Conference Speech

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Ladies and Gentlemen, it is my pleasure and honour to be addressing you here this afternoon.

I am particularly happy that in addition to the Information Commissioners, we have a strong representation of civil society with us today.

I want to start by reading you an extract from a short story by Nobel laureate José Saramago. The story is entitled "The Tale of the Unknown Island" and it's a parable about how when we set out to search for one thing, we sometimes find a different, unexpected, but even better thing. At the start of the story, a man goes to the royal palace, to the door for petitions, to ask something of the King:

The Unknown Island

"The king's house had many other doors, but this was the door for petitions. Since the king spent all his time sitting at the door for favours (favours being offered to the king, you understand), whenever he heard someone knocking at the door for petitions, he would pretend not to hear, and only when the continuous pounding of the bronze doorknocker became not just deafening but positively scandalous, disturbing the peace of the neighbourhood (people would start muttering, What kind of king is he if he won't even answer the door), only then would he order the first secretary to go and find out what the supplicant wanted, since there seemed no way of silencing him. Then, the first secretary would call the second secretary, who would call the third secretary, who would give orders to the first

assistant, who would in turn give orders to the second assistant, and so on all the way down to the cleaning woman, who, having no one lese to give orders to, would half-open the door ask through the crack, What do you want. The supplicant would state his business, that is, he would ask what he had come to ask, then he would wait by the door for his request to trace the path back, person by person, to the king. The king, occupied as usual with the favours being offered him, would take a long time to reply, and it was no small measure of his concern for the happiness and well-being of his people that he would, finally, resolve to ask the first secretary for an authoritative opinion in writing, the first secretary, needless to say, would pass on the command to the second secretary, who would pass it to the third secretary, and so on down once again to the cleaning woman, who would give a yes or a no depending on what kind of mood she was in."

I am not sure if José Saramago is a frequent user of the Portuguese access to documents law, but this tale would no doubt strike a cord with many requestors of information around the world, used as they become to long delays, frequent silences, and eventual arbitrary and unfounded refusals of their requests.

The story also rings true for many civil society groups who know that only by knocking on the doors of state, knocking so hard and long that it becomes positively scandalous, will eventually get what they are asking for.

And maybe also the Information Commissioners see themselves reflected in the story, as they often find themselves in the role of the cleaning woman, given the dirty work of making the final decision on requests that no one else in the palace of state really wants to handle.

The global picture is positive: the right of access to information is moving forward in leaps and bounds. Not only are more and more laws being adopted (we are approaching a total of 70 laws -- which leaves only another 121 UN member states) but implementation is improving: there are monitoring studies, government reports, commissioner's decisions and court jurisprudence to prove it.

The right to information is increasingly being respected as a right in itself, the right to know purely for the sake of knowing, and at the same time it's proving its instrumental credentials in areas such as defence of human rights and as a tool in the fight against corruption.

The two communities present here today are at the forefront of these developments: the community of Information Commissioners and the community of civil society groups working to promote and defend the right to information. This is not to exclude other actors – governments, the media, the wider public and also inter-governmental organizations– but the reality is that the actors spearheading the drive for greater government openness are represented by those of you seated in this room today.

Although having an illustrious history dating back to the 1766 Swedish Freedom of the Press act, and even back far earlier according to some historians, the right of access to information is also clearly a very young right. The fact that this meeting is just the fourth annual meeting of Commissioners, the fact that the FOI Advocates network will only reach its fourth birthday later this year, remind us of just how young it is, at least as a globally recognized human right that extends beyond a benefit granted by statute in a handful of the leading democracies.

It is a young right and it's a right that's growing up in a difficult and hostile world, at a time when the global political and security context is shifting priorities from a democratization agenda to a social control agenda. Be it well- or ill-founded, the massive increase in surveillance of us all, accompanied by some definite increases in secrecy on the grounds of national security is impacting directly on the concept of the right to information – is it the public's right to government information or the government's right to information about the public?

The movement that promotes the right to government-held information seeks to shift the power balance in societies from the elected back to the electorate. That information can redress historical imbalances in power helps explain the tremendous enthusiasm for the new access to information laws in the transitional democracies of central and eastern Europe, as part of the recent democratic reforms in Latin America, and now in emerging democracies in other parts of the world, in Africa and in Asia.

