Observations on the
2004 Bolivian Access to Information Draft Law

The Carter Center
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Building on the draft Access to Information and Transparency laws from the year 2000, the Presidential Anti-Corruption Delegation (DPA) has recently completed a new draft law. This draft law incorporates comments from consultations that the DPA held with civil society groups in all 9 departamentos, as well as those received from The Carter Center in May 2003.

The importance of access to information lies in its ability to serve as a tool to rebuild trust between government and its citizens; hold government accountable; allow persons to more fully participate in public life; and serve as a mechanism for ensuring that persons can exercise their fundamental basic rights. Access to information is vital for a healthy, functioning democracy and essential for persons to protect their social and economic rights.

Since our last observations document, President Mesa has demonstrated his commitment to transparency through the issuance of a related Supreme Decree and promotion of a voluntary openness strategy in 5 pilot Ministries and agencies. The Supreme Decree and Voluntary Strategy and Code may serve as a basis for the formulation of a comprehensive access to information law and allow important lessons learned in implementation to be applied more broadly, following the passage of the law.

We again welcome the opportunity to provide a number of comments related to the latest draft law. Our observations are made in light of the terms of the Supreme Decree and Voluntary Openness Strategy and Code, the emerging international standards, and lessons learned from other jurisdictions. Ultimately, as stated in our last submission, the Bolivian law must be crafted to best suit this country's socio-economic and political realities.

In most ways, the latest draft of the Bolivian Transparency and Access to Public Sector Information meets the international norms. Below are some observations related to both this draft's positive aspects, and areas for additional consideration. It is not the intention of this document to offer a comprehensive analysis of the DPA's draft transparency and access to public sector information Act, but rather provide some comments that may serve to inform the up coming civil society and Congressional debate.

1. Introduction

The comprehensive access to information law is the third instrument necessary for establishing a new information regime. The first two undertaken by the Government of Bolivia were the Supreme Decree for Transparency and Access to Information and the promotion of a Voluntary Openness Strategy in five (5) pilot ministries and agencies. As these serve as a platform for the passage and implementation of the more comprehensive law, it is important that the definitions, timelines, and processes remain as consistent as possible across all three initiatives. For example, the time limit for responding to requests for information should not vary between the Supreme Decree and the Access to Information Law. By ensuring that these provisions are as similar as possible, there will be reduced confusion by both the civil servants tasked with implementing the law and by civil society users.

2. Structure/Organization

Previously there were two separate laws specifically addressing the right to information: the access to information law that allowed a person to request information and the transparency law which directed government entities to automatically publish certain information. By placing these together under one umbrella law, there is less likelihood of conflict between the laws provisions and more clarity for the civil servant.

The organization of the law is likewise important for both its usability and ease of implementation. We would suggest a modest restructuring that clearly demarcates six areas:

a. principles/objectives;
b. scope of the law;
c. automatic publication;
d. process/procedures;
e. exemptions; and
f. appeals procedures

3. Principles

The overarching principle of any access to information law should be one of openness based on the premise that information belongs to the citizens, rather than the government. The state is simply holding and managing the information for the people. As such, the point of departure should be that:

a. there is a right to information, and
b. all public information is accessible, except under very clear and strict conditions.

Although there appears to be a presumption of a "right" to information in the latest draft bill, it is not clearly stated. The principle that all information is presumed to be public is found in the first clause of Article 5, and may be better placed in a section specifically entitled principles. Although appropriately placing an obligation on the public entity to provide the information requested, the second clause in this sentence appears to confuse the duty to provide information with the duty to automatically publish information.

In the first draft of the access to information law, there were conditions placed on access that provided the opportunity for arbitrary restrictions of this right. Most of these have been removed. However, the first principle of the present draft law relates solely to "activities" of public bodies. Potentially, this could serve as a limitation to access a wide range of information.

As discussed above, the merging of the transparency and access to information laws is an important step in clarifying the new information regime. However, to more fully meet the stated objectives, the modern trend is to repeal all other laws that relate to the flow and control of information and to bring them within the access to information law. For example, laws that regulate information related to the armed forces and banking or duties of civil servants to provide information should all be incorporated in the umbrella transparency and access to information law.

4. Scope

The latest Bolivian draft strives to meet the emerging international standard of providing a right to information to all persons, regardless of citizenry or residency. Article 16 states that "any natural or legal person" has the right to request and receive information based on the right to petition. This section may be clearer and more powerfully written if it simply states, like many of the recent laws including Peru and Jamaica, that "all persons have the right to request information."

In the latest draft the scope of entities covered by the law and the type of accessible information may be drafted in a way that is too limited or leaves open the possibility for unwarranted restrictions. For example, the title of the Act reflects the idea that only information held by the "public sector" will be covered. Moreover, although Article 3 of the draft clearly attempts to include private sector bodies providing public services, it does not appear to cover all private bodies that receive state funding. This same article also may unnecessarily limit the type of information that these private bodies must release to "the nature of said public services." To reduce confusion, one might consider combining Article 2 and Article 3 as they both serve to define the bodies covered under the provisions of the law.

