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COMMENTS OF THE MEMBER STATES ON MEASURES
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[AG/RES. 2252 (XXXVI-O/06)]

WORKING PAPER
TOWARD AN “INTER-AMERICAN CONSENSUS ON
POLICIES FOR ACCESS TO PUBLIC INFORMATION”

(Submitted by the Delegation of Peru)

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WORKING PAPER

TOWARD AN “INTER-AMERICAN CONSENSUS ON POLICIES FOR ACCESS TO PUBLIC INFORMATION”

BACKGROUND

A. The Special Meeting of April 28 and the mandate of the CAJP

On April 28, 2006, a “special meeting with the participation of experts from the member states and civil society representatives to promote, impart, and exchange experiences and knowledge with respect to access to public information and its relationship with citizen participation,” was held at the headquarters of the Organization of American States in accordance with the mandate contained in resolution AG/RES. 2121 (XXXV-O/05).

This meeting, which had been called in 2004 but could not be held for budgetary and agenda-related reasons, took place in Washington, D.C., on the eve of the thirty-sixth regular session of the OAS General Assembly. The meeting was attended, *inter alia*, by the President of the Inter-American Commission on Human Rights, Dr. Evelio Fernández Arévalos; the Special Rapporteur for Freedom of Expression of the IACHR, Dr. Ignacio Alvarez; the Director of the Department for the Promotion of Good Governance of the Organization, Dr. Mariclaire Acosta; the Director of the Department for the Promotion of Democracy of the Organization, Dr. Elizabeth Spehar; as well as various experts from civil society organizations and a number of states.

This working paper, proposed by Peru, is the result of consultations with representatives of Peruvian civil society organizations. It seeks to synthesize the most relevant aspects that Peru considers to have come out of the aforesaid Special Meeting and present elements for a consensus on inter-American policies on access to public information as a practical way of compliance with paragraph 13.a of resolution AG/RES. 2252 (XXXVI-O/06), which recommends that the Permanent Council:

Request the Committee on Juridical and Political Affairs to prepare a basic document on best practices and the development of common approaches or guidelines for increasing access to public information, on the basis of the report of the aforementioned special meeting and taking into account the report of the Chair of the Permanent Council on the implementation of resolution AG/RES. 2121 (XXXV-O/05), as well as inputs from the member state delegations, the Special Rapporteurship on Freedom of Expression of the Inter-American Commission on Human Rights, the Inter-American Juridical Committee, the Department of International Legal Affairs, and the interested organs, agencies, and entities of the Organization, as well as from civil society representatives.

B. The legal framework

Recognition of access to public information as a fundamental right entails that States embrace an ethical imperative and a legal duty. The right to access public information is recognized

universally in Article 19 of the Covenant on Civil and Political Rights and, at the hemispheric level, in Article 13 of the American Convention on Human Rights.

It should be recalled that the latter article provides that, *“Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”*

The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have interpreted this article. In its Advisory Opinion OC-5/85 of November 13, 1985, the Inter-American Court says that the aforesaid article includes freedom to seek, receive, and impart information and ideas and, therefore, it determined that this right has a dual dimension: “individual and social.” The individual dimension includes the right to impart ideas and information, while the social dimension recognizes that freedom of expression is a means for the interchange of ideas and includes the rights of citizens to be privy to public information.

In Judgment 74, par. 143(e) of February 6, 2001 (Ivcher Bronstein Case), the Court held that Article 13 of the Convention corresponds to the broad concept of the freedom of expression and autonomy of the individual; its purpose is to protect and promote access to information, ideas and expression of all type and, thus, strengthen the operation of pluralist democracy.

The Inter-American Court went further when it ruled in its Judgment 75, par. 45, of March 14, 2001 (Barrios Altos Case), that the right to truth has its roots in Article 13.1 of the Convention, because that article recognizes the right to seek and receive information. With regard to that article and, therefore, the State has the positive obligation to guarantee essential information to preserve the rights of the victims, to ensure transparency in public administration and the protection of human rights.

