Observation of Nicaragua Draft Law
June 7, 2004

Building on the Access to Information draft law from early 2000 and a revised draft presented by civil society organizations and media representatives in September 2003, a third was presented to the National Assembly in November 2003. This draft law incorporates suggestions from interested civil society groups, as well as those received from The Carter Center in September 2003.

The importance of access to information lies in its ability to serve as a tool to rebuild trust between government and its citizens; hold government accountable; allow persons to more fully participate in public life; and serve as a mechanism for ensuring that persons can exercise their fundamental basic rights. Access to information is vital for a healthy, functioning democracy and essential for persons to protect their social and economic rights. In the past decade, more than 50 countries have recognized the importance of access to information through the passage and implementation of new laws. For Nicaragua, an access to information law would give legislative meaning to the Constitutional right to information embodied in Article 66. It will also serve as an important complement to the recently approved Participation Law.

Since our last observation document, President Bolaños has continued to express his commitment to transparency. We have had the opportunity to visit Nicaragua again, and to hear from all relevant stakeholders of the importance and priority of a new information regime. Moreover, we met with Congressional representatives that stated their willingness to consider and debate the provisions of this draft as soon as possible.

Thus, we again welcome the opportunity to provide a number of comments related to the latest draft law. Our observations are made in light of the terms of the emerging international standards and lessons learned from other jurisdictions. Ultimately, as stated in our last submission, the Nicaraguan law must be crafted to best suit this country's socio-economic and political realities.

In most ways, the latest draft of the Nicaraguan Access to Public Information meets the international norms. The draft law includes many innovative and important features, such as provisions relating to changing the culture of secrecy and attorney's fees and court costs for successful petitioners. Clearly great strides have been made in attempting to establish provisions that will allow for effective implementation and enforcement of the right to information.

Below are some additional observations related to both this draft's positive aspects, and potential areas for further consideration. It is not the intention of this document to offer a comprehensive analysis of the draft before the National Assembly, but rather provide some comments that may serve to inform the up coming civil society and Congressional debate.

1. Structure/Organization

The organization of the law is important for both its usability and ease of implementation. As we discussed in our observations of the previous draft, by ensuring a clear organization and uniform terminology, the law will avoid confusing repetition and conflicting phrases. We would suggest a modest restructuring that clearly demarcates seven areas:

a. principles/objectives;
b. scope of the law;
c. automatic publication;
d. process/procedures;
e. exemptions;
f. appeals procedures;
g. promoting the culture of openness.

The issue of habeas data, if included in the access to information law, should be considered in a separate section at the end of the legislation. Many recent laws, and some older freedom of information legislation such as the United States, do not intermingle the Habeas Data rights with the Access to Public Information. Should Nicaragua continue to present these distinct rights in the same legislation, it will be important that the provisions (including procedures for archiving and retrieval and appeal) are not in conflict. This observation paper will focus solely on the access to information provisions of the law, and not offer any additional considerations directed at the habeas data provisions.

2. Principles

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 present draft satisfactorily incorporates these principles in Articles 1 and 2. It states that the objective of the law is to guarantee and regulate the constitutional right to information, and provides that publicly held information belongs to the people. As discussed in further detail below, the only area of concern in these principles (and the definition section) is the language used to limit the scope to “Nicaraguans.”

As mentioned in the previous observations document, the modern practice is to ensure that the ATI law is the umbrella, primary law governing all issues relating to access to information. In Article 55, under the final dispositions, the draft law touches on this by stating that it prevails over other laws protecting the same right. This is essential for the workability of the law, both for public servants and for citizens. Ensuring that the entire legal regime regarding access to information is contained in one law can prevent duplication or conflict of laws, and reduce the burden on the civil servant. It will also assist civil society in its understanding of what information should be available, and what is exempt. However, the positive impact of this disposition may be eroded by the broad exemption found in Article 9(i), which provides that any information considered reserved under another law will be withheld from disclosure. As discussed below, all exemptions should be found within the access to information law.

