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THE RIGHTS OF ACCESS TO INFORMATION IN FIGHTING CORRUPTION – A HUMAN RIGHTS PERSPECTIVE

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1. The media are more receptive to human rights issues and the human rights organisations are more able to get their stories into the media. Although this sounds obvious, it is not. Several years of learning, by human rights organisations, as well as “sensitising” by news organisations, were needed to make this situation routine. A certain cultural-historical context also plays a part, namely the end of a bipolar world system in which ideology as well as traditional national interests compete.
2. This paper sets out and answer a series of questions related to access to information and its potential value in fighting corruption and defending human rights.
3. In the first instance this paper considers what the right of access to information is exactly and to evaluate how it works in practice. The paper then seeks to answer questions such as whether access to information is recognized as an instrumental or a fundamental right in international and comparative law and jurisprudence. It also seeks to examine whether access to information as a tool has been of value in defending against violations of human rights and in the fight against corruption, and to consider the potential uses of this right in the future.
4. The paper considers some legal and practical issues that relate to current interpretation of the right to information, including the question of whether governments are under any obligation to create information in order for the information to be provided to requestors – a particularly important issue when dealing with issues of abuse of power not only by governments but by third party actors ranging from paramilitary groups to multinational corporations.
5. The paper also considers how the right to information is working in practice and what kinds of obstacles face requestors, obstacles that include discrimination in the provision of information by governments, which can result in an information gap within society.

6. Finally, the paper considers whether the increasing recognition of access to information as a human right sheds any light on how to promote the right to participate in government and the right to be free from corruption.

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I. THE RIGHT OF ACCESS TO GOVERNMENT-HELD INFORMATION

7. It has long been recognized that access by the public to information held by government can ensure a more effective, efficient and less corrupt system of government in which abuses of power are diminished through the exertion of public scrutiny. During the enlightenment such recognition resulted in Sweden's Freedom of the Press Act of 1766 which asserts in its opening paragraph that public knowledge of government information ensures "a wisely ordered system of government" in which "abuses and illegalities are revealed to the public"¹.
8. The Swedish Act of 1766 explicitly establishes a right of access to "exchanges of correspondence ... documents, protocols, judgements and awards" including those produced by the courts, government departments, and other public bodies. The Swedish act emphasizes the need for these documents to ensure prevent "rash, imprudent, malicious or even cruel and ignominious decisions and deed" as well as to ensure that people are able to "value and defend the obligations, freedoms and rights that they possess, as well as public an individual security."
9. The Swedish Freedom of the Press act went through some ups and downs (it was suspended between 1772 and 1809) but the principle of access to government information has remained central to the system of open and democratic government in Nordic countries, countries which are recognized as having the lowest levels of corruption and human rights violations in the world. The principles of freedom of speech and freedom of the press also gained ground during the 19th and 20th centuries, being recognised as a fundamental human right in the Universal Declaration of Human Rights in 1948 and subsequently in Article 19 of the International Convention on Civil and Political Rights as well as the similar articles of regional treaties, such as Article 10 of the European Convention on Human Rights and Fundamental Freedoms which has resulted in extensive jurisprudence of the European Court of Human Rights in protection of freedom of expression.
10. Some 180 years after Sweden introduced the right of access to government held documents, the UN General Assembly also recognized the fundamental as well as the instrumental role of the right to information when it declared at its first session in 1946 that "Freedom of information is a fundamental human right and . . . the touchstone of all of the freedoms to which the United Nations is consecrated"²
11. The UN General Assembly's concept of Freedom of Information did not, however, explicitly address the right of access to government-held information but rather stated that: "Freedom of information implies the right to gather, transmit and publish news anywhere and everywhere without fetters. As such, it is an essential factor in any serious effort to promote the peace and progress of the world."
12. In light of this definition of freedom of information which fails to place a positive obligation on governments to provide information, but rather which establishes that governments may not interfere with the free flow of information, international human rights courts were reluctant to assert a right of access to government-held information. The European Court of Human Rights has rejected this right, admitting only that a right to information exists when necessary to defend other human rights, such as the right to protect health or family life. For example, in a number

of cases (*Leander, Gaskin, Guerra, McGinley and Egan*) the European Court ruled that the positive obligation imposed on States by Article 8 (private and family life) includes the obligation to provide information.

13. By the late 20th Century however, as the access to information movement gained ground and more countries adopted access to information laws, declarations by regional human rights bodies began to recognize the right to government-held information. One of the strongest declarations is that made by the African Commission on Human and Peoples' Rights in its 2002 Declaration on Principles of Freedom of Expression in Africa, Article IV of which on Freedom of Information clearly states 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;*

14. Similar declarations by the Council of Europe's Committee of Ministers (2002) and by the Organization of American States (2003-2006) also demonstrate that the international human rights bodies are increasingly recognizing the right to government held information.
15. The crucial divide between the a right of access to publicly-held information and a looser freedom to gather information from willing providers and to disseminate it without restraint was finally resolved at a human rights level in September 2006, when the Inter-American Court of Human Rights concluded that:

[B]y expressly stipulating the right to "seek" and "receive" "information," Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.³

16. The case that lead to this decision (which has repeatedly been called historical even by those prone to avoid clichés) was a relatively simple one of a request for information about the permission given by the Chilean government to an company form the United States that was

planning to conduct logging operations in the area of native forest known as the Rio Condor Valley. The logging company was known to have a poor environmental record and there were suspicions that the Chilean government had not carried out the proper background checks on the company before issuing the permit. The case thus combined the right to information with issues of right to environmental protection and possible government wrongdoing (the logging project was eventually stopped as a result of actions by environmental activists including a Supreme Court challenge). The Chilean government had failed to answer the request filed in 1998 for a copy of the report that should have been produced before the US company was granted the logging permission (even in the court they failed to clarify whether or not this document existed).

