

conclusion that the plants are potentially vulnerable to a terrorist attack. In these conditions, should the study be kept secret or be classified, or, on the contrary, should the citizens be allowed to see the content of that report?⁹

The dilemma here would be the following: on the one hand, publishing the report could endanger national security by revealing vulnerable flanks and points to subversive or terrorist groups. However, publishing that information could have a beneficial effect by alerting the citizenry to the situation, which could in turn exert pressure on authorities to remedy or solve the grave problem and, therefore, make it possible to request accountability from those responsible for the nuclear plants' proper functioning.

Curiously, we recently became aware that in Spain, the National Security Council, the country's highest nuclear authority, publicly ordered the opening of a file about a nuclear plant in Tarragona; the plant was using erroneous procedures for reviewing at least 60 safety valves. This led to a request for sanctions against those responsible in the plant for persisting in their error during the process of calibrating the valves. Spain's Security Council explained that the safety valves in a nuclear plant are designed to open or shut hermetically as a circuit when it a specific level of pressure is reached, and that the very fact of being badly calibrated can cause a leak of radioactive particles of greater or lesser importance.¹⁰

Clearly, neither in this case nor in many others is there a single response that can satisfy everyone. Actually, everything will depend on the concrete case, its particular context, and

the moment when it arises, together with a delicate, but necessary weighing of what appear to be conflicting values. ■■■

NOTES

¹ This recommendation to impeach was made once the Supreme Court ruled on July 24, 1974 that executive privilege was not in doubt, but could not prevail against the fundamental demands of due process. See Leo Rangell, *The Mind of Watergate* (New York: Northon and Co., 1980), pp. 163-165.

² See D. Jacoby, "Recent Developments in U.S. Federal Freedom of Information Law," *International Legal Practitioners*, September 1990, and A. Roux, "La transparence administrative en France," *Annuaire d'administration publique* XII (Paris: CNRS, 1989).

³ <http://www.ifai.org.mx/transparencia/LFTAIPG.pdf>. [Editor's Note.]

⁴ "Lineamientos generales para la clasificación y desclasificación de la información de las dependencias y entidades de la administración pública federal," August 18, 2003, <http://compilacion.ordenjuridico.gob.mx/ficha-Ordenamiento.php?idArchivo=5447&ambito=FEDERAL>.

⁵ *Ibid.*

⁶ According to the Law of National Security, intelligence is understood as "the knowledge obtained by the collection, processing, dissemination, and exploitation of information for decision-making in national security matters," and counterintelligence is understood as "the measures to protect government bodies against harmful acts, as well as the actions aimed at dissuading or countering their being committed" (Articles 29 and 32).

⁷ <http://www.justice.gov/dea/speeches/s020708>.

⁸ Eduardo Guerrero Gutiérrez, *Transparencia y seguridad nacional*, Cuadernos de transparencia no. 18 (Mexico City: IFAI, 2010).

⁹ Geoffrey Stone, *Top Secret: When Our Government Keeps Us in the Dark* (Lanham, Maryland: Rowman & Littlefield Publishers, 2007).

¹⁰ Ferrán Balsells, "La nuclear Vandellós II revisa mal válvulas de seguridad desde 1988," *El País*, May 28, 2011, p. 26, http://www.elpais.com/articulo/sociedad/nuclear/Vandellos/II/revisa/mal/valvulas/seguridad/1988/elpepisoc/20110528elpepisoc_3/Tes. [Editor's Note.]

Transparency Or Accountability in Mexico

Ángel Trinidad*

INTRODUCTION

On May 25, 2001, exactly a decade ago, a group of citizens, including academics and journalists, later known as the

Oaxaca Group, published a paid ad in the newspapers pointing out not only Mexico's need for a law on transparency and access to public information, but also offering minimum coordinates to guide that legislation.¹ A year later, after much debate, Congress approved the Federal Law on Transparency and Access to Public Governmental Information (LFTAIPG).²

* Commissioner of the Federal Institute of Access to Public Governmental Information (IFAI).

