

INTRODUCTION

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This book is situated within a vast and growing literature on transparency in Mexico. Several analysts have already addressed the legal issues and documented the political history of reforms involving the opening up of public access to information in Mexico. So, instead of repeating their work, this book has a very specific goal: to offer a general and accessible overview of Mexican government agencies' actual practices. Rather than focus on legal, administrative and procedural issues, the authors' purpose is to share brief and synthetic assessments of the right to information's processes and agenda, seen through the lens of specific issues and institutions. Each essay reveals just the tip of the iceberg of studies and findings that go much deeper, since the only possible way to bring together such a wide range of perspectives in one book was for each one to be brief. The decision to invite these authors to participate was based on their experience and trajectory in each of the issue areas; together, they offer a wide range of perspectives both from civil society and academia.

We strove to include the main issues that have entered into public debate, from those directly involved with the right to know and the context that shapes the capacity to exercise that right, as well as related questions that go beyond transparency and access to information. As one might expect, the range of issues addressed is very broad, because there is no question of public interest that does not involve the demand for disclosure. However, some issue areas are covered here more thoroughly than others and the collection of topics and perspectives is limited by important gaps. This was due to the fact that for some policy issues, we were not able to find colleagues who had done in-depth research on the state of pro-transparency reforms—this was the case of government subsidies to private sector companies, for example. Some articles focus on analysis of certain specific institutions, while others address sectoral issues or processes that involve various institutions. The essays are organized in eight large thematic sections: Electoral Procedures, Political Institutions, Justice and Rights, Economic Policy, Social Policy, Environmental Policy, States and Municipalities, and Cross-cutting Issues.

The period analyzed is President Vicente Fox's six-year administration and the key reference point is the Federal Law for Transparency and Access to Information (LFTAIPG in Spanish), which was approved on June, 12, 2002 and went into effect a year later—although some authors begin with a review of how the prior context influenced information access issues

within the sector, area or institution analyzed. Others extend their analysis to explore events that followed the Fox presidency.¹

The reader will notice that the evaluations do not represent a consensus, indeed, one can find authors that differ in their assessments. However, the essays do suggest some conclusions that are cut across the whole range of subjects and aspects covered, since they highlight structural characteristics of Mexico's current legal and institutional framework for access to information and transparency. Without a doubt, the most important step forward—as most of the authors agree—is the very existence of the federal law and the information access mechanisms that it set into motion.

The law's positive aspects include the two dimensions it regulates: on one hand, transparency, and on the other, information access as a right. In the first dimension, many agree that establishing public disclosure requirements in Article 7—referring to the information that all government agencies have to publish online—is a huge advance, since important information is available and of easy access, without a need for the user to request it.

In addition, many authors find that, in practice, the agencies covered by the law do indeed carry out these obligations to a lesser or greater degree. Such is the case, for example, of the Social Development Ministry, which according to Kristina Pirker generally fulfills these information requirements, creating, “the impression (at least at first glance) that the institution is “open” to public scrutiny.” The National Leadership of the *Oportunidades* program, according to Alberto Serdán, “has a wealth of well-organized information, which complies reasonably well with the requirements of the Federal Law for Transparency and Access to Information,” available on their website. The website of the Federal Electoral Court (TEPJF in Spanish), in Ana Suárez and Libby Haight's opinion, is an exemplary case of, ““voluntary’ dissemination of high quality and useful information.”

In terms of the second dimension, the information rights, authors agree that the creation of mechanisms for access to information and the Federal Institute for Access Information (IFAI in Spanish) are essential elements to ensure the fulfillment of what may be the most basic principle of the law: the maximum disclosure of governmental information. These essays that follow describe several clear-cut cases of the IFAI's definitive contribution to guaranteeing access to public information—even when it exceeds the strictly governmental

¹ Articles were received during a 9-month period, between July 2006 and March 2007, which is why some include more recent data than others.

sphere. Arturo Alcalde, in his discussion of transparency in the labor field, says, “The most important piece of news in terms of union transparency came in the form of eight appeals resolutions between 2004 and 2006 by the IFAI.” Another piece of evidence is presented by José Roldán in his analysis about access to medical records. In its resolutions, “the IFAI has established an important and positive set of criteria: patients have the right to the information in their medical records. [...] On balance, the current situation is positive: citizens, at least those who have access to public services, can count on a powerful tool to improve the protection of their rights. The IFAI’s role has helped to encourage patients who are more informed and better equipped to hold public servants accountable, as well as to generate incentives for better institutional performance.”

