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REPORT ON THE SPECIAL MEETING [1/]

SPECIAL MEETING OF THE COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS ON ACCESS TO PUBLIC INFORMATION

[AG/RES. 2514 (XXXIX-O/09) and AG/RES. 2607 (XL-O/10)]

Washington, D.C., December 13, 2010

1. Prepared by the Department of International Law

REPORT ON THE SPECIAL MEETING OF THE COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS ON ACCESS TO PUBLIC INFORMATION

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REPORT ON THE SPECIAL MEETING OF THE COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS ON ACCESS TO PUBLIC INFORMATION

December 13, 2010
Simón Bolívar Room
Washington, D.C.

I. Executive Summary

The special session on access to public information of the Committee on Juridical and Political Affairs (CAJP), organized by the Department of International Law of the General Secretariat, was held on December 13, 2010. The special session served as an opportunity to review the work of the OAS on access to public information, present the preliminary OAS Principles and Recommendations on Data Protection, as well as consider the possibility of preparing an Inter-American program on access to public information, within the framework of the Organization of American States.

The panel on **Recommendations on Access to Information reviewed the Study on Recommendations on Access to Public Information** (CP/CAJP-2599/08) originally presented to the Committee in 2008. The panelists stressed the need for both the OAS and Member States to work towards the fulfillment of the recommendations contained in the study. In particular, it was noted that one of the recommendations to the OAS indicated that the OAS should adopt and implement an internal information policy, consistent with the legislative recommendations enumerated in the study on recommendations on access to public information. Furthermore, it was noted that the World Bank adopted a disclosure policy in part due to its increasing work in the area of governance and transparency and the need it felt to be as transparent as it was requesting its members be. In terms of recommendations on access to information to Member States, recommendations were made to all member states – including ensuring that all public policies and regulations are consistent with the principles of maximum disclosure and transparency, recommendations to those states without access to information laws – including passing access to information law in compliance with international law and best practices, including maximum disclosure, and recommendations to states with access to information laws – including ensuring effective implementation of the law and mechanisms to monitor compliance as well as focusing on proactive disclosure of information and sharing experiences and best practices with other Member States.

The panel on **Best Practices on Access to Information** presented updated responses to the questionnaire on legislation and best practices on access to public information (CP/CAJP-2608/08) provided by both Member States and civil society. Generally speaking, it was noted that the results of the questionnaires completed by civil society did not show great advances or steps back in the hemisphere. However, several changes in Argentina, Chile, El Salvador, Costa Rica and Mexico were noted. The Regional Alliance stressed that a Constitutional provision alone is not sufficient to uphold the right of access to public information and as such, the importance of each State having a law on the topic. In addition, the Regional Alliance noted the need for a greater emphasis on policies regarding the creation and preservation of documents and archives as well as training of officials. Mr. Raul Ferrada, Director General of the Council for Transparency in Chile, stressed that the sharing of experiences and technical assistance between Chile and Mexico was key to the success and effective implementation of the Chilean law. Delegations commented on the importance of the

topic of access to public information and how access to information has contributed to their democratic development.

The panel on the **Model Inter-American Law on Access to Public Information and Implementation Guide** summarized the content of both the Model Law and the Implementation Guide, stressing that the scope of the Model Law is quite broad, covering all branches and levels of government, includes provisions on the process for filing and responding to a request, as well as extensive provisions on the proactive disclosure of information. Furthermore, the Model Law includes two categories of exceptions to disclosure (for private interests and public interests) and has a public interest override provision. The Law also includes provisions concerning appeals both within the public authority and appeals to an external Information Commission and subsequent judicial review. The panelists noted the utility of the Implementation Guide in implementing the law. The Guide covers six topics, including 1. Adoption of a comprehensive framework, 2. Exceptions from disclosure, 3. Monitoring, enforcement and effectiveness of the law, 4. Allocation of resources necessary to create and maintain an effective access to information system and infrastructure, 5. Adoption of effective information management policies and systems to properly create, maintain, and provide access to public information, and 6. Capacity-building for information providers and users. The Rapporteur for Freedom of Thought and Expression of the Inter-American Commission on Human Rights emphasized two principles and eight obligations of the State that are derived from the *corpus juris* of the Inter-American system and how these are incorporated in the Model Law, including the two key principles concerning the right of access to information -- the principle of maximum disclosure and the principle of good faith.

The panel on **Recommendations on Protection of Personal Data** focused on the importance of privacy and protection of personal data, as well as the presentation of the study on principles and recommendations on data protection. The panel stressed that access to information and data protection are two complementary goals; they are two fundamental rights that work together. There are several purposes served by a privacy law, including, many legal systems have establishes that privacy is a human right, while others have created statutory rights for the protection of privacy; privacy protection enables the free exchange of information; privacy enables commerce because it establishes trust and confidence that information will be used for appropriate purposes; and privacy, when properly applied, can support law enforcement cooperation. Touching upon existing approaches to data protection, it was noted that **t**he European Union set out what is considered the most extensive international framework for data protection. The directive instructs the Member States to adopt national laws incorporating many elements for the protection of personal information, including individuals obtaining rights to gain access and to object to the use their personal/private information, as well as the basis for decision making concerning their person. The fifteen principles contained in the document “Draft: Preliminary Principles and Recommendations on Data Protection (The Protection of Personal Data),” CP/CAJP-2921/10, were also presented. These principles include: Lawfulness and Fairness, Specific Purpose, Limited and Necessary, Transparency, Accountability, Conditions for Processing, Disclosures to Data Processors, International Transfers, Individual’s Right of Access, Individual’s Right to Correct and Delete Personal Data, Right to Object to the Processing of Personal Data, Standing to Exercise Personal Data Processing Rights, Security Measures to Protect Personal Data, Duty of Confidentiality, and Monitoring, Compliance and Liability.

The panel on an **Inter-American Program on Access to Public Information** examined the possibility of preparing an Inter-American program. Previous Inter-American Programs were examined and their structure, activities, and purpose were examined. Seven possible objectives or activities for consideration in a possible Inter-American Program on Access to Public Information were proposed by Mr. Luis Castro, including the provision of a forum, series of meetings or network of information officials to exchange best practices, follow-up on the Inter-American Model Law on Access to Public Information, promote implementation of cooperation projects, promote a culture of transparency, develop staff training programs to meet the right of access to public information, develop guidelines for the conservation and proper management of information, and the exchange/discussion of the incorporation of Inter-American standards in national courts. Ms. Maria Marvan added to these suggestions, noting that an Inter-American Program could promote the development of public policies, laws and best practices, establish a monitoring mechanism in the region to provide follow-up on the Model Law, build a support scheme to the legislative process in different countries, assist Member States in establishing the necessary mechanisms for the implementation of the law, assure the cooperation of civil society and media in all stages of the process; include training programs for civil society, public servants, and the judiciary; develop systems to educate the public on the existence and exercise of this right; create a monitoring and control mechanism; plan and hold seminars, workshops and other events to promote the right; and encourage donors to support the efforts of Member States in establishing a system. The delegations of Mexico and Peru spoke briefly in support of the need for an Interamerican Program.

The Chair of the meeting requested that the present report of the Special Session be prepared so that Member States could review the discussion and at a future meeting of the CAJP discuss the issue of whether an Inter-American Program on Access to Public Information should be prepared, agree on the methodology to be followed in drafting the Program is States wish to proceed and provide preliminary ideas for the content of the Program.

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II. Opening Session

The special session on access to public information of the Committee on Juridical and Political Affairs (CAJP), organized by the Department of International Law of the General Secretariat, was held on December 13, 2010. Ambassador Hugo de Zela, Chair of the CAJP and Permanent Representative of Peru to the OAS, opened the special session and welcomed the delegations of the States and other participants. He noted that this is the Committee's third special session on the topic of access to public information. Ambassador de Zela explained that the OAS General Assembly, through resolutions AG/RES. 2514 (XXXIX-O/09), "Access to Public Information: Strengthening Democracy," and AG/RES. 2607 (XL-O/10), "Model Inter-American Law on Access to Public Information," instructed the Permanent Council, wthin the framework of its Committee on Juridical and Political Affairs, to 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 on Access to Public Information(CP/CAJP-2599/08), presented to the CAJP on April 24, 2008, and taking into account the Model Inter-American Law on Access to Public Information and any observations that the Member States may submit thereto.

Ambassador de Zela noted that over thirty organizations from civil society registered to participate in the special session and that a list of those organizations would be circulated to the delegations.

Enumerating several objectives for the special session, Ambassador de Zela noted that he hoped the special session could be used to examine the advances on access to public information in member states in their public authorities, as well as to examine existing laws in member states, annual reports by the Special Rapporteur on Freedom of Expression, and relevant jurisprudence from the Inter-American Court of Human Rights. Furthermore, he noted that the special session would provide states with the opportunity to comment on the Model Inter-American Law on Access to Public Information as well as to update the report on best practices in the hemisphere and look at the topic of data protection. Lastly, Ambassador de Zela noted that the special session should be used to examine the possibility of an Inter-American Program on access to public information.

