Observations on the
2004 Bolivian Access to Information Draft Law

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

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

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

We again welcome the opportunity to provide a number of comments related to the latest draft law. Our observations are made in light of the terms of the Supreme Decree and Voluntary Openness Strategy and Code, the emerging international standards, and lessons learned from other jurisdictions. Ultimately,

1. Introduction

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

2. Structure/Organization

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

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

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

3. Principles

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

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

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

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

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

4. Scope

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

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

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

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

5. Automatic Publication

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

To more easily implement this provision, the Bolivian Transparency and Access to Information Act could build on the requirements for automatic disclosure already found in the Supreme Decree and the Voluntary Openness Strategy. For example, Article 14 of the draft law may be best served to ensure that those documents listed in the Supreme Decree are also similarly stated in the Act. The Voluntaryse 34ree are aeme Decree and

c. Una descripcion de la estructure y la composicion del Ente, incluyendo un organigrama e informacion acerca de quien es responsible de que funciones y como contactarlo/la;
d. Mecanismos actuales de brindar informacion;
e. Informacion sobre gastos, licitaciones, adquisiciones; metas y resultados alcanzados;

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

c. Denials

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

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

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

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

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

e. Costs

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

f. Record-keeping

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

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

One of the main problems with heading the different exemptions section “Confidential”, “Reserved” etc. is that it is likely to lead to abuse. Public servants who are not enthusiastic about the purpose of the law, or who misunderstand the duties created by it are likely to stamps something “reserved” or “confidential” without dedicating the necessary attention to whether or not the record properly falls within the exemption and whether there is any harm that would be caused by disclosing the information. Article 26 app

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

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

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

8. Enforcement

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

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

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

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

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

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

9. Implementation Coordination

In Article 33, the draft access to information law calls for the establishment of a national coordinating body. The idea of creating such a body is a very good one. We have seen in Jamaica how a strategically located, specialist entity, even with limited staff and resources, can play an important role in developing a strategic implementation plan (in Jamaica, the Ministry of Justice) and attaching stakeholders to it.