Observations of the
Nicaragua Draft Access to Information Law
November 2005

Nicaragua continues to focus on the passage of a comprehensive and effective access to information law. Since our last submission of observations in 2004, the draft access to information law has undergone a number of changes with the latest version emitted by the Congressional Justice Commission in July 2005.

In addition to revisions in the draft law, civil society organizations and the presidency have made a number of advances in raising the awareness of the value of access to information and beginning efforts to implement a voluntary access to information strategy in five pilot entities.

We once again welcome the opportunity to submit observations on the latest draft of the act, based on emerging international standards and experiences from over 60 countries worldwide that enjoy a right to access to public information. We respectfully provide these comments in the spirit of cooperation as Nicaragua seeks to ensure the broad exercise of this fundamental human right. These observations are neither exhaustive nor specific to the Nicaraguan socio-economic and political context. Rather, it is our hope that these general ideas can be used as an additional input for consideration and debate. As always, ultimately, it is the Nicaraguan people and their representatives who will undertake the difficult task of creating an access to information law that satisfies their needs and realities.

In general, this latest draft of the access to public information law has advanced greatly in terms of form and substance. For the most part, the issue of Habeas Data, a right distinct from access to information, has been removed from the text of this draft (although there remain a number of unnecessary references to this throughout the draft), the right to information has been extended to all persons, and the exemptions section has undergone some

1. Principles of the Law

As discussed previously, the overarching principle of any access to information law should be one of openness based on the premise that information belongs to the people, rather than the government. The state is simply holding and managing the information in their name. As such, the point of departure should be that:

a. there is a right to information, and
b. all public information is accessible, except under very clear and strict conditions.

The latest draft has improved greatly in the area of principles. It has removed the previous limitations which only granted the right to information to Nicaraguan citizens and has made this law available to all persons. However, in changing the terminology, the legislature removed another key phrase which stated that the information “pertains” to the people. Now the law, in Article 2, suggests that public information is considered a good of the public interest accessible to whoever requests. Although not inherently conoiT mya-0.0003 y

The main objectives of an access to information law are to facilitate the exercise of this fundamental human right, to allow persons to understand the policies and workings of those that hold power so as to ensure that they are held accountable for their decisions, and to promote the potential for greater participation in the democratic society. It is argued that in order to meet these objectives, one must have access to the same information and documents as available to the state and used in the decision-making processes. As governments are increasingly ceding areas of power to the private sector, transparency advocates contend that these non-public bodies also should be covered under the access to information act.

But the addition of private bodies under the scope of this legislation does not alter the nature of the body. Simply put, just because a private entity may be included under the scope of the act does not make it a public entity. Moreover, unlike a public body that must make all information available, the scope of the information that this non-public entity must provide should be limited.

For example, it is argued that if a company received a public contract to build a school as well as receiving a private contract to build a private home, the documents related to the school should fall under the scope of the access to information law (as they relate to public monies) but the private contract should not. In other words, under this line of reasoning, the responsibility of a non-public entity would be limited to information related to the provision of the public services or management of public funds and the rest of their information would remain private.

In Article 3(c), the definition of public institution or entity includes private bodies when receiving public funds or supporting public institutions. This definition appears to conflate “public body” with “public information.” As discussed above, although a private entity that manages state funds may have public information in relation to those funds, the body itself remains one of a “private” nature. In addition, the term “acts in support” of a public entity may be excessively broad and thus impose unfair measures that are impossible to implement.

The inclusion of private bodies under an access to public information law is an area that continues to receive much attention and debate around the world. Some of the older laws contain no mention of private bodies, while others such as South Africa prove a comprehensive right to all privately held information, where access to that information is “necessary to protect or exercise a right.” Although perhaps agreed that the private bodies that hold public information should be included under the act, some caveats and limitations are justified in relation to the scope of their coverage.

3. Public Interest

In ultimately determining whether a document is exempt from disclosure, the best international practice dictates that a "public interest" test be administered. Under the public interest test, a balancing exercise would be undertaken that weighs the potential harm in releasing the document against the public good in the document's disclosure. Although the principle of a public interest test is increasingly incorporated into access to information legislation, the term "public interest" is rarely defined. Perhaps this is because the determination of what is in the public interest may be ever-evolving or because of the potential harm for misinterpretation if the term is too narrowly defined.

Article 3(o) of the present draft legislation, attempts to define "public interest", and states that it is the value attributed to the reason for the request. Although there is little precedence for what a definition of public interest might include, this is clearly contrary to international norms, as the public interest is based on the content of the document or information and not on the request. It is well-established jurisprudence that the reasons for a request are never pertinent. Thus should the legislature preserve some definition of "public interest" in the act, a debate over the content of this definition may be warranted.

4. Access to Information Offices

The inclusion of high-level access to information offices with clearly defined duties and responsibilities are welcome provisos in the act. If the debate should determine that these information offices are overly burdensome, there could be consideration of an information officer (rather than an entire office) in each entity. The officer could maintain the same duties as outlined in Articles 4-8.

