

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

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DRAFT MODEL INTER-AMERICAN LAW ON ACCESS TO INFORMATION
[AG/RES. 2514 (XXXIX-O/09)]

Draft

DRAFT MODEL INTER-AMERICAN LAW ON ACCESS TO INFORMATION
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DRAFT MODEL INTER-AMERICAN LAW ON ACCESS TO INFORMATION
[AG/RES. 2514 (XXXIX-O/09)]

RECALLING:

Article 13 of the American Convention on Human Rights;

The Inter-American Commission on Human Rights' Inter-American Declaration of Principles on Freedom of Expression;

The Declaration of Nueva Leon;

The Inter-American Court of Human Rights' decision in *Claude Reyes v. Chile*;

The Inter-American Juridical Committee's Principles on the Right of Access to Information;

The "Recommendations on Access to Information" organized by the Department of International Law,
and

CONSIDERING:

That access to information is a fundamental human right of man and an essential condition for all democratic societies;

That right of access to information applies broadly to all information in possession of public ~~bodies~~ authorities, including all information which is held or recorded in any format or medium;

That the right of access to information is based on the principle of maximum disclosure;

That ~~exemptions~~ to the right to access should be clearly and narrowly established by law;

That even in the absence of a specific request, public bodies should disseminate information about their functions on a routine and proactive basis and in a manner that assures that the information is accessible and understandable;

That the process of requesting information should be regulated by clear, fair and non-discriminatory rules which set clear and reasonable timelines, provide for assistance to those requesting information, assure that access is free or limited to the cost of reproduction of documents and require specific grounds for the refusal of access;

That individuals should be afforded the right to bring an appeal against any refusal or obstruction to provide access to information before an administrative body, and to bring an appeal against the decisions of such administrative body before the courts;

That sanctions should be imposed against any individual who willfully denies or obstructs access to information in breach of the rules set forth in this law;

That measures should be taken to promote, implement and enforce the right of access to information in the Americas,

[Member State] agrees to the provisions of the following:

LAW ON ACCESS TO INFORMATION

I. DEFINITIONS AND SCOPE AND RIGHT OF ACCESS

Definitions

1. In this Act, unless the context otherwise requires: –

- a) TBD Information:
- b) Record:

Scope

2. ~~The intent is to provide~~ This law creates the broadest application of the “right of access” to information ~~possessed in possession, custody or control of by~~ the government in its various forms. ~~This law applies to:~~

~~This law applies to A~~ all public bodies ~~authorities~~, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory ~~bodies~~ authorities, ~~bodies~~ non-state bodies ~~authorities~~ which are owned or controlled by government, and organizations which operate with [substantial] public funds or benefits (directly or indirectly) or which perform public functions and services insofar as it applies to those funds or to the public services or functions they undertake; ~~and.~~¹ ~~The government and other public bodies at all levels of the national governmental structure (central or federal, regional or provincial, local, etc.), including all branches of the government (executive, judicial and legislative) as well as independent or autonomous organs, agencies or entities owned or controlled by the government, whether acting on the basis of constitutional or statutory authority;~~

- a) ~~Those non-governmental state bodies which receive substantial public funds or benefits (directly or indirectly) or which perform significant public functions, including provision of public services on behalf of or subject to the direction of the government as well as to non-governmental entities acting for the government or otherwise vested with public or administrative functions in so far as they receive funding or perform those services; and;~~

Comment: The term benefits should not be construed as including tax exemptions or government advertising for media.

Comment: While the model law does not contain a provision whereby private information that is required for the exercise or protection of international recognized human rights would

¹ It remained unagreed as to whether the judiciary should be covered within the scope of the law. Agreement was also no reached on a proposal to divide the scope into two provisions: one dealing with subjects directly responsible for carrying out the purposed of the law; the other with subjects indirectly responsible.

be brought under the scope of the law, some states, including South Africa have adopted this approach.

- b) ~~Privately owned corporations to the extent that disclosure of information is required for the exercise or protection of international recognized human rights [Alternative 1: as reflected in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights]. [Alternative 2: as provided for by the American Declaration of the Rights and Duties of Man and the American Convention of Human Rights]~~

Right of Access

3. Any person making a request for information to ~~a any entity covered by this law~~ public authority shall be entitled, subject only to the provisions of Part IV of this Act: –
- a) to be informed whether or not the ~~public authority~~ entity in question holds a record containing that information or from which that information may be derived; and
 - b) if the ~~public authority~~ entity does hold such a record, to have that information com-municated to him or her.

II. MEASURES TO PROMOTE OPENNESS

Right of Access

3. ~~Any person, regardless of citizenship, making a request for information to a public body authority shall be entitled, subject only to the provisions of Part IV of this Act:–~~
- a) ~~to be informed whether or not the public body authority holds a record containing that information or from which that information may be derived; and~~
 - b) ~~if the public body authority does hold such a record, to have that information communicated to him or her.~~

Duty to Publish

4. Every public authority shall, in the public interest, publish and disseminate in an accessible form an approved Publication Scheme within a reasonable time from~~twelve months of–~~
- a) the commencement of this Act;
 - b) its establishment;
 - c) the designation of application of this Act to its operations or parts thereof by provisions exercised under this Act
5. The publication scheme of the every public authority shall set out-

- a) the classes of information that the agency has available; and
 - b) the terms on which it will make the information available, including any fees that may apply.
6. A public authority publishing a publication scheme must ensure that the publication scheme complies with any guidelines about publication schemes published by the Information Commissioner's office on its website or any other medium of communication.

