

**[From the Senate, United Commissions of Government and First Legislative Studies, April 30, 2002]**

**[Translation by Carlota McAllister]**

**OPINION ACCOMPANYING THE PROPOSED FEDERAL TRANSPARENCY AND ACCESS TO PUBLIC GOVERNMENT INFORMATION LAW**

UNITED COMMISSIONS ON GOVERNMENT AND

FIRST LEGISLATIVE STUDIES

**HONORABLE ASSEMBLY**

The DRAFT OF THE PROPOSED DECREE BY WHICH THE FEDERAL TRANSPARENCY AND ACCESS TO PUBLIC GOVERNMENT INFORMATION LAW IS TO BE PASSED was given to the United Commissions on Government and First Legislative Studies of the Chamber of the Senate of the Honorable Congress of the Union for its study and opinion.

In conformity with that which is expressed in Articles 86, 89, and 94 of the Organic Law of the General Congress of the United Mexican States, as well as numerals 56, 60, 87, and 88 of the Congress's own Regulations, we proceeded to analyze said draft, presenting for the consideration of this Honorable Assembly the following:

**OPINION**

The United Commissions approached our examination of the Draft described above in light of the following antecedents and considerations:

**ANTECEDENTS**

A.- In the 24 April 2002 session of the Honorable House of Deputies, the draft of a Proposed Decree, by which the Federal Transparency and Access to Public Government Information Law is to be passed, was approved.

B.- Said draft was received that same day in this Chamber of the Senate, and passed on to the Commissions who have signed this opinion on 25 April 2002 by the President of the Executive Desk.

C.- Since 1997, when a constitutional amendment incorporating the right to information was made to Article 6, there has been constant public discussion of the need to regulate this right, which has become a permanent demand of many different sectors of society. In this area, no similar topic has ever been so debated, but nonetheless and in contrast, the results of the debate and the State's responses to it have been insignificant. Today, the Congress of the Union has the historic opportunity to begin to respond to this long-postponed citizen demand.

Society has been extensively consulted at different times, convened both by the Executive Branch, notably in 1983 and 2001, and by the Legislative Branch in 1980 and 1995. During these consultations an infinity of proposals and demands have arisen.

With regard to the subject of Access to Public Information, we refer to some of these many proposals only in order to account for the consensus this right, historically been raised only to be ignored until now, has achieved throughout society.

In 1980, a public consultation conducted by the House of Deputies revealed 43.78% of those convened agreed on the demand that the “Obligation of the State is to inform society and guarantee citizens a flow of information.”

In the Forum for Public Consultation convened by the Executive Branch in 1983, notable for the significant public participation and diffusion it achieved, we find that the most frequent proposals clearly expressed the demand that “Public servants’ actions be made more transparent,” as well as that “Government publicity and the operations of the public news media be made more transparent.”

In the Public Consultation convened by the House of Deputies through the Special Commission on Social Communication in 1995, a significant number of participants demanded that “The right to information be legislated in its totality including its constitutive parts: the right to access, the right to reply, and the right to means of communication, the rights of professionals, and the right to privacy,” and that “An autonomous and plural body be created to regulate this right.”

Finally, in the most recent public consultation, convened in 2001 by the Federal Executive Branch for the purpose of gathering opinions regarding the proposed Government Transparency and Access to Information Law--the antecedent to the Law discussed in this opinion--a majority of proposals voiced opinions and demands about the need to expand the reach of this law into all powers and domains of public information, as well as the need to have a Plural Body to supervise the Law and to serve as a site of recourse for citizens.

Another constant feature of many of the proposals was their insistence that this Law does not exhaust the totality of the rights entailed in the Right to Information. Many of these and other proposals were considered by those who wrote the Law.

## **CONSIDERATIONS**

a) The objective of the law proposed in the Draft is to establish a procedure by which individuals may seek access to information generated or held by the bodies of the State. The State as a whole is compelled by the stipulation contained in the final part of Article 6 of the Constitution, such that the Law

refers to all those bodies of the State that recognize the Political Constitution, that is, the public powers and the so-called autonomous constitutional bodies.

Those who have signed this opinion fully agree that a democratic society depends on citizens' ability to evaluate their government, which, to be effective, requires that citizens possess sufficient facts to make reasonable and informed judgments and that their opinions can be expressed and compared with those of other citizens. For this reason, a democratic State is obligated to guarantee these basic freedoms.

The Draft on which this opinion is based makes clear that the constitutional powers have the will to assume the responsibility of governing citizens honestly and with the necessary transparency to recover their trust and undertake the necessary challenge of assuming accountability.

It also represents the first in a series of fundamental citizen rights grounded in and centered on information. Defining the juridical bases for guaranteeing access to information for citizens will also make the value of information as a Good belonging to the public interest more meaningful.