However, while the Transparency Law has been cast as the cornerstone of the governmental information opening process, various authors agree that for different reasons, the law has not been capable of making the government truly transparent, in the sense of allowing citizens to see the guts of institutions and understand the decisions that public servants make, the rationale behind them, their costs and impacts. This book addresses a range of experiences which show that, even now, there is still no access to substantial information, which is needed for the public to be able to evaluate government performance and to promote accountability, timely monitoring and oversight of public spending. In fact, we are still far from being able to claim that we have an open government in Mexico, with transparent and accountable practices, which recognizes and respects the right to know.

In his essay, Mario Di Constanzo points out that, “financial authorities have systematically closed the door to transparency and access to information about the banking system bailout. As a result, the LFTAIPG, which has the main goal of allowing citizens to be informed about our government’s actions, has been incapable of forcing out the truth about this issue.”

In another economic issue area, transparency regarding the government spending of over-budget oil revenue, Rocío Moreno tells us that, “important achievements have not been enough to be able to exercise precise control over the use of surplus income generated from the operation, processing and sale of petroleum,” and explains that this is due mainly to two problems: “discretionary use of surplus income on the part of the Treasury Ministry and the lack of transparency and accountability mechanisms that would make it possible to monitor the use of surplus income transferred to the states.” Both problems are highlighted and discussed in many of the essays that focus on the absolutely central issue of public budget transparency.

Javier Treviño's look at the State in the case of the Special Prosecutor's Office for Social and Political Movements of the Past—created during Vicente Fox's presidency—is even more critical. He argues forcefully that the LFTAIPG does not end a culture of secrecy, as many predicted. Instead, he contends that those that believe so, “ignore the fact that today, in the ‘transparency era’, public information continues to be denied—often by the very regulations that are supposed to increase access to information.”

Besides the challenges that the limitations pointed out in these reflections highlight, the most worrying fact may be realizing that evident advances made during the six-year period that ended in 2006 have been accompanied by important backward movements as well, some of which were introduced by the LFTAIPG itself, while others through different kinds of reforms. This is what Jorge Romero clearly suggests, that changes in the federal budget process introduced by the Fox administration (not related to the transparency law) led to ‘one step forward and two steps back’. In 2003, when the Treasury Ministry (SCHP, in Spanish), “eliminated the analytical volume from budget reports, and de-linked program performance evaluations. In one stroke, the SHCP considerably reduced the information available for program monitoring, and introduced changes that make it impossible to evaluate their impact.” Other types of backsliding could be understood as reactions to the LFTAIPG, when its tools are used to favor opacity. Felipe Hevia describes this phenomenon as follows: “Transparency has generated some perverse practices, as some institutions fear releasing information. For example, the minutes of the regional technical councils of the *Oportunidades* program were declared ‘confidential’.”

However, perhaps the most obvious step backward was the performance of electoral institutions during the elections in July, 2006, and the resulting conflict. Paola Riveros describes a Federal Electoral Institute (IFE in Spanish) which, although presenting considerable limitations, has shown in its daily life—at non-electoral moments, so to speak—a commitment to transparency requirements and to the launching of information access mechanisms. However, these devices were of little use when it came time to ensure clear and transparent decision-making by the General Council at the crucial moment of the 2006 federal elections. As Hugo Almada suggests, the performance of this council at each of the stages of the electoral process, provoked more skepticism than certainty, undermining the Institute's credibility with each step they took. Consider, for example, the case of the decision to open up only a few ballot boxes to carry out a recount, as well as the inconsistent information about election returns that was released by the IFE's Preliminary Results Program (PREP)—which was decisive in shaping the outcome of the election in the eyes of public opinion.