3. Scope

a. Who can request information

The emerging international standard is to provide a right to information to all persons, regardless of citizenry or residency. Philosophically, freedom of information is a fundamental human right that applies to all persons, without consideration of nationality. The Universal Declaration of Human Rights, Article 19, states that "**everyone** has the right to . . . seek, receive and impart information." (emphasis added). Although embodied in the freedom of expression provision, the right to information is increasingly seen as a stand-alone right, both civil-political and socio-economic. In this vein, at the special Summit of the Americas held in Mexico in January 2004, the heads of state declared that "Access to information held by the state. . . promotes effective respect for human rights" and committed its member states to providing the necessary legal and regulatory framework. Moreover, the Inter American Commission on Human Right declared, "Access to information held by the state is a fundamental right of every individual" and that

> Every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights. All people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.

Practically, limiting the scope of the access to information bill will serve as an obstacle for the state in its enjoyment of the law's inherent benefits. For example, it is well agreed that an access to information serves to increase

transparency in government decision-making. For foreign companies, the ability to receive information relating to decisions, priorities and policies is an incentive to investment. If the right to information were limited to only Nicaraguan citizens, the economic benefits of the law would be diminished. The restriction to Nicaraguan citizens would also increase the administrative burden, as public servants are forced to establish systems of cross-checking nationality and will, in the future, limit the options for developing internet based systems (as the web cannot differentiate citizens of one country or another.)

Therefore, we would urge Article 1 through 3 be amended to allow, like many of the recent laws including Ecuador, Peru, Mexico and Jamaica, that "all persons have the right to request information."

b. Which entities are covered

In the latest draft the scope of entities covered by the law and the type of accessible information may be drafted in a way that is too limited or leaves open the possibility for unwarranted restrictions. Although Article 3 strives to cover all public bodies, it establishes that the law only applies to those private bodies that support the listed public entities or that manage public funds.

Increasingly, modern laws are extending to cover information held by private sector bodies. It is, perhaps, worth reiterating the rationale that lies behind this shift. The fundamental concept that lies behind transparency is that through access to information, those who hold power can be held to account for their actions. The past twenty years has seen a huge shift in ownership and control of public services. Nicaragua is no exception to this international trend. For the consumer, the fact that the controlling entity has changed makes little difference to their core concerns: access, quality, and affordability. It seems unwise and unfair to create duties on the public sector to provide a right to access to information without taking into account that many of the most important things that happen to people is now the responsibility of private corporations.

In South Africa, the access to information law acknowledges this new era by providing a comprehensive right to all privately held information, where access to that information is "necessary to protect or exercise a right." With private sector information it is appropriate to include a caveat to ensure that there is not an unjustified intrusion on privacy. As with publicly held information, a right to private information also can be limited with appropriate exemptions, such as for commercial confidentiality. Where a private company is clearly providing a public service, such as after a privatization process, their information should then be defined in the law as "public information." For other private corporations, the extent to which they should be covered under this law may be a matter for public debate.

4. Automatic Publication

The “right to know” approach whereby governments automatically publish as much information as possible, is important in increasing transparency and reducing costs for both the state and the requestor, and making the law more convenient. The Nicaraguan draft law includes two different procedures for allowing persons to access information without specific requests. The first, found in Article 42, is a databank of information (other than exempt documents) created, administered or found in each public institution. This databank will be accessible to the public. In addition, to facilitate access, the institutions are directed to establish a means of electronic communication.

Chapter 11 provides additional documents that must be automatically released, and published. The list includes such information as the structure of the organization, the services it provides and the applicable legislation or regulations; salary of certain public servants; bidding and contracting; use of public resources etc.

In developing an automatic public disclosure scheme, issues relating to implementation must be considered. Article 46 states that the information must be kept current and Article 47 provides some minimal guidance in calling for each public entity to systematize the information to facilitate access, and suggests Internet publication. However, it does not provide a timeline for implementation of the automatic publication scheme, diverse methods for dissemination of information, or specific processes such as protecting copyright. These might be considered either in the law or in subsequent regulation to further strengthen the automatic publication guidelines.