III. OAS Work on Access to Public Information

A. Principles on Access to Public Information

Due to the date changes for the special session, David Stewart, member of the Inter-American Juridical Committee, who was scheduled to present the principles on access to public information approved by the Inter-American Juridical Committee at its 73rd regular session, held August 4-14, 2008 (CJI/RES 147 (LXXIII-O/08), was unable to attend the special session. However, Ambassador de Zela noted that the principles had been previously presented to the CAJP by the Inter-American Juridical Committee and were circulated among the documents for the special session.

B. Recommendations on Access to Public Information

The Chair introduced the first panel of the day, noting that the focus of the panel would be on the presentation of recommendations on access to public information contained in the study organized by the Department of International Law of the Secretariat for Legal Affairs (CP/CAJP-2599/08) and presented to the CAJP on April 24, 2008. [AG/RES. 2514, operative paragraph 8.a]

i) Recommendations to OAS Entities, Organs and Organisms:

– María del Carmen Palau, Specialist, Department of State Modernization and Good Governance, OAS

Ms. Maria del Carmen Palau, Specialist in the Department of State Modernization and Good Governance of the OAS presented the Study on Recommendations on Access to Public Information (CP/CAJP-2599/08). She explained that per the mandate in General Assembly Resolution AG/RES 2288 (XXXVII-O/07), the Department of International Law coordinated a working group consisting of representatives of the Special Rapporteur on Freedom of Expression, the Department of State Modernization and Good Governance, the Inter-American Juridical Committee, the CAJP, the Trust for the Americas, and prominent experts from civil society to produce the study.

Ms. Palau noted that the final study is divided in two parts: the antecedents that establish access to information as a human right under international instruments and applicable jurisprudence and presents access to information as a democratic right of fundamental importance for the good governance of states. The second part presents a series of policy and legislative recommendations to the OAS and to its Member States.

Mentioning that Ms. Laura Neuman would provide an overview of the recommendations made to OAS Member States, Ms. Palau proceeded to explain the recommendations made to the OAS itself, including:

- Adopt and implement an internal information policy, consistent with the legislative recommendations enumerated of the study.
- Consider the drafting and promulgation of a convention, model law, or other international instrument on access to information.
- Assist the member states in establishing and implementing the right of access to information.

- Assist the member states to establish the necessary mechanisms for reporting on their progress in the enactment, implementation, and enforcement of the right of access to information
- Assist states in providing education and training to officials (information officers) responsible for providing access to information.
- Facilitate participation of civil society organizations and the media in the development of effective access to information systems, in informing and educating the general public of the existence and the exercise of this right, and in creating follow-up and monitoring systems.
- Help the member states to share their best practices and lessons learned.
- Continue to include in the annual report of the Special Rapporteur on Freedom of Expression of the IACHR a report on the situation regarding access to information in the region.
- Encourage and prepare seminars, workshops, and other events to promote access to information.
- Encourage donors to support state efforts to establish a right of access system.
- Make a study with background and recommendations, similar to this one, on the topic of protection of personal data.

Focusing on the first recommendation – that the OAS "adopt and implement an internal information policy" – Ms. Palau noted that in recent years, other multilateral institutions such as the World Bank, the International Monetary Fund, and the United Nations Development Programme (UNDP) have adopted disclosure policies, which could serve a s model for OAS to do the same. She noted that Ms. Lisa Lui would further touch on the World Bank's experience with its recently adopted and updated disclosure policy.

ii) Access to Information in the World Bank:

–Lisa Lui, Lead Counsel, Information Policy, The World Bank

Ms. Lisa Lui, Lead Counsel on Information Policy of the Legal Vice-Presidency at The World Bank explained that she hoped to provide the CAJP with a background on the World Bank's disclosure regime and how it came to adopt an information disclosure policy, as well as experiences the Bank has had thus far with its implementation.

Ms. Lui described the evolution of the Bank's disclosure approach, noting that disclosure of information is not a new concept for the World Bank. Since 1983, about every two years Bank has looked at itself and how it is disclosing information. In 1993 the World Bank adopted its first major disclosure policy, focusing on making operational information available to the public. In 2005 the Bank realized it needed to make more information available to the public – in particular about its operations and financing. It took measures to ensure things such as board minutes, operational strategy papers, borrowers information (including procurement plans) were made available to the public. Under this Disclosure Policy, the Bank's Board approved a set list of documents for disclosure.

In the mid 2000s, the World Bank was doing more work in area of governance and advising member states to become more transparent. Ms. Lui noted that the World Bank recognized that with that type of advice, the Bank needed to look upon ourselves and make itself more transparent. The

Bank went through consultations with member countries, meeting with 33 member governments, civil society, members of public and other relevant stakeholders, other donor communities, etc to figure out what information they thought the bank should be disclosing. Based on this review, the World Bank looked at two member governments and their disclosure laws – the United States and India. The World Bank developed its new policy with much consideration for these laws.

In 2009 the new access to information policy was approved. It took effect this past July 2010. Ms. Lui noted that it took the World Bank seven months to put in place the infrastructure and staff knowledge to implement the policy. However, she added that it is still a learning process. With the new policy, the World Bank moved from having a positive list of documents that the executive directors approved for disclosure to a regime where the Bank says basically anything that is in the bank's possession is available for public disclosure unless it falls under an established clear list of exceptions that are set out in our policy.

While the change was relatively radical, the objectives of the Bank remained the same – specifically, Ms. Lui noted that as a development finance institution, the Bank strives to be transparent about its projects and programs (particularly with groups affected by its operations), to share its global knowledge and experience, and to enhance the quality of its operations by engaging with the development community. As an intergovernmental organization owned by countries, the Bank has an obligation to be responsive to the questions and concerns of its shareholders. As a borrower, the Bank has established that the disclosure of information helps attract purchasers to its securities. As an employer, the Bank seeks to provide its employees with all the information they need to perform their duties.

Ms. Lui noted that the new access to information policy has five guiding principles –

1. Maximizing access to information.
2. Setting out a clear list of exceptions.
3. Safeguarding the deliberative process.
4. Providing clear procedures for making information available.
5. Recognizing requesters' right to an appeals process.

Ms. Lui explained that the Disclosure Policy includes a list of ten policy exceptions (restricted information), including:

1. **Personal Information**: The Bank protects the personal privacy of its staff and protects the confidentiality of personal information about them (e.g., staff records, personal emails).
2. **Communications of Executive Directors' Offices**.
3. **Ethics Committee Proceedings for Board Officials** (unless the Executive Directors initiate a decision to disclose).
4. **Attorney-Client Privilege**: The Bank does not disclose information subject to the attorney-client privilege, including, among other things, communications provided and/or received by the General Counsel, in-house Bank counsel, and other legal advisors.
5. **Security and Safety**: The Bank does not disclose information that – if disclosed – could compromise the security of staff, their families, contractors, other individuals, or Bank assets, or would likely endanger any person or the environment.
6. **Information Restricted Under Separate Disclosure Regimes:** the Independent Evaluation Group, Inspection Panel, Integrity Vice Presidency, and the Bank's sanctions

process. The Bank does not disclose other information that would prejudice an investigation.

7. **Information Provided by Member Countries or Third Parties in Confidence:** The Bank does not disclose information provided to it by a member country or a third party on the understanding of confidentiality, without the express permission of that member country or third party.
8. **Corporate Administrative Matters:** e.g., corporate expenses, procurement, real estate, and other activities (in order to focus resources on public availability of Bank operational information).
9. **Deliberative Information:** The Bank makes publicly available the decisions, results, and agreements that result from its deliberative processes, but consistent with the Policy's key principles, the Bank safeguards the free and candid exchange of ideas, and does not provide access to: information (including e-mail, notes, letters, memoranda, draft reports, or other documents) prepared for, or exchanged during the course of, its deliberations with member countries or other entities with which the Bank cooperates, or its own internal deliberations, including the following documents pertaining to Board deliberations.
10. **Financial Information:** (a) financial forecasts and credit assessments; (b) financial and budgetary transactions; (c) individual transactions under loans and trust funds; and (d) banking and billing information.

Ms. Lui also noted that the Bank may exercise the prerogative not to disclose information normally available to the public if there is a determination that the harm resulting from the disclosure would likely outweigh the benefits of the disclosure**.** The Bank may exercise the prerogative to disclose information normally restricted under the Policy if it determines that the benefit resulting from the disclosure would likely outweigh the potential harm. Each prerogative has specific clearance requirements.

In the seven months before effectiveness, Ms. Lui mentioned that the Bank had invested large sums into making sure this policy would be carried out effectively, including providing significant mandatory training for staff, and preparation of communication materials for both staff and member countries so they are well aware and informed concerning the manner in which information produced for (or within) the Bank or provided to the Bank will be handled henceforth.

iii) Recommendations to OAS Member States:

– Laura Neuman, Access to Information Project Manager and Associate Director of the Americas Program, The Carter Center

Laura Neuman, Associate Director of the Americas Program at The Carter Center, a nongovernmental organization headed by former president Jimmy Carter, explained the value of access to information, noting that it is a fundamental human right and is critical to the exercise of other rights. Furthermore, she noted that it is a tool in the fight corruption, increase accountability, promote citizen participation, foster more efficient public administration, improve the use of scarce resources, encourage foreign investment, and overall to enhance the confidence citizens have in their governments and, conversely, the governments responsiveness to its citizens.

