJI) on this issue, in particular resolution CJI/RES. 123 (LXX-O/07), "Right to Information," attached to which is the report entitled "Right to Information: Access to and Protection of Information and Personal Data in Electronic Form" (CJI/doc.25/00 rev. 2), and resolution CJI/RES. 147 (LXXIII/08), whereby the Inter-American Juridical Committee adopted the Principles on the Right of Access to Information;

RECOGNIZING that the goal of achieving an informed citizenry must be rendered compatible with other societal aims, such as safeguarding national security, public order, and protection of personal privacy, pursuant to laws passed to that effect;

RECOGNIZING ALSO that democracy is strengthened through full respect for freedom of expression, access to public information, and the free dissemination of ideas, and that all sectors of society, including the media, through the public information they disseminate to citizens, may contribute to a climate of tolerance of all views, foster a culture of peace, and strengthen democratic governance;

TAKING INTO ACCOUNT the important role civil society can play in promoting broad access to public information;

TAKING NOTE of the Declaration of Principles on Freedom of Expression of the Inter-American Commission on Human Rights (IACHR); and of the Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE (Organization for Security and Cooperation in Europe) Representative on Freedom of the Media, the Special Rapporteurship on Freedom of Expression of the Inter-American Commission on Human Rights, and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression, adopted in 2006;

TAKING NOTE ALSO of the reports of the IACHR Special Rapporteurship on Freedom of Expression on the situation of access to information in the Hemisphere for 2003, 2004, 2005, 2006, 2007, and 2008;

TAKING NOTE FURTHER of the report of the special meeting of the Committee on Juridical and Political Affairs (CAJP), held at OAS headquarters on December 15, 2008, with the participation of the member states, the General Secretariat, and civil society representatives, to examine the possibility of preparing an Inter-American Program on Access to Public Information (CP/CAJP-2707/09);

RECALLING initiatives taken by civil society regarding access to public information, in particular, the Declaration of Chapultepec, the Johannesburg Principles, the Lima Principles, and the Declaration of the SOCIUS Peru 2003: Access to Information, as well as the outcomes of the Regional Forum on Access to Public Information, of January 2004; the Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information, sponsored by the Carter Center, which addresses ways of advancing the implementation and exercise of the right of access to information, and of the International Seminar on Press, Litigation, and the Right to Public Information, held in Lima, Peru, on November 28, 2007;

BEARING IN MIND, therefore, the Americas Regional Conference on the Right of Access to Information, organized by the Carter Center, in Lima, Peru, from April 28 to 30, 2009;

RECALLING that the media, the private sector, and political parties can likewise play an important role in facilitating access by citizens to information held by the State;

TAKING INTO ACCOUNT the Report on the Questionnaire regarding Legislation and Best Practices on Access to Public Information (CP/CAJP-2608/08), which is a contribution to the study of best practices concerning access to public information in the Hemisphere; and

WELCOMING WITH INTEREST the study “Recommendations on Access to Information,” submitted to the CAJP on April 24, 2008 (CP/CAJP-2599/08), a study organized by the Department of International Law pursuant to resolution AG/RES.. 2288 (XXXVII-O/07), “Access to Public Information: Strengthening Democracy,”

RESOLVES:

1. To reaffirm that everyone has the right to seek, receive, access, and impart information and that access to public information is a requisite for the very exercise of democracy.

2. To urge member states to respect and promote respect for everyone’s access to public information and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application.

3. To encourage member states, in keeping with the commitment made in the Declaration of Nuevo León and with due respect for constitutional and legal provisions, to prepare and/or adjust their respective legal and regulatory frameworks, as appropriate, so as to provide the citizenry with broad access to public information.

4. Also to encourage member states, when preparing or adjusting their respective legal and regulatory frameworks, as appropriate, to provide civil society with the opportunity to participate in that process; and to urge them, when drafting or adjusting their national legislation, to take into account clear and transparent exception criteria.

5. To encourage member states to take the necessary measures, through their national legislation and other appropriate means, to make public information available electronically or by any other means that will allow ready access to it.

6. To encourage civil society organizations to make information related to their work available to the public.

7. To encourage states to consider, when they are designing, executing, and evaluating their regulations and policies on access to public information, where applicable, with the support of the appropriate organs, agencies, and entities of the Organization, implementing the recommendations on access to public information contained in the study organized by the Department of International Law and submitted to the Committee on Juridical and Political Affairs (CAJP) on April 24, 2008.

8. To instruct the Permanent Council, in the framework of the Committee on Juridical and Political Affairs, to:

- a. Convene in the second half of 2010 a special meeting with the participation of the member states, the General Secretariat, and representatives of civil society to examine the possibility of preparing an Inter-American Program on Access to Public Information, bearing in mind the recommendations contained in the aforementioned study;
- b. Update the Report on the Questionnaire regarding Legislation and Best Practices on Access to Public Information (CP/CAJP-2608/08), requesting to that end contributions by member states, the Special Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR), the Inter-American Juridical Committee, the Department of International Law, the Department of State Modernization and Good Governance of the Secretariat for Political Affairs, interested entities and organizations, and civil society representatives; and
- c. Include in the study mentioned in the preceding subparagraph the right of all citizens to seek, receive, and disseminate public information.

9. To instruct the Department of International Law to draft, in cooperation with the Inter-American Juridical Committee, the Special Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights, and the Department of State Modernization and Good Governance, and with the cooperation of the member states and civil society, a Model Law on Access to Public Information and a guide for its implementation, in keeping with international standards in this field.