Standards are being set right now that will define the contours of the right to information and the right to privacy for years to come. Many people in this room are involved at a day to day level in setting these standards. It is an important role in ensuring the continuity of open and democratic societies.

I am now going to focus on five challenges ahead of us if we are to strengthen and defend the right of access to information.

The first challenge is ….

1. Securing recognition of access to information as a fundamental human right.

In spite of the phenomenal progress in recent years, with national laws and jurisprudence, the right to information is not yet fully recognized at the international level, it is certainly not yet on a par with freedom of expression and media freedom. The European Court of Human Rights has been equivocal, although it has at least recognized that information is needed to make informed decisions about how to protect family life and to maintain a clean and healthy environment.

But that may soon change: on 3 April of this year, the Inter-American Court of Human Rights held a public hearing in Buenos Aires, Argentina, in a case against the government of Chile. The case resulted from requests filed in 1998 for information about a controversial logging project, and in particular about the checks that the Chilean government ran – or should have run -- on the US-based company that planned to carry out the logging. It's not clear if the checks, such as environmental and financial probity checks, were indeed conducted, because even in the court hearing the Chilean government was less than specific as to whether or not the information existed. Failing to get an answer to their request and failing also to have a full hearing before the Chilean courts, which rejected the appeal as unfounded, the case was taken to the Inter-American Human Rights System. In the first phase of that process, successful for the applicants, the Inter-American Commission on Human Rights in July 2005 commented that there is a right to information and that the Chilean government was in violation of it. The Commission noted that:

The importance of an effective right of access to information has a solid basis in international and comparative human rights law … [and] there is a growing consensus that governments do have positive obligations to provide state-held information to their citizens …"

It now remains to be seen if the Inter-American Court of Human Rights will reinforce the existence of this right. Such a ruling, likely to be delivered by early 2007 , would certainly complement the declarations of General Assembly the Organization of American States which for each of the past three years urged member states "to respect and promote respect for everyone's access to public information and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application."

Council of Europe

Standard-setting on the right to information has been largely driven by developments at the national level, while the inter-governmental bodies that limited themselves to the declarative.

That is changing however. In 2002 the Council of Europe, which represents 46 countries, adopted its Recommendation on Access to Official Documents [Council of Europe, Recommendation on Access to Official Documents, 2002], which, as many of you here know, lays out the essential elements of the right of access to publicly-held information and has proved useful in defending and promoting the right, including influencing some of the laws passed since 2002 in central and eastern Europe, and being a reference in legal drafting in other countries, such as helping civil society define the exemptions in the Nigerian bill.

In May 2005 the Council of Europe mandated a working group to review the possibility of converting this recommendation into a binding treaty on access to documents, a treaty which is expected to be open for ratification in 2007.

The drafting work has started and the next drafting meeting takes place at the end of next week in Strasbourg. Initial meetings of the working group indicate that the treaty will contain the main elements of the 2002 Recommendation: it is proposed that it include recognition of the right of access to official documents, and consideration is being given to the broader formulation of a right of access to information, to take full account of the range of European norms. It is proposed that the list of exemptions set by the treaty be a definitive list: signatory governments would not be permitted to add other grounds for exemptions – and be subject of course to harm and public interest tests.

The definition of bodies to be covered by the obligation to provide information will be broad, including all bodies performing public functions. The specialists working on the treaty are mostly experts in the field and committed to openness. Civil society is being consulted. All is well.

The biggest obstacle is likely to be not the content of the treaty but the monitoring mechanism. Unless there is a strong monitoring mechanism, a treaty be not differ significantly from the current Recommendation.

Some European governments have expressed reluctance to commit to a full monitoring mechanism, and it has even been proposed that the monitoring body meet just once every five years. This would be a real problem and would take the teeth out of the treaty.

The problem, it is argued, is that a regular monitoring mechanism with capacity to review periodic reports form signatory states and conduct study visits would be too costly.

