CIVIL SOCIETY INPUTS
ACCESS TO INFORMATION ACT DRAFT TWO
September – December 2004

I. Introduction

From September through December 2004, a workshop relating to the proposed right to information was held in each department of Bolivia. The workshops were sponsored by local organizations, with the participation of The Carter Center. The stated objectives of each workshop were to discuss the value of access to information, to explore the need for a legislated right to information in Bolivia, and to briefly analyze the second draft of the Transparency and Access to Information law. In total, these workshops were sponsored by 15 organizations, with 612 participants representing 285 organizations.

The methodology used for each workshop was similar, although the length of time of each varied from four hours to seven hours. Each workshop was opened by the local sponsor with a short presentation on the definition of access to information, and the present situation in Bolivia. Following this, either an international expert or Carter Center representative shared the international experiences regarding access to information, and the ways in which this right is being applied in other developing countries such as India, South Africa, Mexico, and Thailand. In seven of the nine workshops, leading Bolivian media personalities spoke of the value of access to information for their profession, but even more importantly how this is not solely a media issue but rather a human right to be enjoyed by all Bolivians. Finally, in the first session, there was a brief overview of the emerging international standards in relation to access to information laws, including for example the need for simplified procedures to request information, clearly and narrowly drawn exemptions, and accessible enforcement mechanisms.

The second half of each workshop was dedicated to analyzing and discussing the second draft of the access to information law. The groups were divided into five to seven subgroups and tasked with the two questions, with each group addressing a different section of the law:

> 1. If you were able to write the provisions of the law related to (specific topic), how would you draft it?

We then provided the group with a copy of the draft bill, and asked:

> 2. Analyzing the same specific topic, what do you like about the draft law and what would you change?

The areas covered were:

a. scope of the law

b. procedures for requesting and receiving information
c. roles and responsibilities of the civil servants
d. automatic publication
e. exemptions
f. appeals procedures and the role of the Ombudsman
g. national coordinating agency or body

At the conclusion of each workshop, there was a report-back and plenary discussion of the group's findings. The Carter Center was tasked with the responsibility of compiling all of the comments received at the nine workshops, and providing a summary of the suggestions to the Presidential Anti-Corruption Delegation. Although impossible to include every idea that was mentioned or discussed, this document attempts to capture the most common themes and areas of coincidence among the departments.

In general, the civil society groups and organizations represented at the workshops agreed that access to information is a fundamental right, that it is a priority for Bolivia, and in addition to a specific statute legislating the right it also should be included as a right in the constitution. Although there were many recommendations for strengthening the draft law, or clarifying certain provisions, there was overall agreement that this draft law was a positive effort to provide the citizens of Bolivia with a right to information.

II. General comments

In addition to the recommendations received relating to specific articles and provisions, there were four general comments regarding the draft law that emerged in each workshop.

1. At each workshop, concern was expressed regarding the quality of documentation in Bolivia, and the potential for Bolivians to use the information to benefit their lives. For example, comments were made as to the need for improved record-making so that the public documents are understandable and complete. In addition, there was general agreement that efforts should be made to provide information in all the main languages of Bolivia, rather than just Spanish. Suggestions from the workshops regarding affordable ways to provide such information included:
   - All information which is to be published automatically could be translated into the three main languages, but specifically requested documents would be provided in the language in which they were originally created; or
   - Information that clearly affects certain groups could be translated and provided in that group's language.

2. The law as presently drafted references many other pieces of legislation. It was suggested that the access to information law be a self-contained document, without reference to provisions in other statutes. There was concern that if one of the other laws were to change, or be amended in some way, this could adversely

affect the access to information law or change its nature and scope. In addition, participants felt that the draft transparency and access to information law was difficult to fully understand because of the myriad of references to other laws. It particularly was noted in the exemptions section. Finally, it was felt that the access to information law, once passed, should be the overriding legislation relating to information and superior to any other law that mentions or addresses the issue of access to information, and this should be clearly stated in the Act.

4. That there is insufficient detail with relation to the processing of information requests, retrieval of information, and provision.