Access to information is based on the right to learn about information pertaining to the public interest produced by State bodies or any other agency that generates information affecting the general interest. It is thus a significant achievement that this right has not been restricted to information generated by the Executive Branch, but rather includes all bodies of the State, as well as those who produce the public patrimony and those who generate information pertaining to the public interest.

The final goal of an access to information law must be to ensure the real possibility of a well-informed society, where guaranteed rights, such as the right to information, are significant realities. In such a society, citizens will be able to exercise their rights on the basis of information offered, systematized, and handled with transparency and at the greatest distance possible from unilateral decisions and the arbitrary exercise of power. The recognition that this is the case is undoubtedly a sign of progress that we must be ready to encourage.

The nature of this important social right derives from the state's role in protecting those social needs that guarantee the fulfilment of general rights, such as the right of society to be informed, with all the implications of that concept.

We note that this right is considered an obligation of the State, which is thus compelled to ensure its existence for society as a whole, thus demonstrating that citizens will be the principal beneficiaries of this right.

Considering that the value of open and transparent information is the basis of a democratic society, the right to access is naturally extended to those who, once they have the necessary information, can redouble its benefits if they have sufficient freedom to be able to inform others truthfully about public acts;

Considering that consensus is growing on this subject, and that the labor of synthesis and consensus-making among the different proposals that have previously been presented has resulted in the initiative here discussed, the urgency of making this initiative material and concrete shows that in this matter (the right to information in the broadest sense) there cannot and should not be any further delay;

Considering that the worst thing that could happen today is that, after distinguishing between the different aspects of the Right to Information and beginning by granting juridical validity to one of the different rights implied in the right to Information, we once again halt its progress, because by so doing we would prevent the juridical maturation of other rights entailed in the right to information, which are being developed in the hope that this first step will be consolidated in a Law

It is fortunate that after 24 years of reflection on the need to make the Right to Information and all the rights it implies effective, we are now, in 2002, discovering a possible framework for addressing the State's necessary obligation to make its information transparent by regulating access to information of public interest handled by the federal government, and the bodies and instances that handle information of public interest and/or make use of public resources.

From these considerations follows the significance of the fact that we are currently in an unprecedented moment for defining a legal framework that will begin to make material, at least in one of its aspects, the right of citizens to be informed.

These new times and the so-called democratic transition must be something more than discursive rhetoric: they must be transformed into the constitutional aspiration, expressed in Article 3, for a harmonic equilibrium between norms and principles, institutions and ways of life.

b) With respect to the content of the Law, we note that it consists of four sections, 64 articles, and eleven transitory articles. The First Section, which is comprised of five chapters, contains the stipulations common to all subjects compelled by the Law. In turn, the fourth section contains the responsibilities in matters of access to information that correspond to public servants in all Branches and the autonomous constitutional bodies.

The Second Section of the Law, in contrast, contains four chapters that apply exclusively to the Executive Branch. The first two chapters contain the institutional design for this Branch and the last two establish the procedure for access to information and the procedure for appeal to the Federal Institute for Access to Information. Finally, the Third Section of the law is comprised of a single chapter that lays out the principles the Legislative and Judicial Branches, the autonomous constitutional bodies, and the administrative courts must obey when they establish their own procedures and instances in matters of access to information.

The transitory articles establish the principle of the gradual entry into force of the Law's obligations.

c) In the opinion of these Commissions, it is sufficient to stipulate the conditions for withholding information in the Third Chapter of the First Section of the proposed Law, and for this purpose to define the concepts of classified information and confidential information. We agree that while the principle that should guide both actions by authorities and the interpretation of this Law is that of publicity rather than withholding, it is indispensable for the State's bodies to have the juridical tools necessary to limit access to information, which, depending on its nature and use, could be potentially damaging to institutions or persons.

Classified information is that which cannot be made public until the time allotted for its classification has expired, or until the reasons that gave rise to its original classification no longer exist. This category includes information that could compromise the health and/or physical integrity of persons, national security, public security, or national defense, as well as that which could harm the country's economic stability. We also emphasize that this Law does not supersede the stipulations in other ordinances that contain provisions regarding the existence of classified information, such as recognized secrets--commercial, prosecutorial, or banking--as well as the withholding of information during the period in which other juridical or administrative procedures are still developing.

The definition of the concept of confidential information provided in this Law, moreover, states that it is that information which individuals provide to authorities as such. In this case, the information may be made public only if the individual expressly gives his consent. To complement this definition, the Law envisions a mechanism for the protection of personal information in the hands of authorities and a form by which individuals may seek to update or correct this information. This is an essential and complementary element of the Law, because no public interest can be placed above the protections individual rights guarantee to all Mexicans.

In addition, we note that, with regard to the reasons for classification described in the initiative, it will not be enough for the content of the information to be up-to-date for it to be considered a matter subject to classification, such as national security or public security. An element of harm that justifies the assertion that divulging the information could seriously affect a State functions or endanger the life, security, or health of person must also be present.