The first interesting lesson we can learn from this process involves the citizenry's active participation in setting the public agenda. In the words of Luis Aguilar Villanueva, "the way in which the governmental agenda is designed gives it form and content, [and] expresses the vitality or flaccidity of public life...; the design of the government agenda...shows the health or disease of public life."³ Thus, the so-called Oaxaca Group demonstrated that our political system began to show signs of recovering its health and that society was recuperating a life force that had been dormant for decades.

The change in the regime that took place in 2000, after 70 years of Institutional Revolutionary Party (PRI) hegemony, was like oxygen for the political system, breathing new life into society as well, which caught sight of an enormous opportunity to influence the governmental agenda, and managed to do so. Seldom had civil society been seen with the impetus that would conclude in legislation of this import. The transition to democracy brought with it a novel element without which it would be very difficult to consider Mexico a democratic system today. Transparency of government actions and the right to access to public information converged in a substantial idea: bringing down the old edifice of the political system that had been built without windows and with a tiny door through which only a chosen few could pass. The rest of the population was alien to what went on behind those high, dark walls.

The result of this institutional arrangement was predictable. Corruption had grown alarmingly. Enclosed spaces further decomposition; mold takes over everything and the air becomes unbreathable. The remedy for this decomposition was simple: open up the spaces, the windows, and the doors so that air, light...and the eyes and ears of the citizens could come in. U.S. Supreme Court Justice Louis Brandeis put it very simply and profoundly when he said that the light of the sun is the best disinfectant and electric light, the most effective policeman.⁴ And, in effect, everything done under the mantle of secrecy and in the shadows cannot be good for society. If the decision-making process is hidden, something bad will happen.

The defenders of opacity or operating in the shadows will argue that it is necessary. Bentham already said that he did not try to negate that secret policies avoided certain inconveniences, but that he did not doubt that in the long run, they caused more than they prevented.⁵ For that reason, as Bentham himself said, the more political power is exposed to innumerable temptations, the better it is to give those who wield it more powerful reasons to resist them. But public monitoring

Transparency and the right to access to public information converged in a substantial idea: bringing down the old edifice of the political system, built without windows and with a tiny door through which only a chosen few could pass.

is the most constant and universal of all of these reasons. The body politic forms a tribunal, one that is worth more than all the others together.⁶

For 70 years, the Mexican political system made public issues private, a matter for the elite. Only "the rulers" had access to information. Paradoxically, that same closed attitude gradually asphyxiated the system itself, like in the story of the miser who, to prevent anyone from taking his money away from him, locked himself up in a safe until he died of starvation. That is, no matter how strong a system is, sooner or later, it needs oxygen, new ideas, different actors. Mikhail Gorbachev realized this 25 years ago when he sent the world a kind of cry for help and a governmental program: *glasnost* ("transparency"). No one could have imagined that the so-called Soviet bloc—and there is no better word to describe a closed system than the word "bloc"—which seemed so solid and developed, was crumbling because of a lack of light, of air, of social participation. Gorbachev's diagnosis was electric:

An impartial, honest look led us to the logical conclusion that the country was on the verge of a crisis....We need public organizations to function in a healthy, vigorous way, new kinds of activity for the citizenry; in short, a broad democratization of all aspects of society....We want more openness about public issues in every sphere of life...as never before. We need no more dark corners where the mold can reappear, where everything we have begun a resolute struggle against can begin to accumulate. *Glasnost* is an effective form of public control.⁷

Neither politicians nor those in public service "can be a caste living behind the backs of the citizens, forging their alliances, relations, plans, and projects behind the backs of the citizens, without the latter ever being able to penetrate that world."⁸ In a democracy, the citizens have the right to be informed of what their government is doing so they can decide if they ratify their trust in it through their vote or if, to the contrary, they demand someone assume responsibility

In a democracy, citizens have the right to be informed of what their government is doing so they can decide if they ratify their trust in it or if they demand someone be held responsible.

and sanctions be imposed. If each government action is scrutinized by tens of thousands of eyes, it will be very difficult to act irresponsibly or commit acts of corruption. An Orwellian state turned upside down.

