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REPORT OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION OF THE  
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS PURSUANT TO  
RESOLUTION AG/RES. 1932 (XXXIII-O/03)

This document is being distributed to the permanent missions  
and will be presented to the Permanent Council of the Organization.

INTER - AMERICAN COMMISSION ON HUMAN RIGHTS  
COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS

COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS



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**ORGANIZATION OF AMERICAN STATES**  
WASHINGTON, D.C. 20006 U.S.A.

August 27, 2003

Excellency:

I have the honor of addressing Your Excellency in response to your note of August 5, in which you requested the Executive Secretariat of the IACHR, through the Special Rapporteur for Freedom of Expression, to present a document containing proposals for optimal compliance with the mandate issued in operative paragraph 5 of resolution AG/RES. 1932 (XXXIII-O/03).

I attach hereto the Spanish and English versions of the document requested of the Special Rapporteur for Freedom of Expression by the IACHR, with the hope that it will be useful for the tasks entrusted to the honorable Permanent Council of the OAS.

Accept, Excellency, the assurances of my highest consideration.

Ariel Dulitzky  
In charge of the Executive Secretariat

His Excellency  
Ambassador Raymond Valcin  
Chair of the Permanent Council of the  
Organization of American States  
Washington, D.C.



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**OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION**

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**REPORT OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION,  
EDUARDO A. BERTONI, AS REQUESTED BY THE PERMANENT COUNCIL  
PURSUANT TO RESOLUTION AG/RES. 1932 (XXXIII-O-03)**

**1. Introduction**

This report first summarizes some general aspects relating to access to public information that the Rapporteur considers potentially useful as a frame of reference for the Permanent Council in the course of its activities to fulfill the mandate contained in resolution AG/RES. 1932 (XXXIII). With the same objective, the report also reviews certain past, present and future activities of the Office of the Special Rapporteur for Freedom of Expression to demonstrate the importance that the Office attaches to access to public information in democratic societies. The report concludes with some suggestions about activities that the Permanent Council might undertake pursuant to the resolution mentioned above.

**2. Access to public information: general aspects**

In order to adequately guarantee citizens' right of access to information, the theoretical background of the right should be widely understood as both deep and broad. Guaranteeing public access to state-held information is not only a pragmatic tool that strengthens democracy and promotes socioeconomic justice; it is also a human right protected under international law. In addition to a strong conceptual foundation, an access to information regime that complies with Article 13 of the Inter-American Convention on Human Rights<sup>1</sup> requires a complex legislative and regulatory

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<sup>1</sup> **Article 13. Freedom of Thought and Expression**

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
  - a. respect for the rights or reputations of others; or
  - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

structure, which shall be elaborated below.

Access to information is commonly understood as a pragmatic tool, and its value extends to the promotion of the most important goals in the Americas, including transparent and effective democracies, respect for human rights and socioeconomic justice. However, it is important to understand that under the Inter-American System, access to state-held information is also legally protected as a human right. A state must acknowledge all of these factors in order to place sufficient emphasis and urgency on the provision of adequate guarantees.

It is widely acknowledged that without public access to state-held information, the political benefits that flow from a climate of free expression cannot be fully realized. The Inter-American Court of Human Rights stated that the "concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole".<sup>2/</sup> Access to state-held information is also necessary to prevent human rights abuses by government officials and also to ensure that effective remedies are guaranteed. Another pragmatic justification for access to information laws is that they can be a stabilizing force in financial markets. Some international institutions explain that given the role of access to information in improving the flow of information, increasingly open regimes can benefit the world economy; "because better information flows can improve resource allocation, they may be able to mitigate global financial volatility and crises".<sup>3/</sup> As the Office of the Special Rapporteur elaborated in last year's Report on Freedom of Expression and Poverty, access to information is also a critical tool in the alleviation of socioeconomic injustice.<sup>4/</sup>

Despite the availability of these pragmatic justifications, it is important to recognize that access to information is also a human right, protected under the American Convention. In Article 13.1 of the American Convention on Human Rights, the right to freedom of expression and information: "includes the freedom to seek, receive, and impart information and ideas of all kinds regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice." From the plain language, it is clear that Article 13.1 provides the right to seek information, but some might argue that this does not include a positive obligation on the part of the state to provide that which is freely sought. However, given an accurate understanding of what kind of rights are protected by the American Convention, and using the traditional means of treaty interpretation under international law, it becomes clear that access to information is indeed a human right that is protected by the American Convention.