3. Finally, there was general agreement among the participants for a need to reorganize and "clean up" the draft law. Although the comments indicated support for much of the substance of this draft law, the manner in which it is written and organized led to confusion. To resolve some of the duplication (or inconsistencies) and for ease in understanding and applying the law, the groups recommended placing all related issues together. For example, one group suggested that all provisions related to process be placed together, including the issue of costs and manner for requesting information, and that everything to do with civil servants (such as duties, responsibilities, and sanctions) be found together. Moreover, there should be a detailed review to ensure that the numbers are consecutive, that each title is appropriately numbered, and that where there are sections listed within articles, these are consistent and clearly delineated.

IV. Summary of comments by article

There was not sufficient time during the workshop for every article to be discussed in the small working groups, or during the report back and plenary. However, the main articles were broached and the comments provided below:

Title One: General Dispositions

Article 2: Scope

As discussed above, there was concern that this section references other laws, and should these be changed there could be a secondary affect to the access to information law. Moreover, some participants were not certain that the specific provisions referred to in other laws were correct, or the best sections of those laws. In addition the groups agreed that:

a. The laws must cover all the powers of the state, including the legislative and judiciary. At present, it appears that this draft law applies only to the executive branch of government.
b. The access to information law should be wide enough in scope, at a minimum, to include private sector organizations and companies that receive government funds or that provide public services.

Article 3: Legitimacion

Participants preferred the scope of this article to Article 2, but questioned whether there was an inconsistency between the articles. While Article 2 did not mention the private sector, Article 3 states that all persons have a right to request and receive information from semipublic or private bodies that receive, participate or manage state resources. The groups suggested that Article 2 be drafted to more closely mirror Article 3.

Article 4: **General Principles of Administrative Activity**

The group was in agreement with this provision and its affirmation that the civil servants should serve the interests of the collective.

Article 5: Specific Principles of the right to Access to Information

This article received a number of suggestions for improvement, as listed below:

a. some groups felt that the phrase "information veraz, completa, y actual" should be included, rather than simply stating information
b. Publicidad: one group felt that this section was unnecessary and served to confuse the issue, particularly when discuss "principle of publicity." The principle of publicity, which provides that all laws be published, is distinct from the idea of automatically providing information to citizens via the internet or other appropriate means.
c. Gratuidad: there was concern that this section does not clear state that there are no costs for requesting information and for reviewing documents, as it says that the civil servant should do everything possible to allow access to information for free. The group suggested removing the clause "every possible," and instead clearly state the principle that the request and review of information is free and that costs only attach when asking for photocopies or other forms of reproduction.
d. Regarding the costs, there also was a suggestion that received wide support from the group, that this section state that although the applicant must pay the costs for reproduction, it should be only part of the costs and not the full amount.

Article 6: Conservation of Information

The workshop participants felt that it was good that the access to information law included a provision regarding archives, particularly when other laws do not clearly provide such guidance. There were questions raised, however, whether this section clearly covers the private sector (as listed in Article 3), and how these private bodies can be held accountable for maintenance of their records.

Additional comments included:

a. section I of Article 6 states that any public document destruction is prohibited. The group agreed that this is untenable for the government and public servants, as some documents must be destroyed. It was understood that there is no government in the world that maintains and stores all documents produced. Rather a clear retention schedule should be developed that indicates what documents may be destroyed, when they may be destroyed, in what manner, and who has the authority to make the decision.
b. The second paragraph of this section (note, missing the "II") was confusing to the groups, as it appeared inconsistent with section I. Moreover, where there was a five year time period for maintenance of records in each office, one group felt that seven years was more appropriate.
c. There was a suggestion that this article call for a system for classifying information.
d. Finally, there was confusion over meaning of "prescripcion de valor adminsitrativo" (see also Articulo 4).

