

ADDENDUM TO THE DECLARATION OF THE SOCIUS PERU 2003: ACCESS TO
INFORMATION CONFERENCE

Guidelines on Access to Information Legislation

PREAMBLE

Cognisant of the fundamental importance of freedom of expression and of information, a basic human right guaranteed under international and regional human rights treaties;

Taking into consideration international and regional standards recognising the right of everyone to access to information held by public authorities;

Acknowledging the need for greater transparency in countries in the Americas, as well as the prevailing culture of secrecy that pervades much of this region;

Recognising the fundamental role of access to information as a means of promoting democratic participation, as an essential tool in combating corruption, as a way of promoting accountable government and as an efficient means of sharing information with the public;

Mindful of the overriding need for an enabling environment for effective implementation of the right to information and the need for an independent, efficient judicial system;

Aware of the need for all States to adopt legislation establishing clear, effective rules for the exercise of the right to information based on the principle of maximum disclosure;

The participants in the Socius Peru 2003: Access to Information conference recommend the following guidelines to States, inter-governmental bodies and civil society actors for their consideration and further development:

1. THE RIGHT OF ACCESS

1.1 The Principle of Maximum Disclosure

States should adopt comprehensive laws guaranteeing everyone the right to access information held by public authorities based on the principle of maximum disclosure. This principle establishes a presumption that everyone has the right to access complete, timely information, subject only to a limited regime of exceptions (see Principle 3).

Requesters should not have to disclose their reasons for seeking access to information and requests should be able to be made in a range of forms, including oral, written and electronically. The onus of justifying any refusal to provide information rests on the party seeking to deny access. The principle of maximum disclosure also requires public authorities to produce information in accordance with international and domestic obligations, and to ensure that such information is subject to disclosure in accordance with these principles.

1.2 Definition of Information

The law on access to information should, in accordance with the principle of maximum disclosure, define information broadly to include any recorded information, regardless of its form, source, date of creation, or official status, whether or not it was created by the body that holds it and whether or not it is classified.

1.3 Definition of Public Authority

The law on access to information should, in accordance with the principle of maximum disclosure, define public authorities broadly to include any body which:

- is established by or under the Constitution;
- is established by statute;
- forms part of any level or branch of government;
- is owned, controlled or significantly financed by public funds; or
- carries out a statutory or public function, with respect to that function.

1.4 Process Guarantees

The law on access to information should provide for clear, realistic and short time limits for public authorities to provide access to information. Shorter time limits should be established for information, which reasonably appears to be necessary to safeguard the life or liberty of a person. The party requesting access to information has the right to specify the form of access to such information, subject only to reasonable limits based on the capacity of the public authority and the need to preserve the record. Access should, to the greatest extent possible, be provided in any official language specified by the requester. Any refusal to provide access should be accompanied by written reasons, specifying the grounds for such refusal. No fee should be charged simply for lodging a request for information and any fees for provision of access to such information should not be so high as to pose a barrier to access. In some jurisdictions, higher fees are levied on commercial requests as a means of subsidising public interest requests.

2. ROUTINE DISSEMINATION OF INFORMATION

Public authorities should be obliged to disseminate routinely key categories of information even in the absence of a specific request. Such information should include, at a minimum, the following:

- a description of the authority's structure, functions, duties and finances;
- relevant details concerning any services the authority provides directly to members of the public;
- any direct request or complaints mechanisms available to members of the public regarding acts or a failure to act by that authority, along with a summary of any requests, complaints or other direct actions by members of the public and that authority's response;

- a simple guide, or road map containing adequate information about its record-keeping systems, the types and forms of information it holds, the categories of information it publishes and the procedure to be followed in making a request for information;
- a description of the powers and duties of its senior officers, and the procedure it follows in making decisions;
- any regulations, policies, rules, guides or manuals regarding the discharge by that authority of its functions;
- the content of all decisions and/or policies it has adopted which affect the public, along with the reasons for them, any authoritative interpretations of them, and any important background material; and
- any mechanisms or procedures by which members of the public may make representations or otherwise influence the formulation of policy or the exercise of powers by that authority

Such information should be disseminated in an appropriate form, which ensures maximum access by all of the population and should be updated as necessary to ensure that it is current. Public authorities should, in addition to this minimum requirement, ensure the public dissemination of a wide range of other information, subject only to reasonable limits based on their capacity and resources, taking into account new technologies for disseminating information such as the Internet. Progressive implementation of this principle over time should ensure that increasing amounts of information are routinely made available to the public.