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5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

2. I/A Court H.R., Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights), November 13, 1985, Ser. A, No 5 [hereinafter Advisory Opinion OC-5/85], para. 65.

3. World Bank, World Development Report 2002, "Building Institutions for Markets," page 189.

4. Annual Report of the Special Rapporteur for Freedom of Expression, 2002, Chapter IV, Section C: Access to public information as an exercise of the freedom of expression of the poor.

In order to correctly interpret Article 13.1, one must first address a common misunderstanding about the nature of the rights protected by the American Convention. In the past, there was a concept of strict division between "negative" and "positive" rights, which could contribute to the idea that access to information is not protected under Article 13.1. This division imagines positive rights as requiring an act rather than an omission, therefore positing that they are contingent on the existence of sufficient resources to permit the satisfaction of the right.<sup>5/</sup> This idea seems to rest on a particular concept of the nature of human rights. Some have argued that "if it is impossible for a thing to be done, it is absurd to call it a right".<sup>6</sup> This view might lead to the proposition that a right to freedom of expression is only reasonable to the extent that it requires governments to refrain from actively suppressing speech.

There are two problems with this distinction between positive and negative rights. First, the idea that it presupposes about the nature of rights is not supported by the American Declaration of the Rights and Duties of Man, which states that "the rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality".<sup>7/</sup> The second problem is that a government is *always* obliged to take positive steps to ensure that individuals may safely exercise their fundamental rights. In its interpretation of Article 1.1 of the American Convention on Human Rights, the Inter-American Court stipulates that "The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention..."<sup>8/</sup> Thus, the dichotomy that some use to distinguish between "positive" and "negative" human rights is not an accurate device.

Recent developments in international law highlight a broad consensus that rejects the division of fundamental human rights into finite categories, and establishes the important role of access to information. Although not all countries and international organizations ground the right to access state-held information in the freedom of expression, there is a growing consensus that governments do have positive obligations to provide state-held information to their citizens, since this right is interdependent with other fundamental rights.<sup>9/</sup> In addressing the developing international

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5. For a more detailed description of this conceptual distinction, see, e.g., Roberto Garretón M., "La Sociedad Civil como Agente de Promoción de los Derechos Económicos, Sociales y Culturales," in *Estudios Básicos de Derechos Humanos V* (San José, Costa Rica: Instituto Interamericano de Derechos Humanos, 1996).

6. Cranton, Maurice. "Human Rights, Real and Supposed," in D.D. Raphael, ed. *Political Theory and the Rights of Man*, reprinted in Patrick Hayden, ed., *The Philosophy of Human Rights*, St. Paul, MN: Paragon House, 2001, 169-170.

7. American Declaration of the Rights and Duties of Man. The American Convention on Human Rights reiterates this idea in its Preamble.

8. Emphasis added. I/A Court H.R. Velásquez Rodríguez Case, Judgment of July 29, 1988. para. 166.

9. See, e.g., *Shabalala v. Attorney-General of the Transvaal* (South Africa); *Guerra and Others v. Italy* (European Court of Human Rights); *Jane Doe v. Board of Commissioners of Police for the Municipality of Toronto* (Canada); Saras Jagwanth, "The Right to Information as a Leverage Right," in Calland & Tilley, eds., *The Right to Know, The Right to Live*, Open Democracy Advice Center, 2002. In the United Nations System, the interdependence of free access to information with all other rights was made clear in 1946, when the General Assembly adopted Resolution 59(I) stating: "freedom of

consensus on access to information, it is interesting to note that the right to access state-held information is recognized more explicitly in the Inter-American System than in the European Human Rights System. Article 10 of the European Convention does not include the right to "seek" information. But despite this difference, the European Court has held in two recent cases that individuals do have the right to access state-held records, grounding it in the right to private or family life instead of the freedom of expression.<sup>10/</sup> Article 13 of the American Convention, by contrast, explicitly protects the "freedom to *seek*, receive and impart information and ideas of all kinds" (emphasis added). Given that the freedom to *receive* information should prevent public authorities from interrupting the flow of information to individuals, the word *seek* would logically imply an additional right.<sup>11/</sup>