Ms. Neuman clarified the differences between access to public information, habeas data, and data protection laws. Ms. Neuman explained that access to public information allows any person to

request public documents. It is not based on any personal interest and the purpose is to increase openness. On the other hand, habeas data allows a specific individual to access their own records or documents related to them, such as birth certificates or medical records, as well as to request changes to personal documents. The purpose of habeas data is to ensure accuracy in public records with relation to specified individuals. Lastly, Ms. Neuman explained that data protection laws allow individuals to ensure their information remains private and limits the collection of personal data and its use. The purpose of data protection laws is to protect privacy and ensure that the disclosure of personal based on the consent of the effected person.

Examining the history of access to information in the region, Ms. Neuman stated that presently there are 18 Member States with legislated right of access to information, and 8 Member States with decrees or draft access to information laws. Nine Member States have constitutional rights to information but no legislation or draft legislation. Ms. Neuman explained that the right of access to information is based on Article 13 of the Inter-American Convention on Human Rights as well as a series of General Assembly resolutions and the Declaration of Nuevo Leon. She also noted the Inter-American Court decision in *Claude Reyes and others v. Chile* in 2006, as well as the participation of the OAS in the International Conference on the Right of Access to Information which culminated in the "Atlanta Declaration and Plan of Action for the Advancement of the Right of Access to Information." Shortly following the International Conference, Ms. Neuman noted that the CAJP issued its "Recommendations on Access to Information," which led to the Inter-American Juridical Committee's "Principles on the Right of Access to Information" in 2008. Ms. Neuman noted that in 2009 the Special Rapporteur on Freedom of Expression co-sponsored the Americas Regional Conference on the Right of Access to Information, which culminated in the "Regional Findings and Plan of Action to Advance the Right of Access to Information." Most recently, the OAS General Assembly adopted resolution AG/RES 2607 on the Model Law and Implementation Guide on Access to Public Information, approving and attaching the text of this instrument.

Ms. Neuman explained that while the Americas is as a region, in many ways, ahead of other regions on the topic of access to information, many challenges remain, which is why she believes it necessary to continue to discuss where we have done well as well as where we need to continue to grow.

Ms. Neuman then encouraged everyone to bear in mind the following key principles, which provide the substantive context of the afternoon's discussions –

- Access to information is a fundamental right.
- All states should enact legislation to give effect to the right. A constitutional right can be difficult for individuals to exercise. Without a statute that provides for implementation issues and enforcement, a constitutional right alone is insufficient.
- All information is accessible, unless it falls under a clearly defined exception in the law.
- The right of access to information applies to all public bodies and to private bodies that receive public funds or provide public benefits.
- Public bodies should disseminate key information on a routine and proactive basis (also known as proactive publication).
- Clear and simple rules should be put in place to guide processing of requests, including time limits necessary to ensure prompt response to a request.

- The burden of proof for justifying denials lies with the public authority.
- Individuals should have the right to appeal any denial or negative determination.
- Sanctions for any official that willfully denies or obstructs access to information.
- Measures should be taken to promote access to information and implement legislation, including records management and training.

Moving to the recommendations on access to information, Ms. Neuman divided the recommendations into three categories: recommendations for all member states, recommendations for member states with legislation, and recommendations for member states that have yet to enact legislation. Ms. Neuman explained that the recommendations have been pulled from the recommendations of the OAS, as well as the different international and regional conferences on the topic.

For all Member States, Ms. Neuman gave the following recommendations –

- Make access to information an inherent aspect to all public duties and central element of state functions.
- Ensure that all public policies and regulations are consistent with the principles of maximum disclosure and transparency.
- Rescind any laws contrary to the right of access to information. Official secrets acts – when they are in conflict – must be modified to be consistent with the right of access to information.
- Integrate promotion of the right of access to information into national development and growth strategies and sectoral policies.
- Allocate the financial resources necessary to create and maintain effective access to information systems. The short term expense is a long term gain.
- Adopt effective information management and recordkeeping systems.

For Member States without access to information laws, Ms. Neuman gave the following recommendations –

- Pass access to information law in compliance with international law and best practices, including maximum disclosure.
- Assure the minimum standards established in *Claude Reyes v. Chile* are fulfilled.
- Engage civil society in the development of the law.
- Establish systems for proactive disclosure and records management even in advance of a statutory right.
- Consider means to allow the exercise of a constitutional right.

For Member States with access to information laws, Ms. Neuman gave the following recommendations –

- Ensure effective implementation of the law and mechanisms to monitor compliance.

- Focus on proactive disclosure and creative means of getting information to people. The most cost effective way to ensure that the law is working is not to respond to requests, but to put information proactively in the public realm.
- Designate information officers who are responsible for information and responses to requests.
- Create an effective enforcement mechanism. For some countries this may be an information commission or commissioner, other countries have an appeals tribunal. Experience has shown that without an intermediary body that can make decisions on enforcement, it will be difficult for citizens to exercise their right of access.
- Provide training to all public officials and specific capacity building for key officials.
- Engage in a public awareness campaign.
- Share experiences and best practices with other Member States.

– Remarks by Delegations

The delegation of El Salvador noted that just a few days prior to the special session, El Salvador approved a law on access to public information. In describing the legislative process for drafting and approving the new law, the delegate from El Salvador mentioned the role of the OAS Model Law on Access to Public Information, as well as the legislation in other countries in the hemisphere, played in drafting and finalizing the text of the new Salvadorian law. The Salvadorian delegation explained how the legislation complies with the standards dictated by the Model Law and calls for the creation of an Institution of Public Information, to follow-up on implementation and resolve disputes relating to the process and to requests for information. It is an Institution that will be formed by people not nominated by the government, but by civil society, academics, the private sector, and other organizations.

The delegation of Peru, commenting on the presentation given by Ms. Lisa Lui, requested access to the documents and materials concerning the World Bank's disclosure policy so that they could be distributed to the members of the CAJP. The Chair noted that once the documents were made available they would be circulated to the Member States.

C. Best Practices on Access to Information

The Chair introduced the next panel, noting that the focus of the panel would be the presentation of the responses to the questionnaire on legislation and best practices on access to public information (CP/CAJP-2608/08).

i) <u>Best Practices Questionnaire:</u>

– Remarks by Karina Banfi, Executive Secretary, Regional Alliance for the Freedom of Expression and Information

Karina Banfi, Executive Secretary of the Regional Alliance for the Freedom of Expression and Information, a network of 24 organizations in 18 countries throughout the hemisphere, whose focus is the defense and promotion of freedom of expression and access to information as fundamental rights, explained that the Regional Alliance had been asked to work within the

framework of the questionnaire on access to information that was distributed to all of the Member States. This questionnaire was distributed to both Member States and civil society in 2008 and was presented at the previous special session on access to public information. On this occasion, Ms. Banfi explained that civil society took the opportunity to look at what advances or steps back have been taken in the area of access to information. Additionally, Ms. Banfi explained that responses to the questionnaire were solicited from new members of the Regional Alliance and as such, the updated responses from civil society to the questionnaire include responses concerning the state of access to information in member states that were not included in the 2008 responses.

Generally speaking, Ms. Banfi noted that the results of the questionnaires completed by civil society did not show great advances or steps back in the hemisphere. However, several changes in Argentina, Chile, El Salvador, Costa Rica and Mexico were noted by Ms. Banfi.

In Argentina, Ms. Banfi noted that since 2009 there have been changes in the staff of the Undersecretary for the Institutional Reform and Strengthening of Democracy ("Subsecretaria para la Reforma Institucional y Fortalecimiento de la Democracia") (SRIFD), the enforcement authority under Decree 1172/03 that regulates access to public information in the hands of the Federal Executive. After the departure of certain individuals from the SRIFD, it became apparent that several authorities stopped publishing key information on the internet, including statistics. However, in the legislature, during the past year, there has been an active promotion of access to information through the presentation of eighteen draft laws on access to information. In September of 2010, the Senate approved a draft law on access to information that is currently in the House of Representatives. It is expected that the House of Representatives will take up the draft legislation in the first few months of 2011.

In Chile, Ms. Banfi noted two important steps taken in 2008, including the passage of the Law on Transparency and Access to Public Information of the bodies of the State Administration ("Ley sobre Transparencia de la Función Pública y Acceso a la Información de los Órganos de la Administración del Estado"), as well as the creation of the Council for Transparency. Ms. Banfi noted that the passage of the law flowed out of the case of *Claude Reyes v. Chile*. She noted that the Council for Transparency, an autonomous public authority with legal personality, has among its powers to safeguard the right of access to public information.

In Costa Rica, Ms. Banfi explained that they have begun to develop recommendations on minimum standards for internet sites of public organs, indicating which information the authorities should include to facilitate access to information by citizens. However, Ms. Banfi noted that still pending is the approval of a law on transparency and access to public information.

In El Salvador, Ms. Banfi noted that there is a constitutional provision concerning access to information, but this was not seen by civil society as sufficient to guarantee fulfillment of this right. As such, there was a push to adopt legislation. In June 2009 a process began to create an Undersecretary of Transparency and Anticorruption within the Secretariat of Strategic Affairs of the Presidency. Between April and June of this year, the government of El Salvador held a discussion forum on the draft access to public information law. A Salvadorian civil society organization participated in this forum, which strengthened the idea of further joint strategic work. On December 2, 2010, the Assembly approved the Law on Access to Information.

