ENFORCEMENT: PROCESS AND PRACTICE

SOCIUS CONFERENCE
LIMA, PERU

November 27, 2003

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Good morning, and thank you to the British Council and organizers of this Socius. I am very pleased to be speaking on this particular panel as over the past few years, I have often spoke of the three phases of an access to information regime: passage, implementation and enforcement.

This morning I am going to focus my remarks on the enforcement phase of an access to information law. However, with your permission, before I begin I would like to make two comments on passage and implementation of the law. As we have often noted: drafting a law that meets the merging international standards is, relatively speaking, the easiest part. Nevertheless, there are some lessons learned regarding this stage. In my experience it is critical that there is civil society participation in the drafting of the law and a broad debate before passage. In this way, the law will have greater legitimacy and acceptance and civil society is more likely to take advantage of the right to information. In countries like Mexico, Bulgaria, South Africa and India where there was a campaign for information and civil society participation, the law has flourished. In countries where this has not happened, such as Belize, the law is considered with distrust and the benefits are lost.

A second point, and one that will relate to my main topic, is that in drafting the law it is important to consider the processes needed for effective implementation and full enforcement. It is easy when working on drafting the laws to become overly preocuppied with the exemptions section of the bill, to the exclusion of other key provisions. While national security exceptions are clearly more sexy than the implementation procedures, they are often much less important in determining the bills overall value to citizens. Issues such as how the agency will archive and retrieve information, time limits for completion of information requests, costs for requests and copying, and appeals procedures are areas that must receive much greater attention when considering the draft law. It is these practicalities that will, in the long run, determine the value of such a law for the ordinary citizens who want to enforce their right.

Implementation of an access to information law is often the most difficult for the government to accomplish and for citizens to engage in and monitor. In Latin America there is no shortage of laws, in fact in Bolivia we recently heard of the

"hyper-inflation" of laws. Rather these many laws are not being fully implemented. The establishment of processes and the necessary mindshift from the culture of secrecy to openness takes an enormous amount of time and energy, and does not happen overnight. The pressure on governments to quickly put access to information laws into effect is unfortunate. In Jamaica, Mexico and South Africa, the government's gave themselves one year or less to implement the law. In each of these cases, they soon discovered the many obstacles. It is critical to the law's legitimacy that once in effect, the various agencies can satisfy information requests. Thus, we encourage longer lead times for implementation, (although not necessarily the 5 years that Great Britian is taking) and the use of a phased-in system whereby the law becomes effective first in a few keys agencies and is then phased in over a specified period of time.

I would like to spend the remaining time discussing the various enforcement models, the advantages and disadvantages . . . the process and the practice. Much of this comes from a paper that Richard Calland, director of the Open Democracy Advice Centre in South Africa and I are presently writing for publication.

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 some Latin America and Caribbean countries 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. In these cases, 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.

In general we have identified three enforcement models. For each of these models we have looked at the three key points:

1) the power and functions of the body . . . for example, does it have the power to order an agency to release information or simply the power to make recommendations? Does the body have the mandate to provide education or advice relating to the law, what other duties does it hold?

2) the process for establishing the model and the cost, such as the appointment process, the length of the term and the tenure, and the number of cases and complaints processed.

3) Finally, we looked at the practicalities of the model and the benefits (or obstacles) for the users, for example the costs and timeliness.

In the name of transparency, I want to tell you upfront that I prefer the third model that will be discussed . . . the one in which there is an intermediate body, such as a Commission or Commissioner with the power to order and sanction.

Ok, having said that . . . the first model that I mention provides for appeals directly to the judiciary. This model is used in places such as South Africa and the federal United States. When a request for information is denied, the solicitor 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 that they determine the matter *de novo*. In other words, though they may give deference to the agency that has made the initial decision, they address the case as if it is the first determination.

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. Although the United States Freedom of Information Act provides that these cases should take precedence on the court calendar, it can still take many months or years to hear the cases, thus making moot the need for the information. The cost, the time it takes, the difficulty for citizens in accessing the courts . . . all having a chilling effect on the utilization of this enforcement mechanism. There is also the costs for the government and the burden on the court system. In a recent in 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.

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 to follow recommendation, or at least the fear of public animosity when annual compliance reports are released.

In Canada where this model is used at the federal level, it was desirable to create a body that was both informal and non-adversarial. The limited power commissions provide for a more speedy resolution, they are often free to the person submitting the appeal, cost less for the government, and they are specialist as they focus only on the access to information law. 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. In New York State the Commission received 648 written advisory opinions and 4,829 telephone inquiries. The budget for this Commission is only $300,000 US.

Over time, however, even an enforcement body vested 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 or as the Canadian Information Commissioner in his 2000 report stated, he may find himself in the "unprecedented position of seeking ways to encourage public officials to obey mandatory legal obligations." Moreover, 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.

Thus, the third and in my opinion 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 our four principles of timeliness, in Western Australia, they responded to most written enquiries 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 in most cases they are considered highly independent. They are also 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.

There are other hybrid models, such as the Jamaican Appeals Tribunal, that are emerging and other issues related to each model, such as the number of staff, the annual budgets and from where the money comes, the type of notice of

appeal rights provided to persons denied information, time limits for filing appeals, the availability of attorneys and attorneys fees, and punitive damages but unfortunately, there is not enough time to discuss these in detail today.

The final issue that I would like to touch in my remaining minutes is how this body is chosen and their tenure. Designation of Commissioners can range from Executive appointment such as in the Federal Mexico case or Jamaica where the Prime Minister has the sole authority to name the Appeals Tribunal to one case that I know of in a state in Mexico where the selection of the Access to Information Commissioners is more stringent than the election of the United States President (ok well, perhaps that is not the best comparison given what we know now of US elections!). In this Mexico case, there are 5 steps to selecting the Commission . . . first persons come forward and 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. Imagine telling your family and friends that you were eliminated after that stage! 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 I believe 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.

Again, the main considerations should be based on the context and socio-political realities of the country or state. But most critical is the recognition that without effective enforcement, the “right” to information cannot truly exist. Thank you.