While the international comparisons mentioned above are useful, there are more concrete legal strategies for arriving at an interpretation of the American Convention. Article 31 of the Vienna Convention on the Law of Treaties (hereinafter the Vienna Convention) says that the ordinary meaning of the terms must be taken into account in their context, including the preamble, annexes and any agreements or instruments made "in connection with the conclusion of the treaty."<sup>12/</sup> To this end, it is important to note the preamble and Article 29 of the American Convention, which emphasize choosing the least restrictive interpretation possible and the dramatic importance of representative democracy. These contextual excerpts both suggest that an interpretation of the word "seek" that protects the right to access state-held information is appropriate. The Vienna Convention on the Law of Treaties also offers other tools that make this outcome even more clear.<sup>13/</sup>

Article 31.3.b of the Vienna Convention establishes that "[t]here shall be taken into account, together with the context...any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." In the case of the American Convention on Human Rights, the relevant interpretations in the course of its application are those made by the Inter-American Court and Commission. The Commission has unambiguously interpreted Article 13 to include a right to access state-held information, and the Court's jurisprudence seems to support this analysis.

In its Advisory Opinion of November 13, 1985, the Inter-American Court wrote:

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information is a fundamental human right and...the touchstone of all the freedoms to which the United Nations is consecrated."

<sup>10.</sup> *Gaskin v. United Kingdom*, 7 July 1989; *Guerra and Ors v. Italy*, 19 February 1998.

<sup>11.</sup> See Toby Mendel, "Freedom of Information as an Internationally Protected Human Right". Article 19, 2000, page 3, *available in* <http://www.article19.org>.

<sup>12.</sup> Vienna Convention on the Law of Treaties, Article 31.2.

<sup>13.</sup> One of these tools is contained in Article 32 of the Vienna Convention, which allows interpretation of the "preparatory work of the treaty" in certain cases. However, the preparatory work of the American Convention makes it clear that "the debate turned on aspects of technical precision more than it did on substance" (Report of the Rapporteur of Committee I, Doc. 60 19 Nov. 1969, page 7). In fact, none of the member States commented on the language that subsequently became Article 13.1, and it was accepted in the form as it appeared in the Draft Convention. There is no documentation concerning interpretation of the word "seek."

Those subject to the Convention have not only the right and freedom to express their own thoughts, but also the right and freedom to seek, receive, and impart information and ideas of all kinds... the freedom of expression and information requires, on the one hand, that no one be arbitrarily hindered or prevented from expressing his own thoughts, and therefore represents a right of every individual. But it also entails a collective right to receive any information and to have access to the thoughts of others... For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.<sup>14</sup>

The Inter-American Commission has recognized that "the right of free access to information existing in government archives and documents is one of the fundamental guarantees of constitutional democracy, inasmuch as it ensures citizen participation in discussion and decisions on matters of common interest, and increases the transparency of government activity."<sup>15/</sup> The Inter-American Commission has also approved the Declaration of Principles on Freedom of Expression published by the Office of the Special Rapporteur for Freedom of Expression, and Principle 4 says:

Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right. This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies.

Even given an adequate theoretical foundation which establishes access to information as a right, achieving a compliant regime is much more complex than simply declaring that the public may have access to state-held information. There are specific legislative and procedural characteristics that must be exhibited by any compliant access to information regime, including: a principle of maximum disclosure, a presumption of publicity with respect to meetings and key documents, broad definitions of the type of information that is accessible, reasonable fees and deadlines, independent review of denials, sanctions for noncompliance, and an adequate procedure for declaring exceptions. Even given all of these qualities, an access to information law could still never be successful without the presence of strong political will to implement it, along with an active civil society.