Interestingly, other monitoring mechanisms do receive funds, such the GRECO process that monitors compliance by Council of Europe member states with anti-corruption principles.

The real problem, put quite simply, is that access to information is not yet seen as being a political priority in the same way that defense of other human rights or the fight against corruption is. This is a challenge for all of us, particularly in the Council of Europe region but also more widely as this treaty will create a model for international supervision of the right and could become a strong complement to the work carried out nationally by Information Commissioners.

I would urge those of you whose governments are in a position to influence the decision on how the Council of Europe treaty on access to information will be monitored, to encourage your governments to make this treaty a priority and to commit resources to the monitoring mechanism.

Italy and Dominican Republic

A further element in defining the right of access to information is not to tolerate sub-standard laws and violations of the right at the national level, particularly in countries purporting to respect the right.

There are a handful of countries where the right to information is enshrined in law but at the same time the law restricts the right in its very essence. One such country is the Dominican Republic where an otherwise excellent law requires requestors to state the reasons for their requests.

Another such country is Italy, where the relevant sections of the administrative code establish the right to request administrative documents but require that the requestor to justify the reasons for requesting the information – essentially that the requestor has to demonstrate that the information is needed to protect a legal interest or because the requestor is in some way party to an ongoing administrative process.

Such requirements are unacceptable and will breach the future Council of Europe treaty. In the meantime, the community of nations involved in standard-setting needs to ensure that legal regimes containing such flagrant breaches of the right are not counted when listing countries that respect the right of access to information, and such breaches should be condemned wherever possible.

2. Defining exemptions – and what information should actually be made public?

The second challenge facing us is the need to define yet more precisely the exemptions to the right, and to define also, and more specifically, what information should be entering the public domain, either proactively or through requests for information.

There is increasingly a commonly agreed if not perfectly aligned set of exemptions to the right to know. The challenge is to ensure common interpretation of those exemptions, because in practice the picture is rather messy.

Take the issue of the application of the commercial interests exemption to access to government contracts with private suppliers. In more developed information regimes, copies of contracts and/or the majority of the information in them is available. There is good jurisprudence from the courts, in older FOI regimes such as the United States but also in newer regimes such as Israel, where several court verdicts about access to government contracts have firmly established that when a commercial entity makes a contract with government, the commercial entity is accepting to put itself under public scrutiny.

In addition to the courts, there are the Information Commissioners, who have issued strong decisions, such as that from the Irish Commissioner ordering the Department of Finance [Irish Freedom of Information Commissioner, 2003] to release details of contracts with advisors, in one case noting that a contract payment of some €850,000 is a "large amount of public money."

The Slovenian Information Commissioner similarly has ruled that a contract between a local municipality and a housing management company (run as it happened by the deputy mayor), should be released [Slovenian Information Commissioner, 2004]. The decision elaborated an excellent set of criteria for assessing what could and could not be classed as a trade secret. The Commissioner even suggested that if bidders for government contracts declare large parts of the information they submit to be trade secrets, the contracting agency should exclude the bids.

But in spite of this, even in countries with reasonably well-functioning access to information laws, it's still extremely hard to get copies of a government contracts. In Bulgaria, the Access to Information Programme, an NGO with a good record of winning litigation and securing information, last year lost a case at the Bulgarian Supreme Administrative Court for access to

the contract between software supplier Microsoft and the Bulgarian government [Access to Information Programme, 2005]. The contract in question relates to a deal with a value of $13.5 million – definitely a large amount of public money by any consideration.

Similarly in two cases which are still awaiting court decisions, the Albanian government is refusing to release details of the contract for the privatization of the state telecommunications company and the government of Montenegro recently declared that the entire part of all privatization contracts are business secrets. [The government of Montenegro can be congratulated on achieving independence on Sunday, and now we can add another national FOI law to our lists, but it's transparency policy clearly needs some more work.]

The same patchy picture can be found with access to other classes of documents. Assets declarations for example can be downloaded from the web in Romania, but you need to be a journalist to access them in Bulgaria. In Argentina the are available under some regional laws, but in Peru when the assets declarations of government ministers were requested, the ministers got together in a Committee of Ministers meeting and decided to give out only the summary sheet rather than the details. That's not good enough because for anti-corruption monitoring it's precisely the details that are needed to spot changes in assets held and so to identify possible illicit enrichment.

