

THE NATIONAL HUMAN RIGHTS COMMISSION

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Access to information about the National Human Rights Commission (CNDH in Spanish) is particularly important, both to be able to evaluate the performance of an agency that could be very effective in the protection of human rights, as well as to allow us, by tracking the complaints it receives, to have a rough map of the frequency and intensity with which this country's different authorities violate human rights.

An analysis of information access at the CNDH, before and after the Federal Law for Transparency and Access to Information (LFTAIPG in Spanish) went into effect, should be split into two categories: institutional transparency, and access to the Commission's information. In the first category, progress is clearly visible; one has only to open the CNDH's web page to see it. In compliance with the LFTAIPG, the page provides easy access to institutional information: the total budget and internal allocation of resources, staff salaries, programs and more. None of this existed, or barely did, before this law went into effect. The second category of analysis should be guided by the question of how the Commission has responded to specific information requests. Research revealed two very different patterns corresponding to two kinds of information:

- a. Statistical data describing complaints about violations of rights and information about the administrative operation of the CNDH; and
- b. Information connected with the processing of complaint files that the CNDH receives.

In the first case, the LFTAIPG has been associated with institutional opening at the CNDH, which even generated information above and beyond existing documents, as in the case when it identified the five states where the most complaints about the Army are registered.

In the second case, the situation has not changed as a consequence of the LFTAIPG. The CNDH continues to treat the information in complaint files as reserved for a period of 12 years!¹

The only accessible complaint files are those that conclude with a recommendation. In 2005, the CNDH concluded 4,717 complaint files, but of these, only 28—that is, .59 per cent—ended with a recommendation.² In all the other cases, the CNDH states that they were closed for various reasons, among them 2,630 cases due to the, “orientation of the plaintiff;” 1,476 due to, “resolution within the proceedings and/or reconciliation;” and 270 cases, “for lack of substantiation.” However, researchers have not been able to gain access to any of the relevant information in order to ascertain whether the CNDH resolved the violation or whether, in fact, the complaint lacked substance.

The CNDH has recognized the importance of complaints within its scope of duties, describing them this way: “This Program embodies the essence of an ombudsman’s duties. It includes receipt, evaluation, registry, investigation and resolution of files in regards to alleged violations of basic rights.”³ In this sense, any opacity in this area concerns the primary task of the institution.

It bears repeating that all closed complaint files need to be available, not just the few that lead to a recommendation. In fact, the recommendations that have been examined to date reveal deficient reporting of violations as well as the CNDH’s inadequacy in obtaining reparations.⁴

While analysis of all the Commission’s recommendations reveals systemic weaknesses, obviously the most delicate ones are those directed at public officials, who must accept the recommendations and follow up on them. It is quite probable, then, that there are problems with those cases that are closed without a recommendation. How can they explain that the 1,257 complaints registered against the Federal Attorney General during 2003 and 2004 did not produce a single recommendation by the CNDH?⁵

¹ One exception to this criterion emerged when the CNDH declassified information that had been requested in order to avoid a sentence by the Supreme Court. The Court would have invalidated the legal grounds that the Commission had been using as a basis for refusing to turn over the information, and thus would have obligated the Commission to disclose it as requested. After the CNDH offered the declassification, the Supreme Court dismissed the case, but when the petitioner went to pick up the information, the CNDH did not produce it. See: Programa Atalaya (ITAM- La Ronda Ciudadana), “El derecho a la información. Un derecho sin garantía.” Available at: www.atalaya.itam.mx. The Inter-American Human Rights Committee took up the case for further study on August 18, 2006, in file P-840-06.

² CNDH, *Informe de Actividades 2005*.

³ CNDH, “Programa de Quejas,” in: *Informe de actividades 2005*.

⁴ See: Programa Atalaya (ITAM-La Ronda Ciudadana), “Análisis conceptual, criterios y resultados de la evaluación a las 52 recomendaciones emitidas durante el ejercicio 2003,” in: “Documentos 2003.” Available at: www.atalaya.itam.mx.

⁵ CNDH, “Programa de Quejas,” in: *Informe de actividades 2002* and CNDH, “Programa de Quejas,” in: *Informe de actividades 2003*.