The foundation of any compliant access to information law is a presumption that all information held by public bodies should be subject to disclosure, which is sometimes referred to as the "principle of maximum disclosure."<sup>16</sup> Of course, information held by public authorities is not

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<sup>14</sup>. Advisory Opinion OC-5/85, para. 12, 32.

<sup>15</sup>. I/A Commission, 1999 Annual Report, Chapter 7, para. 20.1.

<sup>16</sup>. See, e.g., Article XIX, The Public's Right to Know: Principles on Access to Information Legislation (June 1999), *available in* <http://www.article19.org/docimages/1113.htm> [hereinafter Freedom of Information Principles], Principle 1. Article XIX is a global non-governmental organization dedicated to promoting freedom of expression and access to official information. Its Freedom of Information Principles have been used widely by international organizations and NGOs. See, e.g., Annual Report 1999, Vol. III, Report of the Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II.111, Doc. 3 rev., Vol. III, at 88; Commission on Human Rights Resolution 2001/47, UN Commission on Human Rights, 57th Sess. Supp. No. 3, at 209, E/CN.4/RES/2001/47 (2001), preamble.

acquired for the benefit of the officials that control it, but for the public as a whole.<sup>17</sup> New access to information regimes will need to openly promote this principle of maximum disclosure, through public dissemination of information regarding the right of access to information, its scope and its attendant procedures. Training within State organs is equally important, and should address how to maintain and access records efficiently, as well as the importance and legal protection of access to information.<sup>18/</sup>

Another essential element in the provision of the right of access to information is the presumption of openness with respect to certain important government functions. First, there should be a presumption that all meetings of governing bodies are open to the public, including administrative proceedings, court hearings, and legislative proceedings. Meetings may only be closed in accordance with established procedures and where adequate justifications exist, and the decision itself must always be public.<sup>19/</sup> Second, public bodies should be under a presumptive obligation to publish key information, including: operational information, the types of information which the body holds, any requests, and the content of any decision or policy affecting the public, along with reasons for the decision and background material.<sup>20/</sup>

The right of access to information that is protected by the American Convention implicitly contains a broad understanding of the word "information," and States must match this breadth in their own laws. The public should have access to all records held by a public body, regardless of the source or the date of production. In addition, "information" encompasses all types of storage or retrieval systems, including documents, film, microfiche, video, photographs, and others.<sup>21/</sup>

The cost of searching and duplication can be significant for certain requests, so access to information laws may include provisions about charging a reasonable fee to those who request information. However, the cost of gaining access to information should not be discretionary, because it must never be high enough to deter potential applicants. Some states differentiate between commercial requests and private or public interest requests to address this problem.<sup>22/</sup>

Access to information laws must also establish a reasonable but strict deadline, requiring States to respond in a timely manner. In order to avoid putting an undue burden on the public body, some laws may choose to have a short time limit in which the State must acknowledge receipt of the request, and then up to several more weeks to substantively comply with the request. Requests should be handled promptly on a "first come, first serve basis," except when an applicant indicates an urgent need for the information, in which case the documents should be provided immediately.<sup>23/</sup>

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<sup>17</sup>. See Toby Mendel, "Freedom of Information as an Internationally Protected Human Right," Article 19, 2000, page 1, *available in* <http://www.article19.org>.

<sup>18</sup>. Freedom of Information Principles, Principle 3.

<sup>19</sup>. Freedom of Information Principles, Principle 7.

<sup>20</sup>. Freedom of Information Principles, Principle 2.

<sup>21</sup>. Freedom of Information Principles, Principle 1. See also, 1999 Report of the UN Special Rapporteur on Freedom of Opinion and Expression, UN Doc. E/CN.4/1999/64, para. 12.

<sup>22</sup>. Freedom of Information Principles, Principle 6.

<sup>23</sup>. Kate Doyle, "Freedom of Information in Mexico", 2 May 2002, *available in* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/index3.html>.