The IFE's General Council's performance—in particular, its lack of transparency—deeply affected the Institute's credibility. Not only did it not provide information in a clear, complete and timely manner, but it also denied access to important documents, such as the actual ballots cast on July 2. As Irma E. Sandoval puts it, with the IFE's debatable argument that ballots are not documents and that, therefore, there is no way to gain access to them, it ruled out the possibility of carrying out a basic exercise of transparency: a vote recount by a group of citizens, civic organizations, academia and media representatives. One could ask, then, what are the performance indicators that matter most when it comes time to evaluate advances in terms of electoral transparency, the institutional mechanisms set up by the IFE's own structure or the rather opaque way in which it behaved in 2006? If their main function is to organize federal elections, the fundamental process for the country's democratic life, then that should be at the center of any evaluation of their commitment to transparency.

Something similar could be said of the TEPJF, which, in spite of the valuable information that it offers on its website, at the defining moment during its intervention in the elections, it did not show any interest in informing the citizens about the development of the legal process. As Alfredo Orellana points out, the citizenry was not taken into account, even as an interested third party: “[The Court] did not make a single institutional effort to notify citizens about the judicial processes that were pending in the cases of a number of specific polling places that had been called into question, nor did it even make a public announcement when its sentences finally eliminated those votes from the national totals. The electoral court challenges were conducted and concluded as though they were inheritance disputes among quarreling individuals, rather than controversies in the public domain.” Unfortunately, there are more than enough elements to conclude that for a large segment of public opinion, the balance sheet for electoral transparency is negative. Some (or most) of the advances that had been made with electoral reforms in previous years, to create trust and certainty in electoral processes, was lost in 2006.

Then, what are the factors that explain the limitations in the outcomes of the pro-transparency reforms and especially the LFTAIPG? In general, the main causes mentioned by the authors can be grouped into seven categories, which may be interrelated, but it is worth trying to understand each one.

- a. *Rules established by the LFTAIPG: the reasons for reserve and confidentiality, and claim of “non-existent” information.* The experiences shared here show how the claim of reserving information is used and abused—in the view of the authors—to deny information that should clearly be of public access. The Federal Electoral Institute, according to Paola Riveros, has denied access to the resumes of federal

candidates for the Congress and Senate, and of the IFE councilors themselves, because they are considered to contain personal data, which are classified as confidential. In his analysis of transparency and the police force, Ernesto López Portillo states that the implementation of the LFTAIPG, “allowed the entire field of public security to be sheltered from public scrutiny; the law’s Article 13 establishes that any information whose release might compromise public security may be classified as reserved.”

In terms of official claims that information requested is “non-existent”, this kind of answer has quickly become the legal way to deny access to information in practice. The scenario is worsened by the fact that, on occasion, the IFAI has ratified government claims of information non-existence. Several cases demonstrate this situation. Jonathan Fox and Libby Haight show how the Social Development Ministry (Sedesol in Spanish) denied the existence of a study carried out by mid-level staff in its own office in Oaxaca, which documents the political use of federal resources for social programs. The petitioner already had a (non-official) electronic copy. During the appeal process, the IFAI ratified the document’s non-existence because it considered that there was insufficient evidence to prove its origin. Michael Chamberlin reports a similar situation, when he requested from the Ministry of Defense (Sedena in Spanish), “the names of alleged *Zapatistas* arrested in Chiapas during the first fifteen days of 1994, the place they were arrested and whether they were later released or turned over to another authority.” Sedena answered that, “the Mexican Army [...] does not carry out activities related to the arrest of individuals [...],” which is why that information does not exist. In contrast with the Sedesol case, the IFAI rejected the initial response; it argued and demonstrated that the Army does carry out detentions. However, the IFAI’s resolution did not manage to open access to the information requested, because the Army insisted on its position and answered with a statement that the information did not exist.

