

MEXICO'S NEW FREEDOM OF INFORMATION LAW

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Mexico City, 10 June 2002—Mexico's first national freedom of information initiative became the law of the land today, when it was signed by President Vicente Fox Quesada in a ceremony held at the presidential residence in Mexico City. The signing follows unanimous votes in both chambers of the Mexican Congress during the last week of April, and ushers in a landmark piece of legislation aimed at guaranteeing the public's right to request and receive information from the government.

The law represents a compromise between two proposals presented to the Congress during 2001. The first was the product of the civil society coalition, the Grupo Oaxaca, presented to Congress in October and adopted and sponsored on December 6 by members of every party represented in the House of Deputies except those of President Vicente Fox's National Action Party. The second proposal was the Mexican government's, presented to Congress on December 1. (There was a third, sponsored last July by Luis Miguel Barbosa Huerta, a deputy of the Revolutionary Democratic Party, but it was incorporated into the working draft of the Grupo Oaxaca's version.) Readers may refer to the texts of the two main proposals below. Much of the language of the final law comes from the government draft, but with a number of critical changes made in the wake of negotiations during the bill's mark-up.

The final product is a very good law: well-conceived, well-articulated and unequivocal in its intent to guarantee of the right of citizens to obtain information about their executive branch. It rests on a premise of disclosure, defining all government information as public (Article 2), and directing government agencies and entities to favor "the principle of publicity of information" (Article 6) over secrecy. It requires agencies to publish in a routine and accessible manner all information concerning their daily functions, budgets, operations, staff, salaries, internal reports, and the awarding of contracts and concessions (Article 7). It grants citizens the right to seek the release of information that is not already public through an uncomplicated request process (Article 40), with a right to appeal an agency's decision to deny information (Article 49), and the right to take the case to court in the event that the appeal is denied (Article 59).

In one special and innovative clause, the law singles out information regarding crimes against humanity or gross human rights violations as unique, and expressly prohibits the government from withholding such information under any circumstance.

If the passage of Mexico's new federal law is exciting, developments at the state level are also extremely encouraging. Indeed, one week before Congress passed the national bill, the state congress of Sinaloa approved its own freedom of information initiative – in several respects, a better document than the federal law. Sinaloa's decision has sparked interest among other Mexican states in writing and passing local statutes; during the last

week of April, Michoacan's governor Lazaro Cárdenas convoked a day-long session of panels in his state capital Morelia to explore the issue.

The text of the Sinaloa document may be found posted below.

Examining the federal law

Mexico's new national law states its broad objectives in the fourth article: among them, to "make public administration transparent," to "encourage accountability to citizens" so that they may evaluate the performance of government agencies, and to "contribute to the democratization of Mexican society and the full operation of the Rule of Law."

Although it is explicit about the executive's obligations to transparency, the law takes only a half-hearted stab at establishing the same kind of standards for Congress and the judiciary. That is not in and of itself troubling; most specialists in information law agree that openness requirements for the three branches of government are distinct and should be treated through separate legislation. But Mexico's openness activists should promptly consider what kind of rules need to be designed for Congress and the judicial branch, and then lobby to turn them into law. The famously dysfunctional, corrupt and closed judiciary, in particular, is sorely in need of new transparency standards that will open its operations to public scrutiny.

Guarantees for the protection of privacy also merit separate legislation, although the new law does devote a large and well-elaborated chapter to the issue (First Section, Chapter IV, Protection for Personal Information).

Not all of the issues raised during negotiations before April's congressional vote have been resolved, and the final law has its weak spots. The law attempts to hold all Mexican government and quasi-government institutions to equal standards of disclosure, including the Federal Election Institute, the national universities, and federally-owned commercial interests such as petroleum giant PEMEX, among others, but its regulations come up short in several cases. Political parties, for example, are required to open government audits and any reports they submit to the Federal Election Institute, but they are not required to publish information about their funding sources. (The public may request that information through the law.)

Articles 13 and 14 contain exemptions to disclosure. Article 13 lists five categories of information considered classified, incorporating the concept of "harm" – that is, the information is classified only if its disclosure could cause identifiable damage. Broadly stated, the categories are national security, international relations, economic stability, personal life and ongoing law enforcement investigations. Article 14 enumerates another six categories of information considered exempt.

Only time will tell how these eleven exemptions are interpreted by agencies, but there are some immediate concerns. First, the law includes a clause contained in the earlier Fox

draft exempting any information that, if disclosed, could “harm the country’s financial, economic or monetary stability” (13,III): a potentially sweeping protection, depending on agency interpretation. Second, judicial and law enforcement bodies are given great latitude to withhold their files, including anything related to “prior investigations” (14,III) and court documents “when there has been no ruling” (14,IV). Finally, and disappointingly, the law exempts altogether records of the government’s internal deliberative process reflecting opinions, recommendations and points of view (14,VI). That differs sharply with the case history behind the comparable exemption in the U.S. Freedom of Information Act (exemption 5), which has required the government to separate and release factual material contained in the documents. The Mexican exemption does require that final decisions be documented and made public.