For its part, the Inter-American Commission on Human Rights approved the Declaration of Principles on Freedom of Expression at its 108th regular session in October 2000. That Declaration is an important document for interpreting Article 13 of the American Convention on Human Rights. Article 4 of the Declaration provides that *“[a]ccess to information held by the state is a fundamental right of every individual [and that] States have the obligation to guarantee the full exercise of this right. It adds that [t]his principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.”*

It should also be mentioned that the UN Special Rapporteur for Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organization for Security and Cooperation in Europe, and the OAS Special Rapporteur for Freedom of Expression signed a Joint Declaration in 2004 that states that the right to access information held by public authorities is a fundamental human right and should be subject only to a narrow system of exceptions.

In addition, the Inter-American Commission on Human Rights has recognized that the right to freedom of information is closely related to the principle of transparency in the administration of government activities. *“Without the information that every person is entitled to, it is clearly impossible to exercise freedom of expression as an effective vehicle for civic participation or*

democratic oversight of government management.” (IACHR Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002, pars. 282-283)

Accordingly, the creation of a legal framework that ensures the exercise of the right to access public information is a duty that the State owes not only to its population, but also to the inter-American system of human rights. Such laws must be based on the assumption that information is public since, as the Inter-American Court found in the aforementioned Advisory Opinion, “*a society that is not well informed is not a society that is truly free*” (Advisory Opinion OC-5/85, par. 70).

The concept of access to public information enjoys almost universal acceptance and more than 60 countries have adopted laws on access to public information, including, in the Americas, Antigua and Barbuda, Belize, Canada, Colombia, Ecuador, Guatemala, Jamaica, Mexico, Panama, Peru, Dominican Republic, Trinidad and Tobago, United States, and Venezuela. Furthermore, at least eight more countries in the Americas are considering the adoption of proposed laws on access to information. Attention should also be drawn to the fact that four countries in the region (Colombia, Guatemala, Peru, and Venezuela) have included the right of access to public information in their constitutions.

C. The multilateral hemispheric framework

Bearing in mind this development in jurisprudence and doctrine on access to public information, the countries of the Hemisphere have concurred that it is advisable to have common domestic standards on observance of this right because that contributes to transparency, facilitates accountability, and, therefore, helps to strengthen democracy and the fight against corruption. In that connection, the heads of state and government of the Hemisphere gathered at the Special Summit of the Americas in January 2004, affirmed that “*access to information is an indispensable condition for citizen participation*” and it is necessary to create “*legal and regulatory frameworks and the structures and conditions required to guarantee the right of access to information to our citizens.*”

In the last three years the OAS General Assembly has adopted successive resolutions on “*Access to Public Information: Strengthening Democracy.*” In the first resolution, adopted in 2003, the OAS reaffirmed that everyone has the freedom to seek, receive, access, and impart information and that access to public information is a requisite for the very exercise of democracy. That resolution also urges states to respect and promote respect for everyone’s access to public information and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application.

In that resolution the General Assembly also said that member states, through their respective national legislation and other appropriate means, should take necessary measures to facilitate the electronic availability of public information, that the OAS should promote seminars and forums designed to foster, disseminate, and exchange experiences and knowledge about the issue, and that the Special Rapporteur for Freedom of Expression should continue including in its annual report a report on access to public information in the region.

The following year, 2004, the resolution adopted by the OAS General Assembly went further and encouraged member states, in keeping with the commitment made in the Declaration of Nuevo León, to prepare and/or adjust their respective legal and regulatory frameworks, as appropriate, so as to provide the citizenry with broad access to public information. It also urged member states to take

into consideration clear and transparent criteria for exemptions when drafting up and adapting their domestic legislation. The same resolution also instructed the Special Rapporteurship for Freedom of Expression to support the efforts of member states that so request in drafting legislation and developing mechanisms in the area of access to public information and citizen participation.

In 2005, in addition to mentioning the concepts and principles contained in the two previous resolutions, the resolution on access to information adopted by the General Assembly decided to recommend to the Permanent Council that it convene a special meeting with the participation of experts to exchange experiences and knowledge with respect to access to public information and its relationship with citizen participation. As we know, that meeting was held in Washington, D.C., on April 28 this year.

