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**THE IMPORTANCE OF THE RIGHT OF ACCESS TO INFORMATION
HELD BY PUBLIC AUTHORITIES,
AND THE NEED FOR THE UNITED NATIONS TO TAKE STEPS TO FURTHER
ELABORATE, CODIFY, PROTECT AND PROMOTE THIS RIGHT**

Talk presented to the UN Conference on Anti-Corruption Measures,
Good Governance and Human Rights
Warsaw, 8-9 November 2006
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Good afternoon. I am very pleased to have been invited to address this distinguished conference.

I will speak today about the right of access to information held by public authorities. In particular, I would like to suggest that appropriate UN mechanisms should be encouraged to take steps to elaborate, codify, protect and promote this right.

A few speakers have already addressed the importance of the right to access government-held information in combating corruption and promoting good governance, including effective public participation in government decision-making. I will note just a few examples.

Rapid Recent Growth in Number of Countries with Access to Information (ATI) Laws and new Survey Results Available

At the outset, let me note that 68 countries around the world have ATI laws, of which 56 adopted laws since 1992, and 36 in the new millennium. These new laws are only just getting up and running, but already thousands upon thousands of information requests have been filed.

My organization, the Open Society Justice Initiative, recently published a survey of the way in which agencies in 14 countries – 8 of which have ATI laws – are responding to information requests. The study (available in pdf at www.justiceinitiative.org) involved the filing of more than 1,900 requests. It showed that all governments provide information erratically; many requests filed twice by different requestors received different answers, and 47 percent of requests in all countries yielded no response at all. Most disturbingly, requests from disadvantaged groups (Roma, the disabled), were ignored at a rate twice that of other requestors. The software the Justice Initiative developed to analyze the study's data is now being used by partners in a half dozen additional countries, and is available to NGOs free of cost.

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Illustrative Cases in Which ATI Laws were Used Successfully to Expose Corruption

My first example is from Mexico, which adopted a very good ATI law in June 2003. The law requires that certain information including detailed budgets be published automatically by all bodies covered by the law. One of the bodies covered is a publicly funded university called the National Polytechnic Institute (Instituto Politecnico Nacional – IPN). In 2003, the Institute's new director seized the opportunity of the new law to combat the corruption and nepotism typical of the Mexican education system. He opened its payroll to the public, knowing full well the scandals that would ensue: one professor whose official salary was 60,832 Mexican pesos (around \$6,000) had received from the public purse, completely illegally, an annual compensation of 782,502 Mexican pesos (\$78,000). Another mid-ranking employee had received 567,855 pesos (\$57,000) or 10 times her official salary. The Institute's archives revealed letters requesting bonuses which had no legal basis and often exceeded the basic salary of the employee. One budget line for “bags” came to a total of 4 million pesos (\$400,000). The clean-up operation by the Institute's new director not only resulted in the dismissals of the worst offenders but in the savings of public funds: an estimated 400 million pesos, or \$40 million in 2003. Mexican activists also report that the pressure is now on other public education institutions to open up their accounts to similar scrutiny.

A second example: In Japan, private lawyers used local government level access to information laws to force the release of reports on the expense accounts of local government officials. These reports revealed huge line items for entertaining visiting bureaucrats at top restaurants. As a result of the revelations, between 1995 and 1997, Japan's 47 prefectures cut their food and beverage budgets by the equivalent of more than \$100 million.

A third example: In Canada, in June 2003 the head of the new gun registry office resigned under pressure after citizens groups obtained his expense records using the access to information law. The records showed that he had spent \$205,000 on 56 airplane tickets

One of the most famous cases of the use of access to information to defend the rights of the poor comes from the Indian state of Rajasthan, with a population of 57 million, where local government officers were diverting funds destined for development projects. The NGO MKSS, a workers and farmers solidarity group, demanded that local administrators provide them with an account of all expenditure made in relation to development work. In the absence of a legal right to access the records, local officials refused. MKSS resorted to peaceful mobilisation - they organised sit-ins, public demonstrations and hunger strikes. As the pressure continued and the media began to take notice, the administration relented and eventually provided the information requested.