17. The question arises why it is so important that access to information is recognized as a fundamental human right. The answer is to be found in the specific elements of the right laid out by the court: not only do governments have the duty to respect this right, but they have to ensure that the mechanisms exist to ensure that it can be exercised in practice. In this regard, it is important to highlight the certain elements of this decision:
 - that there is a **right to request** information that may not be hindered in any way and may not be conditioned on a particular demonstrable interest in knowing the information;
 - that there is a corresponding **right to receive** the information (subject to limited exemptions);
 - that there is an **obligation on the state to reply** to every request, whether providing the information or (in limited cases) denying it;
 - that the **right to freedom of expression** cannot be considered to be fully respected without granting of a right to government-held information;
 - that governments are under an **obligation to take positive steps** to ensure the right to information including (in another part of the judgement) the obligation to establish the **mechanisms for filing requests** (in other words, to adopt an access to information law) and to **train the public officials** on how to process requests and how to respect the right.
18. For those working on the fight against corruption and in defence of other human rights, these elements are important because they create an enforceable right which is actionable in national and ultimately in international human rights tribunals.
19. It is still too early to evaluate the full effects of this decision, but it is undoubted that it will bolster the right to information in the Americas and more widely. In Chile, an access to information law is now on the point of being adopted. Meanwhile, lawyers at the European Court of Human Rights have commented to this author that this jurisprudence will undoubtedly be taken into consideration by the European Court in its future decisions.
20. In the meantime, the first international treaty that will protect this right is currently in the process of being drafted by the Council of Europe and will eventually bind all its 47 Member States. The current draft of this treaty also recognizes a right to information and although the draft has some limitations (such as giving states the option as to whether the judiciary and

legislative branches of power will fall under the scope of the treaty when they are signing up to it), it is a very important step forward in securing the right to information. It is anticipated that the treaty will be opened for signature in 2008 or early 2009 and that when it comes into force it will be overseen by a monitoring body that will require regular reports from States Party. This will provide another mechanism for civil society groups to ensure compliance by national governments with the right to information.

II. National Laws on Access to Information

21. As is often the case with the evolution of human rights, the recognition at the Inter-American Court reflected rather than created a new standard. In the years between 1946 and 2006 the right of access to government-held information has been evolving at an increasingly rapid pace, and very much from the ground up.
22. Evolution of the right to information at the national level moved on apace in the intervening years with over 70 countries adopting freedom of information laws between 1946 and 2007.
23. After the early outlier of the Swedish law, development of the right can be characterized by three main waves. In the first wave, leading democracies introduced laws on the right of access to government documents or records. For instance, Finland passed a law on the right to information in 1951; the United States passed one in 1966, with amendments in 1974 following the Watergate scandal; Norway passed its legislation in 1979; and France and the Netherlands passed theirs in 1978. These laws codified administrative procedures for providing information to the public and focused on administrative bodies, rather than executive, legislative, or judicial bodies. Significantly, these laws enshrine one of the core principles of the emerging right to information: that requestors do not need to justify their interest in the information sought. Nevertheless, they do not recognize access to information as a human right, but rather seek to codify a privilege granted by the public administration.
24. In the second wave, from the 1980s to the early 1990s, democracies in other parts of the world created laws supporting access to information. Countries in this wave include Australia and New Zealand in 1982 and Canada in 1983. European countries adding access to information laws in this period include Austria, Belgium, Denmark and Portugal. In Australia, Canada and Portugal, the new laws introduced information commissioners, whose mandate is to oversee implementation and compliance. However, recognition of the right in these laws is not absolute and other limitations apply, such as in Canada where only citizens and residents can request information.
25. The third wave was generated by the seismic political shift that brought down the Berlin Wall: Hungary became the first post-Communist country to adopt a law on “Protection of Personal Data and the Publicity of Data of Public Interest” in 1992. The law became a new model, with its short, 15-day timeframe for receiving information. It also included explicitly defined exemptions and established an oversight mechanism, the Parliamentary Data Protection and Information Commissioner, who must be notified of refusals to provide information. Throughout the 1990s, the post-communist leadership of Central and Eastern Europe (CEE)

and the former Soviet Union adopted access to information laws. From the Baltics to South Eastern Europe to the Caucasus, governments motivated by greater integration in bodies such as the European Union and under pressure to fight the burgeoning corruption that accompanied the rapid shift to market economies, responded to civil society demands for a legal framework to guarantee open government.