In addition, there could be consideration of a national coordinating body. Experience has shown that this is critical for ensuring effective implementation and continued compliance with the law. Depending on the manner in which the national body is created and the powers vested to it, this entity also could serve to train civil servants as to their responsibilities and increase public awareness of the right to information through public education campaigns.

5. Exemptions

Articles 9 of the draft act captures all of the exemptions to disclosures. This article has undergone major revisions, and is much improved. However, there remain a few areas that might merit additional consideration. Perhaps most important to consider is the right to appeal the classification of information as exempt. Under Article 9, the head of each entity has the authority to classify a document as confidential, and unavailable for release. It appears that the only mechanism for appeal of such a decision is to the Procuradoria General de Derechos Humanos. In debating these sections, one might reflect on the scope of this office and whether it has the authority to mandate a change in classification if there is a finding of incorrect or "over-classification" of documents as exempt.

Moreover, there are some specific subsections of Article 9 which might benefit from additional debate. For example, Article 9(d) allows documents that are received by the public administration under a "promise of confidentiality" to be excluded from disclosure. If a document contains private or commercial information it should be exempted under a specific exemption. But this "promise of confidentiality" could be interpreted quite broadly and arbitrarily. Without additional guidance, this section could become a "catch-all" for any document that the state does not want disclosed. Article 9(f) exempts any document that is expressly considered confidential under any other law. This seems inconsistent with Article 45 which positively mandates that the access to information law is superior to any other law. Moreover, this may allow laws that were not drafted under the principle of openness to override the provisions of this Access to Public Information act, thus serving as an obstacle to receipt of information and making less meaningful this right. And Article 9(g) may be unnecessary as personal information already is exempted under (b), and the inclusion of references to the right to Habeas Data have been otherwise removed from the access to information law (please note potential redundancy with Article 14).

Article 10 provides the public interest test, as described above. However, as mentioned in our last observations, it may be clearer if section (b) and section (c) were reversed, such that the analysis would begin with information that falls under an exemption, a determination of the extent of the potential harm in its disclosure, and then a balance of whether the public interest in its disclosure outweighs the potential harm.

Again, as discussed in previous observations, Articles 11 - 13 are in accordance with the best international practice.

6. Procedures

As with other provisions of the law, the procedures section of this draft has seen some great advances. For the most part, the process as designed facilitates the requestor, and provides simple and non-formalistic measures for requesting and

receiving information. However, in this vein, additional consideration may be given to a few specific provisions, such as:

Article 18 which mandates the inclusion of a photocopy of the petitioner's official identification card with the request for information. For many persons, the need to include a photocopy of their cedula could convert into an unnecessary obstacle in the exercise of their right, as they may not have a cedula or access to a photocopy machine.

Article 21 provides direction on how to request documents. But problematically, it seems to indicate that only requests considered "in the public interest" may be made. By using the term public interest in this way, this provision undermines the principle that information belongs to the people and that there does not need to be any indication of the reason for the request. It should not matter whether the document is in the greater public interest or only of interest to the requester for that person to have the right to access the information.

As stated in our previous observations, in general, modern laws do not attach a fee to the request for information but do require minimal payments to offset the reproduction costs. The Nicaraguan law is **not** in line with the international norms. Article 22 states that requestors may be required to pay for the process of looking for the information and completing the request. The attachment of a fee for processing requests could become an insurmountable obstacle for most Nicaraguans. Although there is some limiting language in this section, it does not obviate the potential confusion and harm. We urge additional consideration of this section, so that the only costs are those for reproduction.

Article 26 as presently drafted is difficult to understand, and may merit review.

7. Enforcement

In our previous submission of observation, we set-out the key mechanisms for effective enforcement of the right to information:

accessible,
timely,
independent, and
affordable.

The manner in which these criteria are met depends greatly on the legal system and context of the country. The mechanisms may range from internal review to an independent appeals body to the high court, or a combination of all three.

In the present draft Nicaraguan law, there seems to be some inconsistency in Articles 27 – 31, which provide the means for responding to denials of

information. While Article 28 indicates that an administrative appeal or amparo is available, Article 30 suggests that the requester must appeal to the Sala de lo Contencioso – Administrativo de la Corte Supreme de Justicia. In addition, there is the issue discussed above relating to the responsibilities and powers of the Procuradoria General de Derechos Humanos.

Without clear and manageable guidelines for ensuring that the right to information is enforceable, the value of this legislation could be undermined. Greater consideration and debate with relation to the way in which an ordinary individual may appeal a denial (whether it be an express denial, administrative silence, or classification of a document as exempt) under this law, is merited.

8. Implementation Time Period

Fully and effectively implementing an access to information law is a great challenge to all state powers and public bodies. When the law goes into effect, these entities should be ready to respond, or requestors will quickly lose confidence and the law's legitimacy will deteriorate. Systems must be established, records must be organized, roadmaps and indexes created, public servants trained, and civil society made aware of the right.

In earlier legislation drafts, the law went into effect immediately upon publication in the official Gazette. In the most recent draft, the time period for implementation has been extended to 90 days. This remains significantly shorter