Minimum Content of Publication Schemes

7. Every publication scheme shall include, but not be limited to, the following key information: -
- a) a description of its organizational structure, functions, duties and the locations of its departments and agencies and their opening hours;
 - b) the internal and external oversight, reporting and monitoring mechanisms that relevant to the public authority including its strategic plans, corporate governance codes and key performance indicators and
 - c) its budget and its expenditure plans for the fiscal year in which the budget is allocated;
 - d) its procurement procedures, guidelines and policies and its contract execution and performance monitoring data;
 - e) the salary scales relevant to all employee categories within the public authority (including all current reclassification of posts data);
 - f) relevant details concerning any services it provides directly to members of the public including customer service standards, charters and protocols;
 - g) any direct request or complaints mechanisms available to members of the public regarding acts or a failure to act by that body, along with a summary of any requests, complaints or other direct actions by members of the public and that body's response;
 - h) a description of the powers and duties of its senior officers, and the procedure it follows in making decisions;
 - i) any regulations, policies, rules, guidelines or manuals or other documents containing interpretations, practices or precedents regarding the discharge by that body of its functions;
 - j) the content of all decisions and/or policies it has adopted which affect the public, along with the reasons for them, any authoritative interpretations of them, and any important background material;
 - k) any mechanisms or procedures by which members of the public may make representations or otherwise influence the formulation of policy or the exercise of powers by that body;

- l) a simple guide containing adequate information about its record-keeping systems, the types and forms of information it holds, the categories of information it publishes and the procedure to be followed in making a request for information; and
 - m) its Disclosure Log containing actual documents released under this Act which are automatically available and its Information Asset Register.
8. Special Requirement for policy documents to be publicly available: -
- a) Public authorities must make copies of each of its policy documents available for inspection;
 - b) However, nothing in this section prevents a public authority from ~~deleting-redacting~~^[jw1] exempt information or contrary to public interest information from a copy of the document.
 - c) A person must not be subjected to any prejudice because of the application of the provisions of an agency's policy document (other than provisions an agency is permitted to delete from a copy of the document) to any act or omission of the person if –
 - A. The policy document was not available for inspection and purchase; and
 - B. The person was not aware of the provisions; and
 - C. The person could lawfully have avoided the prejudice had the person been aware of the provisions.

Other Laws & Mechanisms Providing for Disclosure of Information²

9. This Act does not affect the operation of another Act or administrative scheme that:
- a) Requires information concerning documents in the possession, custody or control, of government to be made available to members of the public;
 - b) Enables a member of the public to access documents in the possession, custody or control of government;
 - c) Requires the publication of information concerning government operations;

~~Whether or not on payment of a charge.~~

10. When a conflict exists between this Act and another Act or administrative scheme, the Act providing for the greatest disclosure of information will prevail.³

² No agreement was reached as to whether the law should become the default regulation in matters of access to information already regulated by different laws. A proposal though 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.

Information Asset Registers

~~10.11.~~ Public ~~a~~Authorities shall release public information which it holds administratively as a matter of course in a range of languages and alternative user-friendly formats, unless there is a good legal, policy, administrative or public interest reason not to, with applications under this Act being necessary only as a last resort.

~~11.12.~~ Every ~~Public~~ ~~public~~ ~~a~~Authority shall-

- a) Create and maintain an updated Information Asset Register (including published material or material available for purchase) accessible by members of the public under approved administrative arrangements.
- b) Ensure that all information contained in the Information Asset Register is appropriately classified and indexed based on approved government classification and index schemes relevant to the public authority.
- c) Ensure that Information Asset Registers are responsive to the demand for better access by members of the public and organizations to public sector information consistent with government policy.

Disclosure Logs

~~12.13.~~ Public ~~Authorities~~ ~~authorities~~ shall create, maintain and publish a Disclosure Log of all documents released in response to a request made under this Act on its website and in the reception area of all its offices accessible by members of the public subject to protections provided by this Act (e.g. the protection of privacy).

~~13.14.~~ Public authorities must ensure and facilitate access to all documents previously released including those in the disclosure logs in the most convenient way possible to persons requesting such information.

~~14.15.~~ Requests for documents contained in disclosure logs shall not be treated as access to information requests (though the protection of personal privacy information must be ensured) and documents must be made available to members of the public as soon as practicable electronically and no later than three working days after the documents are sought if not in electronic form.

15 (bis). It was recommended to add Annual Reporting Requirements to the Model Law.

III. ACCESSING INFORMATION HELD BY PUBLIC ~~AUTHORITIES~~BODIES

³ Members of the group of experts also pointed out the need to include an exemption for statutory prohibitions for certain types of information. It is necessary to reconcile this paragraph with any possible paragraph addressing that issue.

Request for information

16. The exercise of the right to access to information shall bear no cost, with exception of the cost of reproduction.
17. The requester shall not be sanctioned, punished or prosecuted in response to the exercise of the right to access to information.
18. The request for information may also be filed in writing or ~~by~~ by electronic means. It may also be ~~presented~~; orally in person, by phone, or by any alternative means. In both cases, the request shall be properly logged pursuant to paragraph of this law.

Means and requirements for the request for information⁴

19. ~~The r~~Requests for information ~~filed in writing~~ shall be handled in the order in which they are received, and shall comply with the following requirements:
 - a) The requester's contact information for the receipt of notices and delivery of the information requested;
 - b) A sufficiently precise request of the information requested in order to allow the information to be found; and
 - c) An optional indication of the means of delivery ~~means~~ for the information requested. If the preferred means of delivery is not indicated, the information requested shall be provided in the most efficient and cost-effective manner for the public authority.

Comment: The requester need not provide their name on the request for information. However, in so far as the request concerns personal information, the requester's name may be required.

Cost of reproduction

20. The petitioner shall only pay for the cost of reproduction of the information requested and, if applicable, the cost of the delivery, if so was requested.
21. The costs of reproduction and delivery shall not exceed the actual value of the same service in the market.
22. The entities can provide information for free when it is requested by citizens in a special state of vulnerability or poverty, and the entity will evaluate the possibility of providing a minimum number of copies of the information solicited.