When a regional government in the north of Peru went against this decision and published the assets declarations of all local councilors and officials, they received a letter from the State Audit Office warning against "excessive transparency", although failing of course to point to any specific harm that was being done by this over-enthusiasm for openness.

The criticism of being overly transparent is not one that public officials will take lightly in countries with a traditional culture of bureaucratic secrecy. We know from experience that strong comparative arguments about what information should be released can be of tremendous help in convincing public bodies that they are not at the cutting edge of transparency standards in releasing certain information, that they are operating within a safe zone. To achieve this, there is room for more research into and dissemination of comparative standards.

3. Defining the bodies covered by the right to information.

Challenge number three is about defining the bodies that are obliged to provide information. Here in the UK the law is very broad in scope and obliges a vast range of public bodies, basically covering both the public functions principle and the follow-the-public-money logic of

comparative standards. 115,000 bodies is indeed an impressive number -- as I know from the reactions I've seen when I have mentioned it to law-makers around the world.

As the right to information develops, issues arise about the appropriate reach of the right to request and receive information. Last year, Argentina failed to adopt a draft law because of protests over attempts to oblige private bodies to release information. The proposed amendment read that "private bodies, both for-profit and non-profit, that have a public aim or hold public information". What this definition would have meant in practice is not clear. Civil society and media feared potential abuse, for example by forcing journalists to reveal confidential sources of information or NGOs to answer requests for sensitive human rights research materials.

Certainly the proposed provisions in Argentina were overly broad by current international standards. The questions is what are the appropriate obligations to place on private entities. The most progressive laws, such as the South African Promotion of Access to Information Act (South African Government, 2000), do place obligations on private bodies to respond to requests for information, but only insofar as the information is that "required for the exercise or protection of any rights".

If it's the right information is to serve to equalize power balances within society, then some attention has to be given to private companies. With many multinationals having annual turnovers and capital assets in excess of most small countries, the power they wield is phenomenal. The public needs information about the practices of private companies that impact upon matters of human rights and quality of life.

The question is, where should the public to go to request that information, to the private companies or to government oversight bodies and regulators? If it is to be the latter, as the current right to information paradigm suggests, then these government regulatory bodies need to be obliged to gather information.

In the US there is currently a battle going on to stop the Environmental Protection Agency from changing the criteria for reports that companies have to make according to the Toxins Release Index as well as the frequency of that reporting [OMB Watch, 2006]. The concern among environmentalists and others is that these changes would reduce the amount of information that the EPA holds, and therefore reduce public access to this information, even though the private companies would still have the obligation to gather and hold this data. There is currently a bill in the US Congress to block the EPA proposals.

Increasingly, FOI activists and Information Commissioners are being called upon to pay attention to issues of data-gathering and information creation. This opens up a whole new area where comparative norms need to be developed on the types of information that government bodies are obliged to hold if the right to information is to be fully enjoyed.

There also needs to be some serious debate about strengthening obligations on private companies to release information directly to requestors.

4. Supra-National Transparency

Challenge number four relates to supra-national transparency. With all the progress that is being made at the national level, supra-national bodies are now falling behind with respect for the right to information, even if those same inter-governmental bodies are engaged in the process of promoting national access to information laws.

A group of NGOs called the Global Transparency Initiative [Global Transparency Initiative, 2006] has been working with supranational bodies such as the World Bank and other development banks, and has had some positive impacts: the Asian Development Bank for instance last year made the paradigm shift from a disclosure policy based on a presumption of secrecy to presumption of openness with limited exemptions.

There remains the problem of securing access to documents held by international bodies when it is not clear who "owns" the documents.

Even though most national laws oblige public bodies to release information that they hold irrespective of which body was the originator of the information, at the national level requestors sometimes come across the problem of a government refusing to release information related to its relationships with supra-national bodies on the ground that the international body was the originator of the document and is therefore the owner of it.