Every adequate access to information regime must also protect an individual's right to appeal any decision in which information is denied. The independent administrative body charged with hearing this appeal should be composed of independent persons who are appointed by representative bodies, and required to meet standards of competence and follow strict conflict of interest rules. The body should have full powers to investigate any appeal, and to dismiss the appeal or require the body to disclose the information. When faced with a negative decision by the administrative body, both the applicant and the public body should have the right to appeal to the courts.<sup>24/</sup>

In addition to these remedies, there must be a system of sanctions in place, in the event that an agency fails or refuses to comply with the law. The independent administrative body that hears appeals should have the power to fine public bodies for obstructive behavior. It should also have the power to refer certain cases to the court system, if the proceedings disclose evidence of criminal activity.<sup>25/</sup>

The right to access state-held information is a right that must be subject to certain exceptions, since there are legitimate state goals that could be harmed by the publication of particular sensitive information. Under the American Convention, restrictions must be expressly defined in the law and "necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals".<sup>26/</sup> When one of these criteria is used to justify a restriction on the disclosure of state-held information, the burden of proof is on the State to show that the restriction is compatible with the standards on the Inter-American System of Human Rights.<sup>27/</sup> To meet this burden, the government must show that the information meets a strict three-part test:

1. the information must relate to a legitimate aim listed in the law;
2. disclosure must threaten to cause substantial harm to that aim; and
3. the harm to the aim must be greater than the public interest in having the information.<sup>28/</sup>

Finally, and perhaps most importantly, a successful access to information regime is dependent on the substantial political will necessary to implement it. There must be a willingness to allocate public funds toward the establishment of the independent appellate body as well as educational programs to inform the public. Public officials must also be willing to adjust their day-to-day practices to reflect a culture of openness. Civil society must be willing and able to capitalize on the right of access to information in favor of the public interest. NGOs and individual citizens can do this by participating in the debate surrounding the formation, implementation, and utilization of the laws that guarantee access to information, and then by using these laws to participate more fully in their democracies.

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<sup>24</sup>. See, e.g., Freedom of Information Principles, Principle 5.

<sup>25</sup>. Freedom of Information Principles, Principle 5.

<sup>26</sup>. Article 13.2, American Convention on Human Rights.

<sup>27</sup>. See, e.g., The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (November 1996), *available in* <http://www.article19.org/docimages/511.htm>, last visited July 30, 2003 [hereinafter Johannesburg Principles], Principle 1(d).

<sup>28</sup>. Freedom of Information Principles, Principle 4.

### **3. Access to public information: a priority issue for the Special Rapporteur for Freedom of Expression**

#### **3.i. Recent activities**

Pursuant to resolution AG/RES. 1894 (XXXII-O/02), the Special Rapporteur for Freedom of Expression presented to the Committee on Juridical and Political Affairs<sup>29/</sup> a document highlighting some of the issues that, in the opinion of the Rapporteur, should be given priority when it comes to analyzing further measures to guarantee and reinforce the right to freedom of thought and expression. One of the priority issues included in that document relates to the right of access to public information.

As we said at that time, the right of access to information is a priority not only from a theoretical standpoint, but also from an eminently pragmatic perspective. The effective exercise of this right helps combat corruption, which is one of the factors that can seriously undermine the stability of democracies in the countries of our Hemisphere. The lack of transparency in government action has distorted economic systems and contributed to social disintegration. Corruption has been identified by the Organization of American States as a problem requiring special attention in the Americas. During the Third Summit of the Americas, the heads of state and government recognized the need to step up efforts to combat corruption, since it “undermines basic democratic values and represents a threat to political stability and economic growth”. Similarly, the Third Summit’s Plan of Action highlighted the need to support initiatives to allow for greater transparency to ensure that the public interest is protected and that governments are encouraged to use their resources effectively, for the collective good.<sup>30/</sup> Corruption can be controlled adequately only through joint efforts aimed at raising the level of transparency of government action.<sup>31/</sup> Transparency of government action can be enhanced by creating a legal system that allows society to have access to information.