We recognize, moreover, along with our co-legislative colleagues, that some of the concepts used in classification lend themselves to a broad range of interpretation. Such is the case, for example, of the concepts of national security, public security, and national defense. Regarding these concepts, we note that on the one hand, while no universally accepted definition exists, general criteria on the basis of which any interpretation, especially those made by the body charged with applying the Law, must be made, do operate in the domain of International Law and Constitutional Law. On the other hand—and this is a critical point—these concepts are not applied in a juridical void, and for

this reason existing legislation on these matters should be considered in the Law's interpretation, in order to provide these concepts with a specific content. Nonetheless, to ensure greater juridical certainty for individuals and guide interpretation of the Law, a concept of national security that incorporates the generally accepted criteria in this matter is included.

As noted elsewhere, the classification of information as proposed in the Law does not have an absolute value. It is very clearly established, therefore, that the period of classification may be up to 12 years, subject to extension only in exceptional cases with clear justification. This means that competent bodies may classify information for a reasonable period to safeguard protected interests, but once the period of classification is over, or the reasons that gave rise to its classification cease to exist, the information will be declassified and pass into the public domain. Likewise, classified information must be catalogued and cared for so as to guarantee its preservation and prevent its destruction.

e) The Second Section of the proposed Law develops the procedures that should be followed within the Executive Branch in detail. The Law creates two instances in each area of public administration, as well as the Attorney General of the Republic's Office. The first is the liaison section, which is charged with providing a link between individuals and its own dependency. This section will receive and process the requests it receives, do what is necessary to deliver the information requested, and keep a record of requests it has handled, among other duties. The Law also creates an information, the duties of which are to confirm, modify, or revoke the classification of information by the heads of the administrative units, to coordinate activities in its area in order to deliver the information as the Law establishes, and to do what is necessary to find the documents requested.

Through these two instances the process of handling requests for access will take place as follows: the individual goes to the liaison section of the area he considers relevant to the information he is seeking; the liaison section sends his request to the head of the administrative unit responsible for such information, and in cases where the information is neither classified nor confidential, delivers it to the individual. If, however, the information is classified, it is immediately sent to the Information Committee of this area to determine whether the classification is justified or whether it should be lifted. The process will be completed within a maximum period of twenty days, which is the time limit during which the requester should wait for a response to his request.

Evidently, this goal of this plan is to avoid forcing individuals to visit innumerable administrative offices or obliging them to be aware of the exact physical office where the documents they seek are located. That is, individuals will be attended to and their requests handled entirely through the window of access until they receive a response.

With regard to how to treat authorities' failures to respond, we consider *positiva ficta* to compel authorities to give requesters a response as long as, were this hypothetical to become real, the Institute could order the dependency or agency to grant access to the information in a time period no greater than ten working

days, covering all costs generated by the reproduction of the informational material, unless the Institute determines that the documents in question are classified or confidential.

To ensure fullest compliance in this matter, the obligation of ensuring that the Regulations establish an expeditious procedure for rectifying the failure of dependencies and agencies to provide information has been given to the Executive Branch. Thus, individuals may present proof as described in Article 17 of the Federal Administrative Procedures Law, which has been sent to them by the relevant liaison section, or instead they may present a copy of their request, on which the date of its presentation to the dependency or agency appears. In the latter case, the procedure will ensure that the dependency or agency has an opportunity to demonstrate that it responded to the individual on time and in an appropriate manner.

As the instance that receives appeals, the Executive Branch will be provided with a Federal Institute of Access to Public Information, which in the first instance may revisit the individual's request and, when necessary, ratify or rectify the decision made by the Information Committee in this area. In the last instance, the individual may contest the Institute's decision and appeal it to the Judicial Branch, which will then make a definitive ruling.

f) To ensure that the Institute works effectively, the Law proposes that it be autonomous in its budget, operations, and decisions. It will be headed by five commissioners. To qualify, commissioners must have reached the minimum age of thirty-five; previously engaged in activities pertaining to the Law's subject matter; and must not have served as the head of any federal dependency or occupied any elected office or position as a party leader for at least a year before they are named to the Institute.

With regard to the participation of the Legislative Branch in the designation of Commissioners, there is a consensus that these officers must have the greatest possible political support. Nonetheless, because there were questions as to the constitutionality of the Legislative Branch's intervention in this process, especially given the Supreme Court of Justice of the Nation's interpretation of this matter, we preferred to establish a new form that would respect the principle of the balance of powers but still permit them to collaborate without harming the Constitution and its interpretation by the country's highest court. This new legal figure allows the Senate to object to the nominations made by the Executive Branch without detriment to the constitutional duties granted to this body in Fraction II of Article 89 of the Constitution.

