

PROPOSALS FOR TRANSPARENCY IN CONGRESS

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Introduction

In modern democratic societies, people have the right to know—to, “be informed about what the government is doing and why.”² The right to know any information in the possession of public representatives is essential in a constitutional and democratic state governed by the rule of law. A state which denies, retains, hides or complicates access to public information is the antithesis of a democracy.

If Congress is the expression of the democratic principle of popular representation, its legislators are the public’s agents, and therefore every member is a public servant. The purpose of this article is to argue in favor of better transparency and openness in Congress. The argument is based on citizens’ rights—mainly the right to know and the right to participate in government—which in turn lead to citizens’ right to access information about Congress.

Undoubtedly, there have been important advances regarding transparency in Congress. There are irreversible achievements in the area, since, “once the knowledge becomes public, then it becomes a public good that cannot be made private again.”³ However, important challenges still exist in the implementation of a regime of transparency, openness, and access to information.

Advances

In matters of transparency and openness, modern parliaments are quite different from the British Parliament, which operated in absolute secrecy for most of its history.⁴ The advances worth noting include the fact that the plenary sessions of both Mexico’s Congress

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² Joseph E. Stiglitz, *On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life* (Oxford: Oxford Amnesty Lecture, 1999) p. 2.

³ *Ibid.*, p. 6.

⁴ A. Adrian Vermeule, “The Constitutional Law of Congressional Procedure,” *Public Law Working Paper, No. 39* (February, 2003) University of Chicago. Available on SSRN: <http://ssrn.com/abstract=382461>.

and Senate are broadcast on television by the Congress Channel (on cable), or that it is possible to consult the daily journal of debates on-line, as well as the approval of the Federal Law for Transparency and Access to Information (LFTAIPG in Spanish) in 2002.⁵

The LFTAIPG has two basic dimensions: access to information, understood as a fundamental right and, something more complex, a public policy of government transparency.⁶

The fundamental right to freedom of information is established in Article 6 of the Mexican Constitution. This right is also recognized in various international agreements signed and ratified by Mexico, such as the International Pact on Civil and Political Rights, and the Inter-American Convention on Human Rights. According to the Declaration on Principles of Freedom of Expression by the Inter-American Commission on Human Rights, access to information held by the State is a fundamental right of individuals, and States are obligated to guarantee it. Such a principle allows limitations only in exceptional cases that should be previously specified by law.

We have argued about the need to constitutionalize the fundamental right of access to public information, that is, to establish within the Constitution minimum measures that guarantee the essential content of the right and to make it, therefore, mandatory at the state level, and in the offices of Mexico's diplomatic, consular and international representatives.⁷ The "Chihuahua Initiative" stands out, launched on November 10th 2006, in which the governments of Zacatecas, Chihuahua, Veracruz, Aguascalientes and the Federal District agreed to propose that the right of access to public information be recognized at the constitutional level.

Public policy for transparency does not stop with the fulfillment of requirements established in access to information laws, but it does aim to, "maximize the social use of information within and outside the governmental organization."⁸ Thus, the concept of transparency is broader than access to information.

In its original conception, it was thought that the LFTAIPG would only be applied to the executive branch of the federal government. Other governmental institutions were

⁵ www.cddhcu.gob.mx and www.senado.gob.mx.

⁶ Centro de Investigación y Docencia Económicas (CIDE), *Estudio en Materia de Transparencia de Otros Sujetos Obligados por la Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental* p. 19.

⁷ Salvador O. Nava, "El derecho de acceso a la información en el Estado mexicano. Apuntes de caso para su constitucionalización," in Sergio López-Ayllón (ed.), *Democracia, Transparencia y Constitución. Propuestas para un Debate Necesario* (Mexico: Universidad Nacional Autónoma de México-Instituto Federal de Acceso a la Información Pública, 2006) pp. 45-61.

⁸ The changing point in transparency public policy is found in Article 2 of the LFTAIPG, which establishes that all governmental information to which the law refers is public. CIDE, *Estudio en Materia de Transparencia de Otros Sujetos Obligados por la Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental* pp. 27-28.

included at the last minute, partly as a result of demands by media and civil society groups.⁹ As a result, the LFTAIPG's approach to institutional design for other institutions covered by the law was based on general guidelines, allowing each institution to develop their own measures to comply with the law.¹⁰

Limitations

When considering the issue of limitations or obstacles to transparency in the legislative branch, two characteristics of representative institutions should be taken into account during the institutional (and legal) design, to minimize adverse effects.