26. These new laws and the constitutional provisions that are linked to them are stronger instruments, often recognizing a right to government-held information. In 2000, the international community recognized the emerging and more rigorous standards when it required Bosnia and Herzegovina to adopt an access to information law. All the post-Communist countries that entered the EU in May 2004 have access to information laws. The same is true of a dozen other countries in the region, including Albania, formerly the most closed country in Europe.
27. The newer access to information laws also captured the lessons learned during implementation of earlier legislation. The scope of the newer laws became broader: For example, Bosnia's law covers all branches of government and all bodies performing public functions and Slovakia's law covers bodies receiving public funds. The time frame stipulated in the laws for delivering information gradually became shorter, dropping to as few as five days in Estonia.
28. These trends have been mirrored in Latin American countries, where new laws have been adopted as part of democratic reforms in countries such as Mexico (2002) and Peru (2002). The Mexican law is seen as one of the strongest models at a global level, with its recognition of a right of access, a strong emphasis on proactive publication of information, a strict procedure for any refusals to release information, a clause which specifically prohibits withholding of information linked to human rights violations, and a well-resourced Commission that oversees the implementation of the law, including holding public hearings to review appeals against refusals and the power to issue binding decisions which cannot be appealed by the public body (but can be by the requestor given that the right to information is a fundamental right which can be appealed to higher judicial levels and ultimately to the Inter-American court of Human Rights).

Access to information in national constitutions

29. It is not only at the level of laws that the right to information has evolved. An increasing number of constitutions around the world explicitly recognize the right to government-held information. Within Europe, of the 47 member states of the Council of Europe, 37 have constitutional provisions on freedom of information, with 24 of these constitutions providing a right of access to either documents or information⁴.
30. Some countries such as Norway recently amended their constitutions to give full recognition to the right. As of 2004, the Norwegian constitution establishes that:

*Everyone has a right of access to the documents of the State and of the municipal administration and a right to be present at sittings of the courts and elected assemblies. The law may prescribe limitations to this right in regard of the right to privacy or other weighty considerations.*⁵

III. Access to Information in Exposing Human Rights Violations.

31. A crucial question for consideration is whether the right of access to information is yet serving as a tool for exposing violations of human rights.
32. The right to the truth about human rights violations in the past has been a focus of the work of human rights activists and has received some support from national courts. For example, in Uruguay, in a case in which a mother was seeking information about the disappearance in 1976 of her daughter, the Supreme Court of Justice in 2000 ruled that “it is clear that the right to information claimed in this case is linked to the disappearance of a child and the clear and manifest denial by the state of this information request is resulting in the denial of a human right which is essential to permit the plaintiff to know the whereabouts of her daughter.”⁶
33. The recognition that access to information can play such a role in protecting human rights has been set out explicitly in a number of recent laws which specifically prohibit government bodies from withholding information about human rights violations and other abuses of office. Such provisions have been adopted in situations of a transition away from a period of past human rights violations or in the context of some form of national truth and reconciliation process.
34. Mexico’s 2002 Law on Transparency and Access to Public Information provides at Article 14:

“Information may not be classified when the investigation of grave violations of fundamental rights or crimes against humanity is at stake.”
35. This provision was used to force the disclosure of prosecutors files against former President Echeverria for his part in the 1968 Tlatelolco massacre of student, files which showed, *inter alia*, that some members of the paramilitary squadron the “Falcons” had told prosecutors they had received special training in the United States, Japan and Europe.
36. *A similar provision in the Peruvian Law 27806 on Transparency and Access to Public Information (2002) establishes* that information related to investigations into violations of human rights may not be withheld for any reason. Article 18 of the law states that:

“ information may not be considered as classified if it relates to violations of human rights or the Geneva Conventions of 1949 committed under any circumstances by any person. None of the exceptions [in this law] may be used in violation of the [rights] established in Peru’s Constitution.”
37. Such provisions are important tools for those working in defence of human rights. In Peru, for example, this article have contributed to securing access to information about anti-terrorist operations against the *Sendero Luminoso* guerillas in the 1980s and 1990s. For example, in May 2003 the NGO IPYS requested criminal investigation files related to the massacre which took place in the Lurigancho detention centre in 1986. The prosecutorial files, which had been opened in 1986 but closed in 1990, revealed the names of the military commanders alleged to have killed the prisoners, the names of the persons investigated and details of how the crime was committed.

38. To the extent that anti-corruption activists succeed in establishing that there is a right to be free of corruption and that acts of corruption are violations of human rights, then the legal provisions and jurisprudence that requires disclosure of information relating to human rights violations should also apply to information about corruption.
39. In addition, some laws have similar provisions that also apply to corruption, for example the law of Trinidad and Tobago at Article 35 establishes that:
- Notwithstanding any law to the contrary a public authority shall give access to an exempt document where there is reasonable evidence that significant -*
- (a) abuse of authority or neglect in the performance of official duty;*
- (b) injustice to an individual;*
- (c) danger to the health or safety of an individual or of the public; or*
- (d) unauthorised use of public funds,*
- has or is likely to have occurred and if in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so.*
40. The majority of access to information laws do not have such specific provisions but nevertheless most do establish a public interest test whereby access to a document that might fall under a restriction (such as protection of privacy or protection of national security) should be granted if there is a strong public interest in the information. It is clear that information related to past or ongoing violations of human rights should meet such a test and be disclosed.
41. In Bulgaria multiple filing of requests and use of litigation in the courts to force disclosure of information resulted in a Bulgarian investigative journalist being able in 2005 to identify in government files the name of the killer of Bulgarian dissident Georgi Markov, murdered with a poisoned umbrella in London in 1978. The killer was named as Francesco Gullino, a Dane of Italian origin. The information that led to this unmasking of the killer, and the Bulgarian officials who ordered the assassination, resulted from the filing of numerous information requests under Bulgaria's 2000 Public Information Act and litigation to press the Ministry of Interior to release some key files. As political analyst Ivan Krustev commented: "The killing of Georgi Markov was [a] physical killing [and] it was a killing of hope that truth can be learned." Using the Access to Public Information Act, these murders were solved.⁷