While today we must celebrate that we have a Federal Law of Transparency and Access to Public Governmental Information, this does not suffice if we do not take it to its ultimate consequences. In Mexico, the governing class likes very much to sail on the surface and not get to the bottom of things. In short, it is expert at simulation, which is why we must not be satisfied with there being transparency and access to information, but must rather get at the root of government actions, which involves the decisions implicit in the documentation put at our disposal. This is the only way we can go past the epidermis to the neuralgic center of the control of power, and that is accountability, which we will analyze in the next section.

CURRENT SITUATION

Before reflecting on how we are doing, we should underline some of the essential characteristics of our law: a legal reason is not required for requesting information; any *person* can do it; he or she does not even need to be a *citizen*. In addition, the publication of certain minimal information on web sites is obligatory; the right to make complaints exists (called a request for review); and an autonomous body has been set up called the Federal Institute for Access to Information (IFAI). Thus, we can talk about advances, but also of resistances and unresolved issues.

ADVANCES AND RESISTANCES

Taking advantage of the dizzying progress in information technology, the IFAI has developed an electronic system to handle



Commissioner Ángel Trinidad Zaldívar.

requests for access to information that allows any individual to request information and documentation about the exercise of the attributions of more than 240 federal government bodies.⁹ Thanks to this tool, more than 640 000 requests for information have been handled, with the number growing every year.¹⁰ Of these, around 94 percent have been responded to, while the other 6 percent have been the subject of complaints that have forced the IFAI to intervene.

It should be noted that some of the requests have not been well received. On the one hand, because they imply additional work, and, on the other hand, because officials feel their territory has been invaded (how is it that someone dares ask them something or ask them for a document that is “their property”?). The questions make them uncomfortable because “all questioning is an incursion [and because] when the question is asked as a means of power, it cuts like a knife in the body of the person questioned. They may be unimportant, superficial things, but they have been extracted by someone unknown. At the end of the day, a question is a kind of dissection” that allows us to get a look,¹¹ colloquially speaking, at the government’s “guts.” And officials do not like that. The intrinsic aspect of power is secrecy. Writer Elías Canetti says that “secrecy is in the very marrow of power.”¹² For that reason, trying to know them is to want to disrupt the essence of those who rule; it strips them naked. This is the reason the Leviathan (authoritarianism) will never cease its attempts to return to the time in which it shared no decision, no information with anyone. As the Marquis de Croix used

to say supremely unconcernedly, “the subjects of the Great Monarch who sits on the throne of Spain must know that they were born to be quiet and obey and not to reason or express an opinion on the high matters of state.”¹³ What those in power do not like is for there to be citizens instead of subjects. The former like peeking into the corners of power to reason and express opinions, while in contrast, subjects are submissive and leave governments and their secrets in peace. As Escobedo says, “authoritarianisms live on with subjects, not with citizens.”¹⁴

PENDING ISSUES

The exercise of this right has brought out into the light diverse topics that deserve government attention and constant demands by the citizenry. The first is that the government lacks statistics. Many requests for information cannot be answered or are responded only partially because the statistical data simply does not exist. Several questions arise out of this: without statistics, without hard data, how are decisions being made? What are the criteria for knowing whether a public policy has worked or not in the last decade—let us not demand more than that—so it can be rectified or adjusted? For example:

- a) In 2010, a request was made to the State Employees Social Security System (ISSSTE) for information about different health issues.¹⁵ The institution responded that those data did not exist.
- b) A request was made to the Tax Administration Service (SAT) for the amount of monies collected as income tax (ISR) and value added tax (IVA) in the State of Mexico, by type of taxpayer (individual or institutional), for the years 2006 through 2009. In its answer, the SAT said that the information requested did not exist on that level of detail, since it only had the kind of data requested nationally (File 615/10).
- c) Another request was made to the SAT about the number of cases in which it had had to pay reparations to taxpayers after having lost a tax case before the Federal Court of Fiscal and Administrative Justice (TFJFA), including the amount involved and the trial file number. The response was that the institution “does not have any document containing the statistical information with the level of detail requested” (File 4260/10).