10. To instruct the Department of State Modernization and Good Governance of the Secretariat for Political Affairs, and to invite the Special Rapporteurship for Freedom of Expression of the IACHR, to support the efforts of member states that request such support in the design, execution, and evaluation of their regulations and policies with respect to access by citizens to public information.

11. To instruct the Department of International Law to update and consolidate the studies and recommendations on access to public information and the protection of personal data, using as a basis the contributions of member states, the organs of the inter-American system, and civil society.

12. To instruct the Special Rapporteurship for Freedom of Expression of the IACHR to continue to include in the Commission's Annual Report a report on the situation regarding access to public information in the region.

13. To instruct the General Secretariat to identify new resources to support member states' efforts to facilitate access to public information and to encourage other donors to contribute to this work.

14. To request the Permanent Council to report to the General Assembly at its fortieth regular session on the implementation of this resolution, the execution of which shall be



subject to the availability of financial resources in the program-budget of the Organization and other resources.

## **ANNEX 2: Preliminary Structure of the Model Law and Implementation Guide**

### **Model Law Structure:**

#### **1. Scope of Law**

- a. Right of access applies to all branches of government at all levels
- b. Right of access extends to non-state actors that receive public funds or benefits (directly or indirectly), carry out public functions, including provision of public services, and exploit public resources
- c. Right of access extends to large profit-seeking corporations where information is required for the exercise or protection of any human right

#### **2. Fundamental Principles**

- a. Access to Information held by public bodies is a right
  - i. Presumption of Publicity – secrecy is the exception
  - ii. Limited necessary exceptions
  - iii. Disclosure of information should be reviewed independently of government
- b. Access to information held by private bodies is a right where it is necessary for exercise or protection of a right.

#### **3. Definitions**

#### **4. Presumption of Publicity**

- a. Proactive publication of Information concerning structure, functions, duties, and finances of public authorities
- b. Proactive publication not limited to internet
- c. Maintenance of Records

#### **5. Making a Request**

- a. How to Request Info
  - i. Identify document or information to enable public authority to identify document
  - ii. Request can be for access to all documents of a particular description
- b. Fees
  - i. Limited to cost of photocopying and delivery if necessary
  - ii. Must not be a barrier to exercising right
  - iii. Exemptions of fees where info is requested in the public interest
- c. Requester need not show interest or give reasons for wanting information
- d. Guarantee that persons exercising right are not subject to sanction, punishment, or persecution.

#### **6. Answering a Request**

- a. Affirmative obligation to assist requester (language, form or manner of request must not be an obstacle)
- b. Time Limits for Responding to Requests
- c. Requests should be dealt with on an equal basis
- d. Notice of Response
- e. Appointment of information office in each government agency

- f. Means of communicating information
- g. If a Record is not Held
- h. Responsibilities and Sanctions

## **7. Exceptions to Disclosure**

- a. Public Interest Override
- b. Severability
- c. Conditions that must be met for exception to be legitimate:
  - i. Previously sanctioned by law
  - ii. Such restrictions must be in line with American Convention:
    - 1. Respect for rights or reputations of others
    - 2. Protection of national security, public order, or public health or morals
    - 3. Vexatious, Repetitive or Unreasonable Requests
  - iii. Restrictions must be necessary in a democratic society – objective must be safeguarding an imperative public interest.
- d. Inexistence of Record is not an exemption when the information feasibly should have been recorded (information production).
- e. Time Limits / Sunset System mandating eventual disclosure of all documents

## **8. Oversight and Appeals**

- a. Oversight
  - i. Designation of oversight body/agency with authority and duty to monitor legislation's implementation
- b. Appeals
  - i. Types of Appeals Mechanisms
    - 1. Ombudsman
    - 2. Administrative Appeals Court
    - 3. Information Commission
  - ii. Must be low-cost, independent, and impartial body of higher authority than the body that denied the request.
  - iii. State has burden of proof that info is subject to exception

## **Implementation Guide Structure**

### **1. Adoption of comprehensive access to information framework**

- a. Study of existing laws and policies
- b. Adoption of new model law / Amendments to existing law
- c. Rescinding of laws and policies contrary to access to information regime
- d. Enacting supporting laws which promote openness
  - i. Whistleblower protection
  - ii. Open meetings
- e. Phased in Approach

### **2. Allocation of resources necessary to create and maintain effective systems and infrastructure**

- a. Startup Budget
  - i. Factors to Consider
    - 1. Scope of Law
    - 2. Existence of Appeals Mechanism

- ii. Working with individual agencies to determine budget needs
- b. Operating Budget
  - i. Assessment of number of requests, average response time, and number of public servants required to respond to requests
- c. Budgets for Oversight Body vs. Mandated Bodies
- d. Sample Budget

**3. Adoption of effective information management policies and systems to properly create, maintain, and provide access to public information**

- a. Information Production
- b. Proactive Disclosure
- c. Technology
- d. Government Procurement
- e. Archives/Record Keeping
- f. Regular updating of lists or registers of documents held

**4. Capacity building for information users**

- a. Educating the public
  - i. Special attention to vulnerable groups
  - ii. Public promotion strategy
- b. Educating journalists
- c. Partnership with civil society

**5. Capacity building for information providers**

- a. Development of operational manual on information production and archiving for government agencies
- b. Training for government employees
- c. Use of performance incentives to promote new responsibilities
- d. Updating of job descriptions to reflect new duties so that employees can be rewarded for good performance

**6. Monitoring enforcement/effectiveness of law**

- a. Creation of an independent appeals body or court system to hear appeals for information requests that have been delayed, denied, or infringed in some way
- b. Collection/monitoring of monthly agency reports on information requests
- c. Application of evaluations/benchmarks of efficiency and effectiveness of regulations and policies