Articles 7 - 9: Responsibility and Sanctions

The issue of civil servant responsibilities, and potential sanctions, was one that was mentioned in each department as key to the ultimate success of the law. The participants were concerned that this area receives greater attention, as it is a potential vulnerability in the establishment of an effective transparency regime. Moreover, there almost was unanimity that this section should be reorganized to consistent with other related articles, and for ease of understanding and application.

a. Some participants wanted to be certain that there were sufficient sanctions against civil servants who undermine or subvert the principles of openness, with many suggesting the inclusion of criminal sanctions particularly when civil servants knowingly destroy information inappropriately.
b. One groups said that the penal code citation (Article 153 and 154 of the penal code) is incorrect.
c. There was a suggestion that Articles 9 and 30 be placed together, or at a minimum that there is some relationship between these provisions. For example, one group asked for clarification on when civil servant inaction would be considered delay and when it would reach the level of obstruction?
d. Moreover, there was a recommendation for more detail related to the specific responsibilities of the civil servants, for example, that they must respond to requests for documents that they are in charge of; when the document is not under their control, they must transfer the request to the appropriate institution, establishment of roadmaps etc. (please note: some of these responsibilities are already included in the law but since divided into many

separate sections, it was difficult to understand the breadth and specific role of civil servants).

Article 10 is missing

Article 11: Basic Measures

Participants suggested including specific time periods for the completion of each task, such as the organization and publication of information, and in particular a time limit for the establishment of necessary regulations.

Title Two: Transparency in Public Adminstration: Websites

Article 13: Minimum Content of Websites

This section was highly praised. A few suggestions from the working groups included adding information about salaries; changing the word "resultados" to "informes" in section 8; and including on the website the name of the person responsible for its management. In general, the groups wanted to ensure that the websites were easy for both the government to maintain, and for citizens to navigate and use.

Title Three: Access to Public Sector Information

Article 14: Refusal of Access

The clear statement that no request for information shall be denied based on race, sex, language etc. is unique and extremely important. During the plenary discussion, this section was highly regarded.

Article 15: Impossibility

In reviewing this section, the participants voiced some confusion over what would be considered the "conditions" by which the public authority would not be able to satisfy a request. It was unclear whether this would only entail those cases whereby the agency does not have control of the document, or if it could it be expanded to include cases where the agency determines it would be too resource intensive to provide the information. If not clarified, it was suggested that this article could be applied in a manner contradictory to the principles of access to information.

Moreover, the group felt that it is insufficient to simply notify the solicitor that the agency does not have the information. Rather, the public servant should be charged with assisting the requestor in identifying the appropriate agency or transferring the request on the applicant's behalf.

Article 16: Public Access to Information

There appears the potential for contradiction within this article. One section seems to state that information should provide in any format requested, while the other provision says that the agency does not have obligation to change the format. The international participants suggested that perhaps sec. I is attempting to state the principle that the agency does not have the obligation to create records nor to provide records that are not in their control; while section II is more specifically addressing the issue of document formatting. As participants were confused, this section may need re-drafting for greater clarity.

Article 19: No Obligation to Create Documents

While participants agreed that there should not be a burden on government to create or generate new information to respond to a request, this should not serve as an excuse for failure to create necessary and relevant information that government should have as part of their normal workings.

Article 20: Processing of the Information

There was a question regarding the title of this article, ie whether it is misnamed, and whether it would be better if incorporated into Article 19.

Article 21: Partial Information

In reading this article, it was unclear whether this section was addressing documents that have been redacted, because included some information that fell within an exemption, or some other form of partial information. If it is the former, it was suggested that this section be clarified, as to what is "partial information", and moved to the exemptions section. In addition, participants recommended use of the word "proporcionar" instead of "permitir."

Title Four: Exemptions

In general, the civil society participants stated that the exemptions needed to be drafted more narrowly and with greater clarity, including a definition of what is in the "public interest." Groups varied on whether there should be additional exemptions or not. For example, in one group, there was dissention when some members felt that foreign relations information that could cause harm to the country should be exempt; while the other members of the same working group vehemently disagreed. Another group suggested inclusion of an exemption for trade secrets, for example information related to the science or methodology in creating something before it is patented. Overall, there was agreement that the law should clearly provide that personal information is exempt. The suggestion was made to expand Article 24 to include this proposition, and to remove

the Habeas Data section, as creates confusion with the right to public information (versus personal information). Finally, there was a more general debate regarding the appropriate time period for which information is classified and then becomes automatically available. Some participants felt that there should be a specific period; while others advocated for continuous reviews of classification.

Article 24: Exception to the Exercise of the Right to Information

A concern of one of the working groups was the failure to define and clarify the meaning of "harm," while another group said that they thought this article was fine as drafted.