There is some useful jurisprudence on this: in Georgia a court ruled that once a contract had been signed with the World Bank, the funds became part of the Georgian state budget and related information was subject to the access to information law. Similarly, in Costa Rica the Constitutional Chamber of the Supreme Court has ordered the release by the Central Bank of International Monetary Fund reports about Costa Rica's economy.

The European Commission, in a Green Paper published on the 3rd of May of this year [European Union, 2006] about the transparency of EU funds states that whilst the EU "as a

driver of change and modernity" would like to be releasing more information, in spite of the "additional administrative burden" that this entails, it is often put in a difficult position because if a member state is not ready to disclose the information, the Commission cannot, because it does not have the right to hand it out without the prior agreement of the Member State concerned.

The Commission notes that only 11 out of 25 member states are making public information on the Common Agricultural Policy and even then with wide variations in the degree of detail available and the procedures for providing access (ranging from total and direct access to partial access on request). Similar problems of access relate to data on Structural Funds, and to the beneficiaries of the Financial Instrument for Fisheries, which are placed on-line in just 5 member states.

The amounts of money being talked about here are really huge: around 75% of the entire EU budget, or about €87 billion per year, all EU taxpayer's money. There is compelling evidence that in a number of countries the lack of transparency is facilitating corruption and diversion of funds.

Interestingly, the European Commission, in the Green Paper, notes that : "the restrictive approach taken to publicity by some Member States is often based on national law or practices on data protection, which vary from one country to another beyond the minimum requirements set at EU level and are often determined by different national traditions and cultural perceptions and sensitivities."

This is a controversial claim and I am not at all sure that data protection is the full story. But whatever the reasons, the information is falling between the cracks, between the national governments and the supra-national organization, and the public cannot access it. The EU should be encouraged to ensure that it is able to release information and at the same time any problems at the national level should be addressed, to ensure that the buck cannot be passed back and forth between the national administrations and the international body.

The European Union is an important case study because of all the international bodies it comes closest in nature to a government and therefore the standards for transparency that are set at the EU will provide models for other similar bodies around the world in the future.

UN Requests

Finally on the issue of access to information related to international bodies, last week requests were filed in about 20 countries for information about how the world's governments

voted in the election of the UN Human Rights Council on 9 May. The vote was secret and it is therefore impossible to know whether our governments voted for countries with poor human rights records. This initiative started when the Chilean senate (I think that I mentioned before there are some activist senators in Chile) asked the Chilean government how it had voted and it refused. So, in the coordinated filing of requests, made around the world, including by a number of people here today, we asked to know both the vote and also the criteria used to assess the human rights record of the countries voted for. Some of these requests may eventually come across the desks of the Information Commissioners here as it is likely that the international relations exemption will be applied. As with all the other exemptions, there are of course instances in which protection of international relations requires secrecy, particularly for the limited period of time while negotiations are ongoing. On the other hand, when decisions have been taken, particularly decisions which affect human rights, the public interest should prevail. One of the ways in which we are going to open up the supra-national institutions will be through release of information at the national level, and this is clearly another area where sharing of information, decisions and jurisprudence is helpful in setting the appropriate limits to exemptions and ensuring maximum access to information.

5. Commissioners

The fifth and final challenge relates to the role of Information Commissioners.

I don't need to tell you gathered here of the value of Information Commissioners in ensuring the successful implementation of access to information laws and in drawing the appropriate limits around the interests that need protecting, be they national security, privacy or commercial interests. But I think that there are a lot of people we do need to tell about it: there are still too few access to information laws that establish these institutions.

There are some models of Information Commissioners that are increasingly well known: the Mexican IFAI, hosts of last years Commissioner's Conference, and this year's hosts the UK Information Commissioner's office. The problem with these larger institutions is that they are often seen as too expensive and governments are reluctant to commit. It's not "resource neutral" to use a phrase we heard this morning.

That's the case right now in Chile for example where the constitution has been changed to include a right of access to government documents and the new government of Michelle Bachelet has committed to adopting a law, but has expressed doubts about a commission [Pro Acceso, 2006] In part because they are aware of the Mexican model and see it as a large and expensive undertaking.