⁴ It was agreed that there needs to be a separate provision for requests to non government ~~bodies~~ ~~authorities~~. However, it was not agreed what the procedures should be. The proposal that received the greatest support would provide for a request made to the applicable public authority (i.e. contracting or regulatory agency), which would be responsible for obtaining the information from the non-governmental body. A second proposal would permit for information requests presented directly to the non-state body.

23. Any applicable fees shall be published beforehand.

23 (bis). Public authorities can provide information free of charge when it is requested by persons in special state of vulnerability or poverty.

Access to ~~information of~~ original data

24. Public authorities shall respond to the requests of exhibition of their own original data through means of their preservation, in the premises of said public entities, trying to adjust facilities for said purpose. The exhibition shall be carried out at no cost and, in the event that a copy was requested, the petitioner shall only pay for the cost of reproduction.

Information Officer

25. ~~Each~~ The head of the public authority public [~~and/or private non-state~~ body]⁵ responsible for responding to requests must ~~designate~~ establish an Information Officer to assist requesters in making requests.⁶ The contact information for each such Information Officer must be posted electronically and made readily available to the public.

26. Need provision on duties of information officer.

Logging,⁷ Interpreting, and Tracking the Request⁸

24-27. The public or private body authority in receipt of a request must reasonably interpret the scope and nature of the request.

25-28. In the event the receiving body authority is uncertain as to the scope and nature of a request it must contact the requester to clarify what is being requested. The receiving body authority must make reasonable efforts to assist the requester in formulating the request.

26-29. If the receiving public or private body authority reasonably determines that it is not the proper authority to handle the request, it must, within ten working days, forward the request to the proper body authority for processing. The receiving body authority must also notify the requester that his/her request has been routed to another public or private body authority for processing. The

⁵ The brackets in this paragraph will be removed is it is decided that information requests may be presented directly to non-state bodies.

⁶ Other alternatives that were discussed included the creation of a possible information office to handle incoming requests for information as well a possible liaison office between the applicable public authority and the information commission. It was decided that these alternatives would be state and/or agency specific and should be considered for a possible comment or paragraph in the implementation guide.

⁷ The law requires a provision for the logging of requests.

⁸ The question was raised as to whether there should be a provision saying that third parties with a stake in the information being requested should be notified before the information is released.

forwarding ~~body authority~~ must provide the requester with a point of contact at the public or private ~~body authority~~ where the request has been routed.⁹

Comment: There should be a published list of addresses for requesters to use in making requests. The requirement to route a request could be limited to requests that are addressed to a proper body in the first instance.

~~16. All requests should be handled in the order in which they are received. Public and private bodies may establish multiple queues within which to place requests, based on the complexity of, and volume of material responsive to, the request. If a public or private body establishes a multi-track system for responding to requests, it shall process the requests in each queue in the order in which they were received. Requesters must be advised of the queue within which their request has been assigned and must be given an opportunity to narrow their request in order to be placed in a faster queue.~~

Comment: Public and private bodies could establish queues by regulation. They could be mandatory, or optional¹⁰.

Searching for Records

~~28.30.~~ Upon receipt of a request for information that satisfies the requirements of ~~Chapter Section 5~~, the public or private ~~body authority~~ in receipt of the request must undertake a ~~[thorough and complete]~~ ~~[reasonable]~~ reasonable search for records which are responsive to the request.¹¹

Maintaining Records

~~29.31.~~ All public or private ~~bodies authorities~~ subject to this law must¹² preserve any record which reflects the business of the public or private ~~body authority~~.¹³

Comment: The model law could reference records disposition schedules or refer the bodies to the entity that establishes records retention policies. A different definition of what needs to be maintained could be included. A time limit for the maintenance of records should be considered ~~for a reasonable period as established by law~~.

⁹ There was a suggestion that the requester should be the one to route the request to a new authority. However, it seems that the position that the authority should be responsible for this was preferred in the group.

¹⁰ This paragraph shall be removed to the implementation guide: All requests should be handled in the order in which they are received. Public and private bodies may establish multiple queues within which to place requests, based on the complexity of, and volume of material responsive to, the request. If a public or private body establishes a multi-track system for responding to requests, it shall process the requests in each queue in the order in which they were received. Requesters must be advised of the queue within which their request has been assigned and must be given an opportunity to narrow their request in order to be placed in a faster queue. *Comment: Public and private bodies could establish queues by regulation. They could be mandatory, or optional*

¹¹ There was no agreement on whether the search should be “reasonable” or “thorough and complete” or “in good faith.”

¹² The group of experts pointed out that use of the word “must” should be followed by a provision detailing the accountability and/or sanctions for the public or private authorities that do not comply therewith.

¹³ The group of experts pointed out that, when dealing with a private body, the maintenance of records requirement should extend only insofar as to the non-state body’s public functions or funds are concerned.

Creation of Records that Should Be Maintained

~~30.~~32. When a public or private [body-authority](#) is unable to locate records responsive to a request and those records should have been maintained by the public or private [bodyauthority](#), the [body-authority](#) is required to ~~recreate~~-reconstruct the missing record and provide them to the requester.¹⁴

Time Limits to Respond to Requests

~~31.~~33. Standard Response Period

- a) Each public or private [body-authority](#) must respond to a request [as soon as possible and in any event,] within ~~thirty~~ [twenty] working days of its receipt.¹⁵

Comment: The model law can either suggest a standard response period, or leave that element blank, and have each country select a time period. Although there is generally a strong push to impose short response times, such as ten days, the experience in the U.S. in particular illustrate that often such time periods are not realistic. It is preferable to set a time period that is reasonably reachable by the majority of entities which will be responding to requests. I believe that thirty working days is a reasonable period.