MKSS used the information disclosed to organise ‘social audits’ of the administration's books. Though many villagers were illiterate, through face-to-face public hearings they could scrutinise complex and detailed accounts, question their representatives and make them answerable on the basis of hard evidence. The campaign persisted and eventually was successful in getting local officials to admit to corruption. Some officials returned misappropriated public funds and, in one case, an arrest was made for fraud. Following this success, more and more people mobilised to hold similar hearings and this reached the state capital as a demand for an access to information law, which eventually was passed. This campaign contributed to the national campaign for a federal law, which finally was passed in 2002. Indian human-rights groups have been making active use of the national and state laws

since then to expose the misuse and squandering of public funds. For instance, in 2003, activist Qaneez Sukhrani requested the audited accounts of the Pune Municipal Corporation for the past five years. Although she only received the accounts from 1998-1999, these exposed numerous irregularities, including failures to collect a range of fees and taxes from construction companies and banks. The accounts revealed, for example, that the Maharashtra State Electricity Board, which had been receiving compensation in order to charge educational institutions concessional rates for power consumption, had in fact been billing municipal schools at the commercial rate. The documents obtained also showed that the Chief Auditor had recommended that the Electricity Board repay the excess profit, but that this had not yet happened. Publication of the accounts and ensuing newspaper articles increased the pressure for the authorities to act, as well as to release the audited accounts from subsequent years.

Two final examples concern the compelled disclosure of information even though the agencies that held the information claimed that the documents contained commercial secrets that should not be disclosed. These cases provide especially useful precedents, given the frequency with which the claim of commercial secrecy is used to conceal information concerning corrupt government contracts.

In 2003 the Irish Freedom of Information Commissioner ruled that information in contracts between the government and private companies could be made public even if it had the potential to damage the competitive edge of that company.¹

The case arose from a request filed under Ireland's 1997 Freedom of Information Act for a contract between Ireland's Department of Finance and financial advisors, ABN Amro and McCann FitzGerald Solicitors, that amounted to some €850,247.

The total amounts paid had already been made available by the Minister of Finance (see Table E), but the requestors wanted details of the contract. The financial advisors objected to the contract being made public because it would reveal their fee and pricing structure which, they claimed, would give competitors an advantage, and contained the names of individuals.

The Irish Information Commissioner ruled that once the contract had been signed "the successful tender information lost confidentiality with respect to the fee rates and other details necessary to understand the nature of the services contracted for." He concluded that this was true, even if harmful to the competitive position of the affected parties: "on balance, the public interest was better served by the release of this information in light of the significant need for openness and accountability in relation to the contract."

In a similar precedent-setting case, the Slovenian Information Commissioner confirmed that public procurement contracts between public bodies and private suppliers should be public, except where trade secrets that give a competitive advantage are concerned.² The case

¹ Irish Freedom of Information Commission, Case 99183 - McKeever Rowan Solicitors and the Department of Finance.

² Slovenian Information Commissioner, Case No. 020-18/2004/3, date 28.10.2004, Applicant against the conduct and the decision of the Municipality of Radovljica.

resulted from an information request filed in 2004 by a member of the public who asked for a copy of the agreement between the Municipality and a private company for management of apartments blocks owned by the Municipality of Radovljica. The Municipality rejected the request on the grounds that it was confidential under Slovenia's 1993 Companies Act and cited Article 6 of Slovenia's Access to Information Act which provides for protection of trade secrets. The requestor appealed, arguing that the agreement was needed for there to be meaningful public participation in the decisions relating to the management of publicly-owned housing. A supplementary concern was that a manager of ALPDOM Inženiring was also the deputy-mayor of the local municipality, hence there was clear potential for a conflict of public and private interests. The Information Commissioner ruled that the contract should be released citing a number of grounds that reflect comparative standards for public procurement contract transparency:

- information in a contract which does not impact on the competitive market position of the selected provider cannot be considered a trade secret;
- data cannot be defined as a trade secret if other laws require it to be public (in this case the Slovenian Public Procurement Act of 2000);
- data cannot be defined as a trade secret if it relates to violations of law or breaches of good business practices;
- an entire contract cannot be considered a trade secret as part of the information contained in a contract has to be made public during the bidding process;
- the total financial value of the contract cannot be reserved;
- the object of the tender and description of services/goods to be supplied cannot be reserved;
- supporting references must be made public as they relate to compliance with the procurement conditions and criteria;
- assessment of eligibility and compliance criteria cannot be reserved as these are an essential component of awarding a public contract, and the public has the right to know whether the selection procedure has been carried out correctly and whether the selected bidder made the best possible offer.

