

## **Implementation Oversight and Enforcement Models Nicaragua Speech**

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Thank you to the organizers of this event, the Grupo Promotor and the World Bank for allowing me to speak on the topic of access to information implementation oversight and enforcement models around the world. My name is Laura Neuman and I am the subdirectora del area de transparencia for the Centro Carter. The Centro Carter, as many of you know, is a non-governmental organization led by former President of the US Jimmy Carter and his wife Rosalynn. The Centro Carter focuses on issues of human rights, conflict resolution, democracy, health and transparency. As part of our transparency work, we began the access to information project to support government and civil society efforts throughout our hemisphere to promote, pass and implement access to information laws. In addition to our hemispheric work, we know have specific projects in Jamaica, Bolivia, Mali and Nicaragua. The role of the Carter Center is to provide technical assistance and to share the international experiences with all key stakeholders. As part of this effort, I will be discussing today the various models found in other jurisdictions for implementation oversight and enforcement, some of the benefits and difficulties of each, and some additional areas for consideration and discussion. The decision regarding which model will function best in Nicaragua depends greatly on your own countries political, economic and social context and needs. It is my hope that today's discussion will serve to further the debate about this critical subject.

As many of you have heard me say in the past, I believe that there are three distinct phases to the establishment of a vibrant access to information regime. The first, the passage of the law is relatively speaking perhaps the easiest phase. The second phase is the implementation of the law. This phase includes the setting up of systems to organize and manage documents, the establishment of procedures and processes for the request, retrieval and provision of information, the training of public servants, and the shift in institutional culture from secrecy to openness. Often, this phase is the most challenging for government and its functionaries and there is a clear need for technical support, dedicated expertise and monitoring.

The third phase is in my mind the most critical for the ultimate success of the new transparency regime, and that is the enforcement phase. It is in this stage that persons can seek to enforce their right to information when a request is ignored or denied. Without an independent review procedure of decisions, the right to information will quickly become discretionary and based on the whims and desires of the persons receiving the request. 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 independent external review mechanism is critical to the law’s overall effectiveness.

## **Models**

In the over 68 countries that now count on a statutory right to information, there are a number of different models for implementation oversight and enforcement as well as promotion (for example public education, training of civil servants etc.). Regardless of the model chosen, what has become clear is the need for stronger promotion, monitoring and enforcement in order to ensure compliance by the holders of information. Today I will describe some of these models.

### **Implementation Oversight:**

The first model is an implementation oversight body distinct from the enforcement mechanism. As discussed above, common implementation challenges include<sup>1</sup>:

- The difficulty of adjusting “old”, secretive “mindsets” amidst the bureaucracy/holders of information;
- A lack of commitment to compliance from the bureaucracy/holders of information; and a tendency to ignore difficult requests for information and generally to breach time-limits;
- A lack of capacity in relation to record-keeping and insecurities in relation to older records;
- Insufficient funding for implementation – both in terms of human resources and procedural infrastructure;
- Inadequate staffing, in terms of training, specialization and seniority;
- Lack of training for public servants; and
- Inconsistent implementation efforts.

Monitoring of implementation by the various entities (public and in some cases private) is important to assure consistency and sustainability of the right to information. In those countries without a statutory mandate for implementation oversight by a specialized body the compliance rate may be lower, the number of requests limited, and the right to information eroded. For example, in the United States at the federal level there is no statutory national oversight body, and

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<sup>1</sup> THE PROMOTION OF ACCESS TO INFORMATION ACT: Commissioned Research on the Feasibility of the Establishment of an Information Commissioner’s Office, The Open Democracy Advice Centre, Cape Town 2003.

almost every day we read about the increase in documents classified as secret, the reduced number of requests that are satisfied and the long delays in receiving requested documents. Just yesterday the New York Times disclosed a “secret policy” to remove previously available documents from the public realm and “reclassify them as confidential.” Since 1999, thousands of historical documents have been removed from public access and without an oversight mechanism the only way this was discovered was through a user noticing that pages he had copied some years ago were not classified as “confidential.”

In Trinidad and Tobago their Freedom of Information Law did not provide for a statutorily mandated oversight mechanism, although there was a requirement for periodic reporting. For the first two years of implementation, their Parliament voluntarily established an Access to Information Unit. During these years, the Unit supported the public functionaries, received and monitored agency implementation reports, and conducted some public education. After two years, the Parliament reduced the staff and then finally eliminated the Unit. According to accounts, when the Unit disbanded the agencies almost completely stopped completing their reports and the number of requests declined dramatically. Similarly, in Jamaica the Access to Information Unit, voluntarily established under the Ministry of Information has recently seen a temporary reduction in staff. During this transition period, both implementers and users of the law have expressed difficulties. For the implementers, there is no agency to contact for support, to ensure consistency across government, and to track reports. For the civil society users, there is no official entity to contact with questions or problems.