Current and ongoing violations

42. Exposing past violations is one thing, but it is highly unlikely that in a country in which a government is in the process of committing serious violations of human rights the information would be available from those same authorities while the violations are ongoing.
43. That said, there are some examples from recent times which point to the utility of access to information laws in exposing ongoing rights violations by the government. In the United States for example, a request filed by the American Civil Liberties Union that resulted in disclosure of information showing abusive Pentagon and FBI surveillance targeting peaceful protest groups in the United States and another request for information about detainees held by the United States overseas which exposed evidence of widespread and systemic mistreatment of prisoners in US detention facilities in Guantanamo Bay, Afghanistan and Iraq. A further request for information

regarding the use of torture filed in October of 2003, which has already resulted in the release of over 100,000 pages of documents.

44. The violations of human rights related to the war on terror have sharpened concerns about the need for access to government information needed to defend against human rights violations in countries where this had not been an issue during recent years. In western Europe for example, the scandal over CIA extraordinary rendition flights lead to calls for a requirement that governments divulge relevant information both to their publics and also to their parliamentarians and to intergovernmental bodies. The need for such information was stressed in public statements by the Committee on Legal Affairs and Human Rights' *Ex Officio* representative Dick Marty during his investigations into the network of illegal CIA prisons in Europe and the problems he had investigating extraordinary renditions⁸ Dick Marty repeatedly called on governments to be more open on this issue: "These states could have established the truth long ago" and urged them to conduct "transparent investigations". In the meanwhile requests for information filed in countries where the CIA flights were alleged to have passed, such as Romania, failed to secure relevant information and met with the ongoing denial by the Romanian government that such activities took place [footnote and full reference needed].

45. It is clear that one of the human rights and access to information battles in the near future will be related to government activities in the so-called war on terror – both issues related to the treatment of those suspected of terrorist activities and also the broader civil liberties impacts such as the problems created by increased surveillance of all members of the public. Civil liberties activists are using access to information laws to ensure that the public is informed about such surveillance. In Hungary for example the Hungarian Civil Liberties Union has used the 1992 Freedom of Information law to secure information about the location of CCTV cameras in Budapest [footnote and full reference needed].

IV. ACCESS TO INFORMATION AS AN ANTI-CORRUPTION TOOL

46. The anti-corruption movement has strengthened calls for greater transparency as a means for rooting out and preventing corruption. It is argued that if more information is available to civil society groups and to the media, then wrongdoing and diversion of funds will be exposed and corruption will be reduced. On the other hand, skeptics argue that these are mere mantras of civil society activists and that that it is unrealistic to expect the passage of an access to information law to result of in the disclosure of information which will expose corrupt practices within government: public officials engaged in corrupt practices will simply become more careful about hiding – or not creating - compromising documents; only information of no consequence will be released.

47. Many of the new access to information laws have been adopted in countries where government secrecy had previously been the norm and where corruption had flourished behind closed doors. Much important information about the inner-workings of government is being released. Public knowledge of administrative processes and citizen participation in decision-making is increasing as a result.

48. There are also some very strong examples from around the world about how access to information has been used in exposing corruption which are presented in Box A. These examples show how civil society groups around the world from countries as diverse as Mexico, Japan, the UK, Bosnia, India and the Philippines have made use of access to information laws to identify corrupt acts. There are also examples from Chile and Bulgaria of how an individuals, often those acting out of private interests, can use access to information laws to secure disclosure of information which identifies malpractice in government and which therefore has a wider public resonance. In some cases, the exposure of corruption has also resulted in legal action from the authorities such as from the public prosecutor or another authority which has picked up the case and prosecuted or in another way sanctioned the illegal activity.
49. Such cases as these are widely touted by anti-corruption and access to information activists to demonstrate to the public the need for access to information laws. The reality, however, is that these cases represent only a tiny percentage of the information that results from all the requests filed every year. Most requests for information result in the release of information by which the requestor gains some greater insight into the functioning of government and starts to collect information which may enable investigation into corruption but which does not per se reveal corruption. This can be seen from the work of civil society groups such as the Fair Play Alliance in Slovakia or MANS in Montenegro who have filed literally thousands of requests in their work to build up a clearer picture of issues of conflict of interest in government. Similarly, the case study from Mexico presented in Box A in which the tracking of funds destined for HIV/Aids patients also revealed one case of corruption resulted of a systematic programme of request-filing and litigation that involved dozens of information requests.
50. It should also be taken into consideration that the majority of access to information requests filed under the new access to information laws, are not filed by anti-corruption activists but by private persons protecting their own interests. In the United States after 40 years of the implementation of the FOIA, the data shows that under 10% of requests are filed by journalists and civil society groups respectively. The vast majority of requests are filed by private businesses (or lawyers acting on their behalf) interested in information such as government public procurement processes. The same is now true in Mexico under its new law where approximate data (requestors are asked voluntarily to disclose their identity and professional affiliations but it is not a requirement) show that around 10% of requests are filed by the media, about 20% by civil society and over 30% by business requestors. In the UK as well, while there have been recent debates over the burden that voluminous requests from journalists and NGOs place on government, the reality is that these do represent a minority requests.
51. This then begs the question of whether access to information laws are indeed such a powerful tool for anti-corruption work as they are claimed. It is the submission of this author that the power of access to information laws to reveal corruption is relatively limited. There is even the risk that by promoting access to information as a primary tool against corruption, the responsibility for rooting out corruption shifts from proper authorities within government (such as the prosecution service and the courts) to civil society.
52. For this reason, it is recommended that the new emphasis of the anti-corruption movement should not be so much on access to information as a tool to identify cases corruption but rather

as a prevention mechanism which reduces the space in which corruption can occur. For this prevention mechanism to function, there has to be a significant increase in the volume of information which is automatically available to the public, and there has to be a clarification of which classes of information should be disclosed without the need for filing information requests and certainly without the need for lengthy court processes to secure the information.