The Commissioner also noted that, in addition to the above considerations, information may only be considered as a trade secret if it has been specifically specified as such by the supplier and if it does not relate directly to the procurement at issue. The Commissioner recommended that if bidders declare large parts of the information they submit to be trade secrets, the contracting agency should exclude the bids. Where contracts contain some genuine trade secrets, the information must be severed, either physically removed or crossed out, or electronically deleted in a password protected form.

Lack of Recognition in UN instruments or by UN Bodies of the Right of Access to Information

Despite the clear importance of the right to information, including to enable an informed citizenry, meaningful public participation and exposure of corruption and mismanagement, few UN bodies have addressed the content of the right, and no norm-creating body has affirmed the existence of this right.

Of course the Universal Declaration of Human Rights (UDHR), in Article 19, declares: Everyone has the right to freedom of opinion and expression; this right includes freedom to ...seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 19 of the International Covenant on Civil and Political Rights (ICCPR) includes essentially the same language.³

However, “freedom” to receive information has been interpreted to mean just that and no more – namely, the freedom to receive information from willing sources without government interference.

Indeed, the European Court of Human Rights has confirmed this interpretation in several of its judgments interpreting Article 10 of the European Convention on Human Rights. The Court has repeatedly recognized only a right to state-held information under circumstances in which the denial of information would affect the enjoyment of other Convention rights, such as the right to respect for private and family life, under Article 8 of the Convention.⁴ We hope that the Court’s position may finally be shifting. In a July 2006 admissibility decision, the Fifth Section of the Court held that Article 10 may grant the applicant, a Czech environmental group, a right of access to documents regarding the design and construction of a nuclear reactor.

In any event, the UN Human Rights Committee has never addressed the right to information, according to one member of the Committee with whom I recently spoke. He confirmed that the Committee has not decided any individual communications that address the right, and, in response to my question, said that, given the lack of communications, the Committee would have difficulty justifying the time to elaborate a general comment on the right, at least in the absence of a formal request to do so. Perhaps it is time for an appropriate body to make such a request.

The UN Convention Against Corruption, in Article 13, addresses the *importance* of access to information in promoting public participation and combating corruption. However, it does *not* refer to a “right” of access. Rather it states that state parties should take such measures as (a) “ensuring that the public has effective access to information” and (b) respecting,

³ Article 19(2) reads: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.”

⁴ *Guerra and Others v. Italy*, Judgment of February 19, 1998 (the Court ruled that “[the] freedom to receive information, referred to in paragraph 1 of Article 10 of the Convention, ‘basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him.’ That freedom cannot be construed as imposing on a State... positive obligations to collect and disseminate information of its own motion.”); *Gaskin v. United Kingdom*, Judgment of July 7, 1989 (access to case records refused to an adult who had been in the care of the local authorities as a child); *McGinley and Egan v. United Kingdom*, Judgment of June 9, 1998 (access to records refused regarding the potential health hazards resulting from nuclear radiation tests to which the applicants had been exposed while serving in the British army); *Roche v. United Kingdom*, Judgment of October 19, 2005 (facts similar to *McGinley*, in which a unanimous Grand Chamber again held Article 10 to be inapplicable, noting that “it [saw] no reason not to apply this established jurisprudence”).

promoting and protecting the *freedom* to seek, receive, publish and disseminate information concerning corruption.

The UN mechanism which has gone furthest in recognizing a right to government-held information is the UN Special Rapporteur on Freedom of Opinion and Expression. In 1999, he joined with the special rapporteurs on Freedom of Expression of the OAS and OSCE in issuing a joint declaration that includes the following sentence:

Implicit in the freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.⁵

In 2004, the three rapporteurs issued a second relevant joint declaration in which they affirmed that “[t]he right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation....”

To the best of my knowledge, that statement has not be affirmed by any of the UN's political bodies.

Inter-American System on Human Rights

Of the regional systems, the Inter-American System on Human Rights has gone furthest in recognizing a fundamental human right to access information. In a landmark decision issued against the Government on Chile on Sept 19 of this year, the Inter-American Court ruled that Article 13 of the American Convention

“protects the right of all persons to request access to information held by the state, with the exceptions permitted by the restrictions regime of the Convention. As a result, this article supports the right of persons to receive such information and the positive obligation on the State to supply it, so that the person may have a reasoned response when, for grounds permitted by the Convention, the state may limit access to it in the specific case.⁶

The Court provided further elaboration of the right First, the information “should be provided without a need to demonstrate a direct interest in obtaining it, or a personal interest, except in cases where there applies a legitimate restriction.” Second, restrictions “must be established by laws,” not by the discretionary judgment of public officials. Third, a restriction

⁵ Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media, November 26, 1999.

