

OPTIMIZING TRANSPARENCY AND THE CHALLENGE FACING THE IFAI: MAKING THE PRINCIPLE OF MAXIMUM POSSIBLE DISCLOSURE EFFECTIVE IN ENVIRONMENTAL ISSUES

Miguel Pulido Jiménez

On June 2, 2006, various information requests were submitted to the Federal Prosecutor's Office for Environmental Protection (Profepa in Spanish) in order to find out more about the national registry of the National Environmental Audit and Certification Program (Programa de Certificación de Auditoría Ambiental in Spanish). In general, the information requested concentrated on the following five areas: audit reports; action plans; signed agreements; achievement reports of action plans; and, where relevant, notices of modifications. All requests were directed toward obtaining this information in the cases of the companies Dupont and Peñoles.

Profepa denied the information in every single case. Their argument, the same for each request, rested on three main premises: that the information had been delivered to them by a private party, who was under no legal obligation and who had classified it as confidential; that the information requested was also considered confidential by a law; and that it involved industrial or commercial secrets. An appeal was put before the Federal Institute for Access to Information (IFAI in Spanish) on the grounds that: private parties do not have the right to classify information; there is no legal regulation that explicitly considers the information requested to be confidential; the information is considered to be of public nature because it is found in public archives; and the information serves to document the performance of a government agency. Finally, the appeal stated that— due to its relevance to the environment and the right to health— public versions of the information should be disclosed, leaving out only information that is legally restricted.

On February 14, 2007, the plenary of the IFAI ruled on two of the appeals presented. Alonso Gómez Robledo was the lead commissioner presenting both cases. They decided to uphold Profepa's original refusal to release the requested information. In principle, they rejected Profepa's classification of the information as "confidential"—noting that there is indeed no legal regulation that expressly establishes it as

such. However, they did consider that certain information needs to be reserved on the basis that it constitutes industrial secrets, concluding that the appropriate decision is to deny access to all of the requested documents.

The IFAI should have performed a thorough analysis of the information using technical criteria and its own evaluation of the documents in question. However, the IFAI decision simply assumed that the private party's claims that the information requested included industrial secrets were well-founded.

The IFAI's failure to do an in-depth study of the information contained in those documents and, in particular, to prepare public versions of them— in light of the goals of the federal law— violates the right to information. In reality, the IFAI's resolution builds a niche for opacity in an issue area that currently raises a good deal of concern: how well are the environmental authorities doing their job? There is only one question left. In order to avoid all of this, why did the IFAI not defend the principle of maximum possible disclosure?