53. For example, it has become standard practice in countries that have access to information laws (which is now the majority of established and emerging democracies) that certain basic information about the functioning of government such as the organizational structure of each government department and at least basic budgetary information should be made available.
54. A recent survey of the proactive publication provisions of 23 countries in the Council of Europe region (including 13 members of the European Union)⁹ gives a good picture of the categories of information whose proactive publication is typically required under new access to information regimes:
 - Information relating to the **organizational structure** of a public body - at least 17 countries;
 - Information on the **budget** of the public body must be made public by that body in at least 11 countries (others note that publication of budget and other financial information is often available from a centralized source);
 - Information on the **functions, activities**, decisions taken and formal acts issued - at least 17 countries;
 - Information on decision-making procedures and mechanisms for public participation in decision-making – at least 17 countries;
 - Contact information for the **information officer** and/or information on the mechanisms for accessing information - at least 18 countries.
 - An **index or register of information held**, or of the classes of information held, by each public body - at least 14 countries.
 - Information on **public procurement procedures** both before and after the issuing of a contract must be made available in at least 11 countries under the access to information and/or public procurement laws, with additional countries having requirements of transparency in their public procurement legislation.
55. It is through such proactive publication of information complemented by information requests relating to specific issues that the space in which corruption can occur will increasingly be reduced. It is however very hard to find data that gives a quantitative measure of the impact of such transparency on levels of corruption. One of the problems is that the only real tool for giving a quantitative measure of corruption is the measure of perceptions of corruption. Notoriously unreliable, there is even evidence that the perception of corruption sometimes increases during a period of government reform because more corruption cases come to light and so to the public's attention. Nevertheless, it seems clear that if government operations such as public procurement take place in full view of the public, it is much harder for backroom deals to fix the outcome of such processes.

56. The next question that arises is what support there is in international law for the greater proactive publication of the necessary classes of information for transparency laws to have the necessary beneficial impact on corruption.
57. The provisions of international law already examined in this article focus on the right of the requestor to solicit information rather than on automatic disclosure. The forthcoming Council of Europe treaty may contain an article on proactive disclosure but it is possible that rather than setting even a minimum standard, it will be left to ratifying states to declare which information they will make available without the need for the public to file information requests.
58. There are however other international instruments that do provide more detail on what kinds of information should be disclosed. These include the anti-corruption treaties such as the United Nations Convention Against Corruption (UNCAC), which contains provisions requiring States Party to commit not only to the principle to transparency but also to establishing mechanisms to ensure respect for the right of information. UNCAC also contains provisions that require public disclosure and dissemination of specific information relating to the functioning of the administration and its anti-corruption measures.
59. These provisions are important because they set standards that are not met in practice and/or in law in the majority of signatory countries. For example, research shows that there is no commonly agreed standard for the level of detail that must be included in budgets released to the public, nor in the content of key anti-corruption documents such as declarations by public officials of their assets or of conflicts of interest. Indeed, there is not even a common standard on who has to submit such declarations and whether they should be made publicly available. The World Bank gathers data on such assets declarations but does not impose a standard for their collection and publication.
60. The same is true for other key documents such as information relating to the public procurement process and government contract. Whilst national level jurisprudence establishes that information contained in contracts should be released, there is as yet no common comparative standard. This is an area where much work could usefully be done in order to promote coherent government policies and to set at least minimum standards.

V. POLICY RECOMMENDATIONS

61. For the right of access to information to function effectively as a tool in the fight against corruption, violations of human rights and other abuses of power, there are at least two areas in which it needs to be strengthened:
 - 1) Ensuring minimum standards for access to information laws and ensuring that all laws contain a public interest test. Much work has been done in this area and yet with access to information only recently having been recognized as a right, greater clarity is needed on the implications of that right for national access to information laws. For example, some laws and the future Council of Europe treaty exclude the judiciary from the scope of the right to request information. If access to information is a right and if it is to serve as a tool for

fighting corruption and human rights violations, it is imperative that access to judicial information is included in its scope.

- 2) Clarifying and establishing international standards on the information which must always be made available, generally proactively, with an emphasis not just on the general need for information but the detailed standards on which information should be revealed. This includes information about the financial management of state, including budgetary information and information about all stages of public procurement processes. It also includes information about declarations of assets and of conflicts of interest by public officials, and other information gathered by governments under the rubric prevention of corruption.
62. Civil society's role should be to continue research into the information that is currently available and the functioning of access to information laws in order that it can engage with national governments and inter-governmental bodies in promoting such standards.