As mentioned at the beginning of this document, the resolution adopted in 2006 [AG/RES 2252 (XXXVI-O/06)] recommended in paragraph 13.a that the Permanent Council request the Committee on Juridical and Political Affairs to prepare a basic document on best practices and the development of common approaches or guidelines for increasing access to public information in the region.

It is important to underscore that this regulatory evolution in the framework of the OAS has been possible thanks to the contributions received from society organizations. The aforementioned resolutions were certainly inspired by an important series of declarations promoted by civil society, such as the Johannesburg Principles, the Declaration of Chapultepec, the Lima Principles and the Declaration of the SOCIUS Peru 2003. Accordingly, it is necessary to recognize the work that civil society organizations have done and do to promote the evolution of this issue in the framework of the OAS. This work stands as an example of the joint efforts of society and governments in strengthening democratic governance under the conviction that access to public information strengthens democracy and permits citizen control of public administration.

D. The conceptual framework

Access to public information is a cross-cutting concept closely linked to various other items on the regional political agenda, such as conditions of democratic governance, progress of social justice and improvement of quality of life, as well as the fight against corruption in government and society. In that context, this right or guarantee becomes a pillar for improving the lives of citizens in the Hemisphere and for seeking fairer economic and social growth.

1. Link to democratic governance

There is consensus that interdependence exists between access to public information and democratic governance. Authorities should have the legal obligation to make available to the public all the information they need in a timely manner, in order to create a culture of transparency and promotion of good governance in the State. The foregoing entails a joint responsibility of the State and the citizenry. For that reason, there is consensus that the State should promote mechanisms for access to public information and ensure that access, and that the citizenry, for its part, with the cooperation and support of civil society, should demand access to public information.

At the Special Meeting of April 28, the President of the IACHR recalled that “access to information in the possession of the State is also necessary to prevent the abuses by government

officials, who, behind a cloak of stealth and secrecy that violates the republican principle of openness in the acts of the public administration and the different branches of government, break the law with impunity, seriously undermining the faith of the citizenry in public institutions and in those who hold judgeships at the highest levels of government.”

That is why, in addition to the provisions contained in Article 13 of the Pact of San José, the heads of state of the Hemisphere recognized at the Third Summit of the Americas that good governance requires effective, transparent, and accountable government institutions.

For its part, the Inter-American Court of Human Rights, in Advisory Opinion OC-5/85 has held that “[t]he just demands of democracy must consequently guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions.” The Court also added that the right of each person to be well informed is a basic prerequisite for a democratic society.

The Court also drew attention to the impact of freedom of expression on the consolidation of democracy. Of particular relevance is the position it held in the case of “*La Nación*” with respect to transparency in government activities and its effect on freedom of expression by permitting “mechanisms for control” to function so that citizens can report any irregularity. In the same case the Court recognized that “democratic control” on the part of civil society requires that restrictions on discussions of matters of public interest be kept to a minimum. In the same sense, in the *Canese Case*, the Court considered the importance of freedom of expression in the context of an election campaign and held that the former “leads to greater transparency, and better control over the future authorities and their administration.”

At the Special Meeting the President of the IACHR also said that the Inter-American Court of Human Rights has expressly recognized the role that disclosure of information plays in a democratic society, particularly because it enables the citizenry to monitor the activities of leaders to whom they have entrusted protection of their interests. It follows, therefore, that the State has a positive obligation to provide that information to the citizenry, especially when it is in its possession and no other means of access to it exist. The foregoing is without prejudice to any special limitations previously established by law that respect the principles of proportionality and necessity.

For his part, *in the aforementioned Meeting*, the Special Rapporteur of the IACHR mentioned that the public discussion and debate on access to information held by the State helps democracies to become stronger. He noted that access to information encourages accountability and transparency in the State and leads to vigorous and informed public debate. Accordingly, access to information empowers people to adopt an active role in government, a necessary condition to maintain a healthy democracy.