- b) In the event the request was routed to the public or private [body-authority](#) from another [bodyauthority](#), the date of receipt shall be the date the proper [body-authority](#) received the request, but in no event shall that date exceed ten working days from the date the request was first received by a public or private [body-authority](#) designated to receive requests.¹⁶

Comment: As noted above, it is preferable to require that each [body-authority](#) authorized to respond to requests publish the address for requesters to use to request records from that [bodyauthority](#). Any request made to a designated entity, but which is not itself the proper entity to process the request, would then be routed to the proper [body-authority](#) by the receiving [bodyauthority](#).

~~32.~~34. Extension of Response Period

- a) For any request involving: i) -the need to search for or review voluminous records, or ii) the need to search offices physically separated from the receiving office, or iii) the need to consult with other public or private [bodies-authorities](#) prior to reaching a disclosure determination, the public or private [body-authority](#) processing the request may extend the

¹⁴ There were differing views as to whether there should be an obligation to “recreate” or to “reconstruct” the information. It was also recommended that when the records needed to recreate or reconstruct the requested information can be located in a public archive, it is the obligation of the requester (not of the public authority) to obtain the information from that archive to piece together the requested record.

¹⁵ There was a suggestion that the time limit was too long and that the suggested time limit should be 20 working days. There was no discussion of this suggestion though and so it is unclear as to whether this was agreed to.

¹⁶ There was a suggestion that the time limit was too long and that the suggested time limit should be 20 working days. There was no discussion of this suggestion though and so it is unclear as to whether this was agreed to.

time period to respond to the request by another ~~thirty~~ [twenty] working days. The requester must be notified that the extension is being taken by the responding body-authority and given an opportunity to narrow or modify the scope of the request.

- b) If, for the reasons identified in Section 32-32 (a) above, the public or private body-authority anticipates that the time for responding to the request will exceed the period of time provided by the extension, the requester must be notified and given an estimated date for the completion of the processing of the request and provided an opportunity to narrow or modify the scope of the request.

Comment: In some circumstances an entity is unable to process the request even after taking an extension of time. The law should recognize that that might happen and require notification to the requester and an opportunity to modify the request.

- c) In any event, the failure of the public or private body-authority to complete the processing of the request within thirty working days, or, if the conditions specified in Section 32-32 (a) are met, the failure to respond to the request within sixty working days, shall be deemed a denial of the request.

33. Requirements for Responding to the Requester¹⁷

a) Acknowledging the Request, Providing Requester Status and Fee Information

- A. Upon receipt of a request which will take longer than ten working days to process, the public or private body-authority must assign a tracking number to the request. For those requests, the public or private body-authority must: i) advise the requester that the request has been received; ii) provide the requester with the assigned tracking number for the request; iii) advise the requester of the track to which the request has been assigned, if the public or private body utilizes a multi-track system for processing requests; and iv) provide the requester with a point of contact for making inquiries about the status of the processing of the request.
- B. As soon as the public or private body determines that the processing of the request will involve assessment of any applicable fees, it shall notify the requester of the estimated fee to be assessed to obtain the agreement of the requester to pay the estimated fee. The requester must also be afforded the opportunity to narrow or modify their request to reduce the amount of the fees owed.

b) Form or Format of Records

- A. Records shall be provided to the requester in the form or format that the requester specifies, provided the records are readily reproducible in that form or format with a reasonable amount of effort.
- B. If the public or private body receives two or more requests for the same information, or in any instance in which the public or private body determines that requested

¹⁷ This paragraph 33 was not discussed during the second meeting of the group of experts due to time constraints.

records would be of interest to the general public, the public or private body shall make the requested records available on the body's website.

c) Releasing All Non-Exempt Portions of Records

A. Public or private bodies must provide to the requester all portions of each requested document that are non-exempt and are reasonably segregable from the exempt material.

d) Explaining Grounds for any Denials and Providing Appeal Rights

A. In the event that any record or portion of a record is withheld from a requester because it falls within an Exception to disclosure, the requester must be given a reasonable estimate of the volume of material that is being withheld and a description of the legal bases for the withholding.

B. For any request which does not result in a full grant of access, the requester shall be notified of their right to file an administrative appeal.

Training

33 (bis): The State Agencies subject to this law have [the Information Commission created by this law has] the responsibility to train public officials in transparency and access to information.

IV. EXCEPTIONS/EXEMPTIONS

Exceptions to Exemptions from Disclosure¹⁸

34. ~~State agencies~~Public authorities may refuse or deny requests for information only in the following circumstances:¹⁹

a) Allowing access would harm the following individual rights:

- ~~an~~ individual's right to privacy;
- ~~an~~ individual's right to life, health, or safety; or,

¹⁸ There was consensus to explicitly reject the "orden publico" exception but there was no agreement on whether a narrower exception for the "proper functioning of the authority" should be included. There was discussion as to whether confidential and reserved information should be distinguished in this section.

There was a suggestion of in Spanish differentiating between "informacion confidencial" and "informacion reservada."

Also undetermined is whether the decision making processes of public authorities should be exempt. Some participants argued it should be and others said it should not be (noting that if it is not exempt that people may be less likely to record the information.)

¹⁹ It was suggested that this section or its commentary make reference to Article 13.2 of the American Convention on Human Rights, in particular to ensure that the application of all exemptions is done on the basis of strict interpretation.