It is, perhaps, worth reiterating the rationale that lies behind those laws that now extend to cover information held by private sector bodies. The fundamental concept that lies behind transparency is that through access to information, those who hold power can be held to account for their actions. The past twenty years has seen a huge shift in ownership and control of public services. Bolivia is no exception to this international trend. For the citizen or the consumer, the fact that the controlling entity has changed makes little difference to their core concerns: access, quality, and affordability. It seems unwise and unfair to create duties on the public sector to provide a right to access to information without taking into account that many of the most important things that happen to people is now the responsibility of private corporations.

In South Africa, the access to information law acknowledges this new era by providing a comprehensive right to all privately held information, where access to that information is "necessary to protect or exercise a right." With private sector information it is appropriate to include a caveat to ensure that there is not an unjustified intrusion on privacy. As with publicly held information, a right to private information also can be limited with appropriate exemptions, such as for commercial confidentiality. Where a private company is clearly providing a public service, such as after a privatization process, their information should then be defined in the law as "public information." For other private corporations, the extent to which they should be covered under this law may be a matter for public debate.

5. Automatic Publication

The "right to know" approach whereby governments automatically publish as much information as possible, is important in increasing transparency and reducing costs for both the state and the requestor, and making the law more convenient.

To more easily implement this provision, the Bolivian Transparency and Access to Information Act could build on the requirements for automatic disclosure already found in the Supreme Decree and the Voluntary Openness Strategy. For example, Article 14 of the draft law may be best served to ensure that those documents listed in the Supreme Decree are also similarly stated in the Act. The Voluntary Openness Strategy and Code suggest automatic publication of, in addition to the documents stated in the Supreme Decree:

a. Una lista de todas las categorias de informacion que tiene en su poder;
b. Informacion que describe el papel y las responsabilidades del Ente, inlcuyendo su mision, objetivos y funciones;

c. Una descripcion de la estructure y la composicion del Ente, incluyendo un organigrama e informacion acerca de quien es responsible de que funciones y como contactarlo/la;
d. Mecanismos actuales de brindar informacion;
e. Informacion sobre gastos, licitaciones, adquisiciones; metas y resultados alcanzados;
f. Las politicas institucionales
g. Investigaciones y estudios y los resultados;
h. Acuerdos y convenios;
i. Reglamentos, procedimientos, guias internas para funcionarios y manuales administrativos;
j. Informacion sobre los servicios que brinda, cuales son las metas establecidas, que estandares de servicio se esperan y que resultados se estan logrando;
k. Intercambios de informacion verbales o escritos y negociaciones (inernas/externas)
l. Otra informacion pertinente

In developing an automatic public disclosure scheme, issues relating to implementation must be considered. Article 13 of the draft law provides for no more than 30 days to implement the publication scheme. This may not be realistic for all entities covered, particularly those that have not established an effective archiving and record keeping or do not have a website. Moreover, this timeline appears to be inconsistent with Article 15, which contemplates two phases of implementation over an 18-month period. Although it may be that Article 13 is intended only to dictate the establishment of a website, this is not clearly written. The phased methodology for the automatic disclosure scheme is appropriate and may help avoid overwhelming agencies, which could in turn discourage full implementation.

The Bolivian draft law, in Article 15, states that forms of publication other than just the internet should be utilized. This is welcome as it serves to ensure maximum access by all of the population. Moreover, a process for updating information and protecting copyright might be considered to further strengthen the automatic publication guidelines.

6. Processes/Procedures

Often the processes for requesting and providing information are more determinative of the Act's value and effectiveness than any other provisions. Thus, clear and workable guidelines should be established to ensure that the right to information may be accessed by all persons. Access to Information laws differ in the specifics, but most modern laws included the following procedures:

a. How to Request Information

Article 35 (a)[1] describes the procedure for requesting information. In general, this process should be as simple as possible to facilitate requests and not require the satisfaction of formalistic procedures. Requestors should be obligated to describe the information requested with sufficient specificity so that the civil servant can identify the item. However, requirements to submit the request on a specified form or to a specified person within the relevant agency may cause unnecessary obstacles to the exercise of the right to information. Moreover, many laws allow for verbal requests of information, either in person or via the telephone. This is particularly important in countries where there is a high level of illiteracy or varying languages.

Positively, the draft law satisfies one of the key components of a modern law in that it does not require the requestor to state a reason for seeking the information.

b. Responding to Information Requests

Access to Information laws should clearly establish the process that civil servants must follow in responding to information requests. In addition to the manner in which the civil servant should provide the information, this section should include precise time frames for responding to requests, with a potential for an extension, and the circumstances in which a request may be transferred to another covered entity.