Article 25: Habeas Data

Habeas Data is not an exemption to access to information. Rather it is a constitutional right that allows individuals to receive information about themselves that the government holds. This is not the same as a privacy exemption and should be removed.

Article 26: Secret Information in the Military Sphere

Two of the working groups appreciated the concepts (ie the need for some military information to be kept secret when it could cause harm to the public), but felt that it could be written more clearly. These groups suggested that this Article state that all information is available, and only those certain documents listed are exempt. Under this scheme, section I would already have been stated and could be removed.

Another group suggested rather than list certain documents that are exempt; the exemptions within this sphere should be based solely on harm to national security.

Article 27: Reserved Information in the Police Sphere

All of the working groups that assessed the exemptions section were in agreement with an exemption for police information, when it could potentially adversely affect a legitimate police investigation.

Article 29: Regulation of Exemptions

One of the working groups particularly liked this article, and its emphasis that the only time information will be denied is when it is exempt under this law. However, there was concern that this section may be in conflict with other articles that mention other laws.

Article 30: Entities that can receive classified information

In assessing this section, there was a great deal of confusion. Sections II and III were particularly problematic, especially the mention of Article 23. Overall, a strong suggestion was issued to clarify this section. In addition, one of the groups recommended

including the Ombudsman as an entity that can receive information classified as secret, reserved or confidential.

Article 31: National Coordinating Agency

Although there was some consensus on the need for a national coordinating body (only one group thought that the responsibility for coordinating the operation of the law should be decentralized), there was little agreement among the departments on the way in which it should established and operate. The various comments included:

- supportive for a national coordinator to ensure an effective system, but that also need to have a responsible person designated for each institution
- suggestion of a coordinating agency in each department and a national entity that would oversee these departmental bodies
- that there is a need for a national coordinator, and that the Ombudsman could be tasked with this responsibility

Title 4: Del Procedimiento should be renumbered to "Title 5"

Article 32: Initiating the Process

This section received more attention from the participants than almost any other, and interestingly there was great uniformity among the groups around the nation.

a. the groups suggested that 20 days plus an additional 20 days is too long of a time period for providing the requested information. In general, there was consensus for an initial 20 day time period plus a maximum extension of 10 days; and that the extension for additional time would only apply when the agency provides an explanation for the delay.
b. the groups agreed that there should be clear sanctions specified for failure to provide the requested information in a timely manner.
c. there was general enthusiasm for specialized information officers, but felt that this section would benefit from a more detailed description of their responsibilities.
d. this article should include provisions that mandate assistance for certain groups, taking into account the idiosyncrasies of different communities.
e. person requesting information should be allowed to do so either in writing or orally, including via the telephone.

Article 33: Negative Administrative Silence

The working groups that reviewed this section felt that it should be renamed something more generic to indicate that this article addresses all appeals and that is should be expanded to include more detail regarding the appeals mechanisms. Moreover, they recommended that all the various reasons for appeals should be included, such as denial of information, inappropriate costs etc. Beyond that point, there were a variety of suggestions relating to appeals mechanisms. Some of these ideas are listed below:

- Defensor del Pueblo receive all appeals; but if Ombudsman becomes responsible for adjudicating appeals there will need to be a modification in the Ombudsman Act, and the provision of additional resources
- Creation of new administrative body to hear appeals in the first instance, and then continued denials could be appealed to the courts
- Time limit for responding to appeals should be 30 days
- The appeals process should be decentralized, not just one body in urban area
- One group said that the defensor del pueblo should not hear appeals as can not engage against the private sector and would alter its original attributes too much
- Administrative rout with right to appeal
- Include a provision in the section that costs for appeal should be covered by the entity that did not answer or to act appropriately

In the coming weeks, we shall send a matrix with all of the comments from each department.

The Carter Center wishes to thank all of the participants and organizers of these events, and to express our gratitude for the trust instilled upon us to organize and summarize the many comments and innovative suggestions and recommendations. It is our hope that these inputs, if appropriately incorporated into the draft access to information law, will serve to strengthen the bill and to increase its effectiveness and utility for all Bolivians.

The Carter Center
January, 2005