

THE TRANSPARENT DENIAL OF INFORMATION

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Up to now, studies on transparency in Mexico have typically concluded that transparency is a, “crucial step in the democratic transition”, and that the Federal Law for Transparency and Access to Information (LFTAIPIG in Spanish) signifies “the end” of the “culture of official secrecy”. They ignore the fact that today, in the “transparency era”, public information continues to be denied—often by means of the very regulations that are supposed to increase access to information. This article explores how government agencies reproduce the culture of secrecy without violating the transparency law, and analyzes how a democratic government manipulates the rules it has itself created.

One paradigmatic case is the investigation of abuses committed during previous regimes, a project referred to as achieving the “transparency of the past”.¹ The federal agencies in charge of this investigation are the Special Prosecutor’s Office for Social and Political Movements of the Past (Femospp in Spanish) and the National Archives (Archivo General de la Nación, or AGN in Spanish). They are particularly interesting because they regulate transparency in two ways: on the one hand, they control citizens’ rights to know about the past; on the other, they regulate information about their own current administration.²

The Context: The Desire to Know

Under the influence of the human rights movement, a certain consensus has emerged around the idea that “knowing” is a right as well as an obligation; and that these two sides of the same coin are important in the consolidation of democratic systems. In Mexico the “government of change” deployed its transparency campaign not only in relation to the present (and the future), but in relation to the past—from which it was trying to differentiate itself. Transparency seemed to be a sign that the new “leaders were ready to change the way the country was governed.”³

To follow through on that transparency discourse, President Fox created a “Special” Prosecutor’s Office to investigate state crimes perpetrated during previous regimes; the

¹ This project was initiated by the government of Vicente Fox.

² Much of this article comes from my personal experience doing research on the political control of the past in Mexico.

³ Human Rights Watch, *Mexico. Lost in Transition. Bold Ambitions, Limited Results for Human Rights under Fox, 2006* Available at: <http://hrw.org/reports/2006/mexico0506>.

government declassified 80 million documents and “transferred” them to the AGN. These steps forward were bolstered by the creation of the Federal Transparency Law and the Federal Institute for Access to Information (IFAI in Spanish). Now, however, at the end of his presidential term, it is apparent that progress has been uneven: application of the new access laws has been dependent on the political will of the particular government agencies involved.

The First Achievement toward Transparency of the Past: Opacity

To strengthen the transition to democracy, Fox made a commitment to promote and respect the right to know what had happened during the PRI era. However, it would seem that the agencies in charge of disclosing the past are vigilantly committed to maintaining the culture of official secrecy.

Ninety percent of the information that the Femospp uses to build its cases comes from archives. Hence the tight relationship between the Femospp and the AGN. They are both federal agencies, which means the Federal Transparency Law applies to them, and the IFAI is empowered to supervise their actions. However, in this project they visibly ignored the Transparency Law and the IFAI’s interpretations.⁴

Article 14 of the Federal Transparency Law stipulates that information on “gross” violations of human rights or crimes against humanity cannot be classified as “reserved” for any period of time. Nonetheless, the AGN has made such information inaccessible, with the argument—also legal—that during its investigation, the Femospp may not make public anything that might damage “procedural strategies in legal processes”. Currently, almost 300 archives are “reserved”.

Information is also denied when the documents contain personal data; the transmission of such information is prohibited by the Federal Transparency Law unless there is “express consent” in writing from the individuals referred to in the documents. Yet, in this case, such consent is often impossible, since the documents refer to dead people or those who have been *disappeared*.

Finally, although the Transparency Law establishes that the AGN must organize its files and make a “simple guide” to its classification systems available to the public, half of its

⁴ On the AGN’s performance, see Kate Doyle, “Forgetting is not Justice,” *World Policy Journal*, pp. 61-72, (2003); Kate Doyle, “Una verdad en construcción,” *Proceso* 1545: 52-53; Sergio Aguayo and Javier Treviño, “Neither truth nor justice: Mexico’s de facto amnesty,” *Latin American Perspectives* 33 (2): 56-88.

archives are not indexed.⁵ Also, while some of the archives are organized, the ability to consult them is left to the discretion of the AGN. Indeed, at some points in the system, the former custodians of “official secrets” are the very same individuals who are now in charge of policing government transparency. For instance, the archives of the now-extinct Federal Security Department are controlled by the same archivist who has managed them for 30 years.