- b. *Gaps in the rules that regulate access to information that result in institutional opaqueness.* The authors warn that it is still necessary to fine-tune the regulations in order to improve public access to information. In the case mentioned above, Chamberlin considers that authorities can abuse the claim of information non-existence because, “Article 42 does not establish an impartial mechanism that would independently verify whether or not the requested information really does ‘exist’ in an agency’s archives, or whether it is being hidden.” Another serious problem has to do with the reliability and completeness of the information. The regulations lack precision in terms of what can be done when the petitioner suspects that the information received is, “false or only half-true,” as Javier Treviño points out and

in his opinion, appeals should be allowed in these cases. He also argues that the criteria needed to claim that dissemination of a given piece of information would cause harm are not sufficiently clear. Salvador Nava and Javier Ortiz state that a more precise list of the parliamentary information that should be disclosed would contribute significantly, making the work of the legislature more transparent.

- c. *Inconsistencies with other laws.* It is clear that transparency does not legally depend only on the laws that regulate the issue, because there are other legal provisions that can inhibit or strengthen access. Chamberlin shares a good example, when he refers to the prohibition on reserving information when related to, “the investigation of serious violations of basic rights or crimes against humanity,” as established by Article 14 of the LFTAIPG. This mandate turns out to be quite limited, since there is no, “instrument under Mexican law that *defines* basic rights or crimes against humanity. Although Mexico has signed a number of international treaties that provide such definitions, and which could be applied in these cases, national legislation must be brought in line with international agreements, by integrating such crimes into the Federal Penal Code.”
- d. *When transparency depends on other reforms in the sector.* Some authors suggest that, in certain issue areas, improvements in information openness will require structural reforms in those certain sectors, since the scope of the LFTAIPG is limited. This is clear in the case of the Public Prosecutor’s Office. Enrique Ochoa explains that it is one of the least transparent institutions in the Mexican State because of the fact that it acts within a (written) mixed/inquisitive justice system, “though [this] could quickly change with the implementation of Oral Trials,” that is, an oral/accusatorial system. Similarly, Jacqueline Peschard suggests that advances made in political party transparency have been driven to a large degree by electoral reforms, and she concludes that their transparency obligations should be addressed by a law for political parties, which would be supervised by the IFE.
- e. *Problems in information quality.* There are many angles to this issue, but in general, they have to do with the fact that governmental information is often not useful, because it is not complete, comparable, consistent, timely, or accessible. This could be due to the way in which information is generated (corrupted from the beginning) or to the way in which it is presented (deliberately or not) in formats that are difficult or impossible to deal with. In the articles that follow, we find a chorus of complaints about this. Alfredo Orellana notes that in terms of the 375 legal cases that were filed after the July elections, the TEPJF disseminated information on its website that was internally inconsistent, in addition to the fact that court’s legal

decisions and vote recount results were published in different formats (Word, PDF) without offering any databases or mechanisms that would allow data analysis or comparison. Similarly, Alberto Serdán points out that the information about the operations of the Oportunidades program (beneficiaries and budget cycles, for example) is presented in electronic formats that make it difficult to analyze the data and compare different geographic areas and periods of time.

Many of the authors comment on the lack of complete information. Daniela Díaz, in her analysis of the policy towards maternal mortality, points out that the Health Ministry does not have complete information about incidence of the different causes of morbidity that cause women to die when they are not addressed. She states, “Such record-keeping, of course, is essential for finding policy solutions to maternal mortality.” Similarly, Alicia Athié reveals that in order to explore spending targeted to HIV/AIDS, “one must seek information from diverse sources, and even then it remains impossible to come to definitive conclusions.” This situation is worsened by the fact that the social security institutions (IMSS and ISSSTE) do not disaggregate their budgets in terms of different diseases. Another problem is that the information may not be homogeneous and comparable. Kristina Pirker suggests that an obstacle for monitoring resources allocated to the Estrategia Contigo (The “With You” Strategy social programs) is their distribution among different governmental agencies, ministries, state and municipal governments. Each agency presents information differently, which shows the lack of consistent criteria for processing and presenting information.

One should also keep in mind that if public information is supposed to be useful, it is necessary to take into account the user’s background in its presentation. In the case of water issues, Jorge Fuentes underlines that the National Water Commission tends to provide information that turns out to be extremely technical and difficult to understand. Something similar occurs when the information is of interest to the indigenous population; if the information is not presented in the appropriate language, it will be of little use to the interested parties. This is the case of much of the information generated in Agrarian courts, as Francisco López Bárcenas points out, as well as for information produced by social programs that deal with indigenous communities. In sum, the number and diversity of problems associated with information quality is huge, and they represent a major challenge. Their solution will depend on detailed work and commitment from the authorities to review the information needs and address the deficiencies found in each area of public policy.