5. Processes/Procedures

Often the processes for requesting and providing information are more determinative of the Act’s value and effectiveness than any other provisions. Thus, clear and workable guidelines should be established to ensure that all persons might access the right to information. Access to Information laws differ in the specifics, but most modern laws included the following procedures:

a. How to Request Information

In general, the process for requesting information should be as simple as possible to facilitate requests and not require the satisfaction of formalistic procedures. Requestors should be obligated to describe the information requested with sufficient specificity so that the civil servant can identify the item. However, requirements to submit the request to a specified person or on a specified form may cause unnecessary obstacles to the exercise of the right to

information. The procedures section of the draft law does not clearly state that a specified form is required. But Article 34 mentions the completion of required forms.

Article 35 of the draft law merits additional attention. Although not clearly written, it appears to mandate that some (or all) requests are accredited and notarized. If this were the case, it would certainly reduce the number of persons capable of requesting information and be contrary to the international standards to provide simple and accessible processes for requesting information. Thus, we suggest that these provisions are reviewed and clarified to eliminate any conflict or unnecessary obstacles.

Article 30 provides additional guidance stating what data must be included in the request, such as the identifying the authority to which the request is made, name of requestor and copy of identification card, clear description of the requested information, and a location to send the documents. Again, obstacles to request should be eliminated whenever possible. Depending on the political context of the country, the inclusion of a photocopy of the requestor identification card may have a "chilling effect", and does not appear to serve any significant legitimate purpose.

Many laws allow for verbal requests of information, either in person or via the telephone. This is particularly important in countries where there is a high level of illiteracy or varying languages. Article 27 states that all information requests must be made in writing, unless the nature of the issue permits oral requests. The drafters may consider extending this to allow any request to be made via phone or orally.

Positively, the draft law satisfies one of the key components of a modern law in that it does not require the requestor to state a reason for seeking the information.

b. Responding to Information Requests

Access to Information laws should clearly establish the process that civil servants must follow in responding to information requests. In addition to the manner in which the civil servant should provide the information, this section should include precise time frames for responding to requests, with a potential for an extension, and the circumstances in which a request may be transferred to another covered entity.

Many countries in an attempt to appease detractors put in time limits for responding to requests that are too short and impossible to meet on a consistent basis, thus undermining the workability of the law and giving the appearance that the holder of the information is unwilling to release it. Rather, the time limits

should be realistic, without being excessively long, and there should be an opportunity for one reasonable extension. Many laws provide for 20 working days or 30 calendar days, with the potential for an extension of a similar period of time. In Article 28, the draft law states that a decision regarding access to information shall be made within 15 working days, with a potential for extension under very specific circumstances (Article 29). Depending upon the specific Nicaraguan context and maturation of the record keeping and retrieval processes, this may be unduly short.

In addition to time lines, sections relating to responding to information requests generally include a specified duty and procedure for transfer of requests when the information requested is held by another agency. In other words, where a requester makes a request to the wrong body, he or she should not simply be denied the information; instead, the agency must point the requester in the correct direction by transferring the request to the appropriate agency. Such a provision places the responsibility on the agency, rather than the petitioner, to transfer the request to the appropriate body and should include the manner in which the request is transferred, the time for responding, and mechanism for notifying the requester that his/her request has been transferred. In the Nicaraguan draft, Article 31 places the burden to transfer the request on the requester. This could create a "ping-pong" situation and undermine the law's effectiveness and legitimacy.

Missing from this section is the manner in which information will be provided. Most access to information laws allow that the petitioner may request the form in which he or she would like the information, such as document, photo, video etc., with some legitimate limits. Positively, the law does allow for inspection of the documents during regular business hours at no cost.

c. Denials

All laws include a process for denying requests. The best access to information laws mandate that information requests will be denied only based on a specified exemption, and that the denial will be provided in writing. Article 39 clearly provides that denials will be in writing and that the notification must cite the legal basis for denial.

d. Responsibility and sanctions

Identifying a responsible body or person is one of the first steps in properly implementing an access to information law. Thus, we welcome the inclusion of Articles 4 - 8, provides that each public entity shall establish a senior level access to information office whose mission is to facilitate access to information for all requesters. Each office will be governed by a procedural manner, have a

detailed index or registry of it's entities information, and provide an area to request and review information.

Although not expressly stated, the draft law appears to contemplate an individual (could be clearer if titled "Information Officer") responsible for working within the Access to Information Office and in Article 7 in conformity with the best international laws assigns this person responsibility for assisting requesters. This Article could be supplemented with a more detailed description of the powers and duties of the Officer, such as responsibility for the operation and implementation of the automatic publication scheme and for ensuring requests for information are satisfied.