It would be going to far to claim that without an effective independent oversight body, the right to information is not respected. As long as there is recourse to the courts, there is protection of the right. But that's to overlook the wider role that Information Commissioners play: providing guidance on institutional reform, training of public officials, educating the general public and developing systems like the SiSi request submission portal in Mexico, monitoring compliance by government bodies and taking action to address problem areas … there is much that Information Commissioners can do, and somebody need to be doing this work for the right to information to function effectively. We often see that in countries without Information Commissioners, civil society has to step into fulfill the role of public awareness raising and even training of public servants. The nature of the right is such that it requires action and oversight. No government would think of running elections without an electoral commission. Data Protection Commissioners are recognized as part and parcel of protecting the right to privacy; the same needs to be achieved with Information Commissioners.

This means overcoming arguments about costs and demonstrating the utility of Information Commissioners. Avoiding the costs of lawyers and the burden on the court system is part of it, more efficient information management and better-informed decision making is another part of it. These are not always visible savings and may be hard to quantify, but neither should they be overlooked.

A greater variety of models needs to be presented to countries considering commissioners, to Chile and also to Uruguay, Croatia and Moldova. In Uruguay members of parliament are interested in the Slovenian Information Commissioner model: it's on a more appropriate scale for the small country than the Mexican model, Slovenia's population is a similar size and its macro-economic indicators and democratic profile are ones to which Uruguay aspires. I propose that we discuss how the FOI activist community and Commissioners can share their experiences with countries where laws are in the process of being drafted or reformed. For example, Chile looks to New Zealand and Ireland as models and would be interested in the oversight functions there. Even a simple study trip costs money of course but, the readiness of the Commissioners to host such visits would facilitate such trips and even could help with securing funds.

HOW TO ADDRESS THE CHALLENGES

So those are some of the challenges in front of us. To finish I'd like to look briefly at how they can be addressed. Three ideas:

Number one is Money, of course: more funds are needed to ensure continuity of the work of civil society and the work of Information Commissioners. Money is needed for the international human rights bodies to monitor the right to information, and for the monitoring mechanism of the future Council of Europe treaty.

This means that the donors – both governmental and private donors -- need to be convinced of the utility of protecting the right to information and they need to understand what nature of the work that needs supporting. Civil society groups know only too well that funds are more easily available for campaigns to adopt access to information laws than for the laborious technical assistance work of assisting with implementation, conducting monitoring and undertaking litigation.

Support is also needed for sharing of best practices between the Information Commissioners. The World Bank for example is providing support to the IFAI for wider distribution of the SiSi request filing system [Instituto Federal de Acceso a la Información, 2006]. There is much to share if resources are available to help us share it.

Number two: Information sharing – Even with limited funds, I believe we can further improve sharing of the body of knowledge being built by civil society and Information Commissioners. The FOI Advocates Network [FOIAnet, 2006] has around 90 member organizations and a mailing list of about 200 individuals. The main discussion list contains dynamic exchanges. Anyone on the list can request information on comparative law and practice on a wide range of access to information issues, and answers are usually received within hours of the requests being posted on the list. Some of the examples I have given in this presentation are taken from recent exchanges on the FOIA network. A few commissioners are on that list, but we could if any more would like to join, you would be very welcome. Let me know if you are interested.

Number three, Right to Know Day – my last point is to note that NGOs working on freedom of information have nominated 28th September as International Right to Know day and the idea has been picked up around the world; last year there were events and media activities to mark the day in at least 30 countries, and although not yet a formal UN day, it has received some recognition from intergovernmental bodies such as UNDP.

I believe that much more advantage can be taken of International Right to Know day to promote the values which all of us here share. Having an annual day provides a platform for reaching out to the public and raising awareness of the right to request information from

government, the right to know what the government knows, the right to know how taxpayers money is being spent and how power is being exercised.

It would be wonderful if the Information Commissioners, either as a body or individually would also mark Right to Know Day and so help to maximize its potential for raising awareness of the right to information.

At the end of the short story by José Saramago, the man gets to see the king, who gives him what he is asking for, which is a boat, and he falls in love, with the cleaning woman in fact, and together they set out to sea in search of unknown islands and other new discoveries. I wish you all such happy endings.

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