In Mexico, Ms. Banfi noted two occurrences of concern. She explained that the Federal Tribunal of Fiscal and Administrative Justice (TFJFA) assumed jurisdiction to overturn a decision of the Federal Institute of Access to Information (IFAI), despite not being a specialized agency, as required by Section IV of Article 6 of the Mexican Constitution. Furthermore, the State of Campeche introduced amendments to the Law on Transparency and Access to Public Information which, according to Ms. Banfi, are in contrast to the provisions of Article 6 of the Mexican Constitution.

Civil society responses to the 2010 questionnaire on best practices included responses concerning the state of access to information in six Member States – Bolivia, Colombia, Ecuador, Paraguay, Uruguay and Venezuela – not included in the 2008 responses. In the case of Bolivia, Ms. Banfi noted that there is no law on access to information, however for at least the past two years, a draft law has been in the works. Ms. Banfi noted that currently civil society is working to provide comments and feedback on the draft law.

Ms. Banfi explained that something similar is happening in Colombia, where a group of civil society is working on a draft law on access to information and transparency. Ms. Banfi noted that under Law 57 of 1985, it is the obligation of the State to publish acts and official documents. However, she noted that it is becoming clear that Colombia needs a specific law on access to information.

In the case of Ecuador, Ms. Banfi explained that there is a law that dates back to 2004, but that there has been some backsliding. In an annual monitoring exercise conducted whereby the offices of public authorities are contacted concerning a report they are to provide concerning what information has been requested or published, only 470 authorities out of 4,000 responded.

In Paraguay, civil society is working on a draft law to present to Congress. While there is a Constitutional provision concerning access to information, according to Ms. Banfi there is no data to show that the State is providing information when it is requested.

In Uruguay, Ms. Banfi noted that a law was approved in 2008 and that currently civil society is working with the State to implement the law.

In Venezuela, while there is no federal law, Ms. Banfi stated that there have been some advances in a few regions and municipalities with local laws on access to information. There also exists a mechanism for requesting information that is established in the Constitution, however, civil society has found that failure to respond to the request for information has been found in 85-100% of the cases.

Ms. Banfi noted the following recommendations that civil society would like to make to the Member States–

- The importance of each State having a law on access to public information. She explained that a Constitutional provision is not sufficient.
- The need for greater emphasis on policies regarding the creation and preservation of documents and archives.
- The need to take steps so that the agencies responsible for oversight and implementation of the regulations on access to information have the necessary budget to carry out the functions assigned to it.

- That schools (especially those focusing on journalism) incorporate as a compulsory subject, the study of these issues.
- The need for greater efforts in training of public officials.

ii) Sharing of Best Practices:

– Remarks by Raúl Ferrada, Director General, Council for Transparency, Chile

Mr. Raul Ferrada, Director General of the Council for Transparency in Chile, noted that Law 20.285 on Access to Information is still a rather new law, having gone into effect on April 20, 2009. The law operationalizes Article 8 of the Constitution which consecrates the principle of transparency and recognition and guarantee of the right of access to information.

The Council for Transparency is an autonomous body that aims to promote transparency in public administration, monitor compliance with the norms of transparency and disclosure of information for the bodies of state administration and guarantee the right of access to information. It has powers which include the establishment of norms, promotion, training, and information dissemination, the power to audit the authorities in charge of providing access to information and data protection, the power to provide definitive resolution to disputes regarding denial of access to information, and powers to sanction authorities that willfully disregard its obligations under the law.

Mr. Ferrada noted that the mission of the Council on Transparency is to promote and assist in the construction and institutionalization of a culture of transparency in Chile, guaranteeing the right of access to information. He noted further that the process of meeting that goal is not a short one, but that by combining efforts and working with others in the government to show them that the Council is not only a regulatory agency but is there to join them on the path to ensuring implementation of the law.

Mr. Ferrada explained that the Chilean Law has a clearly stated list of exceptions that are restrictive. He noted that in addition to its regulatory role, the Council for Transparency must serve as a model for transparency within the country. The Council for Transparency works to spread the message throughout the country that everyone, including state agencies, the people, etc. gain through greater transparency.

Mr. Ferrada stressed the role and importance international cooperation has played in the development of the Council for Transparency. The Council received technical assistance and best practices from both the Inter-American Development Bank and Mexico's IFAI when the Council was first being created, including training for the Commissioners. Additionally, Mr. Ferrada noted that the Council participated in the drafting of the Model Law on Access to Public Information at the OAS, as well as in a development project on information exchange funded by the World Bank involving Peru, Bolivia, Uruguay, Mexico, Canada and Chile. The Council for Transparency is working with Mexico's IFAI to start a pilot project on the exchange of experiences and best practices.

Reviewing statistics relating to the implementation of the law, Mr. Ferrada explained that in Chile more than 5,600 participants have been trained in capacity building workshops. The Council for Transparency has seen an increase in the number of requests for information – with 53,760

requests having been made. Of these requests, 1,501 appeals were filed between April 2009 and November 2010, of which, the Council has come to decisions on 1,328 of those cases.

In terms of monitoring implementation of the law, Mr. Ferrada noted that a recent review of 261 institutions revealed that the average compliance with the laws provisions was 88 percent. He announced plans by the Council to publish rankings of the administrative bodies' compliance with the provisions of the law in order to spark competition among them.

Mr. Ferrada noted that the Council faces the following pending challenges in terms of implementing the law:

- Raising levels of institutional and public awareness;
- Completing the process of institutional capacity-building;
- Building an integrated information system;
- Implementing a document management policy; and
- Improving legislation in the area of protection of personal data.

In conclusion, Mr. Ferrada explained that the system of transparency in Chile is based on the Constitution, a specialized law, and an independent monitoring body with lawmaking, oversight, punitive and advisory powers and noted that the Council for Transparency opted from the start to serve as a facilitator and partner in the implementation process of the culture of transparency in Chile.

iii) Best Practices in OAS Member States:

– Remarks by Delegations

The delegation of the Dominican Republic noted that in the Dominican Republic, access to information is regulated by a law adopted in 2004 as well as a regulation by Presidential Decree. Furthermore, the delegation noted that the right has been consecrated in the new Constitution of the Dominican Republic. To comply with the law on access to information, the authorities are obligated to establish an internal organization to systematize the information of public interest to provide access to interested individuals, as well as to publish the information through available means. The delegation explained that the law contemplates sanctions for those individuals who do not comply with the law. In the event of a denial of a request for information, citizens have administrative and jurisdictional recourses. The citizen can go to the supervisory organ that oversees the agency that denied the request, as well as to an administrative tribunal. The delegation noted that currently the government is working to effectively implement the law as well as working with civil society on the creation of a body that will oversee the implementation of the law even though the law does not require the creation of the body. Public servants have also been trained on this topic and public awareness of the law has been raised through seminars and debates. There is a long path to travel on access to information, but the delegation of the Dominican Republic expressed their understanding that what is important is the willingness to continue to strengthen and ensure the right of access to information.

The delegation of Costa Rica noted that the right of access to information in Costa Rica is routed in the Constitution. The delegation noted their preoccupation concerning the development of

the Model Law on the topic being seen as the only solution. They noted that the goal, according to the delegation of Costa Rica, is to guarantee the right of access to information and, for those countries that can benefit from the implementation of the Model Law, to do so. However, the delegation noted that this is not the case of Costa Rica as they have Constitutional provisions from 1949, including Article 27, that guarantees the individual and collective right to request information, as well as Article 30, that guarantees the free access of administrative departments. Since 1978, Costa Rica has had a Law on Public Administration that has been a pioneer in the region, which includes procedures, sanctions, as well as a regime of exceptions. In 2008 a new administrative code was adopted that also worked to strengthen access to information. Since the 80s, the delegation noted that Costa Rica has had a law on constitutional jurisdiction that expresses the right of access to information as a Constitutional privilege and is supported by ample Constitutional jurisprudence. The delegation stated that while they recognize more work can be done in the area of access to information and that some aspects could be regulated by a specialized law, for over forty years the democratic practice in Costa Rica has been to provide access to information without a specific legislation on the topic.

The delegation of Chile emphasized that the Council for Transparency in Chile is an autonomous organ with broad supervisory powers. They mentioned that various ministries have created offices and improved internal and external relationships to respond to this new law. The delegation noted that the government web sites have improved – to the point that an individual can look up the length and terms of the contracts for the delegate as an employee of the Ministry of Foreign Relations. The delegation asked the panelists how documents classified as secret or confidential are handled under the law. Lastly, the delegation wished to congratulate the Council for Transparency as having served as a good example of Inter-American cooperation, having traveled to other countries, learned the experiences of other countries, having participated in the drafting of the OAS Model Law, to improve the implementation of the law as well as sharing the best practices learned through the implementation of the law thus far.

