

## ACCESS TO PUBLIC INTEREST INFORMATION GENERATED BY PRIVATE FIRMS: OLD STRINGS ATTACHED OR NEW PARADIGMS?

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With the approval of the Federal Law for Transparency and Access to Information (LFTAPIG in Spanish) in 2002, it seemed that public scrutiny over government actions (at least at the federal level) had moved from the realm of the “desirable” to the realm of the “possible”. This change had all kinds of implications, since the actions of the government agencies subject to the law are driven by a wide range of motives. Insofar as they are subject to a public mandate, their performance should be subject to citizen evaluation, aside from whatever their internal bureaucratic rationales may be.<sup>1</sup> Yet, at the time the law was passed, no one foresaw that the evaluation of public sector performance could be blocked by private parties.

This issue is particularly relevant when the information necessary to evaluate the performance of public agencies is actually generated by private parties, or when a public agency holds information about the actions of private entities.

Few have raised the issue of private agents’ impact on the “right to know”, through their capacity to impede access to information about issues involving the public interest issues. Two phrases in the Transparency Law dramatically transform our understanding of what is “public”, at least when it comes to information. The first is found in Article 1, where it is expressly established that the law serves to, “guarantee, for all persons, access to the information in the possession of government agencies at the federal level.” The second is found in Article 3, which details that information is, “that which is contained in the documents that mandated institutions generate, obtain, acquire, transform or conserve under any title.”

At the time the Transparency Law was passed, lawmakers probably did not anticipate a collision between what is a deeply-rooted pro-privacy tradition in Mexico, and the new paradigm of what is “public” established by law itself. In our country, it is often understood that issues referring to the actions of individuals, even when they may imply intervention from a public authority or affect an entire community, belong to the realm

<sup>1</sup> See Article 4 of the Transparency Law.

of the “private”—be they people or companies. For years and years, many issues that are fundamentally public in nature have been improperly appropriated into the existing patrimonial relationship between the state and society. Information is no different.

What follows is the summary of a case that demonstrates the problems that arise as the result of this public-private tension. In August, 2006, eight requests for access to information were presented before the Federal Environmental Protection Attorney’s Office General’s (Profepa) through the Federal Institute for Access to Information’s (IFAI in Spanish) Information Request System (SISI in Spanish), which referred to documents that two private companies— Met Mex Peñoles, based in Torreón, Coahuila, and Dupont, in various cities— presented to comply with the requirements to obtain certification from the National Environmental Audit Program.

Profepa processed the requests but denied the information, arguing that after requesting the companies’ authorization to release it, both refused. In response, an appeal was filed to the IFAI, challenging Profepa’s answer. However, before continuing with the details of this particular case, it is important to provide a few clarifications about the information in dispute.

The National Environmental Audit Program was created under the mandate established in Article 38 of the General Ecological Equilibrium and Environmental Protection Law, which establishes that it, “will develop a program geared towards promoting audits.” These audits are procedures that seek to identify, evaluate and control industrial activities that could be operating under risky conditions or generating environmental pollution, assessing the degree of compliance with different aspects, regulated or not, in environmental matters.<sup>2</sup> The case of the National Environmental Audit Program has one very distinctive characteristic: if a company wishes to obtain a Clean Industry Certificate, they must willingly submit to these audits.

According to Profepa, the benefits for a company that subscribes to this program are the following: comprehensive evaluation of organizational processes and their impact on the environment; improving the company’s public image; use of the certificate logo; and recognition from the authorities. Because companies participate voluntarily, they cover the costs of an auditor approved by Profepa, and they commit to fulfilling the terms included in a Collaborative Agreement.<sup>3</sup> These actions serve as proof that the company is in compliance with existing environmental regulations, and therefore constitute information

<sup>2</sup> See: <http://www.profepa.gob.mx/Profepa/AuditoriaAmbiental/ProgramaNacionaldeAuditoriaAmbiental/>.

<sup>3</sup> *Ibid.*

that should be accessible from government authorities. We can now return to the facts in our case.

Once the appeals were filed with the IFAI, there were two main reactions from the companies in question, who had submitted this information to Profepa—the same information that was requested through SISI. Met Mex Peñoles filed an injunction (*recurso de amparo* in Spanish) against the Transparency Law itself, arguing that it does not respect the right to a hearing. The opinion of Met Mex Peñoles, a company involved in a heated controversy involving lead pollution, is that the IFAI cannot resolve a controversy about access to information in favor of a person when the information belongs to them and is possessed by Profepa (or any other authority), thus violating their civil rights. Peñoles' impressive legal action does not include any consideration about the reasons why Peñoles handed over the information to environmental authorities (for example, justifying that there is no danger to the community because of its activities and that they comply with environmental laws).

It is important to highlight that information considered to be confidential and reserved is protected by law. Thus, the IFAI can only decide to release information to citizens if it is of a public nature. Peñoles' distrust of the IFAI's capacity to reconcile the company's interests (patrimonial) with those of the citizenship (oversight) drove it to seek to annul, in one blow, the right to scrutinize Profepa's actions. If we take into account that Profepa declares that audits validate compliance with a legal framework, that the seals awarded improve the company's image, and that Profepa operates with public resources, it is indispensable for society to have access to basic evidence with which to evaluate its actions. If the appeal is decided in favor of Peñoles, the IFAI would not be able to force the Profepa to hand over information about its handling of the Peñoles case, and it would be a private party that ruled out this possibility.

Dupont, the other company involved in the information requests, followed a different path. In the first place, when it discovered the appeal filed with the IFAI, it submitted a challenge to keep Commissioner Juan Pablo Guerrero from overseeing the case, because the appellant was part of an organization of which he is an honorary member. Once the plenary accepted Commissioner Guerrero's refusal from the case, and the appeal was admitted, Dupont presented various documents to the IFAI that energetically defended what it considered a right to deny information that is the company's property and strictly their concern. Again, there was no consideration of the public impact of their activities, environmental rights, benefits (private and patrimonial) that it obtains from flaunting a seal (of public nature and with public funds) that endorses it as a clean business. Nor

was there the slightest reference to the fact that information presented in an audit, even if it is voluntary, is intended to prove that the company does not violate environmental legislation.

The appeal continued on its course and the IFAI's commissioners ruled that the information requested would be reserved for a period of 12 years. Aside from opinions regarding their resolution, the relevant point here is that a new legal action by a private party was able to block the possibility of public review of the actions of public institutions. In this case, Dupont's legal efforts, which ended up obstructing the right of access to information of public character and interest, continued with an injunction that seeks to overturn the IFAI's decision to restrict the possibility of evaluating the Profepa's actions for 12 years. Instead, Dupont claims that the information should be considered confidential, which would prevent its disclosure indefinitely. If Dupont is granted its injunction, it is likely that we will never know about Profepa's actions regarding the seals that it granted to Dupont. At the time this article was finished, both appeals were in process.

Two brief conclusions follow. First, to enforce the reach of rights that are profoundly collective, such as environmental rights and access to public information, requires a transformation in the culture of what is considered "public" and "private". Second, private parties are reinforcing opacity in these cases. At the center of this controversy is the patrimonial vision of two companies unwilling to understand that what was requested does not refer to their very respectable private sphere, but to actions that involve public authorities and which affect our society.