3. EXCEPTIONS

3.1 The Three-Part Test

All individual requests for information from public authorities should be met unless the public authority can show that the information falls within the scope of a limited regime of exceptions. A refusal to disclose information is not justified unless the public authority can show that the information falls within the scope of the following strict three-part test:

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

3.2 Legitimate Aim

All legitimate aims for refusing to disclose information should be defined clearly and narrowly in the law on access to information. The list of legitimate aims should be consistent with international law and no other grounds for refusing access to information should be permitted.

3.3 The Harm Test

It is not sufficient that information simply fall within the scope of a legitimate aim listed in the law. Access to information should be granted unless disclosure of such information would pose a serious risk of substantial harm to one of the legitimate aims listed in the law, taking into account all of the circumstances.

3.4 The Public Interest Override

Even if it can be shown that disclosure of the information would cause substantial harm to a legitimate aim, the information should still be disclosed whenever the overall public interest in disclosure outweighs the harm such disclosure would cause.

3.5 Application of the Three-Part Test

Any refusal to disclose information should be based on a specific, case-by-case application of the three-part test to that information at the time of the request. If part of the information requested falls within the scope of an exception, all information which is not subject to the exception should, to the extent it may reasonably be severed from the rest of the information, be disclosed. A process should be put in place to ensure the regular declassification of information over time.

3.6 Relationship with Other Laws

The access to information law should, to the extent of any inconsistency, apply to the exclusion of any provision in other legislation that prohibits or restricts the disclosure of information. At the same time, nothing in access to information law should be understood as limiting or otherwise restricting the disclosure of information pursuant to any other legislation, policy or practice.

4. RIGHT OF APPEAL

The law on access to information should provide for an individual right of appeal to an independent administrative body against a refusal by a public authority to disclose information. Everyone should have the right to appeal to this body in cases where a public authority fails to meet the time limits set out in the law, charges excessive fees for the provision of information, fails to give adequate notice of any refusal to provide information, unjustifiably refuses to disclose information, in whole or in part, or refuses to disclose information in the form requested

The independent administrative body may be either an existing body, such as an Ombudsman or Human Rights Commission, or one specially established for this purpose. The administrative body should be provided with adequate funding to undertake its functions, in a manner that protects its independence. Its independence should also be guaranteed in a range of other ways, including:

- by a specific and explicit statement of independence in the law;
- by a clear legislative statement of the powers of the body;
- through the rules relating to membership, including clear conflict of interest rules and rules prohibiting the appointment of individuals with strong political links; and
- by formal accountability to the public through a multi-party body.

The administrative appeals body should operate rapidly and in a cost-efficient manner. It should have all the necessary powers to fulfil its functions under the law, including the ability to compel witnesses and, importantly, to require any public authority to provide it with any information or record for its consideration, *in camera* where necessary and justified. It should have the power to order a range of remedies in case of a failure by a public authority to fulfil its obligations under the law, including the power to order a public authority to disclose information, to lower costs charged for provision of information and

to provide information in the form requested. It should also have the power to refer appropriate cases of breach of the law to the courts. The decisions of this body should, to the extent possible, be enforced as legally binding.

The law on access to information should also provide for a full appeal to the courts on the merits against decisions of this administrative body.

5. MEASURES TO PROMOTE ACCESS

The law on access to information should include a series of provisions designed to promote its effective implementation. These should include, at a minimum, the following:

- provision for public education, including through the schools, designed to promote understanding of the law as well as a culture of openness;
- training and other measures designed to prepare public officials for implementation of the law and to address the prevailing culture of secrecy within government;
- systems, along with adequate resources, to promote appropriate maintenance of records, including rules governing the archiving and destruction of records;
- sanctions for those who wilfully obstruct access to information, including by destroying records;
- protection for those who disclose information, reasonably and in good faith, which discloses evidence of wrongdoing (whistleblowers);
- administrative sanctions for serious failures by public authorities to fulfil their obligations under the law;
- provision for the publication and broad dissemination of a public guide on using the access to information law;
- a requirement for public authorities to appoint dedicated information officers with specific responsibility for internal implementation of the law;
- an obligation on public authorities to publish annual reports detailing their activities in the area of information disclosure, including in relation to requests for information pursuant to the law;
- protection for public officials who reasonably disclose information pursuant to the law; and
- provision for an independent administrative body to undertake a range of promotional roles regarding information disclosure, such as monitoring, making recommendations for reform, training, promoting public understanding of the law and so on.

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