- ~~an~~ individual or legal entity's commercial and economic interests.²⁰; ~~or~~;
- b) Allowing access would harm the following public interests:
- ~~the~~ protection of national defense;²¹
 - ~~protection of~~ public safety; ~~or~~
 - ~~protection of the internal deliberations of government agencies~~²¹
 - ~~protection of~~ international relations;
 - ~~the~~ prevention, investigation and prosecution of crime;
 - ~~the~~ protection of the ~~due process rights and~~ equality of parties ~~protection of parties in~~ ongoing court proceedings
 - ~~and the~~ effective administration of justice; and
 - ~~the~~ protection of the financial, economic or monetary stability of the State.
- c) Allowing access would constitute an actionable breach of confidence in communication between private parties, ~~or seriously prejudice relations in communications between States.~~²²
- d) Allowing access would contravene prohibitions established by specific statute.²³

~~d)e) State agencies~~ Public authorities that deny access to information based on paragraphs ~~Aa), B b), or C-c) or d)~~ bear the burden of proof to justify a legitimate State interest in maintaining that information ~~confidential-exempt~~ and must ensure that ~~exceptions-exemptions~~ interfere as little as possible with exercising the right to access information.²⁴

Comment: Although the Inter-American system provides for a potential exemption for the protection of "public order" An exception based on preserving public order it is explicitly rejected as a grounds for refusing access in the present Model as it is overbroad and overly vague and provides for an overbroad application as an exemption.

Strict Interpretation

²⁰ It was agreed that exceptions in sub-paragraphs (a) and (b) would be separated into bullets, rather than clustered into a single paragraph. The drafting group is to decide whether each bulled exemption should include a further description of the exempt right.

²¹ It was agreed to include an exemption to protect the internal deliberations of government agencies. However, it was left to the drafting group to formulate two limitations to this exemption: the first to provide a time limit, allowing an exemption only while the internal deliberations are on-going; the second to provide a substantive limit, allowing an exemption only for advisory documentation but not for statistical or other factual information.

²² ~~There was some suggestions to delete this subsection c.~~

²³ There was discussion, but no agreement, on whether to include a paragraph (or commentary) on statutory prohibitions. If included, this paragraph (or a commentary) must be subject to the presumption of publicity and statutory supremacy of the model law. It will also be necessary to decide whether a schedule should be added, which lists the statutes (or types of statues) exempted under the paragraph. Finally, it will be necessary to determine whether laws existing at the time of enactment are grandfathered under the statutory exemption and whether subsequent legislation can be exempted. In this latter case, it would be necessary to detail the process and body authorized to make such determinations.

²⁴ There was discussion, but no agreement, on whether non-state entities (private authorities) also bear the burden of proof for information in their possession, custody, or control, or whether the regulatory authority of contracting public authority bears the responsibility for obtaining and providing the information in the first place and, hence, also the burden of proof concerning potential exemptions. In a separate matter, it was also proposed that this paragraph should provide a functional formula for its operation based on a harm test and/or public interest test.

34 (bis). Application of the exemptions provided for under Section 34 must be based on the strictest interpretation of the instruments and jurisprudence of the Inter-American system.

Partial Disclosure

35. For circumstances in which the totality of the information contained in a document is not ~~protected~~ ~~exempted~~ by an ~~exception~~ ~~exemption~~ in Section 34, protected information may be redacted. Information not ~~protected~~ ~~exempted~~ from disclosure in a same document, however, must be delivered to the requesting party and made available to the public.

Eventual Disclosure

36. Information ~~excepted~~ ~~exempted~~ from disclosure under Section 34 may remain confidential only until the harm or public interest rationale for ~~exception~~ ~~the exemption~~ is no longer valid, upon which time the information shall be made public.²⁵ ~~In no circumstance may the information remain confidential for a period to exceed ___ years.~~ Personal information, however, is not subject to eventual disclosure.

Public Interest Override

37. ~~State agencies~~ Public Authorities may not refuse to indicate whether or not it holds a record, or refuse to communicate information, unless the harm to the protected interest outweighs the public interest in disclosure.
38. In cases of violation of fundamental human rights or crimes against humanity the information otherwise exempted under Section 34 ~~found in the investigations~~ may not be deemed privileged.

Information Production

39. ~~Inexistence of a record is not an exception exemption from to disclosure in cases where the information requested should have been recorded by a State agency. Such agency is obligated to collect and produce the relevant information and deliver it to the requesting party.~~

V. OVERSIGHT AND APPEALS

Internal Appeal²⁶

40:39. Grounds for Internal Appeal

²⁵ There was discussion, but no agreement as to whether personal information should be excluded from this since in some countries it is never made public.

²⁶ There were suggestions by some that the internal appeal should be eliminated. However other said the internal appeal should be optional, not mandatory. The latter suggestion seemed to be preferred.

- a) A requester may lodge an internal appeal of (i) a decision of a public authority to refuse a request, or (ii) the failure of a public authority to respond to a request.

41.40. Process for Filing Internal Appeal

- a) An internal appeal:
 - A. Must be filed with the relevant authority, and a copy must be sent to the information officer or other responsible agent of the public authority appealed against within ___ [*recommend 60*] days of the action, or failure to act, which is the subject of the appeal; or if notice to a third party is required by section ___, then within 30 days after notice is given.
 - B. Must identify the subject of the internal appeal and state the reasons for the internal appeal.
- b) If an internal appeal is lodged after the expiry of the period referred to in subsection 41(a)(A), the relevant authority must, upon good cause shown, allow the late lodging of the internal appeal.

42.41. Notification of Decision

- a) As soon as reasonably possible, but in any event within ___ [*10 is recommended*] days after receipt of notice of an internal appeal, the public authority must submit to the relevant authority:
 - A. the reasons for the public authority's decision or failure to act; and
 - B. the name, postal address, phone and electronic mail address, whichever is available, of any third party that must be notified.

43. Third Party Response to Notification

- a) A third party that is informed of an internal appeal may within xx [*21 is recommended*] days after receiving notice, make written representations to the relevant authority either (i) consenting to disclosure of the information, or (ii) stating reasons why the information should not be disclosed.
- b) A third party that does not receive timely official notice may submit written representations as soon as practicable stating (i) the nature of the party's interest and (ii) any reasons why the information should not be disclosed.