We have had some access to a handful of unresolved complaints being followed by the CNDH, thanks to the LFTAIPG. A number of public agencies, like the Instituto Mexicano de Seguro Social (Mexican Social Security Institute or IMSS in Spanish), la Procuraduría Federal del Consumidor (the Federal Consumer Defense Agency), and la Compañía de Luz y Fuerza del Centro (the Central Electric Company), have made available their corresponding elements of CNDH files against them. The Commission opened files on these agencies in response to complaints about human rights violations attributed to public servants employed there. It seems paradoxical, however, that authorities in the Executive Branch would provide information that is denied by the primary organization designated to protect human rights.⁶

Meanwhile, although the recommendations that are issued are supposed to be public, the CNDH has itself been its own regulator in terms of its obligations for information access—a questionable exercise of its power as an autonomous organization. Specifically, it has created a rule that only allows access to a file when the alleged violation is considered “serious.”⁷

The same restriction applies to follow-up on the recommendations. Thus, it is not possible to access any documentation that would indicate, on the one hand, whether authorities are complying with the recommendations they have accepted, or, on the other hand, how the CNDH is assessing their compliance—for instance, if the Commission has categorized compliance as “partial” or “total”. The *right to know* is restricted to the explanations that the CNDH provides in its successive annual reports; but these explanations tend to be very general, and do not include the elements that would be necessary for an outside observer to verify their content.⁸

The “Legal” Reasons for Institutional Barriers

The CNDH has justified its refusals to open its files to public scrutiny by sheltering itself under its own constitutive law, and in its characteristics as an autonomous organization

⁶ For an analysis of the results of a selection of cases concluded through reconciliation, see: Programa Atalaya (ITAM-La Ronda Ciudadana), “Análisis sobre el procedimiento de conciliación de la CNDH,” in: “Análisis de gestión de la CNDH en 2004,” pp. 15-16. Available at: www.atalaya.itam.mx.

⁷ Articles 9 and 10 of the Transparency and Access to Information Regulations of the CNDH.

⁸ This is the case of Recommendation 10/05, addressed to the Governor of the State of Baja California, which is reported as “totally fulfilled” in the CNDH’s 2005 Annual Report. The report reads that the Commission received, “a packet of documents proving that authorities had taken action toward providing adequate, good quality food to prison inmates housed in the Centro de Readaptación Social de Tijuana, B. C. [...] a situation that was further verified during a follow-up visit by personnel of this national commission August 25, 2005.” However, the CNDH does not allow anyone outside the Commission to consult either the “packet of documents” or the reports from that visit.

under the Mexican Constitution. Articles 4 and 48 of the law that created the Commission establish that the information handled by the CNDH will be confidential and that the institution will have discretionary authority in deciding whether to divulge it.

When it designed these regulations, the CNDH could have opted to interpret its normative framework in the spirit of the LFTAIPG, broadening constitutional rights to information access—but it did not. On the contrary, its new regulations restricted access even more, by specifying that complaint files would be classified as reserved for a period of 12 years after their closure.⁹

Meanwhile, the LFTAIPG establishes that the CNDH, as an autonomous organization, is exempt from the authority of the Federal Institute for Access to Information (IFAI in Spanish). Thus, the CNDH's decisions on access can only be reviewed by the Commission's own agents and, in the last instance, by the federal court system.

Before the LFTAIPG went into effect, the Supreme Court had supported the discretionary power of the CNDH. However, although the criteria on which the Court had based its decision were made obsolete by the LFTAIPG's principle of, "full public disclosure and availability of information held by compelled offices," to date the formalities that rein supreme in the application of justice in Mexico have not permitted a reform of the legal framework that Congress originally conferred on the CNDH, nor of the one the Commission has conferred on itself.¹⁰

In effect, the Supreme Court has issued a restrictive interpretation of the Mexican Ley de Amparo.¹¹ When both a law and the application of it are simultaneously challenged in court as invalid, all the authority has to do is back away from that specific application. At that point the courts, including the Supreme Court, simply dismiss the case, without addressing the underlying legal challenge. This policy has allowed the laws and norms themselves (in this case those of the CNDH) to remain untouched.

⁹ CNDH's Regulation on Transparency and Access to Information, Articles 9 and 10.

¹⁰ LFTAIPG, Article 6.

¹¹ Editor's note: The Ley de Amparo does not have a direct translation into English. It is a special constitutional motion that can be invoked when an authority is in danger of violating a citizen's rights, similar to an injunction.

Differential Access: the Judicial Branch and the CNDH

Following an initially restrictive policy surrounding information access, the Federal Judicial Branch, which is also an autonomous organization in this sense, published a new set of regulations, in which it explicitly recognizes that:

“[...] the concept of public sentences referred to in article 8 of the Federal Law for Transparency and Access to Public Information is broadened; therefore, access to these is permitted even when they pertain to files of a penal or familial nature, although this does not reduce the obligation to suppress the personal data of involved parties in these cases.”¹²

It is odd that court files containing information regarding any kind of crime can now be consulted, while those related to human rights violations remain off limits.

Perspectives

To get past the CNDH’s opacity, legal changes and court decisions are needed that would fully subject the Commission to the new constitutional regime in regards to information access and transparency. In this process, the participation of civil society and academia is invaluable.

¹² Regulation of the National Supreme Court of Justice and of the Federal Judicial Council for the application of the Federal Law for Transparency and Access to Public and Governmental Information.