Furthermore, the possibility of access to information held by the State is a fundamental requirement for the responsible exercise of the right of the public to take part in decision-making processes. The UN Committee on Economic, Social and Cultural Rights opined accordingly when it referred to the purpose of the reporting obligations of states under the International Covenant on Economic, Social and Cultural Rights. Said reports are intended “to facilitate public scrutiny of government policies with respect to economic, social and cultural rights and to encourage the involvement of the various economic, social and cultural sectors of society in the formulation, implementation and review of the relevant policies” [Committee on Economic, Social and Cultural

Rights, General Comment 1, Reporting by States parties, (Third session, 1989), U.N. Doc. E/1989/22, annex III at 87 (1989), paragraph 5].

Finally, in the Declaration of Nuevo León, the Heads of State and Government of the Americas affirmed that “access to information held by the state... is an indispensable condition for citizen participation and promotes effective respect for human rights.”

2. Link to social development

Access to public information is also a tool for social and economic development.

As the Special Rapporteur of the IACHR mentioned at the Meeting of April 28, access to information is vital for overcoming socioeconomic injustice and poverty, recognizing that vulnerable people suffer from a lack of access to information about the services the government offers to help them survive. Excluded groups need access to information on these services and on many other decisions of the government and private organizations that profoundly affect their lives.

It should also be recalled that in 2004, in keeping with resolution AG/RES. 2057, the Rapporteurship included in its annual report a section on the issue titled “Access to information in the Hemisphere: Access to information and economic development,” in which it argued in favor of laws on access to information as a tool for economic and social development.

Without question, greater transparency of information not only strengthens the mechanisms of democratic participation and is an effective means to combat corruption, but can also be a factor in political, economic, and commercial integration.

On this point, Dr. Elizabeth Spehar, Director of the Department for the Promotion of Democracy of the Organization said at the above-mentioned Meeting that, in addition to the obligation of governments to facilitate access to information for citizens, other sectors must also be included, such as businesses and people in the private sector, which also must be taken into consideration because of their weight and importance in society. She also pointed to the role of the communications media, where the issue of access to public information can be approached from various perspectives.

3. Link to the fight against corruption

Another core dimension of access to public information is that it contributes to the fight against corruption.

In this connection, in 2001, the Special Rapporteurship for Freedom of Expression mentioned in its annual report that, in the light of “*practices contributing to a culture of secrecy with respect to state-held information..., agents in possession of such information opt in favor of denying it, out of fear of punishment.*” For that reason, the Rapporteurship further stressed that “[t]hese practices represent a threat to the constitutional democratic system, permitting a greater incidence of corruption”.

At the Third Summit of the Americas, the Heads of State and Government recognized the need to step up efforts to combat corruption, and highlighted the need to support initiatives to allow

for greater transparency to ensure that the public interest is protected and that governments are encouraged to use their resources effectively for the collective good. Corruption can be controlled adequately only through joint efforts aimed at raising the level of transparency of government action.

**ELEMENTS FOR AN
“INTER-AMERICAN CONSENSUS ON POLICIES
FOR ACCESS TO PUBLIC INFORMATION”**

The countries of the Hemisphere could establish a consensus on policies for access to public information based on the following precedents and elements:

- The stipulations on the issue contained in the American Convention on Human Rights (Art. 13), the Universal Declaration of Human Rights (Art. 19); the Inter-American Democratic Charter; and the Declaration of Nuevo León;
- The Declaration of Principles on Freedom of Expression of the Inter-American Commission on Human Rights, as well as the Joint Declaration on Access to Information of the UN Special Rapporteur for Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organization for Security and Cooperation in Europe, and the OAS Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights adopted in 2005;
- The Reports of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights on the situation of access to information in the Hemisphere for 2003, 2004 and 2005;
- The initiatives taken by civil society regarding access to public information, in particular, the Declaration of Chapultepec, the Johannesburg Principles, the Lima Principles and the Declaration of the SOCIUS Peru 2003: Access to Information, as well as the Regional Forum on Access to Public Information: Challenges to Freedom of Information in the Hemisphere, held in Lima, Peru, on January 20 and 21, 2004; and
- The contributions presented at the Special Meeting on access to public information held at the headquarters of the Organization of American States on April 28, 2006, in compliance with the mandate contained in resolution AG/RES. 2121 (XXXV-O/05).