Box A: Examples of how Access to information laws have helped expose corruption

a. Mexico – Public Spending on Education

63. The Mexican freedom of information law which came into force in June 2003 requires that certain information including detailed budgets be published automatically by all bodies covered by the law. Such automatic publication requirements are typical of the new generation of FOI laws. One of the bodies covered by the new Mexican law is a publicly funded university called the National Polytechnic Institute (Instituto Politecnico Nacional – IPN), whose recently-appointed director seized the opportunity of the new law to back up his efforts to combat the status quo of corruption and nepotism typical of the Mexican education system. In September 2003 the IPN 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 IPN's archives revealed letters from its directors to the head of human resources requesting bonuses which had no legal basis and often exceeded the basic salary of the employee. The Director of Public Relations, for example, had been awarded a bonus of 254,358 pesos (\$25,000) on top of his basic salary.
64. In addition to over-inflated salaries the IPN's budget revealed suspiciously high spending on goods and services – for example one budget line for “bags” came to a total of 4 million pesos (\$400,000). The clean-up operation by the IPN's new director not only resulted in the dismissals of the worst offenders but - perhaps more importantly – 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.

b. Mexico – Access to HIV/Aids Treatment

65. The monitoring of public spending in Mexico by the NGO Fundar has made active use of the right to information under Mexico's 2002 access to information law as well as bringing together a diversity of other information sources of information, including that published on government websites and from institutions receiving funding, such as hospitals. For example, Fundar tracked the spending of 600 million (approx. \$60 m) of federal funds for treatment of HIV/Aids and found that some hospitals with large numbers of HIV/Aids patients were receiving less money than those with fewer patients; and some hospitals received no funds at all in spite of treating patients. This resulted in reallocation of funds by the **Secretaría de Salud**.
66. As a result of information requests filed to track the disbursement of the funds, Fundar also found that 30 million (approx. \$3 million) of funds earmarked for promoting women's health and HIV/Aids prevention had been allocated to the organization Pro-Vida. In addition to evidence of nepotism and corruption in the allocation and use of the funds, it was found that more than 80% of the funds had been used by Pro-Vida to hire public relations companies for campaigns against supply of contraceptives to women. As a result of the ensuing scandal, the **Secretaría de Health** requested reimbursement of the funds and the Secretaría de la Función Pública has started criminal investigations.

c. Philippines - Ousting a Corrupt President

67. In some instances the use of access to information to public records has brought down corrupt political regimes. A good recent example is the work of the Philippines Centre for Investigative Journalism (PCIJ), which in 2000 began a major investigation into the personal wealth of President Joseph Estrada. The PCIJ reports that "the coffeeshops were already buzzing with talk of fancy mansions being built for presidential mistresses and of Estrada taking cuts from various business deals", but no serious investigative journalism had been done to substantiate the rumours.
68. The PCIJ's work included painstaking research in areas where the allegations were most likely to be linked to documentary evidence: the acquisition of real estate and the formation of companies by members of Estrada's family. Such transactions entail filing papers with various government authorities and although the Philippines does not have an access to information law, the PCIJ was able to use the combination of existing mechanisms for accessing information and precedents established by litigation under a constitutional guarantee of access.
69. The PCIJ's story is nevertheless indicative of the problems facing investigative journalists in the absence of full access to information laws: to get corporate registration records at the Philippines Securities and Exchange Commission (SEC), researchers had to start queuing at the SEC office as early as 7 in the morning and would sometimes only receive the documents five or six hours later. Moreover, each researcher was allowed to access only three corporate records a day. This became particularly time-consuming as searches using SEC computers yielded 66 corporations in which the President, his wives and various children were listed as incorporators, board members or substantial shareholders. It took the PCIJ more than two months of lining up at the SEC office to obtain the records of all these corporations.

70. Piecing together the evidence, the PCIJ gradually identified 17 pieces of real estate, many of them exceptionally opulent mansions, often registered in the name of shell corporations formed by close associates of the President. The journalists then interviewed local residents, building suppliers and interior designers, enabling them to estimate the vast sums of money being expended on these buildings, and also to confirm the presence of the President and his mistresses. As the articles about the mansions gradually appeared in media, the journalists received information from an ever more engaged and outraged public, including through anonymous tips through phone-calls, e-mails, documents and photographs. The connection between these properties and the President seemed to be just the tip of the corruption iceberg.

71. As the momentum of the anti-corruption campaign built up, the mainstream media increasingly covered these and other revelations. When the Philippines House of Representatives eventually voted to impeach the President, three of the reports by the PCIJ were cited in the debate.

d. India - Defending Social and Economic Rights of the Poor

72. 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 where local government officers were diverting funds destined for development projects. The persistent demands for information by Rajasthan civil society groups and villagers came in the absence of an access to information act and resulted in the passage of a state-level law, as well as contributing to the campaign for the adoption of the federal legislation.

73. Mazdoor Kisan Shakti Sanghatan (MKSS), a workers and farmers solidarity group, works in Rajasthan, one of India's least developed states. In the course of their efforts to get fair working conditions for daily wage earners and farmers in the region, MKSS workers realised that the government was exploiting villagers. Not only were they being denied minimum wages, they were also not receiving benefits from government-funded developmental activities earmarked for the area.

74. Under the slogan 'Our Money-Our Accounts', MKSS workers and villagers organised themselves to demand their local administrators provide them with an account of all expenditure made in relation to development work sanctioned for the area. In the absence of a legal right to access the records, local officials, long-used to holding villagers in thrall and never being questioned, dug in their heels and refused to provide the documents. MKSS resorted to peaceful mobilisation to increase the pressure to release copies of official records - they organised sit-ins, public demonstrations and hunger strikes. While there was resistance at all levels, little by little, as the pressure continued and the media began to take notice, the administration relented and eventually provided the information requested.