The delegation of Mexico stressed their belief in the importance of the right of everyone to access information as indispensible requisite of the exercise of democracy. An important part of that right is to include the public in the design of public policies, ensuring trustworthy paths for information. In the past decade there have been important advances on access to information in Mexico – not only is the right of access to information guaranteed in the Constitution, but, the delegation also noted through federal and local laws, it is established that all information in possession of federal, state and municipal bodies is public and can only be withheld temporarily for reasons of public interest as established by law. According to the delegation, access to information in Mexico has provided for the improvement of public management, it has safeguarded personal data, and it has improved the organization, classification, and management of documents. This has ultimately contributed to the strengthening of democracy and the rule of law. The Instituto Federal de Acceso a la Informacion Publica (IFAI – Federal Institute for Access to Public Information), an autonomous body, has been the driving force behind these developments. In regards to advances after the publication of the questionnaire, the delegation of Mexico noted that in addition to the Constitutional reform of 2007, making this right obligatory in all federal agencies, there have been advances in many of the states and the Federal District. The delegate mentioned that Mexico, in July of 2010, adopted the Federal Law on Data Protection, which was since entered into force. The delegation expressed their willingness to share their experiences and best practices and work with other Member States as well as the OAS in advancing these important rights.

The delegation of Panama noted that access to information is regulated in Panama through a law from 2002. They explained that there is a thirty day period in which to respond to information requests and that when this response period is not met, citizens can use the habeas data recourse. In Panama, an ombudsman serves to ensure the right of access to information is guaranteed as citizens feeling that information has been improperly withheld or that their rights of access to information are in jeopardy, can seek the assistance of the ombudsman. The Code of Ethics for Public Officials provides for administrative sanctions, such as verbal or written warnings, suspension or removal from office for those public servants that have incurred violations of the provisions of the code. In terms of best practices, the Panamanian delegation wished to share that they have set up a procurement system via the internet that facilitates the exchange of information and the process for government procurement of goods and services, bringing unprecedented transparency to public functions. Additionally, the government of Panama has recently established the 311 citizen service system in order to receive all complaints against government institutions and public officials, which has opened opportunities not only to access information but to report any irregularities in government administration. Responses to complaints are given to citizens within a period of 30 days.

The delegation of Argentina noted that currently a draft law exists in the Congress that has already been approved by the Senate, and mentioned that the draft law is based on the OAS Model Law.

The delegation of Uruguay stressed the fundamental importance of the topic of access to information. In Uruguay, the norm is based not only in the Constitution, but also in international and regional instruments. Referring to Ms. Banfi's presentation, the delegation of Uruguay reiterated that in 2008 Uruguay passed a law on access to public information. The law includes fundamental principles such as the principle of maximum disclosure, the principle of limited exceptions, the principle of proactive disclosure, the principle that access to information is free and should not exceed the cost of reproduction, etc. The delegation noted that currently civil society is working with the supervisory agency to implement the law. In terms of capacity building, the delegation of Uruguay stated that many training sessions have been held.

The delegation of Venezuela stressed that Articles 58, 51, and 143 of the Constitution regulate access to information. These provisions provide that all people have the right to present requests for information before public authorities or public servants who posses the desired information, as well as to receive responses. Those public officials who do not act according to the laws are sanctioned, including the possibility of losing their posts. In addition to the Constitutional provisions concerning the right of access to information, the delegation noted that Venezuela is a party to the Inter-American and international instruments that guarantee access to public information. Additionally, access to information is also dealt with in additional laws including the Organic Law on Public Administration. The delegation stressed the importance of access to information within the hemisphere as well as the important role it plays in participatory democracy.

Mr. Raul Ferrada, in response to the question posed by the delegation of Chile, noted that the Ministry of Foreign Relations is a ministry regulated by the Council. In terms of applying the exceptions to information requested from the ministry, Mr. Ferrada noted that it is key that the individual reviewing the request have some level of specialization in the area so that they understand the work of the ministry.

In terms of best practices, Mr. Ferrada explained that Chile has received intense amounts of cooperation from other states as they sought to implement their law. He noted that the four Commissioners from Chile traveled to Mexico to learn from the experiences of IFAI in Mexico. This has resulted in a great exchange of technical information and experiences. And, as an example of the great cross-border influence of practices and resolution of disputes, Mr. Ferrada noted that there is more than one resolution of the Council that cites jurisprudence from Mexico's IFAI. After having benefited from the cooperation with Mexico, Mr. Ferrada noted that the Council for Transparency is interested in and eager to share its knowledge and experiences with other States embarking upon this path.

The Chair of the CAJP noted that responses to the Questionnaire Regarding Legislation and Best Practices on Access to Public Information (CP/CAJP-2906/10 corr. 2) were solicited from all of the Member States and that responses had been received from the following Member States: Mexico, Peru, Chile, Argentina, Dominican Republic, El Salvador, Canada and Panama. Furthermore, the Chair noted that the study including the responses to the questionnaire would circulate in the coming months.

D. Model Inter-American Law on Access to Public Information and Implementation Guide

i) Structure and Provisions of Model Law:

– Melanie Anne Pustay, Director of the Office of Information Policy, United States Department of Justice, USA

Ms. Melanie Anne Pustay, Director of the Office of Information Policy at the United States Department of Justice, sought to respond to a comment made in the first panel concerning whether the United States should consider having more intermediary steps in the Freedom of Information Act appeals process, noting that there are currently intermediary steps including FOIA request services centers and FOIA public liaisons, as well as an administrative appeals process, and a new office of Government Information Services within the National Archives that provides mediation services. She also mentioned that the Department of Justice offers Ombudsmen services to requesters. And although Ms. Pustay stressed that while it is important to have mechanisms to resolve disputes, it is far more important to prevent the disputes from arising.

Turning to the Model Inter-American Law on Access to Public Information, Ms. Pustay noted that the scope of the Model Law covers all branches and levels of government. Of the key provisions included in the Model Law, she mentioned the basic right for the public to be aware if a public authority has the information requested, the right to received the information requested in a timely manner, to have the right to make an appeal if the disclosure of the information is not provided, the right to make requests anonymously, the right to be free from discrimination or other retaliatory measures for having made a request, and the right to not having to provide a justification or prove standing for making a request.

Ms. Pustay explained that the Model Law has extensive provisions on proactive disclosure – requirements that government agencies proactively publish the information in their domain – without the information having to be requested. This includes the requirements to have publication schemes and key information delineated and available to the public, and the obligation to make any information previously released to one person that made a request, available to all citizens. She provided further detail in what she called the key part of the Model Law, which is the very system that allows individuals to make requests for information. Under the Model Law, requests can be made in any format – verbally or in writing. The only requirements under the Model Law are that the requestor provides contact information (the request may be made anonymously) and sufficient description of the information being sought so that the government agency can locate it. The onus is on the public authority to respond to the request. Additionally, each public authority is required to have an information officer – someone who can work internally to promote best practices and also work externally to help requestors and to receive requests. Ms. Pustay explained that the Model Law addresses the issue of fees, noting that it is very important that there not be a cost for processing a request and as such the only fee contemplated is the cost of reproduction.

Ms. Pustay went on to describe the exceptions to disclosure as included in the Model Law, explaining that they are divided into two different categories: 1) exceptions for protected private interests, such as the right to privacy or protection for commercial interests; or 2) exceptions for protected public interests, such as national security, law enforcement concerns, provision of full and frank advice, etc. She described that the Model Law includes a public interest override that operated in conjunction to the system of exceptions, whereby if the public interest in disclosure is greater than the need to protect the information under the relevant exception, then Model Law would necessitate the release of the information despite the existence of a valid exception.

With regard to enforcement and settlement of disputes, Ms. Pustay noted that the Model Law provides for appeals both within the public authority where the request was directed and externally to an Information Commission. She mentioned that the Model Law further provides for a third possible level of decision making in deferring to a judicial review. Finally, she mentioned that the burden of proof falls on the States to prove the existence of a valid exception, not on the requesting party to prove he or she is entitled to receive the information. Additionally, she explained the Information Commission created under the Model Law must be autonomous with control over its own budget, consisting should consist of at least three or more Commissioners.

ii) Structure and Content of the Implementation Guide:

– Issa Luna Pla, Researcher, Institute for Legal Research, National Autonomous University of Mexico

Ms. Issa Luna Pla, Researcher at the Institute for Legal Research at the National Autonomous University of Mexico (UNAM), provided description of the Implementation Guide and Commentary that accompanied the Model Inter-American Law on Access to Public Information. She stressed that Guide's utility both for common law as well as civil law countries is that it provides a roadmap for the proper implementation and operation of the Model Law. Ms. Luna Pla noted that the Guide provides concrete recommendations to States while also serving as a manual on the application of the law. The Guide consists of six sections: 1) Adoption of a comprehensive framework; 2) Exceptions from disclosure; 3) Monitoring, enforcement and effectiveness of the law; 4) Allocation of resources necessary to create and maintain an effective access to information system and infrastructure; 5) Adoption of effective information management policies and systems to properly create, maintain, and provide access to public information; and, 6) Capacity-building for information providers and users.