Manual of Opacity: Concealing Information According to the Law

We may never know if the opaque control of the past is due to “technical” problems in the access to historical information, or if these limitations were foreseen by the government.⁶ However, these institutions not only hide the past, they conceal current information about themselves, and they do it legally. Official and legal denials can be divided into three categories.⁷

- a. *Literal* denial, when information is denied by saying that something is not true or never happened: “it is not within our institutional purview to keep a register of the Programs that the Femospp ran; the Femospp is technically autonomous;” or, “This administrative unit does not possess in its archives any document containing the information requested.”
- b. *Implicate* denial, in which access to information is openly denied, but by justifying the legal implications of doing so: “The information committee deeply regrets that it cannot respond to your request for information due to its classification as confidential;” and, “The applicant has not demonstrated the express, written consent of the information’s owners.”
- c. *Interpretative* denial, in which information is not openly denied, but the application is reinterpreted such that the response is oblique; or, since the requested information is sensitive or disturbing, the offices respond with a lie: “The appellant is attempting to confuse the Honorable Plenary of the IFAI;” and, “If what the applicant wants is

⁵ Human Rights Watch, *Mexico. Lost in Transition. Bold Ambitions, Limited Results for Human Rights under Fox, 2006.*

⁶ We could entertain the possibility that the government (which was not entirely democratic) created these institutions to simulate its willingness to be accountable to the public, without really changing its behavior; or that; on the other hand, as they developed, the institutions acquired these characteristics, producing unintended consequences. For more on the first argument see Erika Morena *et al.*, “The Accountability Deficit in Latin America,” in Scott Mainwaring and Christopher Welna (eds.), *Democratic Accountability in Latin America* (Oxford: Oxford University Press, 2003). For more on the second argument see Paul Pierson, “The limits of design: explaining institutional origins and change,” *Governance: An International Journal of Policy and Administration*, 13(4): 475-499.

⁷ To date, the most thorough study of these three types of denial can be found in Stanley Cohen, *States of Denial. Knowing About Atrocities and Suffering* (London: Polity Press, 2005).

to know how much the Femospa has spent, this information should be requested via a separate form.”⁸

Literal and/or *implicate* denials can be overturned easily if proven inappropriate. This is not the case, however, with *interpretative* denials, since it is difficult to demonstrate the falseness of facts presented as “official truths”.

For example, when criticized for its performance, Femospa defended itself by arguing that its budget was insufficient. This excuse was accepted and disseminated by journalists and researchers; Human Rights Watch, for instance, recommended that the government allot more resources to the Femospa, so it could do its job.⁹ After January, 2006, I submitted seven requests for the Femospa’s annual and total budget. According to the materials I received in response, its resources were in fact surprisingly low: \$41,872,286 pesos in five years. I intuited that this “official truth” was false, but I could not legally appeal, because the Law does not contain provisions for appeals when the information is fictitious.

Then a highly-placed government official leaked—illegally—the “real” budget to me, which was six times larger. I decided that the Femospa should officially recognize its true budget. To that end, I submitted seven audit requests and two more information requests, in a *war of attrition* that lasted five months. Finally, I learned that the Femospa had received nearly \$250 million pesos. Its performance had little to do with its budget.

The Clearest Region

The opacity of the institutions put in charge of disclosing the past provides a striking contrast with the positive impact that the Federal Transparency Law and the IFAI have had. These have not only contributed to know information that was previously hidden or denied, but have also bolstered its public and official acknowledgment.¹⁰

⁸ All of these direct quotes were collected during the struggle to get Femospa’s budget. Request forms: 1700007706; 1700007806; 1700007906; 1700008006; 1700008106; 1700008306; 1700008206; 1700029206; 600034406. Responses: DGPDSC/UEAI/0175/2006; DGPDSC/UEAI/0176/2006; DGPDSC/UEAI/0177/2006; DGPDSC/UEAI/0178/2006; DGPDSC/UEAI/0179/2006; DGPDSC/UEAI/0181/2006; DGPDSC/UEAI/0180/2006; DGPDSC/UEAI/0873/2006; 0138/2006. Audits: 206/06; 205/06; 207/06; 208/06; 209/06; 210/06; 211/06.