Ensuring publication and dissemination of a "roadmap" (sometimes described as a guide or manual) is another responsibility that has been vested with each public body's Access to Information Office. A "roadmap" which describes the type of information held by each agency, and how it can be accessed, serves to assist the citizen in targeting their information requests and is an integral part in any record keeping system. It also helps government organize its records and systems, and serves to limit the number of time-wasting misdirected requests. But as discussed in our observations of September 2003, it is important that this "roadmap" not convert into a mechanism for restricting information or be used as a reason for denial. Article 6 states that the roadmap will list only available not contained within an exemption. Public servants may deduce that any information not listed is, by assumption, exempt, thus creating an unacceptable umbrella exemption.

In addition to responsibilities, the inclusion of a provision for sanctions for impeding access to information is in line with best international practice. In the Nicaraguan draft law there are three areas where sanctions are eluded. Article 13 provides that only public servants can be held responsible for releasing exempt materials, Article 41 states that failure to follow a judicial order will be considered contempt of court, and Articles 52 – 54 provide sanctions for hiding or destroying information. As discussed in our earlier observations, the law may be extended to provide sanctions for failure to comply with important procedural obligations, such as time limits and assisting requestors. Without clear sanction, the responsibilities discussed above may be ignored.

e. Costs

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 32 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 quickly 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 you to consider amending this section to allow only for costs of reproduction.

Moreover, in many laws there is the possibility of a waiver of the reproduction costs for a certain number of copies, for indigent persons or for requests that are considered to be in the "public interest."

f. Record-keeping

Thought should be given to the question of archiving and record keeping, and the duty of the civil servant to create and maintain certain records. As it is important not to overburden the legislation, we suggest that a provision be included in the law requiring the executive to establish guidelines, through delegated legislation, to assist public bodies to develop good and uniform practices in relation to archiving and record keeping.

g. Annual report

The Nicaraguan draft law does not include any requirement for reporting to the executive, legislature or to the public. The Peruvian Law calls for the Office of the President to send an annual report to the Congress that accounts for all completed and unfulfilled information requests, as well as the response times and status of complaints. In the Mexican law, information committees in each public agency must submit a report to the Federal Institute for Access to Information (the ATI coordinating body). The new Ecuadorian contains similar provisions, as well as a mandate to provide a report to Congress twice a year of all classified information. And in the Jamaica law, the Minister responsible for access to information is obligated to prepare an annual report of its operation.

6. Exemptions

In the best access to information laws, exemptions to the right to access information should be narrowly and clearly drafted, and should explicitly define the public harm that is being protected by the exemption. The legitimate exceptions to release of documents should all be listed in an exemptions section.

The classification of a document as "reserved" or "confidential" should not, without further review, be considered an automatic reason for exemption from release. Classifications are generally a tool for archiving of documents related to national security and should not, without a clearly definable public harm, render a document exempt from release.

One of the main problems with heading an exemptions section "Reserved" is that it is likely to lead to abuse. Public servants who are not enthusiastic about the purpose of the law, or who misunderstand the duties created by it are likely to

stamps something “reserved” or “confidential” without dedicating the necessary attention to whether or not the record properly falls within the exemption and whether there is any harm that would be caused by disclosing the information.

Article 9, which captures all of the act’s exemptions, could be amended to remove the focus on classification and instead emphasize the potential harm. In addition, this article should be further examined to insure that it is written narrowly and with as little unnecessary discretion as possible. For example, 9(e) states that information about studies or projects whose release could clearly cause harm to a state interest or could imagine would put it’s realization at risk, is exempt. This, as well as some of the other provisions in Article 9, may be considered unnecessarily broad.

Moreover, Articles 10 and 11 mention “an agreement” to classify a document as exempt. As stated in the observations from 2003, the reference to an “agreement” is curious and suggests a potentially unacceptable amount of discretion.