75. MKSS used the information disclosed to organise 'social audits' of the administration's books. They organised public hearings to see if the information in the government's records tallied with the reality of the villagers' own knowledge of what was happening on the ground. Not surprisingly, it did not. At each public hearing, a description of the development project, its timelines, implementation methods, budget and outputs would be read out along with the

record of who had been employed, how long they had worked and how much they had been paid. Villagers would then stand up and point out discrepancies – dead people were listed, amounts paid were recorded as being higher than in reality, absent workers were marked present and their pay recorded as given, and thumb impressions that prove receipt of payments were found to be forged. Most tellingly, public works like roads, though never actually constructed, were marked completed in government books.

76. 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. Local officials reacted badly. Determined to undermine the people's campaign for accountability, they appealed to class, caste and clan loyalties and even resorted to threats and violence. But 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. Public pressure grew as the local and national media covered the campaign extensively. The government eventually issued administrative orders implementing the right to get copies of local records. The main opposition party promised in its manifesto to create a state level law that would guarantee the right to access information. In power, it took three years to bring it on the books, and only after further advocacy and input from MKSS and the National Campaign for People's Right to Information, but Rajasthan does now have an right to information law.
77. An additional outcome of the work by MKSS in Rajasthan has been the institution of the concept of public audits carried out by reading out documents. In a recent exercise, this approach was used to correct the electoral register in Rajasthan – a major task, it nevertheless proved to be one of the most efficient ways of updating the register, and resulted in 7 million changes, in a state with a population of 57 million. In countries with low literacy and rural populations not used to operating with written records, this oral approach to access to information is providing a model whose application activists in other developing countries are now considering.

Case study supplied by the Commonwealth Human Rights Initiative

e. Bosnia – Diversion of Cultural Funds

78. In Sarajevo, the orchestra leadership has been exposed to fraud and abuse of labour rights. The director and conductor of the orchestra, Emir Nuhanović, has been misusing public funds for private gain for the past 3-4 years. As the orchestra is a public institution associated to the Canton Sarajevo Ministry of Culture and Sport, it receives an annual subsidy.
79. Nuhanovic engaged musicians from abroad. He transferred enormous amounts of money to them which he later on split with them. He further signed contracts with sponsors and pilfered parts of the money for private gain. In addition, orchestra funds were wrongly used to establish a NGO that organised a music festival instead of making music.

80. Three musicians of the Sarajevo Orchestra found out about the acts of corruption. When they pointed publicly at the misuse of public funds over the course of the last 3-4 years they were dismissed by the Orchestra Director.
81. These victims of corruption contacted the Transparency International Advocacy and Legal Advice Centre (ALAC) in Bosnia and Herzegovina to seek legal advice how to file an official complaint against the Director and how to best advocate for systemic change.
82. Legal professionals from the ALAC immediately identified the offences as acts of corruption and contacted the responsible institutions with the request to swiftly check the received evidence of corruption. ALAC further provided solid legal advice to the complainants and enabled them to put forward a lawsuit against the orchestra administration on the grounds of violation of the Freedom of Information (FOI) law. In addition, the ALAC helped complainants in protecting their labour rights.
83. To date, the case is not resolved and still under investigation. The Canton Ministry of Culture and Sport keeps on denying any responsibility for the misuse of public funds. Until now there has not been any reaction by a representative of a higher level of government.
84. Due to the public exposure of the case by the local media, the attention of the prosecuting authorities was caught and they became active in this case. It is considered a success that the Canton Prosecutor initiated criminal charges against the Director of the Orchestra. Furthermore, the Bosnia and Herzegovina State Ombudsman has adopted fifteen decisions against the orchestra leadership on the grounds of violation of the FOI law.

f. Bulgaria

85. The Access to Information Programme runs a hotline and provides legal assistance to members of the general public, some of whom have also used the Bulgarian Access to Information Law to expose corruption. One such is Ivaylo Ganchev, who in early 2003 was passing through the Ministry of Science and Education when he noticed that a private company was displaying its advertising banners in the lobby. Suspicious of the circumstances in which this public space was being used for private commercial reasons – he suspected links between the Minister and the owners of the company - he filed a request for documents relating to the rental of the lobby. When the Ministry failed to provide him with this information, he turned to the Access to Information Program for legal assistance and an administrative appeal was filed.
86. In response to this appeal the Ministry claimed that no information could be disclosed to the requester because the relevant documents had already been transferred to the State Archives and **we** no longer in the possession of the Ministry. The Access to Information Program then turned to the director of the State Archives, requesting information about documents received from the Ministry of Science and Education. The State Archives responded that the last documents sent from the Ministry to the archives were dated 1991! When this information was presented in court, exposing the lie, the Minister's lawyer conceded that in fact no contract had been signed for renting the public lobby to the private company. Although no criminal prosecutions or resignations have yet resulted from this exposure of

wrongdoing, it is a good example of how civil society can hold government accountable reducing the space in which is possible for corruption to occur.