There is one significant innovation in Mexico’s law, which has no equivalent in the United States. After the exemptions in Article 14 are listed, the text declares that: *“Information may not be classified when the investigation of grave violations of fundamental rights or crimes against humanity is at stake.”* Given the secrecy that continues to distort understanding of historical events such as the 1968 military massacre of students in Mexico City’s Tlatelolco Plaza, or the role of state security forces in “disappearing” hundreds of Mexican guerrillas and non-violent activists in the 1970s, this extraordinary clause in the new law may help provide critical clarification and accountability.

The law establishes government bodies that will implement the new transparency rules. Each agency will form a “liaison section” to serve as an administrative office to deal with publishing open information and responding to citizen requests. A new “Information Committee” will supervise the agency’s openness procedures and ensure that the liaison section responds to the public properly. It will also oversee classification standards and decisions to withhold or release, and organize the agency’s documents for archiving purposes. According to Article 17, agencies must produce an index of its classified files, organized by subject matter, and *publish* it biannually – a significant improvement over U.S. law.

One concern about the liaison units and Information Committees is that they are to be established and operated using agency’s regular budget; no extra money will be allocated for the purpose, potentially leading to bureaucratic resentment and resistance to the entities.

To implement the law at a national level, the government is required to create a new Federal Institute for Access to Public Information. The Institute is critical because it will oversee all aspects of the information process. With regard to the agencies, it will help establish classification criteria, provide training and technical support on how to publish their open information and respond to requests, create guidelines for the management of personal information, alert internal oversight bodies of alleged infractions and receive reports from them. With regard to requesters, the Institute will advise individuals on how to find information and file requests, and hear their appeals. Finally, it will educate

citizens and public servants alike about the new right, prepare a guide on access to federal information, and produce an annual report to Congress on government responsiveness.

Although the Fox administration wanted to be able to choose and appoint the Institute's seven commissioners without outside interference, the Grupo Oaxaca successfully negotiated a role for Congress, and the Mexican Senate may now reject a presidential nominee with a majority vote (Article 34). Unlike the agency liaison sections and Information Committees, the Institute will have its own line in the federal budget.

Other aspects of the new freedom of information law include:

-- Secrecy end-date: According to Article 15, the government must open its files 12 years after they were created (representing a compromise between the Fox draft's 20 and the Grupo Oaxaca's 10 – and compared to 25 years in the United States).

-- Deadlines: An agency must respond to a request within twenty working days and deliver documents ten working days later.

-- Documents: A citizen's request and the government's response must themselves be public, and agencies must make the resulting documents available to all in an accessible manner (another advantage over U.S. law).

-- Fees for access: Chapter V of the new law resolves the problem of fees by removing the cost of search. Only the cost of reproduction and delivery of documents is now charged.

-- "*Positiva ficta*": Article 53 resolves in the Grupo Oaxaca's favor the question of what an agency's failure to respond to a request means. According to the law, the lack of a response will be considered acceptance of the request, setting in motion the process and deadlines normally associated with an accepted request, with the added advantage of an expedited procedure.

-- Repeated request opportunities: Article 60 gives citizens renewed opportunities to challenge an agency's decision to withhold information, after one year has passed since the original decision.

Sinaloa's state law

Sinaloa's freedom of information law contains several clauses that are significantly more progressive than the federal law. One of them is particularly interesting: the requirement to educate the state's citizens about their new right to information. The obligation is described in Chapter III, "Promoting Openness."

In Article 13, the law requires that state agencies train their officers on the right to information and Habeas Data through "courses, seminars, workshops and any other

teaching and training methods considered appropriate.” Article 14 targets the school system: “Plans and study programs for basic, elementary and upper education as well as training of elementary school teachers shall include training on the importance of the right to access public information and the right of Habeas Data in a democratic society.” Sinaloa’s State Commission for Access to Public Information (equivalent to the institute established in the federal law) is obliged to assist in preparing programs and didactic materials for the schools. Finally, Article 15 requires the state’s public and private universities to include in their curricula study segments on the right to information and Habeas Data, with assistance from the Commission.

The Sinaloa law will serve as a fascinating test of the extent to which government can legislate cultural change. For beyond the new openness requirements mandated by the initiative, the law aims to change people’s attitudes and expectations toward government by educating them about their rights and about the government’s obligations to them.

Conclusion

Mexican civil society has broken new ground with the passage of the country’s federal and state freedom of information acts. The laws represent the crowning achievement of a long campaign for transparent and accountable government in Mexico, one that truly began in the mid-1970s with efforts to amend the Mexican Constitution in order to enshrine the public’s right to information as a constitutional right. The amended language to Article 6 passed in 1977.

The government now has exactly one year to make the institutional changes required by the act and to prepare its civil servants before the law takes effect. By the same token, however, the reporters and editors, scholars, lawyers, openness advocates and public interest organizations behind the freedom of information campaign also have just one year – for the success or failure of the law’s implementation will depend as much on the continued participation of Mexican civil society as it will on government action.

Mexico is a country where a powerful executive branch has historically overshadowed a weak Congress, a dysfunctional judicial system and a malleable press, and whose citizens are unaccustomed to demanding – and receiving – their rights. Today, the Mexican public still has no access to information about the most fundamental ways in which government affects daily life, and issues such as local school budgets, crime statistics, anti-pollution controls, the salaries of public officials, the number of police patrols, contracts awarded and much more remain out of reach for ordinary citizens. In order for Mexico’s new freedom of information act to become enforceable, the same civil society groups that organized and fought for the law must now mobilize to educate people on how to use it in their favor.