In the first place, there have been attempts to distinguish between legislative bodies, as political authorities and jurisdictional organizations, which follow the paradigm of judicial authorities. There is a notion that political authorities enjoy discretion, since the scope of their duties is self-bounded. What is true is that the constitutional State cannot achieve its goals without the Parliament, which entails a bridge between constitutional sovereignty and supremacy, as well as an instrument through which fundamental rights are cast and the State's public functions are thread. The Congress has a series of functions that go beyond passing laws, as a central representative body where rights and politics converge.

In the second place, the legislature is the only governmental body that regulates itself, which makes it necessary to establish criteria that lengthen the time-period for reserving information in a specific law, rather than in internal procedure manuals, or regulations.

In order for a transparency law to fulfill its task, it is necessary for it to be fully implemented by all of the mandated agencies. The Federal Institute for Access to Information (IFAI in Spanish) released the study, "On transparency matters of other institutions mandated by the Federal Law for Transparency and Access to Information," carried out by the Center for Economic Research and Instruction (CIDE in Spanish). The study created a compound index to measure the degree of implementation of the LFTAIPG in, "other institutions mandated by the law." The rankings were divided in three levels: high, middle and low. The Senate has a middle ranking on the compound index (with 0.530) and the House of Representatives a low ranking (with 0.428).¹¹

⁹ *Ibid.*, p. 26 and Ernesto Villanueva, "Transparencia: un balance sexenal," *Proceso*, núm. 1569 (26, Novmember, 2006) p. 74.

¹⁰ See Article 61 of the LFTAIPG.

¹¹ CIDE, *Estudio en Materia de Transparencia de Otros Sujetos Obligados por la Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental* pp. 85-86.

Some of the results that the study show are:

“In terms of the degree of correspondence between the principles of disclosure and transparency and institutional design, we observed that the Republic’s Senate has placed a greater emphasis on aspects of institutional quality in detriment to the fulfillment of transparency obligations. The House, on the other hand, shows a significantly lower degree of compliance, for it has neither been capable of fulfilling the obligation of publishing formal data from the organization, nor has it been capable of including transparency in its units’ design, nor in the institution’s efforts on the issue [...]. The two legislative bodies’ efforts to publish information on the internet are flawed. That is, neither organization has been capable of meeting their transparency obligations [...], although they have legal tools that could regulate the handling of information in those organizations.”¹²

If one accepts these results, this would indicate that the legislative bodies have not fully implemented the LFTAIPG.

Perspectives: the Right of Access to Public Parliamentary Information

We would like to take the argument a step further, and propose that there is a right to access public parliamentary information. Given that Congress embodies the democratic principle with a system of popular representation and, therefore, legislators are agents of the public (with delegated powers), it would be unthinkable that one charged with this responsibility would not be accountable to those who have delegated authority to them. For that reason, one of the main principles of a transparency law is the principle of maximum information disclosure. This principle allows for specific exceptions (reserved or confidential information) which can only be justified when there is a risk of interfering with the performance of a given parliamentary function, or when it refers to personal data.

If we desire not only a more participatory democracy, but also a democracy in which public deliberation occupies a central role, and congressional procedures do not produce empty rituals, the fulfillment of the principle of maximum information disclosure in parliamentary matters is essential. A minimum list of transparency or official public information in parliamentary matters would have to include the following issues:

¹² *Ibid.*, p.74.

- “Political negotiations” which are carried out by party groups or their leaders, among themselves or with the government;
- Resolutions, actions and administrative measures within the Congress, especially resources allocated to various parliamentary groups;
- Information about what is being done or is present, as well as information related to what is not being done, what has been stopped or is obstructed (for example, the large numbers of bills that are not admitted for debate);
- Records and transcripts of every session, meeting, committee, assembly or any other arena of deliberation;
- Information related to lists from commissions, sub-commissions, special commissions or research commissions’ work meetings; and
- Office or field work that the legislator carries out in his district or constituency.

Conclusions and Recommendations

These propositions suggest the following conclusions and recommendations:

1. The right to be informed about what the government does and why it does it is a basic right.
2. The fundamental right of access to public information must be made constitutional: the minimum constitutional requirements to guarantee the essential content of this right should be established in the Constitution.
3. There is a right to access to public parliamentary information, as a concrete manifestation of the right of access to information in the field of legislative institutions.
4. Although there have been important advances made in matters of transparency in Congress, there is a deficit in implementation of the transparency, openness and access to public information regime in both houses.

5. According to the principle of maximum information disclosure, a list of official parliamentary information should include, among others:

- “political negotiations”;
- resolutions, actions and administrative measures;
- legislative tasks, including information regarding those that are not performed;
- records of deliberative work;
- commissions, sub-commissions, special or research commissions’ work meetings; and
- desk and field work done by legislators.

Exceptions to the principle of maximum information disclosure of legislative activity should follow clear and transparent criteria specified in the law (in a formal and material sense), rather than by closed-door political negotiations that hide the process of representation.