44. Decision on Internal Appeal

- a) When deciding on an internal appeal, the relevant authority may confirm the decision appealed or substitute a new decision for it.

- b) The relevant authority must issue a written decision stating adequate reasons for the decision, including the provisions of the Act relied upon, and how they apply to each item of information or document requested.
- c) The relevant authority must decide the appeal (i) as soon as reasonably possible, but in any event within xx days [30 is recommended] from receipt of the notice of appeal.
- d) The relevant authority must transmit its decision to the appellant, the public authority, and any interested third party as soon as possible but in any event within xx [5 is recommended] days, and must notify them of their right to seek review of the decision by ~~[a court]~~ ~~[ombudsman or the]~~ information commission~~[er]~~.

Comment: An internal appeal should not be mandatory, but instead optional for the requester before proceeding to the external appeals process.

External Appeal and Oversight

Type of Mechanism:

The type of external oversight/appeal mechanism should be chosen based on consideration of the specific political, legal and bureaucratic contexts in which the system must function.²⁷ There are three main models that may, if sufficiently independent and resourced, comply with Inter American and international standards:

- a) A commission/er or ombudsman with order making powers, whose decisions are subject to some form of judicial review, and which may have other functions (e.g., data protection), hereafter referred to as an “information commission/er”;*
- b) A commission/er or ombudsman with powers that do not include order making (e.g. Canada federal level, Hungary, New Zealand, Sweden), whose decisions are subject to some form of judicial review, and which may have other functions (e.g., data protection, general ombuds functions), hereafter referred to as an “ombudsman”;*
- c) Judicial review by a court of general jurisdiction (e.g., South Africa, U.S. federal level) or an administrative appeals court (e.g., Bulgaria), without the intermediate step of an independent body.*

45. Establishment of Oversight/Appeals Body

- a) The ~~Oversight and Appeals Body [e.g., Information Commissioner, Commission, Transparency Council or Ombudsman]~~ shall be in charge of promoting, and disseminating information about the use of, the right of access to information; monitor and promote effective implementation of this law; seek to mediate any disputes; and adjudicate appeals of decisions, or failures to make decisions, concerning application of this law by public authorities.

²⁷ This section draws extensively on Laura Neuman, “Enforcement Models: Content and Context,” (World Bank Institute Access to Information Working Paper Series 2009).

- b) The ~~[Oversight and Appeals Body]~~ Information Commission shall have operative, budgetary and decision-making autonomy; and shall have the human and material resources needed for the performance of its duties.

46. Composition

This section is appropriate if the Oversight and Appeals Body is comprised of more than one member.

- a) The Information Commission ~~[or Council]~~ shall be comprised of __ commissioners.

Three or four commissioners are recommended, as is the case in Chile (four) and Mexico (five^[u2]).

- b) The Commission ~~[or Council]~~ shall be chaired by a Commissioner, who shall be its legal representative, and who shall be elected by the Commissioners. He or she shall remain in the position of Chair for __ years [*two years in both Chile and Mexico*], and may be re-elected once.

47. Qualifications

- a) ~~[The]~~ Each ~~[Commissioner]~~ Ombudsman shall

- A. be a citizen;
- B. be at least __ years of age [35 recommended, see, e.g., Mexico law]
- C. be a person of high moral character and recognized competence in the field of transparency and the right to information,
- D. not have held a [high-ranking] position in government or with a political party within the past xx years [*recommend at least two years; Mexico's law provides for one year*]
- E. not have been convicted of a violent crime or a crime of dishonesty for which he or she has not been pardoned.

48. Selection

In order to increase confidence in the institution, it is desirable that both the executive and legislature be involved in the selection process; that any decision by the legislature be by a supermajority sufficient to ensure bi- or multi-partisan support; that the public has an opportunity to participate in the nomination process; and that the process be transparent. There are two main approaches: executive appointment, with nomination or approval by the legislature; and legislative appointment, with nomination or approval by the executive.

- a) The ~~[Commissioner(s)]~~ Ombudsman shall be appointed by the [President][Head of State] upon the nomination by a vote of [60%] [two-thirds] of the legislature.

or

The {Commissioner(s)} {Ombudsman} shall be selected by [60%] [two-thirds] of the Legislature, based on nominations from a committee that includes the following actors: [the list should include representatives of the executive branch and the public, and be sufficiently balanced to ensure broad confidence].

- b) In advance of the appointment, the names and experience of the nominee(s) shall be published, and there shall be an opportunity for public comment.

49. Salary

- a) The ~~Commissioners~~ shall serve full-time and be paid the same salary as a judge of the [court of first instance] [court of second instance] [Supreme Court].

It is strongly recommended that the ~~Ombudsman~~, Information Commissioner, or Chair of the Information Commission should serve full-time, and that his/her salary should at least be commensurate with that of a judge of a court of first instance, in order to strengthen respect for the office, attract candidates of high caliber, and ensure that the leadership of the body is able to devote her/ his full attention to its work.

50. Staff

- a) The {Commissioner(s)} {Ombudsman} may appoint such employees as are necessary to accomplish its/ his / her duties, as set forth in section __, below.

51. Term of Office

- a) Subject to subsection xx re dismissal, the {Commissioner(s)} {Ombudsman} ~~is~~ are to hold office for a period of _____ [5 to 7 years recommended], which term may be renewed once.
- b) The {Commissioner/s} {Ombudsman} shall not hold another job, position or commission, except in educational scientific or charitable institutions.

See, e.g., Mexico's Federal Law on Transparency and Access to Public Government Information (FLTAPI), art. 34.