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Another problem is related to the quality of the information provided. That is, there is a great deal of information available, but is it quality information? Is it verifiable? Is it useful for making decisions? The answer is not always yes. In addition, the defects in archive preservation are of concern since, if this law turns on the existence of the documentation, if the documents do not exist or are impossible to consult, the law has no meaning.¹⁶

TRANSPARENCY OR ACCOUNTABILITY?

Making governmental purchases transparent or having access to certain documents should not be understood as ends in themselves, but as a means whereby citizens, once informed, will be able to demand accountability from those in government. Society not only requires documents, but also wants explanations.

Accountability is more than access to information; it is the following step, it is the aim of the system, the final end. It is useless to know a highway or a clinic cost a certain amount if we cannot know who decided to build it and why that option was better than others. This gives us the certainty that it was done taking into consideration the greatest benefit to society and that it was not a discretionary decision. Even if the money is “correctly” disbursed—that is, nobody steals a cent—if it is an unnecessary public work, that is another kind of corruption.¹⁷

For Andreas Schedler, accountability allows the citizenry to demand that public officials report on their decisions, but that they also explain their decisions and provide the arguments underlying public policies and their implementation.¹⁸ Society does not want information *per se*; as we said before, it wants information to be able to evaluate the government and, if necessary, to sanction it. Sergio López Ayllón and Mauricio Merino have concurred with this, saying, “Accountability by governmental agents is about the exercise of fa-

culties and for that reason, there can be no supervision or judgment of it without information about the decisions public authorities make in the exercise of their attributions, about the procedures they follow to do so, and about the results they obtain.”¹⁹

Accountability makes it possible to avoid falling into what Jonathan Fox calls “opaque (or diffuse) transparency,” which

refers to forms of dissemination of official information that do not reveal how institutions perform in practice, whether in terms of how decisions are made or what the results of their actions are. This is to be contrasted with “clear transparency”—that is, accountability—which sheds light on institutional behavior, specifying the responsibilities of their officials, particularly with regard to decision-making.²⁰ ■■

NOTES

¹ The Oaxaca Group was not founded under that name, nor was it just a formal organization. Unprecedented in mobilizing public opinion, its first activity was to hold a national seminar, “The Right to Information and Democratic Reform,” convened by the Ibero-American University, the Information and Democracy and Konrad Adenauer Foundations, the *El Universal* daily newspaper, the Association of Publishers in the States, the Mexican Association of Publishers, and the Fraternity of Reporters of Mexico, in Oaxaca City on May 23 and 24, 2001. Once the group began to have an impact on public opinion around the issue of the right to public information as part of the right to information in general, it became necessary to give it a name. Journalist and *New York Times* correspondent Ginger Thompson was the one who for the first time called the emerging mobilization the Oaxaca Group, naming it after the place the academic conference had been held. See Juan Francisco Escobedo, “Movilización de opinión pública en México: el caso del Grupo Oaxaca y de la Ley Federal de Acceso a la Información Pública,” *Derecho comparado de la información* no. 2, July-December 2003, Instituto de Investigaciones Jurídicas-UNAM, p. 71, [http://www.juridicas.unam.mx/publica/rev/ indice.htm?r=decoinc&n=2](http://www.juridicas.unam.mx/publica/rev/indice.htm?r=decoinc&n=2).

² The Chamber of Deputies passed it on April 24; the Senate, April 30, 2002.

³ Luis Aguilar Villanueva, “Estudio introductorio,” *Problemas públicos y agenda de gobierno*, Antologías de política pública Collection (Mexico City: Miguel Ángel Porrúa, 1993), pp. 26-27.