An Inter-American Consensus on Policies for Access to Public Information should cover, inter alia, the following areas of action:

1. Ensure access to information as a right

- States should recognize and respect the right of everyone to seek and receive public information they need from the State.

2. Recognize the link between access to information and promotion of democratic governance

- Access to information is at once a human right and a requirement for a democratic society.

- Everyone has the right to monitor effectively the activities of the public administration, of the different branches of government as a whole, and of the companies that provide public services. To do so they need to know the information they have in their possession.

3. Recognize the links between access to public information and citizen participation and the fight against corruption

- Access to information is indispensable for people to be able to participate in public affairs and decision-making, and, in general, identify the responsibilities of public servants, objectively appraise the facts, and form an opinion in order to increase levels of participation in the political, economic, social, and cultural life of a country.
- This right also permits oversight, scrutiny, and the appropriate discussion of government activities, which are essential conditions for transparency in the administration of public entities and for preventing corruption and other abuses of power.

4. Enact laws on access to public information and the obligations of the State in this area

- States should undertake to adopt, in the framework of their constitutional standards and international commitments the necessary laws and regulatory measures to permit effective exercise of the right to access to public information.
- Such provisions should stipulate that the State and companies that provide public services have the obligation to observe and ensure the right of access to information for all persons.
- The authorities should be required by law to make available to the public all the information they require in a timely manner. The government has the duty to create and keep public records in a serious and professional manner so that the right to information can be exercised in full.
- A public policy is needed for preservation and development of a corporate memory in government institutions.
- Provisions that develop this right must guarantee the utmost transparency, recognize that everyone is entitled to exercise it, and ensure the information is obtainable in the format desired by the requesting party or at least in the format in which it is available.
- Government authorities should provide the information requested in a reasonably timely manner without establishing formal preconditions that might hamper the exercise of this right.
- As a matter of principle information should be made available free of charge.
- The State should furnish the necessary resources to ensure access to public information, including funds for the archive and collection of information, as well as for training staff.
- The State has the obligation to foster, through the education system and through civic education campaigns, a culture of transparency in society and in the public sector.
- Civil society should have a role to play in the design of laws in this area as well as in monitoring compliance with these standards and their divulgation.
- Laws should provide prompt and simple mechanisms that the citizen can invoke in the event of any unwarranted or arbitrary withholding of information.

5. Recognize the link between access to information and the free exercise of journalism

- States should guarantee and respect the exercise of journalism and the freedom and independence of the media, as well as ensuring for journalists the necessary conditions to access information and impart it in the exercise of their profession.
- No journalist should be compelled by the courts or a government authority to reveal their sources or the contents of their personal and professional notes and files.
- States and the media should collaborate to ensure that standards and policies on access to public information help to further democratic governance, social justice, and the fight against corruption.

6. Enact appropriate standards on exceptions to access to public information

- Regulations on exceptions to access to public information should be limited and governed only by legitimate provisions in the Constitution or with the rank of law, in accordance with the guiding principles of a democratic society and always subject to the condition that they are necessary to protect national security or the legitimate right of the individual to privacy
- Any refusal of access to public information must be justified and duly covered by the limited system of exceptions.
- The law, having determined the specific cases in which information is classified, must establish reasonable time limits and procedures for its declassification as soon as national security interests permit it, so that information is not kept classified indefinitely.
- It should be left to independent review bodies to determine if exceptions to the right of access to public information are legitimate and reasonable.

7. Ensure legal protection for access to public information

- It is necessary that there exist prompt and simple judicial mechanisms that can be invoked in the event of any unwarranted refusal of access to public information.
- The judiciary and public protection institutions should monitor compliance with domestic and international provisions on access to public information.
- The independence of the judiciary is fundamental for ensuring the right of access to information in the event of any refusal by authorities and officials or when its exercise is restricted.
- On the petition of the requesting party, an impartial and competent judge should be able to review the validity of such a refusal and order the information to be surrendered.