

## MEXICO'S FREEDOM OF INFORMATION LAW IN INTERNATIONAL PERSPECTIVE

**John M. Ackerman**

Mexico stands out internationally for the strength and effectiveness of its new freedom of information law. It offers an excellent example of the new breed of Freedom of Information (FOI) legislation which recently has grown up in new democracies throughout the developing world. Mexico along with South Africa, South Korea, Thailand and over twenty countries of Eastern Europe are setting the standard for access to information throughout the globe. These laws tend to be much stronger than both the historic laws of Sweden, Colombia and the U.S. and the recently passed laws in older, wealthier democracies such as Germany, the U.K. and Switzerland.

In a new democracy, access to information is not just a good idea which may help combat corruption and make government more effective, but an essential right of the people which will allow citizens to bring democracy to its ultimate consequences. After decades of authoritarian rule, social actors are tired of being treated as passive subjects and eager to take up their roles as active citizens. The design and implementation of a new FOI law is therefore inspired by idealistic hope and hard hitting societal demands.

Despite these advantages, there still remain some important problems with both the legal design and practical implementation of Mexico's law. For instance, the attention to appeals is not equal throughout all government agencies and access to financial information is severely limited. This essay evaluates how well Mexico's new access to information legislation measures up at the global level.

Mexico's law is best known for three innovative characteristics. First, it explicitly states that none of the law's exemptions apply to information necessary for, "investigating grave violations of fundamental rights or crimes against humanity," (Federal Law for Transparency and Access to Information (LFTAIPG in Spanish), Article 14). This establishes a blanket public interest override for all information related to delicate issues such as political assassinations, the persecution of ethnic minorities or government censorship of the press. The information must be made public even in cases where it would arguably affect "national security" or any other State interest included in Articles 13 and 14 of LFTAIPG. Although there have been problems with the interpretation and implementation of this clause in practice, its existence is a major achievement for the pro-access community and distinguishes Mexico in the global context. No other FOI law in the world has a similar clause.

The law also has particularly strong procedural guarantees. Every government agency is required to set up a liaison office to handle access to information requests and must respond within 20 working days. If the office fails to respond in time, the answer is automatically considered to be positive and the information must be handed over within 10 working days. The existence of such an *afirmativa ficta* clause is crucial since it puts considerable pressure on government agencies to respond expeditiously to requests. Only the FOI laws in Colombia and Austria have similar procedural guarantees.<sup>1</sup>

Research has shown that “mute refusals” are extremely common responses to access to information requests throughout the globe, seriously undermining the effectiveness of many FOI laws.<sup>2</sup> Mexico is an exception. Its procedural safeguards put the burden on the agency in the case of no response. For instance, the Open Society Institute’s (OSI) study ranks Mexico as number 1 in the world in terms of explicit written answers to FOI requests.<sup>3</sup>

Mexico’s Federal Institute for Access to Information (IFAI in Spanish) also stands out on the global stage as a particularly powerful oversight agency. The IFAI functions simultaneously as an administrative court responsible for reviewing negative responses by executive agencies and an *ombudsman* in charge of strengthening the “culture of transparency” in both government and society. Although it is part of the executive branch, it has significant financial and operational autonomy and is led by five councilors approved by the Senate for seven year terms.

Only a few other countries have such a powerful independent body in charge of FOI oversight. Comparable institutions exist in Ireland, South Africa, Serbia and Slovenia, but even these agencies have been hampered by political interference and operational weaknesses.<sup>4</sup> The IFAI has recently gotten mired in political difficulties of its own. Although the agency’s new president is an intimate friend of Mexico’s new president and is close to the ruling party, he has refused to excuse himself from cases which might imply a conflict of interest. It remains to be seen whether this will have a concrete impact on the performance and legitimacy of the agency.

During the first three years of implementation of Mexico’s law (2003-2006), the executive branch received a total of 159,639 information requests and responded to 88.9% (141,849)

<sup>1</sup> See Ernesto Villanueva, *Derecho de acceso a la información en el mundo* (Mexico: IJJ/UNAM-Miguel Ángel Porrúa-Cámara de Diputados, 2006).

<sup>2</sup> Open Society Institute Justice Initiative, *Transparency & Silence: A Survey of Access to Information Laws and Practices in 14 Countries*, 2006, p. 38.

<sup>3</sup> *Ibid.*, p.43.

<sup>4</sup> See John Ackerman & Irma Sandoval, “The Global Explosion of Freedom of Information Laws,” *Administrative Law Review*, Vol. 58, No.1, pp. 85-130: 105.

of them.<sup>5</sup> The IFAI received 7,473 appeals during this same period.<sup>6</sup> The annual count is also quite impressive. In 2005, there were 50,127 requests, 44,598 responses and 2,639 appeals.<sup>7</sup> The IFAI is normally quite pro-active in its response to appeals. During 2005, it reversed or otherwise modified the agency's response in over 40% of the cases.<sup>8</sup>

These numbers compare positively at the global level. For instance, Italy's 1990 law is used quite infrequently. During 2004 the government received only 2,160 requests.<sup>9</sup> In Australia, the government received 39,265 FOI requests during the 2004-2005 fiscal year but only answered 67.27% of these requests within 30 days.<sup>10</sup> In the UK the new law was used on 38,108 occasions during its first year of full operation in 2005 with 87% of the requests formally answered in time.<sup>11</sup> Mexico's law is already at the levels of use of the U.S. FOIA. During the 2004-2005 fiscal year the U.S. government received 52,010 requests and processed 2,921 appeals.<sup>12 13</sup> This is an impressive feat for Mexico given the fact that the U.S. has a much larger administrative apparatus and its FOI law has been on the books for three decades.