For the reasons cited, this right is an indispensable prerequisite for the very functioning of democracy. In a representative and participatory democratic system, citizens exercise their constitutional rights to political participation, the vote, education and association, among others, by means of broad freedom of expression and free access to information. Moreover, publicizing information allows citizens to control public administration, not only by verifying that government acts are consistent with the law, which government authorities have sworn to uphold, but also by exercising the right to submit petitions and demanding a transparent rendering of accounts.<sup>32/</sup>

Consistent with the foregoing, the Rapporteur has recommended and urged that member

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<sup>29/</sup> See this report in OEA/Ser.G CP/CAJP-1972/02, September 19, 2002. Original: Spanish

<sup>30/</sup> See Third Summit of the Americas, Declaration and Plan of Action, Quebec City, Canada, April 20-22, 2001.

<sup>31/</sup> See Inter-American Convention against Corruption, Inter-American System of Legal Information, OAS.

<sup>32/</sup> See OAS, Model Law on Access to Public Information for the Prevention of Corruption, Regional Technical Workshop: Guatemala, November 2000.

states adopt laws on access to information, and mechanisms for putting them into effect, thereby enabling members of society as a whole to form considered and reasoned opinions on policies and actions, whether state or private, that affect them.<sup>33/</sup>

It is important to note that the OAS General Assembly approved resolution AG./RES. 1932 (XXXIII/03) at its last session, stressing the importance of access to information as the foundation of society's participation and oversight.

The Special Rapporteur for Freedom of Expression wishes to submit for the consideration of the OAS Permanent Council some of the work conducted by the Office with respect to this issue:

- In an annex to its 1999 Annual Report, the Office of the Special Rapporteur included a series of principles drawn up by the nongovernmental organization "Article XIX",<sup>34/</sup>
- The 2001 Annual Report contained a special chapter on this right.<sup>35/</sup>
- The Rapporteur participated in preparation of the chapter in the 2002 "Report on Terrorism and Human Rights" dealing with freedom of expression, and a portion of that chapter was devoted to access to information.<sup>36/</sup>
- In the 2002 Annual Report, the issue of access to information was dealt with in the chapter on "Freedom of Expression and Poverty".<sup>37/</sup>
- The Special Rapporteur also cooperated in drafting the Lima Principles, which may be considered when addressing these issues.<sup>38/</sup>

### **3.ii. Activities of the Office now underway**

Operative paragraph 6 of Resolution AG/RES. 1932 (XXXIII-O/03) resolves "to instruct the Inter-American Commission on Human Rights, through the Office of the Special Rapporteur for Freedom of Expression, to continue including in its Annual Report a report on access to public information in the hemisphere." Pursuant to that mandate, the Rapporteur is currently preparing an

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<sup>33</sup>. On several occasions the Rapporteur has issued press releases commenting on legislative changes relating to access to information. See for example: <http://www.cidh.org/Relatoria/English/PressRel02/PRelease5602.htm> In the chapters on freedom of expression contained in the Annual Reports, the Rapporteur has also referred to legislative and jurisprudential matters <http://www.cidh.org/Relatoria/English/AnnualReports.htm>. Finally, the topic has been highlighted in special reports on freedom of expression in various countries <http://www.cidh.org/Relatoria/English/CountryReports.htm>.

<sup>34</sup> See <http://www.cidh.org/Relatoria/English/AnnualReports/AR99/Annexes1999.htm#THE%20PUBLIC'S%20RIGHT%20TO%20KNOW>.

<sup>35</sup>. See <http://www.cidh.org/Relatoria/English/AnnualReports/AR01/ChapterIII2001.htm#1>.

<sup>36</sup>. See <http://www.cidh.org/Terrorism/Eng/part.k.htm#E.%20%20%20%20%20%20%20%20%20Right%20to%20Freedom%20of%20Expression>.

<sup>37</sup>. See <http://www.cidh.org/Relatoria/English/AnnualReports/AR02/ChapterIV2002.htm>.