In the most advanced laws, such as Mexico, Canada, Ireland, and now the United Kingdom there is a specific oversight/monitoring body. In fact, in Queensland State in Australia, a study recently found that an independent enforcement body was not enough and that they needed a “ new monitoring/promotion function.”<sup>2</sup> The 2001 report recommended the creation of a freedom of information monitoring entity designed to promote public awareness, provide advice and assistance to applicants, and also to monitor public agencies' compliance. Thus, the practice has shown the necessity for a statutory mandated and permanent oversight body to ensure the continued implementation and compliance with the access to information law. In some cases these bodies will also have promotional responsibilities, or those might be exercised by another entity such as an Ombudsman as I will discuss later.

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<sup>2</sup> Report of the Queensland Legal, Constitutional and Administrative Review Committee, December 2001. See also Hodgson D., and Snell, R. Freedom of Information in Queensland – A Preliminary analysis of the Report of the Queensland Legal, Constitutional and Review Committee.

## Implementation and Enforcement:

If we agree that a national oversight body is necessary for coordination and continuity, there remains the question of whether this oversight body should also have enforcement responsibilities. “Experience with FOI legislation in Australia at both Commonwealth and State levels, as well as in overseas jurisdictions such as New Zealand and Canada, strongly indicates that an external review body is a crucial design feature”<sup>3</sup>.

Some models vest both implementation and enforcement in the same body, while others separate these duties into two distinct entities. Regardless, as stated above, enforcement is key to the ultimate success of the access to information regime and 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: Any aggrieved person can seek enforcement without excessive formality
- Affordable: for the user and for the state to administer
- Timely: Receive decisions on appeal in a timely manner
- Independent
- Specialist: Access to Information laws are complex, particularly in terms of balancing the public interest in release over withholding. For that reason, many consider the need for a body that specializes in this area.

There are three main enforcement models, and a number of hybrids. The principle mechanisms include:

1. Appeal to the Courts, with no intermediary body
2. Appeals to an Information Commission or Commissioners with the power to issue recommendations
3. Appeals to an Information Commissioner or Commissioner with the power to issue binding orders

And the hybrid models, which I will not discuss in detail today, are specialized access to information appeal tribunals, such as in Jamaica and Japan.

## Courts

Most experts agree that a model dependent solely on the Courts to enforce the access to information law is insufficient, and does not meet the principles described above. This model is used in places such as South Africa and the

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<sup>3</sup> Snell, R. and Tyson, N. *Back to the Drawing Board: Preliminary musings on redesigning Australian Freedom of Information*. Freedom of Information Review: Number 85, February 2000, page 4. Snell, R. and Tyson, N. *Back to the Drawing Board: Preliminary musings on redesigning Australian Freedom of Information*. Freedom of Information Review: Number 85, February 2000, page 4.

federal United States. When a request for information is denied, the person must appeal to the federal court in the US case or the High Court in the South African case. The main benefits of such a model are that the courts have the power to order the release of information if inappropriately denied and do not have to abide by the agency decision.

However, there are a number of disadvantages to this model. As discussed above, the main principles for the enforcement model must be that it is timely, affordable, and accessible. For most citizens, the courts are neither accessible nor affordable. For success in this model, the information requestor may need to hire an attorney or advocate and pay the many court costs. And because courts are often overburdened, it can take many months or years to hear the cases, thus sometimes making moot the need for the information. The cost, the time it takes, the difficulty for citizens in accessing the courts, serve as an obstacle to persons filing appeals. And this model is more costly for the government and the burden on the court system. In a recent case in South Africa that went to the High Court, the Auditor-General theorized that they had spent over \$300,000 Rand (close to \$30,000 US) in defending their decision to deny information. Moreover, in some countries there is often a deep lack of trust in the independence of the judiciary, in these cases, an enforcement model that is not dependent on judicial involvement in the first instance may be best.

### **Information Commission(ers) with the power to issue recommendations**

A second enforcement model is the use of an Information Commission or Commissioner with limited powers. In this model, there is an interim body that has the power to hear appeals and to make recommendations to the agency or Ministry regarding the release of information. This model is found in Canada, Hungary, Sweden and some of the US states. These Commissions (or as in the case of Sweden, the Ombudsman) often have the ability to investigate, review reports, and issue opinions. But they cannot force the agency to release information. Rather they often use forms of conciliation or mediation and rely on the good will of the agency (or fear of public criticism) to get them to follow recommendations.