⁴ Jonathan Fox, “Transparencia y rendición de cuentas,” John Ackerman, comp., *Más allá del acceso a la información* (Mexico City: Siglo XXI/IJ-UNAM, 2008), p.174.

⁵ Jeremy Bentham, “Tácticas parlamentarias” (Mexico City: Senado de la República, LX Legislatura, 2006) p. 99.

⁶ *Ibid.*, p. 97.

⁷ Mikhail Gorbachev, *Perestroika, nuevas ideas para mi país y el mundo* (Mexico City: Diana, 1988), pp. 23, 32, 33, 59, 83, and 84. In his *Memorias*, Gorbachev writes, “How did it all begin? A few men in [very high] positions in the party hierarchy had realized the need for reform, but what was more decisive was that, in addition, they were willing to run the enormous risk of undertaking not only cosmetic measures or a repair job, but a profound transformation of that highly centralized, bureaucratized, and ideology-ridden system that had atrophied over seven decades.” See Mikhail Gorbachev, *Memorias*, José Luis Gil Aristu, trans., Círculo de Lectores Collection (Barcelona: Plaza & Janés, 1996), p. 587.

⁸ Fernando Savater, *Ética, política, ciudadanía* (Mexico City: Grijalbo/Hoja Casa Editorial, and Causa Ciudadana, 1998), p. 52.

⁹ The system, called Infomex, has gradually been perfected thanks to disinterested support from many institutions like the Supreme Court, the Federal Electoral Institute (IFE), the Federal Judiciary’s Electoral Tribunal (TEPJF), the National Institute of Statistics and Geography (INEGI), as well as certain state-level IFAI-like institutions, which have contributed ideas and experience for facilitating people’s access to information.

¹⁰ The cut-off point was March 21, 2011. In 2003, there were 24 097 requests; in 2004, 37 732; in 2005, 50 127; in 2006, 60 213; in 2007, 94 723; in 2008, 105 250; in 2009, 117 597; and in 2010, 122 138.

¹¹ Elías Canetti, *Masa y poder* (Madrid: Alianza/Muchnik, 1999), p. 281.

¹² *Ibid.*, p. 286.

¹³ Martín Quirarte, *Relaciones entre Juárez y el Congreso* (Mexico City: Miguel Ángel Porrúa/Cámara de Diputados, 2006), p. XLVII.

¹⁴ Juan Francisco Escobedo, *México: polarización en construcción. Democratización, comunicación, información y gobernabilidad* (Mexico City: Universidad Iberoamericana/Fundación Información y Democracia A.C. /Fundación Konrad Adenauer, 2004), p. 16.

¹⁵ File 3225/10: 1) the number of cardiovascular cases; 2) the number of cases of rheumatoid arthritis; 3) the number of cases of breast cancer; 4) the number of type-two mellitus diabetes; 5) the number of cases of chronic myeloid leukemia; 6) the number of cases of schizophrenia and bi-polar disorder; 7) the number of kidney and liver transplants; and 8) the number of HIV-AIDS cases.

¹⁶ In File 1015/11, Mexico’s state-owned petroleum giant, Pemex, refused to hand over information saying that “with regard to the information requested, *it would be difficult to determine with any certainty whether it ever existed*, since in the past, there were no requirements mandating the institution to specifically safeguard the documentation contained in the archives.”

¹⁷ In Mexico, one president built an international airport in his hometown of fewer than 2 000 inhabitants, and different officials have built avenues near their residences or highways to service their private ranches.

¹⁸ Andreas Schedler, *¿Qué es la rendición de cuentas?* IFAI Cuadernos de transparencia Collection no. 3 (Mexico City: IFAI, 2005), p. 14.

¹⁹ Sergio López Ayllón and Mauricio Merino, “La rendición de cuentas en México: perspectivas y retos,” www.rendiciondecuentas.cide.edu.mx, 2009, pp. 17-18.

²⁰ Jonathan Fox, *op. cit.*, p. 190.