<sup>38</sup>. See <http://www.consejoprensaperuana.org.pe/principiosdelimaing.htm>.

update of the report cited above,<sup>39/</sup> referring to the situation regarding access to information in countries of the hemisphere. In July 2003, letters were sent to the permanent missions of the OAS member States, seeking further information. Those letters were accompanied by a questionnaire designed to update information on legislation, case law and current practice in member states.<sup>40/</sup>

Additionally, the Office of the Special Rapporteur for Freedom of Expression and the Justice

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<sup>39</sup>. See <http://www.cidh.org/Relatoria/English/AnnualReports/AR01/ChapterIII2001.htm#1>

<sup>40</sup>. In transmitting the questionnaire, the Office of the Special Rapporteur included the following clarification: "The concept of "access to information" is often confused with the concept of "*habeas data*". As explained in the 2001 Annual Report, the Office of the Special Rapporteur for Freedom of Expression understands that "access to information" refers to state-held information that should be available to the public. An action of *habeas data* refers to the right of any individual to access information *referring to him*, and to modify, remove or correct such information when necessary. This questionnaire only requests information about access to public information." The questions were formulated as follows:

1. Are there constitutional provisions that recognize the right to access to state-held information? Please attach the text of the pertinent norms.
2. Are there laws and/or regulations that recognize and protect the right to access to state-held information? Please attach the text of the laws or regulations.
3. Are there laws and/or regulations that limit, restrict, or define exceptions to the right to access to information? Please attach the text .
4. Are there legal proposals under consideration that recognize and protect the right to access to information? Please attach the text of the proposals.
5. Are there legal proposals under consideration that limit, restrict, or define exceptions to the right to access to information? Please attach the text.
6. Is there jurisprudence in tribunals of justice that concedes access to information? Please attach a copy of the decisions from leading cases.
7. Is there jurisprudence in tribunals of justice that denies access to information? Please attach a copy of the decisions from leading cases.
8. Are there public campaigns to educate civil society and public functionaries about the right to access to information? If the answer is yes, describe these campaigns.
9. Is there a system to register requests for public information? If the answer is yes, describe the system and provide the following information:
  - a. How many requests did the State receive in the last two years? If possible, indicate the total number of requests directed to each state entity.
  - b. In how many cases during the last two years were requests denied completely? Partially? If possible, provide the reasons for these denials.
10. Are there local (provincial, municipal, departmental, etc.) norms regarding the right to access to information? Please attach the text of these norms.

Studies Center for the Americas (CEJA) are currently conducting a study to develop tools and strategies for enhancing access to legal information in various countries of the Western Hemisphere. Both of these OAS bodies recognize the importance of access to information and of transparency in government activity in terms of strengthening and stabilizing democracy. The study is expected to be completed in the second half of 2004.<sup>41/</sup>

Finally, pursuant to its mandate,<sup>42/</sup> the Office has been working since its inception in November 1998 to promote and publicize freedom of expression and access to information, primarily through its participation in international forums and its advisory services to states in drafting legislation. The primary objectives of these activities have been to create an awareness and understanding among sectors of society about the importance of the inter-American system for the protection of human rights, international standards governing freedom of expression, comparative jurisprudence in this area, and the importance of freedom of expression in the context of a democratic society. The Office will continue to carry out such activities in the future on topics including the topic of this report. For example, the Office participated in the preparatory meeting for the international seminar on access to information, sponsored by the Peruvian Press Council and the British Council. That meeting was held in Lima, Peru, August 14 and 15; the international seminar is planned for November 2003.

#### **4. Proposals**

In a note addressed to the Executive Secretary of the IACHR, the Permanent Council requested the Special Rapporteur for Freedom of Expression to submit a document with proposals on ways to comply more fully with the mandate contained in operative paragraph 5 of resolution AG/RES. 1932 (XXXIII/03).<sup>43/</sup>

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<sup>41</sup>. See <http://www.cidh.org/Relatoria/English/PressRel03/PRelease7803.htm>.