All good access to information laws provide for a public interest test that allows an override of the exemption. In these cases, after determining that a document, or part of a document, falls within an exemption for release, a balancing test is applied. If it is found that the public interest in providing the document outweighs the potential harm identified by the exemption, the document is released. Article 10 (b) of the present draft law appears to provide a reverse public interest test, which focuses on considering whether the public harm that release could cause outweighs the public interest. Although we welcome the analysis of the potential harm, which should be the starting point for any exemption, this article includes other sections that may diminish the effectiveness of the public interest test, the “agreement” language discussed above and, for example, (c) which again focus on the potential threat to interests if information is received.

Sometimes, one part of a document may fall within an exemption but not the balance of the document. Under the premise of severability, only the offensive part(s) of the requested document should be withheld from release. Article 11 of the draft law appears to address this issue.

Finally, there are some very good provisions including the prohibition on invoking an exemptions when the information is necessary for investigating a grave violation of a human right, a common crime or crime against humanity; and the automatic declassification of documents after 10 years.

7. Enforcement

As with implementation, the enforcement mechanisms must be fully considered during the drafting of the law. Enforcement of the law is critical; if there is

widespread belief that the right to access information will not be enforced, this so called right to information becomes meaningless. If the enforcement mechanisms are weak or ineffectual it can lead to arbitrary denials, or it can foment the "ostrich effect", whereby there is no explicit denial but rather the government agencies put their heads in the sand and pretend that the law does not exist. Thus some external review mechanism is critical to the law's overall effectiveness.

However, in countries where there is a deep lack of trust in the independence of the judiciary or it is so overburdened that resolution of cases can take years, an enforcement model that is not dependent on judicial involvement in the first instance may be best. The context in which the access to information law functions will help determine the enforcement model chosen, but in all cases it should be:

- accessible,
- timely,
- independent, and
- affordable.

Enforcement models range from taking cases directly to the Courts to establishment of an independent Appeals Tribunal or an Information Commission/Commissioner with the power to either recommend or to order.

The Nicaraguan draft appears to include a number of different appeal mechanisms. Articles 15 and 16 provide an appeal regarding classification of documents as exempt. In Article 15, the petitioner may request an internal review. If the decision is negative or not provided within the designated time period, an appeal can be lodged with the Attorney General for Human Rights.

In cases of a denial or administrative silence, and the exhaustion of administrative remedies, Article 38 provides for use of either appeals mechanisms established in the access to information law or an amparo.

Article 40 states that in cases where the request is denied or deemed denied the requestor might file an appeal in the local civil court. Importantly, this article also allows the petitioner to seek court costs and damages, thus making the system somewhat more accessible and affordable for Nicaraguans.

This enforcement scheme, internal review and court review, should be considered in light of the above considerations, and the provisions should all read together to ensure that there are no internal conflicts, duplication or confusion. Further guidance as to which appeal mechanism applies and the procedures for appeal should be added to the law, or established in accompanying regulations.

8. Promoting the Culture of Openness

Impressively, the drafters of this bill recognized the challenge in shifting the mindset of the public servant and the citizen from one of secrecy to one of openness. As an important step to making this cultural change, the draft law contains an entire chapter on promoting a culture of access to information. Included in Articles 49 – 51 is the mandate for training of civil servants, inclusion of the issue in the school curriculum, and University and technical college classes that promote the right.

9. Implementation Time Period

Fully and effectively implementing an access to information law is often the greatest challenge for government. When the law goes into effect, government 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 some countries, such as South Africa and Mexico, they implemented the law over a 12-month period and found that they were still not fully prepared on the date the law went into effect. In other jurisdictions, such as Jamaica, they have chosen a phased-in implementation scheme beginning with the first phase of Ministries and agencies 18 months after the passage of the law.

In Nicaragua, the law appears to go into effect immediately. An implementation schedule should be considered that meets the local context.

As stated in our first observation paper, Nicaragua should be congratulated for considering a comprehensive access to information law. We encourage the involvement of all relevant sectors of society, including civil society, the media, unions, and the private and public sector when drafting and debating the law. Public audiences before the Justice and/or Transparency Commissions and an informed debate in Congress will help ensure the ultimate legitimacy and effectiveness of the Nicaraguan access to information law. With careful attention to the various provisions, and an inclusive process of public engagement, Nicaragua will soon meet the challenges. The Carter Center remains ready to assist.

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