52. Procedure for Removal or Suspension from Office

- a) The {Commissioner(s)} {Ombudsman} may not be removed or suspended from office, except by [the official who appointed him/her] [with approval of the legislature], and only after an independent body has found reasons of incapacity or behavior that renders him/her unfit to discharge his/her duties. Such behavior includes:

- A. conviction of a criminal offense,
- B. infirmity that affects the individual's capacity to discharge his duties,
- C. severe breach of the provisions of the Constitution or this law, or
- D. refusal to comply with any objective disclosure requirements, such as re salary or benefits.

- b) The independent body must disclose any evidence that it considers in reaching its decision and must give the ~~{Commissioners }~~~~{Ombudsman}~~ an opportunity to contest the evidence and present evidence on his/her own behalf.
- c) The ~~{Commissioners }~~~~{Ombudsman}~~ must have an opportunity to appeal to a court of law any decision to remove or suspend.

53. Duties and Powers

- a) The ~~{Commission/er}~~~~{Ombudsman}ers~~ shall have the following duties:
 - A. To interpret this law,
 - B. To monitor and promote compliance with this law, including by (a) training public servants, (b) providing guidance concerning this law's implementation, (c) helping the National Archives in the creation and use of the criteria for cataloguing and conserving documents (*e.g., Mexico*); (d) helping other authorities to catalog and conserve their documents (*e.g., Mexico*).
 - C. To promote awareness and understanding of the law and its provisions among the public;
 - D. To make recommendations on existing and proposed legislation;
 - E. To investigate claims of non-compliance by public authorities with this law; seek to mediate any disputes between information requesters and public authorities; and, where mediation is unsuccessful, consider and decide claims of non-compliance;
 - F. To enact and publish its internal regulations and other operational standards;
 - G. To collect and publish statistics and other data annually regarding compliance with this law.
- b) The ~~{Commissioners /er}~~~~{Ombudsman}~~ shall have the following powers in order to discharge its above-stated duties:
 - A. To review information a public authority seeks to withhold;
 - B. To consult widely, including with public officials and members of civil society, in assessing harm of, and public interest in, disclosure;
 - C. To inspect the records of public authorities on-site;
 - D. To have such other powers as are necessary to discharge its/ his or her duties, including full legal personality, and the power to acquire, hold and dispose of property.

Recommended powers

- E. To order the release of information.

- F. To establish and review the classification, declassification and custody criteria to be used for privileged and confidential information (e.g., Mexico).

54. Reporting

- a) The ~~{Commissioner(s)}~~ ~~{Ombudsman}~~ shall report annually on ~~its/his/her~~ the Commission's operation. This report shall include, at least, the number of appeals filed with the body, including a break-down of the number of appeals from various public authorities; and results and status of these appeals.

55. Procedure for Filing an Appeal with the Commission~~/er/Ombudsman~~

~~*[Note: This section is appropriate only if the Commission~~/er/Ombudsman~~ has the authority to adjudicate appeals.]*~~

a) Time in which to File

- A. Any person who has been denied information, or who has requested information and not received a reply, ~~and/or~~ has properly filed an internal appeal and either received an adverse decision, or no decision within the time specified in section ____, may file, on his or her own behalf or through a representative, an appeal with the Commission~~/er/Ombudsman~~.
- B. Unless good cause is shown, an appeal must be filed within ____ days of (i) the receipt of denial of an internal appeal or (ii) the expiry of the period in which an internal appeal must be decided.

A length of time should be set that enables the appellant to review the decision of the internal appeal process and to secure counsel if so desired, but which does not allow the facts to grow stale: 30 days is recommended.

b) Contents of Appeal Document

The appeal document should clearly state:

- A. The public authority with which the request was filed;
- B. The name and contact information of the requester;
- C. The name and contact information of any third party;
- D. The date of the decision of the internal appeal, if one was sought, and the appeal decision, or the date of the expiry of time in which the authority was obliged to issue a decision;
- E. The withholding of information that is being contested;
- F. Whether or not the requester/appellant requests an oral hearing;

G. Any other information that the requester considers relevant.

c) Response of the Public Authority and any Third Party

- A. Any written response of the public authority must be filed with the Commission/~~er~~ and received by the requester/appellant within 15 days of receipt of the notice of appeal, or within 30 days if good cause be shown.
- B. Any interested third party must file its written response within 15 days of receipt of notice of the appeal, or within 30 days if good cause be shown.

56. Decision

- a) The Commission/~~er~~ shall decide the appeal within __ days [60 is recommended] of receipt of a response from the public authority and/or third party, or within __ days [90 is recommended] of the filing of the appeal, if no response is received.
- b) The Commission/~~er~~ may summarily reject applications:
 - A. which are frivolous, vexatious or clearly unwarranted; or
 - B. where the applicant has failed to use any effective internal appeals mechanism.
- c) The Commission/~~er~~, in deciding the case, may:
 - A. reject the appeal;
 - B. require the public authority to take such steps as may be necessary to comply with its obligations under this law;
 - C. in cases of egregious or willful failures to comply with this law, impose a fine on the public authority.
- d) The Commission/~~er~~ shall serve notice of its/~~his/her~~ decision, including any rights of appeal on both the requester/appellant and the public authority.
- e) If no petition/appeal from the Commission/~~er~~'s decision is lodged, the decision shall become final and binding on the __ day [46th is recommended] after being issued.
- f) If a public authority does not comply with the Commission/~~er~~'s decision, the Commission/~~er~~ or the requesting party may file a petition with the _____ court in order to compel compliance.

This section is based in substantial part on the Model law developed by Article 19.

57. Burden of Proof, Harm and Public Interest Tests

- a) The burden of proof shall lie with the public authority to establish the reasons why the information needs to be withheld. In particular, the public authority must establish that the

likelihood and gravity of the harm to a legitimate protected interest from disclosure outweighs the public interest in the information.