87. In developed democracies, where public opinion carries greater weight, the disclosure of such scandals routinely leads to public officials being forced to resign from their posts. In a recent example from 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 commuting from his home in one part of Canada (Edmonton) to his office in another (Ottawa). Such developments have a precedent in Canada: in a case from the 1980s, a government minister was forced to resign after the media used the Access to Information Act to reveal that she had spent five days in Paris at public expense to attend a one-hour meeting. The potential consequences for politicians when such scandals are exposed by citizen watchdogs is a powerful mechanism for discouraging abuse of office.

g. Chile

88. When the Chilean gas company Gasandes received a concession from Chile's energy regulator (the Superintendencia de electricidad y combustibles) to build a gas pipeline from Chile to Argentina, it took the liberty of also building a telecommunications line alongside it, something it could later sell for millions of dollars. According to a law, Gasandes should have obtained a concession for this from the telecommunications regulator, and, given the for-profit nature of the telecommunications line, should have increased the level of compensation paid to the landowners over whose property the pipelines were running. Hence, by not complying with the law, Gasandes was saving money due both to the public purse and private landowners. All this was done in secret.
89. A landowner with only a few kilometers of land traversed by the pipelines became suspicious as to what was actually going on, and she used the relatively limited access to information provisions of Chilean law, which are part of the probity law, to seek documents which would verify the existence of a telecommunications line. After six months of waiting for information which did not come, the landowner hired a public interest lawyer to sue both for the documents and for a judicial declaration that the electricity regulator was failing to ensure compliance with other aspects of the probity law. As a result, the regulator investigated the problem, fined Gasandes \$20,000 and ordered it to put in order the legal status of the pipelines. The regulator was also ordered by the court to publish on its website all the relevant documents, thereby ensuring that not only the litigating landowner, but all others affected could be aware of the situation.

Box B: Access to Information under UNCAC

1. Adoption of Access to Information Laws: Article 13 of UNCAC, which is dedicated to promoting the participation of society, specifically requires States Parties to ensure “effective access to information” for the public. Furthermore, States Parties are required (Article 10) to adopt procedures or regulations that allow members of the general public to obtain information that on the “organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public.”

Article 13 of UNCAC also contains a requirement that States Parties respect, promote and protect the “freedom to seek, receive, publish and disseminate information concerning corruption,” subject to the restrictions provided by for international law. In light of the Inter-American Court of Human Rights decision cited above (*Claude Reyes and others vs. Chile*, Inter-American Court Decision of 19 September 2006) this provision can be interpreted as imposing an obligation on States to release information concerning corruption should it be requested and also to publish it proactively if they are to be in compliance with UNCAC.

2. Transparency of Specific Information

UNCAC identifies a number of classes of information that should be made publicly available to assist the fight against corruption and in order for their to be effective government accountability. The required transparency includes:

(i) Employment of Public Officials: There shall be transparency with respect to the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials (Article 7). The elements of public sector employment outlined in Article 7 include in particular that there shall be objective criteria such as merit, quality and aptitude (Article 7.1.a) and adequate remuneration and equitable pay scales (Article 7.1.b)

(ii) Conflict of Interest-related Information: States Parties are required to “endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.” (Article 7.4)

(iii) Public Administration: States Parties are required to enhance transparency in the public administration with regard to its organization, functioning, and decision-making processes (Article 10).

(iv) Decision-making process in government: States are required (Article 13.1.a) to enhance the transparency of and promote the contribution of the public to the decision-making process.

(v) Public Sector Finances: States Parties are required (Article 9.2) to promote transparency and accountability in the management of public finances. This is to be achieved by, *inter alia*:

- (a) Procedures for the adoption of the national budget;
- (b) Timely reporting on revenue and expenditure;
- (c) A system of accounting and auditing standards and related oversight;
- (d) Effective and efficient systems of risk management and internal control;

(vi) Public Procurement: States Parties are obliged (Article 9) to ensure that systems of public procurement are based on the principle of transparency. This should be achieved by:

- public distribution of information relating to procurement procedures and contracts

- publicly available information on invitations to tender
- publicly available information on awarding of contracts
- clear rules for the tender process
- clear, objective and predetermined selection and award criteria
- rules for publication of tender announcements
- submission of assets declarations of those involved in public procurements

(vii) Election Campaign Funds / Political Parties: States Parties are required to “enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties” (Article 7.3).

END NOTES

¹ Sweden: His Majesty’s Gracious Ordinance Relating to Freedom of Writing and of the Press (1766) as cited in “The World’s First Freedom of Information Act” published by the Anders Chydenius Foundation 2006, ISBN 952-99519-2-2 see http://www.chydenius.net/pdf/worlds_first_foia.pdf

² United Nations Resolution 59(I), *adopted* 14 December 1946, U.N. Doc. A/RES/59/1/1946 see Resolutions Adopted By The General Assembly During Its First Session <http://www.un.org/documents/ga/res/1/ares1.htm>

³ Inter-American Court of Human Rights, *Claude Reyes et al. v. Chile*, Judgment of September 19, 2006 paragraph 77.

⁴ see Access Info Europe, Briefing Paper on Access to Information: A fundamental right, a universal standard. January 2006. Available at www.accesss-info.org.

⁵ Norway’s Constitution , Grlbest. 29 okt 2004 nr. 1402, Article 100.

⁶ see case of Maria del Carmen Almeida de Quinteros, Supreme Court of Uruguay – **full reference needed**.

⁷ See the Access to Information Programme, Bulgaria, at www.aip-bg.org citing also www.novinite.com.

⁸ See the Council of Europe’s dossier on this issue at <http://www.coe.int/T/E/Com/Files/Events/2006-cia/>.

⁹ Access Info Europe, Article 19 and the Open Society Justice Initiative, Briefing # 2 regarding the elaboration of a Council of Europe Treaty on Access to Official Documents, June 2007. Available at www.access-info.org