Section one on adoption of a comprehensive framework, Ms. Luna Pla explained, provides the elements necessary to harmonize a new access to information law and disclosure regime with existing government regimes with antiquated classification systems and even laws that can conspire against transparency, such as states secrets acts. This section provides the wherewithal to allow states to adoption the complementary laws necessary to reinforce and contribute to the guarantee of access to information, while derogating those that can have the opposite effect, and provide for the development of a plan of action for implementation of the law.

Section two on the interpretation of exceptions to disclosure is closely coordinated for the proper implementation of the Model Law's system of exceptions to protect legitimate public and private interests. This section provides guidance on the manner in which the body in charge deciding whether information is exempt or not from disclosure must interpret the Model Law. To this effect, Ms. Pla noted that the Guide provides the necessary assistance so that exceptions to disclosure are interpreted under the principles of maximum disclosure, proportionality, legitimacy and necessity as required by the law. Furthermore, this section provides the information necessary for the proper application of the public interest and harm test required under the law.

Ms. Pla explained that section three on monitoring, enforcement and effectiveness of the law, provides further detail and structure to the Information Commission contemplated in the Model Law, provides guidelines for forming, funding and staffing a commission, provides information for other enforcement and implementation systems for States that do no wish to form a commission as required under the Model Law. It also provides the roadmap for states to properly monitor the implementation of the law and its effectiveness in all aspects of disclosure.

Section four on the budgetary implications for the full implementation of the Model Law provides considerations that are not contained in the text of the law itself, but rather provides the economic and political considerations necessary to create start-up (short-term) and permanent (long-term) budgets vital for the implementation of the law and for the promotion of access to public information. This section also provides a step-by-step methodology and the line-item content for the budgets necessary for a new open system to function. The Guide also provides formulas for calculating the expected demand, so states can budget sufficient resources to keep up with demand. Ms. Pla explained that this section also includes information on cost saving measures that can be implemented to maximize the use of government resources allocated to this important task, including the fact that promoting a system based on proactive disclosure (where the information is provided to the public without there being an official request), which is a lot less expensive than a system based on requests (where the information is provided only after an individual requires action to disclose, the costs of which could have been avoided by having previously published the information).

Section five on archives and records management provides information on how to develop effective policies, including the evaluation of current archives, the development of an effective permanent plan, the development of policies on the safeguarding and destruction of information, as well as the use of technologies to better manage, process and archive government information. Records management systems also play an extremely important role in reducing the costs of an access to information system. State governments handle millions, if not billions of records a year, most of which are now in electronic format. An initial investment in setting a comprehensive and effective system for the manner in which all government agencies and officials generate, receive, manage and archive information, will thus create a system that costs a fraction of one in which each official and agency has its own individual process, software and method for handling information.

Ms. Luna Pla noted that the section six on capacity building and public awareness stresses that education on human rights, including access to information is key. First, people must understand their rights and know how to exercise them. Equally important, public servants must understand the importance of the right and how to comply with the legal requirements in place to guarantee the promotion and protection of this right.

In conclusion, Ms. Pla noted that the Implementation Guide has been extremely useful for those States implementing access to information laws.

iii) Inter-American Standards Contained in the Model Law:

– Catalina Botero, Rapporteur for Freedom of Thought and Expression, Inter-American Commission on Human Rights

Ms. Catalina Botero congratulated El Salvador on the approval of their law on access to information, noting the important role civil society played in the process as well as the open dialogue that was maintained with international organizations.

Ms. Botero went on to outline two principles and eight obligations of the State that are derived from the *corpus juris* of the Inter-American system and how these are incorporated in the Model Law. The two key principles concerning the right of access to information are the principle of maximum disclosure and the principle of good faith. Ms. Botero noted that both of these fundamental principles are derived from the case of *Claude Reyes v. Chile* at the Inter-American

Court on Human Rights, and form part of an Inter-American jurisprudence that is binding on the subject matter.

The principle of maximum disclosure is embedded throughout the Model Law, but particularly in Articles 2 and 3. Ms. Botero explained that the principle of maximum disclosure means that transparency is the rule and secrecy is the exception – access to information is universal for all people.

The second fundamental principle, that of good faith, is based in Article 30 of the Inter-American Convention on Human Rights. Ms. Botero explained that Articles 2 and 3 of the Model Law incorporate the principle of good faith fully and effectively.

In addition to the two fundamental principles, Ms. Botero noted that there are eight obligations with which States must unequivocally comply. These are derived not only from *Claude Reyes*, but also from the reports from the Inter-American Commission on Human Rights and the office of the Special Rapporteur. The obligations Ms. Botero outlined include:

- The obligation to respond in a timely, complete, and accessible manner to requests. This obligation can be found in Articles 2 through 8 of the Model Law.
- The obligation to provide an adequate, free, universal, and accessible administrative instrument. Ms. Botero noted that a law filled with principles can not be effective without an administrative instrument to serve the needs of the public. The Model Law provides for this administrative instrument in Articles 20 to 40. An administrative instrument is not enough though.
- The obligation provides that someone from the outside must be able to review the decision taken by the State through external and judicial appeals processes found in Articles 47 through 52 of the Model Law.
- The obligation of active transparency, which Ms. Botero noted requires the State to provide the public with the maximum quantity of information proactively, provided for in the Model Law.
- The obligation to produce or gather information needed to fulfill its duties, pursuant to other laws and is referred to in Article 34 of the Model Law. Ms. Botero stressed that where the State has an obligation to have the information, it can not rely on the excuse that the information doesn't exist or was lost. Instead, the State must find the information or produce the information.
- The obligation to create a culture of transparency. Ms. Botero explained that the passage of a law does not in and of itself create a culture of transparency – instead, one must make cultural changes, which costs money and time to do.
- The obligation of adequate implementation, as provided for in the implementation guide.
- The obligation to adjust domestic legislation to international standards on access to information, as required by the Model Law as well.

Ms. Botero emphasized that her office exists to assist states in meeting the international standards and as such, Member States can count on her office's support at any moment to ensure that

these principles and obligations are realized in all of the Member States as they move to enacting a new legal framework or to revise their current legal frameworks to better implement this right.

iv) Comments of the Delegations pursuant to AG/RES 2607:

The delegation of Costa Rica asked Catalina Botero about the obligation to provide an adequate, free, universal, and accessible administrative instrument and what exactly is meant by an administrative instrument. In the case of Costa Rica, the delegation explained that the right of access is a constitutional right and that there is not an administrative instrument.

Catalina Botero explained that the right should not be guaranteed through an administrative route, but through the Constitution or by law, at a minimum. She clarified that when referring to an administrative instrument she means an administrative mechanism through which individuals can request that the administration provide information. It is that mechanism that must be accessible and free. If that mechanism fails, then there should be the external appeal or judicial recourse.

IV. Recommendations on Protection of Personal Data

The Chair introduced the panel on the protection of personal data, noting that the panel would present the study and recommendations on protection of personal data. [AG/RES. 2418, operative paragraph 10, and AG/RES. 2514, operative paragraph 11]

i) Privacy and Data Protection:

– Marc Rotenberg, Executive Director, Electronic Privacy Information Center

Mr. Marc Rotenberg, Executive Director of the Electronic Privacy Information Center, provided a presentation on the definition of data protection, why it is important, and what are some of the key principles to be covered in a data protection law. He stressed that access to information and data protection are two complementary goals and two fundamental human rights that work together. Access to information has the goal of promoting a transparent government while data protection has the goal of protecting the privacy of the individual.

Mr. Rotenberg noted that there are several purposes served by a privacy law, including, privacy is a human right; protecting privacy enables the free exchange of information; privacy enables commerce because it establishes trust and confidence that information will be used for appropriate purposes; and privacy, when properly applied, can support law enforcement cooperation.

According to Mr. Rotenberg, what a privacy law does is to allocate the rights and responsibilities in the collection and use of personal data. The rights are given to the individual in law and the responsibilities are assigned to the organizations in possession of the personal information.

Mr. Rotenberg addressed the development of data privacy rights dating back to the adoption of the Universal Declaration of Human Rights in 1948, which sets out in Article 12 the human right of the protection of privacy. Mr. Rotenberg noted that Article 12 makes clear that the right to privacy should be set out in law. He explained that the European Court of Human Rights has had an influential role in extending the right of privacy into new information environments, as the right is

contained in Article 8 of the Council of Europe's Convention on Human Rights. In the Council of Europe Convention, Mr. Rotenberg noted that certain types of data are given heightened protections – such as, in Article 6, consideration of racial origins or political opinions require greater protection. Privacy laws also frequently include a provision for data security.

Privacy helps to enable transparency by giving individuals the ability to see what information is collected about them and how it is used. Mr. Rotenberg noted that the OECD based in Paris, has set out in a brief list some of the goals in a data protection law, including notions of limiting the collection of data to that which is necessary, making clear the purpose of the data collection, ensuring certain limitations on use, as well as accountability.

The European Union more recently set out a Directive – a binding decree on EU members considered the most extensive international framework for data protection. Mr. Rotenberg explained that the directive instructs the Member States to adopt national laws incorporating many elements for the protection of personal information, including individuals obtaining rights to gain access and to object to the use of information about them, as well as the basis for decision making concerning said individuals. One of the key provisions of the Directive is Article 25, which requires that when information is transferred to a third party country, there be adequate privacy protections so that those interests that the European governments seek to protect are protected in the new territory. Argentina became the first Latin American country to adopt a privacy law that was recognized by the European Union as meeting this standard of adequacy. The Directive also calls for an advisory authority to examine the workings of the privacy protection, which Mr. Rotenberg said is extremely important and has been a weakness in the United States.