⁹ Human Rights Watch, “Justice in Jeopardy: Why Mexico’s First Real Effort to Address Past Abuses Risks Becoming Its Latest Failure,” Human Rights Watch 15(4): 1-30, 2003 pp. 2, 3, 10, 11, 12, 26 and 27.

¹⁰ This is key in regards to the transparency of the past, because more than often, those who are requesting information were victims of abuses and know who their repressors were and what they did. What they are looking for is an official acknowledgment of the truth.

For example, the Femospp was supposed to set up “free telephone lines” that would allow for “direct communication between society and the Femospp.”¹¹ This was to be the only instrument through which victims could narrate their stories, without having to navigate the challenges of complex legal processes. I knew that this “hotline” had never existed, but I could not prove it. After I submitted information requests, however, the Femospp was forced to admit that, “due to problems of a budgetary nature, it was not possible to install media reception and citizen services, such as a special free access line.”¹²

The Transparency Law also helped reveal the mismanagement of resources, which has previously formed part of the culture of secrecy. In November, 2005, the Femospp published two press releases to refute an article that had irritated its executives.¹³ I found this provocative and, using request #0001700066106, asked the Femospp how many press releases it was publishing per year, and how much they cost. Although I received incomplete information in response, I learned that in a single year that office had paid at least \$2,441,709 pesos to publish 54 press releases attacking its critics.

Finally, it is important to also acknowledge the IFAI’s investigative work on cases that turn into appeals. In a marked departure from Mexican juridical tradition, which focuses all attention on the “procedural” review of a case, the IFAI conducts a simultaneous investigation into the legitimacy of an information denial, not just whether or not all forms have been filled out correctly.¹⁴

Final Considerations and Recommendations

There has been undeniable progress in citizens’ right to know; but this progress has also been convoluted by government agencies that continue to deny access to public information. Created to reveal “the truth” about abuses committed during the authoritarian regime, the Femospp and the AGN are instead concealing it, and hiding information about their own administration as well.

Agencies have learned how to deny the existence of information, and how to produce it incompletely, or falsify it—all in a very legal way. Legal progress in transparency will be

¹¹ Agreement of the Presidency of the Republic by which, through the power of attorney, diverse methods are made available for justice to be served on crimes committed against people linked with social and political movements of the past, *Diario Oficial de la Federación*, 27 November, 2001.

¹² Request Forms 1700066206 and 1700066306.

¹³ Sergio Aguayo and Javier Treviño, “Ni verdad ni justicia,” *Proceso*, 1515: 50-56.

¹⁴ Conference with IFAI Commissioner Juan Pablo Guerrero in the Latin American Department of Social Sciences, June 12, 2006.

of little use if agencies continue to foster the old culture of secrecy. Efforts in this area should focus on avoiding the manipulation of the Transparency Law; and on promoting the principle of full disclosure that really means what it claims to: full disclosure. These observations lead to several recommendations.

On the transparency of the past: The Executive Branch and the IFAI should improve access to the archives at the AGN. In order to do that, they should supervise the cataloguing, classification and indexing of the AGN's files. Moreover, the AGN needs more resources and more qualified researchers assigned to the task. Finally, it should be made clear in the law that information regarding genocide and crimes against humanity cannot be reserved under any circumstance.

On the opacity of the institutions for transparency: audits should be allowed when there are grounds to suspect that the information issued is false, or not completely true. To avoid the wars of attrition that agencies tend to wage, the time periods allowed for such audits should be limited. Finally, the term "proof of harm" could be more precisely defined, so that agencies are obliged to demonstrate clearly the supposed harm caused by divulging a particular item.