- f. *Lack of genuine commitment to transparency.* Although this is a rather subjective interpretation, many authors flirt with this hypothesis. Miguel Treviño's proposal in his assessment of the situation at the state level is suggestive: "if it is true that currently no single state serves as a model, it is because technological fetishism, obsession over bureaucratic procedures, and a contentious vision of the right to information have won over the desire to guarantee access through the generation of tools that make it easier for the petitioner." Miguel Sarre describes a similar situation involving access to information from the Human Rights National Commission (CNDH) files. This agency used its own law to classify information that it handles as confidential, and claims the right to use its own discretion to make disclosure decisions. When the right to access information was extended through the LFTAIPG, the CNDH had the chance to take a more pro-opening approach to the interpretation of its own law, yet it did not. To the contrary, its own information access regulations represent a step backwards, sealing complaint files for 12 years after their conclusion. How can one explain the attitude of the agency in charge of defending human rights, without concluding that it has an utter lack of commitment to the right of access to information and transparency?
- g. *Limited reach beyond the federal level.* A great deal of evidence shows that having different legal frameworks for the federal and state governments has led to enormous variation in the quality of disclosure requirements and freedom-of-information tools. As a result, to monitor spending on a particular federal social or health program all the way to its final destination, channeled through the state governments, can become an impossible mission, because there is no regulation that obliges accountability for these resources (not even regarding reporting, not to mention consistency). In addition, given that, as could be expected, many public issues that are of interest to citizens are under local government jurisdiction, the effects of the federal law fall short. To face the challenge of standardizing and strengthening conditions for transparency and access to information in all the states and municipalities, various authors support the reform of Article 6 of the Constitution, to set minimum standards for the right of access to information.²

These are some of the issues raised in the essays that help to sketch a picture of the right to know in Mexico. To be sure, the reader will find other points where the authors agree, as well as elements that inform reflection about a series of broader questions that ground this discussion: What impact have these reforms had on government accountability?

² In March, 2007, the Congress approved an amendment of Article 6 of the Constitution, and the Senate approved it in April.

Have they bolstered the system of checks and balances? Have the advances in this area encouraged citizen participation in the design and evaluation of public policies? Does the electorate have better tools today to cast an informed vote?

It is true: transparency is an indicator of the quality of a democracy, and as such, is a means to promote the transformation of a society as a whole, especially in terms of the population's relationship with its government. Putting this principle into practice would reform the incentive system that shapes public life. Disclosure of all of the government's actions and decisions would contribute to building a citizenry that is interested in the way in which its representatives lead the country, that demands efficiency and honesty in the use of public resources, that demands accountability and that their opinion be taken into account—not only at the ballot box, but also in the solution of public problems. In turn, this system could encourage public servants to act responsibly, knowing that the decisions they make will be attributable to them, and will have consequences for them (good or bad). Just as this transformation would not happen solely as a result of having an information access regime—without a functioning system of justice, there would be little impact—in order for a transparency culture to become a daily reality rather than a mere dream, many factors need to come together.

The law clearly represents a major advance; indeed, for many, it constitutes the only democratic reform that was actually carried out during Vicente Fox's term as president. Yet, as this book's essays show, its effects after almost four years of exercise are still uncertain. To make the transition to the consolidation of an information access regime, during this phase of implementation of the law, users' audacity in requesting information and persisting until obtaining it has to be combined with applying and interpreting the law in terms of its goals, in order to overcome procedural errors and cultural obstacles. The worst-case scenario may be one in which the efforts to open the Mexican State up to public scrutiny lead not to a strengthening of the culture of transparency, but to a façade of transparency, where in spite of the appearance of access to public information, in practice, information that is important, sensitive and decisive continues to be hidden behind sophisticated interpretations that take advantage of the existing rules. Could it be that we are building a system that looks transparent on the outside but is opaque on the inside?