The most recent development in terms of data protection was the adoption of the Lisbon Treaty by the European governments and the entry into force of the Charter of Fundamental Rights. The Charter has a provision in Article 8 that speaks specifically to the right of information privacy.

Mr. Rotenberg noted that there have been some disputes between the European Union and the United States that may impact Latin American governments concerning the transfer of data of one country's citizens to another country. For example, when the United States asks the European airlines to transfer information about passengers to the United States, the European governments express concern over how that information will be used. The question is whether in the absence of an effective privacy law, how else might that information be used without legal safeguards in place?

In regards to the Draft Principles and Recommendations on Data Protection, Mr. Rotenberg noted that he believes the fifteen principles and recommendations are extremely important and represent one of the most useful tools in the Americas to help determine and protect the right of privacy and data protection. Additionally, Mr. Rotenberg noted that there are other principles that could be considered, including the notion of data minimization – that the data collected should be limited to its purpose, as well as how to build in techniques to build privacy protection, also known as privacy by design.

ii) Principles and Recommendations on Data Protection:

– John Wilson, Senior Legal Officer, Department of International Law, OAS

John Wilson, Senior Legal Officer in the Department of International Law at the OAS, presented the preliminary study and recommendations on protection of personal data (CP/CAJP-

2921/10), as required by General Assembly resolutions AG/RES. 2418, operative paragraph 10, and AG/RES. 2514, operative paragraph 11. Touching upon the procedural history surrounding the study, Mr. Wilson noted that since 1996 the General Assembly has called for work surrounding access to information and data protection. However, Mr. Wilson noted that while much work has been done in the area of access to information at the OAS, the study and recommendations on protection of personal data is the first time the OAS has focused specifically on data protection. Mr. Wilson described two categories of substantive background to the study, including technological and legal advances. Given the rapid increase in technological advances, Mr. Wilson echoed the previous comment made by Mr. Rotenberg that often the data privacy laws from the past are unable to adequately protect an individual's right to privacy in our fast-paced technological society.

Mr. Wilson described three prevalent types of legislation that exist on data protection, including the European system which is the strictest, the United States system which relies on self regulation by private entities, and the system of habeas data existent in many Latin American states which is provides recourse to an individual to recover personal information in the hands of government. The objective of legislation, according to Mr. Wilson, is to protect an individual's right to privacy while balancing that against an interest in increasing the free exchange of information and the strengthening of commerce and the flow of information.

As explained by Mr. Rotenberg, the European system, recognizes the right to privacy as a fundamental human right. In the Americas, however, it is not conceptualized in the same manner. Mr. Wilson explained that, paradoxically, while access to information in is Americas is a fundamental human right, it is not viewed as such in the European system. Meanwhile, privacy is considered a human right in Europe by not here. As a result, the regulation of data protection is more rigorous in the European system because it is conceived for the protection of a fundamental right. Accordingly, the European system also regulates information in the possession of both governments and private parties and the European Union's Directive applies the right of data protection extraterritorially. The transfer of personal data from the European Union can not be made to a country that is not providing the level of protection required by the Directive.

The system in the United States balances the individual's right to privacy with the public collective interest. For those private parties in the United States who are not transferring data internationally, there is a system of self-regulation. On the other hand, Mr. Wilson noted that for the transfer of personal data from the European Union to the United States, the United States has a safe harbor under the Federal Trade Commission whereby private parties can appeal to the system to certify that they provide the adequate level of protection of personal data.

In Latin America, Mr. Wilson noted that there exists a Constitutional protection that is habeas data. Mr. Wilson stressed that while habeas data does provide some protection, it has some limitations including, the fact it requires that the information be of the individual and that the individual must go before a judicial system to make a correction to the information. In that sense, it is not a proactive system. Touching briefly upon the new data protection law in Mexico from July 2010, Mr. Wilson explained that it only regulates data in the hands of private actors and provides another option, different from the systems of the European Union and the United States.

After describing the background of these divergent systems for protection of personal data, Mr. Wilson proceeded to the fifteen principles contained in the document "Draft: Preliminary Principles and Recommendations on Data Protection (The Protection of Personal Data)," CP/CAJP-

2921/10, noting that Member States as well as civil society are invited to comment on the draft before March 31. The principles contained in the document are as follows:

- **Principle 1: Lawfulness and Fairness –** Personal data should be processed lawfully and fairly.
- **Principle 2: Specific Purpose –** Personal data should be processed for a specific purpose. This means that the purpose for the processing of personal data should be unambiguous and should be aligned with the reasonable expectations of the individual at the time that the data was obtained or consent given.
- **Principle 3: Limited and Necessary –** The personal data that is processed should be limited to that personal data necessary to achieve a specific purpose.
- **Principle 4: Transparency –** It is important for the processing of personal data to be a transparent process.
- **Principle 5: Accountability –** The data controller is responsible for taking all the necessary steps to follow personal data processing measures imposed by national legislation and other applicable authority. In addition, the responsibility lies with the data controller to show individuals and the appropriate supervisory authority that the data controller is complying with necessary measures to protect the individual's personal data.
- **Principle 6: Conditions for Processing –** The processing of personal data should only take place if one of the following conditions exists and the processing is fair and lawful: consent, data controller's legitimate interest, contractual obligations, legal authority, or exceptional circumstances.
- **Principle 7: Disclosures to Data Processors –** The data controller may use data processors to process personal data. It will not be considered a disclosure to a third party, which would require notice to the individual whose data is being processed, if one of the following conditions exists.
- **Principle 8: International Transfers –** International transfers of personal data should only be carried out if the receiving country, which is the destination country, offers, at a minimum, the same level of personal data protection, afforded by these principles.
- **Principle 9: Individual's Right of Access –** The right of access is the individual's right to request and obtain information about the individual's personal data from the data controller.
- **Principle 10: Individual's Right to Correct and Delete Personal Data –** The individual has the right to request that the data controller correct or delete personal data.
- **Principle 11: Right to Object to the Processing of Personal Data –** The individual may object to the processing of the individual's personal data where there is a legitimate reason.
- **Principle 12: Standing to Exercise Personal Data Processing Rights –** Individuals and third party representatives may exercise the right of access, the right to correct and delete, and the right to object over personal data processing.

- **Principle 13: Security Measures to Protect Personal Data –** The data controller and the data processor must provide reasonable technical and organization measures to protect the personal data.
- **Principle 14: Duty of Confidentiality –** The data controllers and data processors have the duty to keep all personal data confidential.
- **Principle 15: Monitoring, Compliance and Liability** – The data controllers and data processors, who do not comply with the principles set out in law, may be subject to administrative, civil, or criminal liabilities.

iii) Remarks by Delegations:

The delegation of Canada noted that the Canadian approach to the protection of personal data is rooted in the right to privacy and human rights. The delegation added that the Canadian law on data protection applies in cases of private multinational companies such as Facebook and Google and that perhaps the Canadian Commission was more influenced by European law. The delegation requested time to review the proposed document and provide comments. He suggested that the OAS should work in coalition with the other international organizations that are working on advancing data protection in the world, including the Council of Europe and the OECD, etc.

The delegation of Mexico noted that they would be submitting comments to the draft principles and recommendations and that the new Mexican law on data protection was motivated by a Constitutional reform in 2009.

The delegation of Costa Rica noted that data protection is a topic under development in Costa Rica. They echoed the Canadian delegation's call for the OAS to continue to work on the issue in conjunction with other international organizations.

The delegation of Peru noted that data protection goes hand in hand with access to information and noted that Peru is currently debating a draft law on data protection and that the study prepared by the OAS has been a great step for the organization. Additionally, the delegation noted their belief that the Inter-American Model Law on Access to Information has been one of the greatest advances on access to information in the Inter-American system.

V. Inter-American Program on Access to Public Information

The Chair introduced the next panel, noting that the focus of the panel would be discussion on the possibility of preparing an Inter-American Program on Access to Public Information, in the framework of the Organization of American States. [AG/RES. 2514 operative paragraph 8.a and AG/RES. 2607, operative paragraph 2]

i) Possible Methodology and Objectives:

– Luis Castro Joo, Minister Counselor, Ministry for Foreign Affairs, Peru

Luis Castro Joo, Minister Counselor in the Ministry for Foreign Affairs of Peru, noted that prior to discussing the possibility of having an Inter-American Program on Access to Public Information, it is necessary to look at the background on the topic in the Inter-American system as well as other Inter-American Programs that have been developed by the OAS.

In terms of the development of the topic of access to public information at the OAS, Mr. Castro noted that General Assembly resolution AG 1932 (XXXIII-O/03), "Access to Public Information: Strengthening Democracy," was the first resolution that placed access to public information on the agenda of the OAS. The heads of state in the Declaration of Nuevo Leon, stated, "we are committed to providing the legal and regulatory framework and the structures and conditions required to guarantee the right of access to information to our citizens." Furthermore, Mr. Castro noted the important case of *Claude Reyes vs. Chile* from 2006, as well as the inclusion of access to information in the annual reports of the Inter-American Commission on Human Rights. In 2008, the Inter-American Juridical Committee presented Resolution CJI/RES. 147 (LXXIII-O/08), "Principles on the Right of Access to Information."