Article 20 of the Bolivian draft law addresses the form in which the documents shall be provided to the requestor. It may be expanded to provide the right of inspection (for no charge), include the provision for authentication found in Article 21, and allow the requestor to waive authentication and the accompanying fee.

Many countries in an attempt to appease detractors put in time limits for responding to requests that are too short and impossible to meet on a consistent basis, thus undermining the workability of the law and giving the appearance that the holder of the information is unwilling to release it. Rather, the time limits should be realistic, without being excessively long, and there should be an opportunity for one reasonable extension. Article 35(b) provides ten working days, with one five-day extension. Depending upon the specific Bolivian context and maturation of the record keeping and retrieval processes, this may be unduly short. As provided in the Voluntary Openness Strategy, twenty working days with an extension of an additional twenty days may prove more workable. The deemed denial provision found in Article 35(c) is in line with most ATI laws.

In addition to time lines, sections relating to responding to information requests generally include a specified duty and procedure for transfer of requests when

[1] Please note that it should be numbered Article 36.

the information requested is held by another agency. In other words, where a requester makes a request to the wrong body, he or she should not simply be denied the information; instead, the agency must point the requester in the correct direction by transferring the request to the appropriate agency. Such a provision places the burden on the agency, rather than the requestor, to transfer the request to the appropriate body and include the manner in which the request is transferred, the time for responding, and mechanism for notifying the requester that his/her request has been transferred.

c. Denials

All laws include a process for denying requests. The best access to information laws mandate that information requests will be denied only based on a specified exemption, and that the denial will be provided in writing.

Articles 19 and 22 of the Bolivian draft law may unreasonably extend the circumstances for which information may be denied. Article 19 allows for denial "whenever the entity is not in condition to satisfy the request." The purpose of this provision may be to address lost or destroyed documents, but appears to be drafted much more broadly and could unintentionally become a "catch all" reason for denying information. Article 22 is directed at cases in which the entity does not have in its control the requested information. As discussed above, rather than allow for a denial to be issued, this section should establish a duty to transfer the request to the appropriate body (see above).

Article 17 of the Bolivian draft law includes a welcome addition, which states that no entity may refuse to provide information based on race, sex, language etc.

d. Responsibility and sanctions

Identifying an Information Officer is one of the first steps in properly implementing an access to information law. Thus, we welcome the inclusion of Article 11, which states that each agency shall appoint such an official. However, this Article could be supplemented with a more detailed description of the powers and duties of the Officer, such as responsibility for the operation and implementation of the automatic publication scheme and for ensuring requests for information are satisfied.

Ensuring publication and dissemination of a "roadmap" may be another responsibility of the Information Officer (often described in the more modern access to information laws as 'guides" or manual"). A "roadmap" which describes the type of information held by each agency, and how it can be accessed, serves to assist the citizen in targeting their information requests and is an integral part in any record keeping system. It also helps government

organize its records and systems, and serves to limit the number of time-wasting misdirected requests.

Moreover, most modern laws impose a duty on the public service to assist the requestor. Although included in the original draft law, unfortunately this provision seems to have been deleted from the latest draft. In terms of helping to establish a new culture of service and openness, we strongly recommend that the provision be restored.

The draft law appears to include three articles related to sanctions of public officials (Articles 8-10). The inclusion of a provision for sanctions for impeding access to information is in line with best international practice, and may also include sanctions for destroying or altering documents.

e. Costs

Article 6 is well considered, and in accordance with international standards. In general, modern laws do not attach a fee to the request for information but do require minimal payments to offset the reproduction costs. However, in many laws there is the possibility of a waiver of costs for a certain number of copies or for requests that are considered to be in the "public interest."

f. Record-keeping

Thought should be given to the question of archiving and record keeping, and the duty of the civil servant to create and maintain certain records. Article 7 of the current draft briefly provides that "public records must be established and kept." This seems an important principle of record keeping to include.

Moreover, as it is important not to overburden the law, we suggest that the provision also require the executive to establish guidelines, through delegated legislation, to assist public bodies to develop good practices in relation to archiving and record keeping.

g. Annual report

Articles 34 and 35 respond to the need for reporting to both the Congress and the public. Additional details related to the content, frequency and format would appropriately be included in the Act's regulations or instructions for implementation.

7. Exemptions

In the best access to information laws, exemptions to the right to access information should be narrowly and clearly drafted, and should explicitly define the public harm that is being protected by the exemption. The legitimate

exceptions to release of documents should all be listed in an exemptions section. The classification of a document as “secret” or “confidential” should not, without further review, be considered an automatic reason for exemption from release. Classifications are generally a tool for archiving of documents related to national security and should not, without a clearly definable public harm, render a document exempt from release.