58. Right to Judicial Review

OPTION A—If there is provision in the law for a body [such as an Information Commission/er] that has authority to determine appeals from decisions of public authorities to withhold or release documents:

a) Grounds for Appeal to a Court:

- A. A person may file a petition/appeal with the _____ court to challenge the decision of, or the failure to issue a timely decision by, a public authority or the [Information Commission/er or other appellate body] concerning disclosure of information.
- B. Any public authority may file a petition/appeal with the _____ court to challenge the decision of, or the failure to issue a timely decision by, the [Information Commission/er or other appellate body].

Comment/Note: Under Mexico's law, only the person requesting information has the right to file an appeal.

b) Time in which to File

- A. Unless good cause is shown, a petition/appeal must be filed within ___ days of (i) the receipt of denial of an internal appeal, (ii) the expiry of the period in which an internal appeal must be decided, (iii) the receipt of a decision of the [Information Commission/er or other appellate body], or (iv) the expiry of the period in which the [Information Commission/er or other appellate body].

A length of time should be set that enables the appellant to review the decision or failure to act and consult with a legal professional, but which does not allow the facts to grow stale: 45 days is recommended.

OPTION B—If there is no provision in the law for a body that has authority to determine appeals from decisions of public authorities to withhold or release documents:

a) Grounds for Judicial Review

- A. A person may file a petition/appeal with the _____ court to challenge the decision of, or the failure to issue a timely decision by, a public authority concerning disclosure of information.

b) Time in which to File

- A. Unless good cause is shown, [notice of intent to file] a petition/appeal must be filed within ___ days of (i) the receipt of denial of an internal appeal, or (ii) the expiry of the period in which an internal appeal must be decided,

~~*A length of time should be set that enables the appellant to review the decision or failure to act and consult with a legal professional, but which does not allow the facts to grow stale: 45 days is recommended.*~~

c) Response to the Petition/Appeal

- A. Any written response to the petition/appeal must be filed with the Court and received by the petitioner/appellant within __ days (15 days is recommended), or within __ days (30 days is recommended) if good cause be shown.
- B. Any interested third party must file its written response within __ days (15 days is recommended) of receipt of notice of the petition/appeal, or within __ days (30 days is recommended) if good cause be shown.

d) Decision

- A. Given that the right to information is a fundamental right, the Court shall decide the petition/appeal on an expedited basis and in any event within 180 days from the filing of the appeal. Any delay beyond 180 days must be justified in writing based on exceptional circumstances.
- B. The Court may summarily reject applications:
 - i. that are frivolous, vexatious or clearly unwarranted; or
 - ii. where the applicant has failed to exhaust any effective internal appeals mechanism.
- C. The Court, in deciding the case, may:
 - i. reject the appeal;
 - ii. require the public authority to take such steps as may be necessary to comply with its obligations under this law;
 - iii. in cases of egregious or willful failures to comply with this law, impose a fine on the public authority.
- F. Burden of Proof, Harm and Public Interest Tests
 - i. The court may consider any substantive as well as procedural defects with the reasoning or decision of the body whose decision is subject of the petition/appeal. The burden of proof shall lie with the public authority to establish the reasons why the information needs to be withheld. In particular, the public authority must establish that the likelihood and gravity of the harm to a legitimate protected interest from disclosure outweighs the public interest in the information.

Criminal and Civil Responsibility

59. Good Faith Disclosures

- a) No one shall be subjected to civil or criminal action, or any employment detriment, for anything done in good faith in the exercise, performance or purported performance of any power or duty in terms of this Act, as long as they acted reasonably and in good faith.

60. Criminal Offences

a) It is a criminal offense to willfully destroy or alter records after they have been the subject of a request for information.²⁸

~~a) It is a criminal offense to willfully:—~~

~~b) —~~

~~A. obstruct access to any record contrary to Part ___ of this Act;~~

~~B. obstruct the performance by a public body of a duty under Part ___ of this Act;~~

~~C. interfere with the work of the Commission/er; or~~

~~D. destroy or alter records after they have been the subject of a request for information.~~

~~17.b) Anyone who bears responsibility for an offence under sub-section (1a) shall be liable to a fine not exceeding [insert appropriate amount] and, for a repeated offense, to imprisonment for a period not exceeding _____ years. The head of a public body that is found to have committed any of these offenses may be subject to a fine between 20% and 50% of his or her annual salary.~~

~~18.c) A court may hold the head of a public body in contempt for failure to comply with a court order to disclose information, and may impose daily fines for non-compliance up to 50% of his or her annual salary.~~

~~19.d) Any sanctions ordered shall be posted on the website of the [Commission/er] [Ombudsman] and the respective public body within five days of their having being ordered.~~

61. Civil Offenses

a) It is a civil offense to willfully: -

A. Obstruct access to any record contrary to Part ___ of this Act;

B. Obstruct the performance by a public authority of a duty under Part ___ of this Act;
and

²⁸ It was determined that the other actions that were originally listed as requiring criminal sanctions could be reduced to administrative sanctions. However, there remained discussion of whether the destruction of documents should involve criminal sanctions as in some countries it is already included under general penal codes.

C. Interfere with the work of the Commission.

b) Anyone who bears responsibility for an offence under sub-section (a) shall be subject to an administrative sanction.²⁹

Interpretation

61. When interpreting a provision of this Act, every court must adopt any reasonable interpretation of the provision that best gives effect to the right to information.

Short Title and Commencement

62. This Act may be cited as the Access to Information Act [insert relevant year].

63. This Act shall come into effect on a date proclaimed by [insert relevant individual, such as president, prime minister or minister] provided that it shall automatically come into effect six months after its passage into law if no proclamation is forthcoming.

²⁹ Paragraph 31 establishes that public/private authorities “must” maintain a record for a reasonable period of time. The group of experts agreed that failure to do so could result in a civil sanction for the responsible authority and posed the question as to whether such provision should be included in this paragraph 61.