Summarizing the development of the right of access to information in the Inter-American system, Mr. Castro noted the following key points:

- Access to public information is related to the strengthening of democracy.
- There exists agreement among the States to promote the adoption of normative frameworks on the subject.
- Access to public information is considered a stand-alone right (a right in-and-of itself), not exclusively linked with the right of freedom of expression.
- There now exists an Inter-American Model Law on Access to Public Information.

Examining the other Inter-American programs, Mr. Castro noted they cover a wide range of thematic areas, including, the Inter-American Program to Combat Poverty and Discrimination, the Inter-American Program for Education on Democratic Values and Practices, the Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, including Migrant Workers and their Families, the Inter-American Program for Cooperation in the Fight Against Corruption, and the Inter-American Program for the Universal Civil Registry and "The Right to Identity." The structure and content of these programs is varied. While some programs have specific goals and objectives, others have more general ones. The most commonly found objectives include, a forum for the exchange of best practices, promoting cooperation, training and dissemination.

According to Mr. Castro, three of the five programs reviewed include an express follow-up mechanism, which could take the form of biannual reports, the inclusion of the topic in annual reports by the secretariat, or special sessions of the CAJP. In terms of human resources, Mr. Castro noted that generally the programs call for the support of the General Secretariat. In terms of financial resources, only two of the programs expressly deal with the topic, whether they create a fund for voluntary contributions or note they will draw from both regular and special funds.

In terms of the drafting of an Inter-American Program, Mr. Castro noted that typically the drafting is done by a working group formed under the CAJP, in which the Member States participate. However, Mr. Castro noted that there are other possibilities for drafting, including, having the Inter-American Juridical Committee draft the program for consideration of the Member States, or instruct the General Secretariat, with the support of a group of experts, to draft the Program for consideration of the Member States.

Turning to the participation of civil society, Mr. Castro reminded the CAJP that the Inter-American Juridical Committee consulted with the following organizations to develop the Principles

on Access to Public Information: the Due Process of Law Foundation, The Carter Center, AccessInfo Europe, El Consejo de la Prensa Peruana, Article XIX, ProAcceso of Chile, Open Society, Universidad Nacional Autonoma of Mexico, la Associacion de Derechos Humanos of Argentina, and the Trust for the Americas. Mr. Castro noted that the programs must count on the involvement and participation of civil society.

Mr. Castro noted that an Inter-American Program and a Convention can be complementary of one another. For example, the Inter-American Program for Cooperation in the Fight Against Corruption specifically provides follow-up to the Inter-American Convention Against Corruption.

Turning to the possibility of an Inter-American Program on Access to Public Information, Mr. Castro suggested the following possible structure for the program:

- Background and Context
- Objectives
- Specific Activities
- Monitoring Mechanism
- Identifying Actors/Partners
- Human and Financial Resources

Mr. Castro proposed seven possible objectives or activities for consideration in a possible Inter-American Program on Access to Public Information:

- Provide a forum for the exchange of best practices.
- Provide follow-up on the Inter-American Model Law on Access to Public Information.
- Promote and implement cooperation projects.
- Promote a culture of transparency.
- Develop staff training programs to meet the right of access to public information.
- Develop guidelines for the conservation and proper management of information.
- Exchange/Discussion of the incorporation of inter-American standards in national courts.

ii) Possible Design and Content:

– María Marván Laborde, Commissioner, Federal Institute of Access to Information and Data Protection, Mexico

Ms. María Marván Laborde, Commissioner at the Federal Institute of Access to Information and Data Protection (IFAI) in Mexico, noted that like IFAI provided assistance and support to Chile as they implemented their law on access to public information, Mexico was the recipient of such support from Canada when Mexico first implemented their law on access to public information.

Ms. Marván thus posited the question of why is it important for the OAS to create an Inter-American Program on Access to Public Information as well as what are the possible activities that such a program might contain. She noted that an Inter-American Program might be necessary to generate activities for all Member States so that they have a legal framework to ensure public

participation in a democratic system, facilitate accountability, and ensure the full enjoyment of this human right. Furthermore, the implementation of access to information laws poses challenges that may best be confronted by a program of mutual assistance and support.

According to Ms. Marván, the objectives of an Inter-American Program on Access to Public Information should include the goal that the right of access to information should become an integral part of the civic culture of the community and the organizational culture of state institutions. Specifically she noted that an Inter-American Program could do the following:

- Promote the development of public policies, laws and best practices;
- Establish a monitoring mechanism in the region to provide follow-up on the Model Law;
- Build a support scheme to the legislative process in different countries;
- Assist Member States in establishing the necessary mechanisms for the implementation of the law;
- Assure the cooperation of civil society and media in all stages of the process;
- Include training programs for civil society, public servants, and the judiciary;
- Develop systems to educate the public on the existence and exercise of this right;
- Create a monitoring and control mechanism;
- Plan and hold seminars, workshops and other events to promote the right;
- Encourage donors to support the efforts of Member States in establishing a system.

Ms. Marván noted that some of the possible actors who might be involved in an Inter-American Program on Access to Public Information may include: organs and entities of the OAS (the Secretary General, the Department of International Law, the Department of State Modernization and Good Governance, the Special Rapporteur on Freedom of Expression, the Inter-American Juridical Committee, the Trust for the Americas, the CAJP, etc.), the Member States of the OAS, governmental actors from national, state and local levels of the executive, legislative and judicial branches, civil society, transparency agencies in charge of the administration and implementation of the law, and the media.

In terms of the process for designing an Inter-American Program, Ms. Marván suggested that the structure, function and participants of the Program first be defined and then subsequently that a Plan of Work be elaborated. Ms. Marván noted that the Program should create a supervisory organ in charge of supervising the promotion and fulfillment of the mandates. In terms of follow-up on the implementation of a Program, she suggested a mechanism through which yearly reports would be made on the accomplishments achieved.

Ms. Marván suggested the establishment of an Annual or Biannual Special Session to exchange best practices, analyze new proposals that could be incorporated in the Program, and include meetings of experts that present recommendations on the topic. Additionally, she stressed that the creation of a virtual forum would be useful in allowing parties to exchange experiences as cases arrive.

Touching on specific activities that could be included in a Program, Ms. Marván mentioned the following:

- Creation of indicators and standards of progress in implementation of the right of access to information.
- Qualification, publication and exchange of best practices.
- Provision of technical support and "know-how" on implementation and/or promulgation of new laws or the adequacy of the existing framework.
- Promotion of the creation and/or updating of systems to manage requests and internet sites for the publication of official information.
- Creation and compilation of relevant jurisprudence and case law, in particular on the interpretation of exceptions.
- Carrying out of thematic studies and related activities, for example on the budges of Commissions, the source of resources, proactive disclosure, data protection, etc.
- Development of a system of training for public officials and the general public.
- Creation of a model system of archives.
- Creation of a model system of information management that allows for a uniform and compatible system at the national and local governmental level.
- Consider the issue of privacy – particularly the protection of personal data in the hands of government.
- Organization of international seminars for the promotion of the right through such themes as the structure and content of the Model Law, perspectives on data protection in the Americas, constitutional and legislative incorporation of the Model law in the juridical systems in the Americas, etc.

Ms. Marván noted the following possible activities for the General Secretariat to undertake to promote the right of access to information:

- Preparation and dissemination of a study on national legislation;
- The exchange of information and technical assistance with state agencies and public officials;
- The development of programs designed to protect this right;
- The exchange of best practices among the different actors in the Program.

Ms. Marván noted the following possible activities for Member States to undertake to promote the right of access to information:

- Sign or ratify the universal and Inter-American instruments providing the right of access to information;
- Joining the Program;
- Review their legislation to ensure it is consistent with the obligation to respect this right;

- Provide specialized training to public officials who perform functions related to the matter.

iii) Remarks by Delegations:

The delegation of Mexico noted the need for a specialized mechanism that could be an Inter-American Program on Access to Public Information.

The delegation of Peru expressed support for Mexico's comments and noted that the government of Peru in response to the solicitation for comments on the Model Law, stated that they believe the necessary compliment to the Model Law is the creation of an Inter-American Program on Access to Public Information. Furthermore, the delegation noted that perhaps an Inter-American Program could include a forum or network where experts from public authorities responsible for access to information in the various Member States can exchange best practices, development of a culture of transparency, and build cooperation and capacity-building in the implementation of laws.

The delegation of Venezuela noted that they did not yet have the necessary instructions to take a decision on whether to have a Program.

The delegation of Costa Rica noted on the topic of funding that they were prepared to discuss whether an Inter-American Program should be developed.

VI. Closing Session

In closing, the Chair asked the Department of International Law along with the Special Rapporteur to produce the present meeting report to summarize the discussions that took place in the Special Session, which will serve as a basis for discussions in a subsequent session of the CAJP to discuss the possibility of an Inter-American Program on Access to Public Information and the final state positions on the matter.

The meeting was then concluded.