The Institute will thus have autonomy on various levels. On the first level, its autonomy will be constantly renewed by virtue of the Institute's independence of decision, administration, and budget; its requirements for nomination and dismissal; the staggering of commissioners' periods of service; the Institute's obligation to account for its activities in the form of a report to Congress; and the full transparency of the Institute's operations. This implies that for purposes of its decisions, the Institute will not be subjected to any other authority, making them with full independence. On the second level, because the Judicial Branch

of the Federation will remain the guarantor of the constitutional order, the initiative retains constitutional jurisdiction as the ideal means of protecting the fundamental rights recognized in the Constitution, by means of the process of appeal which is the last instance available to the parties to the case. In other words, the Institute's decisions are subject to judicial review.

Creating a new administrative instance within the Federal Executive Branch serves four functions. The first is to make the Institute the regulative body in matters of information for the federal government. The second is to resolve any disagreements that may arise between individuals and the administration by means of a procedure conducted in the form of a trial, like the procedures conducted by administrative courts. The Institute will be the last instance of appeal for government authorities, but its decisions will be subject to judicial review. The third function is to ensure respect for the Law and, when necessary, to report violations of the Law to internal bodies of review. Finally, the fourth function is to promote the exercise of the right of access to information among citizens and create a new culture of handling information among public servants as well as citizens.

Among the duties of the Institute are: interpreting this Law within the administrative arena; establishing and revisiting criteria for the classification of information; producing recommendations for public servants in the area of the Executive Branch as to how to comply with the Law; giving advice to individuals about how to formulate requests for information; explaining the benefits of public handling of information; and cooperating with the other subjects compelled by the Law. In addition, the Institute must deliver an annual report on its activities, with data on requests for access to information.

Likewise, by serving the function of collaborating with the other branches and the autonomous bodies, as well as local and municipal instances respectively, the Institute may eventually produce homogenous criteria for the Law's application.

In summary, the Institute will prevent areas of the Federal Executive Branch from being distracted from their normal obligations, but will also guarantee that the same criteria are applied across the domain of federal public administration.

g) The Third Section allows the Legislative and Judicial Branches and the autonomous constitutional bodies to design their own procedures, as long as these comply with the principles established in the Law. This decision recognizes that organization and functions are different in each branch as well as in the autonomous bodies, and that flexibility is thus required in determining which procedures are best suited to their internal organization and functioning.

h) Finally, the proposed law lays out a chapter of sanctions for public servants who use, destroy, hide, or alter information improperly. It also establishes sanctions for those who act negligently, fraudulently, or in bad faith in fulfilling requests, as well as for intentionally denying information considered public.



Likewise, it lays out sanctions for those who hand over classified or confidential information, or who do not deliver information when ordered to do so by the Institute or an equivalent body.

It cannot be denied that the more citizens know about the functions and activities of authorities, the more they will possess the facts necessary to exercise their right to evaluate authorities. Access to public information is thus a necessary condition for the full democratic development of the state as well as for the public powers to be accountable for their actions.

The proposed law, on which this opinion, enriched by the analytic labors of our co-legislative colleagues, is based, is relevant and sufficient because it is important to provide fully valid and effective legal provisions that confront the need for citizens to have information about political matters.

We aim at creating truly accountable and transparent policies in the exercise of public power.

Having analyzed said Draft, and in conformity with the previously mentioned arguments, the United Commissions on Government and First Legislative Studies take the liberty of submitting for the consideration of the Plenary of the Chamber of the Senate the following:

### **PROPOSED DECREE**

**SINGLE ARTICLE:** The Federal Transparency and Access to Public Government Information Law has been drawn up as follows:

#### **[Text of the law]**

Presented in the Committee Room of the Honorable Chamber of the Senate of the Congress of the Union, in Mexico, Federal District.

### **COMMISSION ON GOVERNMENT**

SEN. GILDARDO GOMEZ VERONICA, President; SEN. HECTOR MICHEL CAMARENA, Secretary; SEN. RUTILIO CRUZ ESCANDÓN; Secretary; SEN. MANUEL BARTLETT DIAZ; SEN. CÉSAR CAMACHO QUIROZ; SEN. ANTONIO GARCÍA TORRES; SEN. FIDEL HERRERA BELTRÁN; SEN. ARELEY MADRID TOVILLA; SEN. FAUZI HAMDAN AMAD; SEN. JORGE ZERMEÑO INFANTE; SEN. JUAN JOSÉ RODRÍGUEZ PRATS; SEN. JORGE EMILIO GONZÁLEZ; SEN. JAVIER CORRAL JURADO MARTÍNEZ; SEN. JOSÉ GUILLERMO HERRERA MENDOZA; SEN. JESÚS ORTEGA MARTÍNEZ.

### **COMMISSION ON FIRST LEGISLATIVE STUDIES**

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