⁶ The Court's judgment is available in Spanish at http://www.corteidh.or.cr/docs/casos/articulos/series_151_esp.pdf. An un-official translation by the Open Society Justice Initiative is posted at www.justiceinitiative.org/advocacy/press. An excellent summary of the case is provided in English by Eduardo Bertoni in “Inter-American Court of Human Rights Issues Landmark Ruling on Freedom of Information,” in Media Law Resource Center Media Law Letter (October 2006), pp 47-78.

should be limited to those goals permitted by the Convention (respect for the rights and reputations of others, protection of national security, public order, health or public morals), and should be proportionate to the right being protected by the restriction. Fourth, “state authorities are governed by the principle of maximum disclosure, which establishes the presumption that all information should be accessible, subject to a restricted system of exceptions.”

The facts of the case were straightforward. Claude Reyes, the executive director of an environmental NGO, requested information relating to a contract between the Chilean state and several companies concerning the development of a forest industrialization project. The relevant government office provided some of the requested information and denied the rest without stating any reasons. The Chilean courts upheld the refusal.

The Inter-American Court, in applying the above principles, concluded that Chile had violated the Convention and ordered Chile to pass an access to information law. The Court further directed Chile to “in a reasonable time, conduct training for the bodies, authorities and public agents charged with receiving requests for information on the norms that regulate this right”

Moreover, in 2005, the General Assembly of the OAS adopted a resolution on Access To Public Information and Strengthening Democracy, in which it 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.” It further urged member 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.”⁷

African Commission on Human & Peoples Rights

The movement towards the adoption of Access to Information laws is also making in-roads in Africa. Although only three countries in Africa have adopted what could legitimately be considered ATI laws, the African Commission on Human and Peoples Rights laid a strong basis for such laws in Africa, and set standards for member states of the African Union (AU), when it adopted the Declaration of Principles on Freedom of Expression in Africa in October 2002. The Declaration, which is regarded as an elaboration of the right to freedom of expression contained in Article 9 of the African Charter on Human and Peoples Rights, provides in part that:

1. *Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.*
2. *The right to information shall be guaranteed by law in accordance with the following principles:*
 - *everyone has the right to access information held by public bodies;*
 - *everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;*

⁷ AG/RES. 2121 (XXXV-O/05), Access To Public Information: Strengthening Democracy (Approved by the Permanent Council at its meeting of May 26, 2005)

- *any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;*
- *public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;*
- *no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and*
- *secrecy laws shall be amended as necessary to comply with freedom of information principles.*

Council of Europe

In November 2005, the Council of Europe began drafting a treaty on Access to Official Documents. A group of experts will hold its third drafting session in Strasbourg next week, and a draft is expected to be presented to the Council of Europe's political bodies in the next year or two.⁸

My organization, the Justice Initiative, welcomes this drafting process, and we are actively participating in it, but we are also concerned that the treaty could codify the lowest common denominator of existing laws in Europe. The treaty is to be based on a recommendation adopted by the Council of Ministers in 2002, which itself took five years to draft, reflecting the consensus in Europe as it existed in the late 1990s.

Since the late 1990s, three countries in western Europe and 24 countries in Central and Eastern Europe adopted new ATI laws or substantially reformed their old ones. Most of these laws reflect a developing progressive consensus.⁹

Yet these 24 new Council of Europe member states are represented by only two experts on the working group –I am pleased to note that one is Poland, and the other is Bulgaria. This fact places a great responsibility on these delegates, and creates a significant opportunity, to try to move forward the consensus of the Council of Europe. I hope that European anti-corruption officials represented here will participate in this process.

The Justice Initiative and other NGOs have several concerns regarding the language that is being developed. I will briefly mention three of these.¹⁰

⁸ See, e.g., Group Of Specialists On Access To Official Documents DH-S-AC (2006)007, Report of Meeting, 31 May – 2 June 2006.

⁹ These countries are Germany, Switzerland, the UK and Albania, Armenia, Azerbaijan, Bosnia & Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kosovo, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Poland, Romania, Serbia, Slovakia, Slovenia, Turkey and Ukraine.