One of the main problems with heading the different exemptions section “Confidential”, “Reserved” etc. is that it is likely to lead to abuse. Public servants who are not enthusiastic about the purpose of the law, or who misunderstand the duties created by it are likely to stamps something “reserved” or “confidential” without dedicating the necessary attention to whether or not the record properly falls within the exemption and whether there is any harm that would be caused by disclosing the information. Article 26 appears to try to legislate this idea. But the drafting is unclear. Rather, the notion that exemptions should be the “exception to the rule” should be contained in the principles section and the issue of a public interest override should be contained in a new clause.

All good access to information laws provide for a public interest test that allows an override of the exemption. In these cases, after determining that a document, or part of a document, falls within an exemption for release, a balancing test is applied. If it is found that the public interest in providing the document outweighs the potential harm identified by the exemption, the document is released. As stated above, Article 26 of the present draft law appears to provide for limited case a reverse public interest test, which focuses on considering the public detriment. Although we welcome the analysis of the potential harm, which should be the starting point for any exemption, this article does not explicitly call for the balancing of potential harm with the public interests, and does not cover all classes of exemptions.

The exemptions section as presently written in the new draft law, are unnecessarily broad, particularly the inclusion of an exemption related to information whose release may affect the “democratic system.” Article 30 is especially concerning as it appears to include a list of documents, without clearly identifying the harm that their release would cause.

Sometimes, one part of a document may fall within an exemption but not the balance of the document. Under the premise of severability, only the offensive part(s) of the requested document should be withheld from release. Article 25 of the present draft appears to address the case of a document that contains partial information. This may be expanded to state that the part of a document that does not fall within an exemption must be provided to the requestor.

In applying the exemptions section, some have defined a three-part test for refusal to disclose information[2]:

a. the information must relate to a legitimate aim for refusing access that is clearly listed in the law;
b. disclosure must threaten to cause substantial harm to that aim; and
c. the harm to the legitimate aim must be greater than the public interest in having the information.

Finally, the inclusion of Article 31 is an excellent step in limiting the scope of exceptions. With more clearly defined exceptions, a public interest test, and the clear principle of Article 31, this section could serve to satisfy international standards.

8. Enforcement

As with implementation, the enforcement mechanisms must be fully considered during the drafting of the law. Enforcement of the law is critical; if there is widespread belief that the right to access information will not be enforced, this so called right to information becomes meaningless. If the enforcement mechanisms are weak or ineffectual it can lead to arbitrary denials, or it can foment the "ostrich effect", whereby there is no explicit denial but rather the government agencies put their heads in the sand and pretend that the law does not exist. Thus some external review mechanism is critical to the law's overall effectiveness.

However, in countries where there is a deep lack of trust in the independence of the judiciary or it is so overburdened that resolution of cases can take years, an enforcement model that is not dependent on judicial involvement in the first instance may be best. The context in which the access to information law functions will help determine the enforcement model chosen, but in all cases it should be:

- accessible,
- timely,
- independent, and
- affordable.

Enforcement models range from taking cases directly to the Courts to establishment of an independent Appeals Tribunal or an Information Commission/Commissioner with the power to either recommend or to order.

The present draft law does not include clear provisions for enforcement.

[2] "Guidelines on Access to Information Legislation," Addendum to Declaration of the SOCIUS Peru 2003: Access to Information Conference.

9. Implementation Coordination

In Article 33, the draft access to information law calls for the establishment of a national coordinating body. The idea of creating such a body is a very good one. We have seen in Jamaica how a strategically located, specialist entity, even with limited staff and resources, can play an important role in developing a strong implementation plan (in Jamaica, the Access to Information Unit is attached to the Ministry of Information in the Prime Minister's Office). Article 33 should more fully explain the functions, responsibilities and location of the unit. Thought needs to be given as to how this executive agency would relate to the Ombudsman and enforcement body, which has the responsibility for adjudicating appeals.

It appears that the core function of the unit would be to oversee implementation and to try to set compliance standards across government and covered private sector bodies. We would recommend renaming the entity to the National Access to Information Implementation Unit, as the current name might be cause for misinterpretation by those concerned that the law is intended to control access rather than promote and facilitate access to information. This article may also need to be clarified to ensure that there is not a conflict or inconsistency with the duties placed on each agency's Information Officer.

As stated in our first observation paper, adjusting the mindset and creating a new culture of openness represents a large challenge that will require resources and political will. Much progress has already been made in establishing a framework for transparency. Even more can be made through a participatory lawmaking process. Thus, we encourage the involvement of all relevant sectors of society, including civil society, the media, unions, and the private and public sector when drafting and debating the law. Public audiences before the Constitutional Commissions and an informed debate in Congress will help ensure the ultimate legitimacy and effectiveness of the Bolivian access to information law. The Carter Center remains ready to assist.

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