In Canada where this model is used at the federal level, they wanted to create a body that was both informal and non-adversarial. A Commission with more limited powers may allow for a speedy resolution, are often free to the person submitting the appeal, cost less for the government, they are specialist as they focus only on the access to information law and are quick. In Hungary in 2001, the Information Commissioner received 828 petitions for investigation and took an average of only 52.6 days to fully process the cases.

Over time, however, even an enforcement body with these more limited powers may become increasingly formalistic, contentious and slow. Moreover, without

some power to order or sanction inappropriate denials, the enforcement body may be ignored. In a major review conducted in 2002 of the Canadian Access to Information Act, the task force found that “giving the Commissioner power to make binding recommendations may well provide more incentive to departments to respect the negotiated undertaking to respond within a certain time-frame . . . it is more rules-based and less ad hoc . . . this results in a consistent body of jurisprudence that assists both institutions and requesters in determining how the Act should be interpreted and applied.”

### **Information Commission(ers) with the power to issue recommendations**

The third and in many experts' opinions the preferred model is the one used in places such as Mexico, Ireland, and some US States and Canadian Provinces. In this model there is an independent Commission or Commissioner vested with the power to: oversee the agencies and Ministries; to investigate claims; to set guidelines; to hear cases and subpoena evidence; to make recommendations; and to issue binding orders. This model satisfies the principle of timeliness. For example, in Western Australia, they responded to most written inquiries in a matter of days and in Ireland over 50% of the cases were resolved within 3 months (although in the State of Connecticut where the Commission has order powers the time from the date the complaint is filed until the final decision is made averages 328.4 days). This model is accessible, affordable as there are no costs to the appellant, and specialists in the area of access to information. Finally, with the power to order agencies or apply sanctions this model serves as a deterrent to the government and can alleviate the need for further appeals to the Courts.

But for any Commission to meet its objectives, it must be considered independent. In considering the independence of the body, one might explore the mechanism for choosing the members, the length of their term, to whom they report and how the Commissioners can be removed from office. Designation of Commissioners can range, some common models include:

- Executive appointment such as in the Federal Mexico or Jamaica where the Prime Minister has the sole authority to name the Appeals Tribunal (note: in Mexico, the Senate has the right to object)
- Executive appointment with Congressional approval, such as Canada
- Appointment by the President based on nominations given from the Congress, such as in Ireland
- President provides names to Congress for decision
- Establishment of a Committee, which can be comprised of persons appointed by the executive and the legislature and they oversee the work of a professional Commissioner or Director and staff, such as the case of New York State
- Elected by Parliament, such as in Hungary and the Swedish Ombudsman

- Or as one case in a small state in Mexico where there are 5 steps to selecting the Commission. The first step is voluntary nominations, where interested persons self-nominate. They are each then given a test on their knowledge of budgets, administration, politics, and history of the state. The next step in the selection process is a written psychiatric test. If successful, the candidate then has an in-person meeting with a psychiatrist. Finally, the candidates must develop a work plan and present this to a group of state legislators and civil society representatives. Although perhaps a bit extreme, particularly when you learn that their tenure is only 4 years with no possibility for re-appointment, this does provide for a trusted and independent enforcement body, one in which persons in this state have great confidence.

Other issues related to each model include the number of staff, the annual budgets and from where the money comes, (without sufficient resources, even the best enforcement and oversight model will fail) to whom they report and how they can be removed.

### **Role of the Ombudsman**

Finally, I want to discuss the role of the Ombudsman. Although important that this body is engaged, one should be careful what duties are placed on these bodies. They have been seen to be more effective in promotion of the law, rather than in enforcement of the law. Their role could be grounded in the legislation such as in S Africa or more informal such as in Peru and Panama

In South Africa, the promotion of the law was given to the South African Human Rights Commission as part of their mandate to promote constitutional human rights. In addition to their other multitude of responsibilities, in relation to the access to information law they were tasked with promotion, monitoring, education, advise, mediation, and citizen support in litigation. They did not have any enforcement powers, such as recommendation to the agencies or power to order release of information. After two years of experience with the law, civil society began a campaign to change the Promotion to Access to Information Act to include a separate specialist entity for enforcement. There was some discussion about expanding the role of the Human Rights Commission, which was argued against by civil society leaders for the following reasons: "First, the danger of over-stretch, and related questions of resources. Second, an issue of potential confusion or conflict of roles. Third, strategic and political factors that arise." On the third issue, deciding against the executive may politicize the institution, finding for the government and potentially lose confidence of the people.

In Panama and Peru, the Ombudsman has played a key role in promoting the passage of the law; placing information on their own website, and when the law was passed providing technical capacity building and services to other public entities, such as the “Nodo de Transparencia en la Gestion Publica” of Panama. Other activities have included bringing legal cases, preparation of such manuals and materials, and supporting citizens in their request for information.