¹⁰ The following several paragraphs are drawn from a briefing paper submitted jointly by Access Info Europe, the Justice Initiative and Article 19 to the Council of Europe's Group of Specialists on Access to Official Documents (DH-S-AC).

First, the treaty may be limited to a right of “access to documents” rather than to information. We recognize that public authorities should not, under this treaty, be obliged to generate information they do not hold, when the answer to a request cannot be extracted from existing documents. On the other hand, while public authorities need not be required to generate *new information*, they should not in principle be exempted from extracting information from documents they hold, even when this effectively requires them to produce a new document, if this is necessary for the satisfaction of a request. The usefulness of an access regime would be severely undermined if it were limited to reading, or making copies, of existing documents. Many requests on topics of great public interest will relate to information that is not recorded in one or a small number of documents, but can nevertheless be derived with relative ease from existing files. Public authorities should, for instance, be under an obligation to answer questions about the types of documents they hold. Similarly, a requester might ask how many individuals were under observation by the secret services for terrorist activities in a particular year. While such a request could perhaps validly be turned down for national security reasons, it should not be dismissed on the grounds that answering it requires counting case files or doing a database search, and thereby creating a “new” document. Article 6(5) of the current working document could be taken to justify such a refusal, in stating that “the public authority is not under a duty to comply with the request if it is a document which cannot be identified.”

Second, the working group is debating whether legislative bodies and judicial authorities should be under a duty to provide access to the documents, or whether only administrative bodies should be so obliged. The present working document would allow States Parties to decide, “bearing in mind the public interest and, in the light of their domestic law and practice” whether legislative and judicial bodies and authorities should be covered by the domestic access legislation.

Third, the treaty draft includes many more exceptions than recognized under the International Covenant on Civil and Political Rights. I will note just three of these overbroad and unnecessary exceptions.

First, the draft recognizes the possibility of withholding information in order to protect the trade and commercial secrets of private or public enterprises. We agree that such an exception is justified insofar as it aims to prevent unfair competitive advantages or disadvantages arising from access requests. But, in a number of Member States commercial exceptions have been abused to withhold information which exposed irregularities in public procurement processes. To prevent this from happening, we suggest formulating the exception narrowly. For instance, the exception could be limited to protecting “the legitimate competitive interests of a public or private entity, insofar as compatible with the need for public scrutiny of procurement processes.”

Clearly, the proposed exception could vitiate the value of the treaty for exposing corruption. We therefore hope that this conference here today, and the UN Office of the High Commissioner for Human Rights might especially note the importance of a narrow definition of commercial secrets as a ground for justifying the withholding of information.

A second troubling draft provision would allow documents to be withheld in order to protect “the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.”

It is clearly important for the effectiveness of the work of public authorities that they have “space to think”, but it is equally important that the public is involved in decision-making processes whenever possible. Moreover, once a decision has been finalized, the public should in principle be afforded an opportunity to know how the decision was reached. The current wording does not strike an adequate balance between the different interests at stake.

There are basically two types of harm related to internal deliberations which might justify a refusal to disclose information: (1) serious prejudice to the current or future formulation of policy or decisions, including the free and frank provision of advice; and (2) frustration of the success of the policy or decision in question through premature disclosure. Formulating the exception in terms of these interests would narrow the risk of excessive secrecy.

As a further safeguard of meaningful public participation in decision-making, the first leg of the exception should apply only to (parts of) documents which disclose the opinions of the civil servants preparing the decision, not to opinions of third parties or factual documents. This is the case, for example, in the domestic laws of the UK and Germany. Upon finalization of the decision, all documents relating to its preparation should be opened, except where doing so would have a chilling effect on future policy development or decision-making, as always, subject to any overriding public interest.

A third exemption would exempt royal communications with governments. We think this exemption is anachronistic. A debate on ratification of the treaty will present a good opportunity to re-examine whether it is still appropriate in the 21st century for a royal family to be able to communicate with the government without any form of public scrutiny.

In conclusion, I would like to suggest that the UN could do more to assert leadership in defining and codifying the right of access to information. Essentially this is a right that has ripened since the 1990s. The UN could play a highly significant and timely role, I suggest, in affirming the importance of the right as a human right, and in elaborating its basic contours.

THANK YOU.