<sup>42</sup>. In general terms, the Commission stated that the duties and mandates of the Office of the Special Rapporteur should include, among others: 1. Prepare an Annual Report on the status of freedom of expression in the Americas and submit it to the Commission for consideration and inclusion in the IACHR's Annual Report to the General Assembly of the OAS. 2. Prepare thematic reports. 3. Gather the information necessary to write the reports. 4. Organize promotional activities recommended by the Commission including, but not limited to: presenting papers at relevant conferences and seminars, educating government officials, professionals and students about the work of the Commission in this area and preparing other promotional materials. 5. Immediately notify the Commission about emergency situations that warrant the Commission's request for precautionary measures or provisional measures that the Commission can request from the Inter-American Court, in order to prevent serious and irreparable harm to human rights. 6. Provide information to the Commission about the processing of individual cases pertaining to freedom of expression.

It should also be noted that the Special Rapporteur conducts, or accompanies the Commission on, on-site visits to countries of the region, during which the Rapporteur collects information and familiarizes himself with the major problems relating to exercise of freedom of expression. This activity is also essential to the tasks of the Office.

<sup>43</sup>. That paragraph resolves "to instruct the Permanent Council to promote seminars and forums designed to foster, disseminate and exchange experiences and knowledge about access to public information so as to contribute, through efforts by the member States, to fully implementing such access".

Bearing in mind the theoretical aspects and the activities described above, the Special Rapporteur respectfully suggests to the Permanent Council the following:

**4.i. Promotional and dissemination activities relating to access to public information**

The Rapporteur believes it is important to continue to highlight the importance of access to public information in democratic societies. Consequently, the Permanent Council might hold a special session on this issue, inviting hemispheric experts to debate topics relating to the effective implementation of access to public information. Those topics might include:

- a. Alternative legislative techniques for giving effect to access to public information (special laws, supplementary laws, etc.);
- b. Technological aspects in support of access to public information (open web pages, remotely accessible databases, readily accessible electronic archives, etc.);
- c. Regulations for the application of access to information laws;
- d. Exceptional cases in which access to information may be limited.

Additionally, the Council could promote the holding of events in different countries that would offer opportunities for the exchange of ideas and experience among academic experts, members of civil society organizations, journalists, legislators, and members of other institutions, public and private alike, with experience in enforcing, implementing or interpreting legal rules governing the right of access to information in each country of the region.

If the Council so wishes, the Special Rapporteur is ready to provide the names of experts or institutions that could be invited to discuss these topics.

Access to public information also constitutes a tool for enhancing transparency in government activities, and for this reason civil society needs to be aware of its existence, its importance, and the possibilities of using it. Consequently, the Permanent Council could hold or sponsor an open forum where nongovernmental organizations representing users within the hemisphere and beyond could present practical cases in which access-to-information laws have been used.

Finally, it is also important to remember that laws governing access to public information will give rise to new practices within public administrations, and this means that public officials must receive proper training. Consequently, the Permanent Council could sponsor training courses for officials responsible for applying access to information laws and regulations. In countries where such laws or regulations are in the process of execution, advanced training of this kind, by creating an awareness of the issue among public officials, could be helpful when it comes to enforcing the rules.

**4.ii. Monitoring states' efforts to give effect to access to public information**

Resolution AEG/RES. 1932 (XXXIII-/03) reiterated that states have the obligation to respect

and enforce the right of access to public information and to promote the adoption of legislative or other provisions as necessary to ensure the recognition and effective application of that right. The Special Rapporteur therefore proposes to the Permanent Council that it establish a mechanism for monitoring compliance with these obligations.

In the opinion of the Special Rapporteur, the Permanent Council might convene a meeting of experts to hear opinions on how to construct indicators that might be useful for monitoring access to public information.

Those indicators, once designed, could serve as parameters for member States in gauging their situation in terms of access to public information. It would be important to consider the foregoing works related to the implementation of the inter American Convention Against Corruption, particularly all of those related to transparency issues.

Finally, the Permanent Council could urge member States to provide the information requested by the Special Rapporteur for Freedom of Expression for purposes of the study that is now underway.<sup>44/</sup>

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<sup>44</sup>. See footnote 40.