Even more remarkable is the fact that Mexico has now passed reforms to include a full range of procedural guarantees within the Constitution itself. As of 2008, all government agencies at the municipal, state and federal level will have to grant free access to government documents, follow the "principle of maximum publicity" when interpreting freedom of information statutes and even make available all information about public funds given to private individuals and groups. It is still up in the air to what extent state and federal legislators will actually comply with the new constitutional text as they design new FOI laws.<sup>14</sup> Regardless, the constitutional reform itself is a major achievement and sets international standards.

Despite this excellent initial track record, the Mexican law also has some important weaknesses when viewed in global perspective. For instance, the IFAI has no jurisdiction over non-executive agencies. The access to information law applies to the legislature, the judiciary and independent agencies like the electoral institute and the human rights ombudsman, but the IFAI cannot oblige these agencies to divulge information. Each one of

<sup>5</sup> [www.sisi.org.mx](http://www.sisi.org.mx), information updated to October 12, 2006.

<sup>6</sup> [www.sisi.org.mx](http://www.sisi.org.mx), information updated to October 12, 2006.

<sup>7</sup> [www.sisi.org.mx](http://www.sisi.org.mx).

<sup>8</sup> [http://www.ifai.org.mx/test/new\\_portal/InformeaalHCongreso.pdf](http://www.ifai.org.mx/test/new_portal/InformeaalHCongreso.pdf), p.18.

<sup>9</sup> [http://www.governo.it/Presidenza/ACCESSO/volumi\\_accesso/volume\\_10.pdf](http://www.governo.it/Presidenza/ACCESSO/volumi_accesso/volume_10.pdf).

<sup>10</sup> <http://www.ag.gov.au/agd/www/agdhome.nsf/AllDocs/E04E14CDAB8B62ABCA2570C8000D7330?OpenDocument>.

<sup>11</sup> Department for Constitutional Affairs, *Freedom of Information Annual Report 2005: Operation of the FOI Act in Central Government*, May, 2006, p.3. Available at: [www.foi.gov.uk](http://www.foi.gov.uk).

<sup>12</sup> [http://www.usdoj.gov/oip/annual\\_report/2005/05foiapg5.htm](http://www.usdoj.gov/oip/annual_report/2005/05foiapg5.htm).

<sup>13</sup> [http://www.usdoj.gov/oip/annual\\_report/2005/05foiapg6.htm](http://www.usdoj.gov/oip/annual_report/2005/05foiapg6.htm).

<sup>14</sup> John M. Ackerman, "Transparencia Minimalista," *Revista Proceso*, No.1607, August 19th, 2007: p.50.

these agencies or branches of government independently manages appeals to information requests. Unfortunately, none of these other areas of government have established an independent review mechanism equivalent to the IFAI.<sup>15</sup> The review process is conceived as an internal administrative review instead of as an appeal to an independent ombudsman or information commissioner, the three forms of appeals predominant at the global level.<sup>16</sup> As a result, these agencies score lower in terms of access to information when compared to the federal executive agencies.<sup>17</sup>

Mexico is also behind the pack with regard to access to financial information. The Secretary of Finance is the agency which most often refuses access to government information.<sup>18</sup> One of the key areas of opacity in this area is information on off-budget government held trusts or *fideicomisos* which mix government and private monies.<sup>19</sup> Opacity in this area is aided by a special exemption included in the Mexican law which prohibits the government from sharing any information which might, “harm economic or financial stability.” Such a blanket statement opens up the field for widespread avoidance of the FOI legislation. No other access to information law in the world has a similar reserve clause protecting economic “stability” in such a broad manner.

Mexico has always been known for the strength of its governmental institutions. During the 71 years of rule by the Party of the Institutional Revolution (PRI) the government did not experience a single *coup d'état*, held elections every six years and reformed the constitution on more than 300 occasions. Mexico's democratic transition has been just as institutional. Instead of armed conflict or an extra-legal “pact”, the transition took place through the negotiation of a set of crucial electoral reforms, creating the Federal Electoral Institute and the Federal Electoral Tribunal in 1996.

Mexico's new access to information law and IFAI follow in the same tradition and promise to institutionalize the country's democratic gains. Nevertheless, institutional performance in the end depends on both political will and on the probity and independence of the individuals directly in charge of the institutions. As the events of Mexico's 2006 elections have revealed, there is no guarantee that one step forward may not be soon followed by two steps backwards. Democracy and transparency are not one time achievements, but need to be carefully constructed and strengthened through consistent action.

<sup>15</sup> “Estudio en Materia de Transparencia de Otros Sujetos Obligados por la LFTAIPG,” CIDE-IFAI, 2007. Available at: [http://www.ifai.org.mx/osos/informes/Osos\\_Estudio.htm](http://www.ifai.org.mx/osos/informes/Osos_Estudio.htm).

<sup>16</sup> Alasdair Roberts, “Access to Government Information—An Overview of the Issues,” (The Carter Center, Working Paper, 1999) Available at: [www.transparency.org/working\\_papers/roberts/roberts.foi.html](http://www.transparency.org/working_papers/roberts/roberts.foi.html).

<sup>17</sup> CIDE-IFAI, 2007.

<sup>18</sup> See Ulises Flores, *El derecho de la información o las nuevas reglas para la secrecía: el Instituto Federal de Acceso a la Información Pública*, M.A. Thesis in Government and Public Affaire, Latin American Faculty of Social Sciences, Mexico (FLACSO-Mexico), 2006.

<sup>19</sup> See essay by Irma Sandoval in this volume.