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TOWARD A LAW OF PUBLIC ACCESS TO GOVERNMENT INFORMATION IN MEXICO

CARMEN QUINTANILLA-MADERO*

I. INTRODUCTION

The right of access to government information is a privilege which allows the people of a state to gain access to government records. The existence of a right of access law helps to strengthen democracy by encouraging the development of civic conscience and political participation. It fosters understanding and communication between the government and the governed with regard to important governmental issues. It enhances confidence and trust in governmental ability. Furthermore, as a popular "control" over government performance, it promotes measures of self-control by the government.

This article will use the operation of the Freedom of Information Act in the United States¹ as a basis to compare and analyze the history and current status of access to government information in Mexico. It also will explore the advantages of and the obstacles to adopting a law granting public access to government information in Mexico. Finally, it will offer some recommendations and suggestions for the drafting of an effective freedom of information law in Mexico.

Sweden was the first country to grant to its people the right of access to government information when it did so initially in 1812.² Many other countries, including Norway, France, Canada, and the United States adopted similar legislation.³ This international

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1. Freedom of Information Act of 1967, Pub. L. No. 90-23, 81 Stat. 54 (1967) (codified at 5 U.S.C. § 552 (1982)).

2. Freedom of the Press Act, ch. 2 (adopted by the Riksdag at its 1976/77 Ordinary Session) (Stockholm 1978), *cited in* 4 K. REDDEN, *MODERN LEGAL SYSTEMS CYCLOPEDIA* 248, 256 (1984).

3. NOR. CONST. art. LXXV, § f (Nor.); *De la liberte d'accès aux documents administratifs*, Loi no. 78-75 3 du 17 juillet 1978, 1 D.S.L. 325 (Fr.); Access to Information Act, 111, Can. Stat. 3321 (Can.) (1980-82); Freedom of Information Act, 5 U.S.C. § 552 (1982).

movement toward the definition of governmental information and the regulation of public access to it gained prominence in 1946, when the General Assembly of the United Nations declared freedom of information to be a fundamental human right and a touchstone for all other liberties.⁴ Throughout the 1940s, the United Nations, in a variety of contexts and through various agencies and committees, reiterated the position that the right to gather information should be protected.⁵

The international development of the concept of freedom of information — coupled with the national political climate at that time in America — was an early influence on the development of the Freedom of Information Act in the United States.⁶

II. THE UNITED STATES FREEDOM OF INFORMATION ACT

The United States Freedom of Information Act (FOIA) established the enforceable right of any person to have access to information concerning the federal government, notwithstanding the existence of any special interest in the information by the government.⁷ All executive departments (including the Executive Office

4. 1 U.N. GAOR Annex 17a (Agenda Item 6) at 2, U.N. Doc. A/148 (1948).

5. Throughout the 1940s, in a variety of contexts and through a variety of committees, the United Nations reiterated its position that all persons should be ensured the right of free access to information. The work of the United Nations with regard to freedom of information culminated in the United Nations Conference on Freedom of Information, held in Geneva, Switzerland, from March 23 to April 21, 1948. For a general description of the proceedings of that conference, as well as the text of the draft conventions and resolutions passed, see *Freedom of Information*, 1948 Y.B. ON HUM. RTS. 494, U.N. Sales No. 1950.XIV.4.

6. On the national level, in the United States, the press led the movement to force a change toward disclosure. In 1951, on behalf of the American Society of Newspaper Editors, Harold Cross, a prominent attorney and counsel to the *New York Herald Tribune*, reported on the then-prevailing status of access to public information:

In the present state of the law people and their organs of information must trust primarily to official grace as affected by reason, courtesy, the impact of public opinion, and other non-legal considerations and, in the longer view, to remedial legislation by Congress. As of now, in the matter of *right* to inspect such records, the public and the press have but changed their kings.

H. CROSS, *THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS* 218 (1953).

7. See generally *The Freedom of Information Act*, 5 U.S.C. § 552 (1982). One author describes the national climate at the time of the passage of the Freedom of Information Act in the United States. He notes that Congress created the FOIA as a consequence of its own frustration, as well as that of the public and the press, with the restrictive policies and practices of the executive branch. In the years immediately after the conclusion of World War II, federal departments and agencies increasingly cloaked their operations in secrecy and were not eager to have their activities disclosed to the public, the press, or other govern-

of the President), government corporations, and all independent regulatory agencies are subject to the FOIA.⁸

Each agency is also obligated to issue opinions, orders, and statements of policy and interpretation in addition to those published in the Federal Register, and to make available for public inspection and copying all administrative staff manuals, instructions to staff that affect members of the public, and current indices of all matters issued, adopted or promulgated since July 4, 1967, the effective date of the Act.⁹ These provisions of the FOIA have been heralded as impressive accomplishments in the opening-up of secret laws, and in the provision of an efficient and reliable disclosure mechanism.¹⁰

Generally, indications are that the FOIA has been successfully implemented. For example, in 1984, federal agencies reported the receipt of 281,102 FOIA requests, most of which were processed at the administrative level without judicial intervention.¹¹ Since its enactment, other laws have been issued to complement the policy of open access to information. Among these other laws are the Privacy Act of 1974,¹² the Sunshine Act of 1976,¹³ the Advisory Committee Act of 1976,¹⁴ and the Presidential Records Act of 1978.¹⁵

A. *Protected Information*

Congress created nine exemptions that permit, but do not require, the withholding of information in certain matters.¹⁶ The exemptions are: (1) national defense and foreign policy; (2) internal personnel rules and practices of an agency; (3) matters specifically exempted from disclosure by other statutes; (4) trade secrets and

mental entities. Relyea, *Access to Government in the Information Age*, 46 PUB. AD. REV. 635 (1986).

8. 5 U.S.C. § 552(e)(1982).

9. 5 U.S.C. § 552(a)(1982).

10. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 804 (1967).

11. Relyea, *supra* note 7, at 636.

12. Privacy Act of 1974, Pub. L. No. 93-579, § 3, 88 Stat. 1897 (1974) (codified at 5 U.S.C. § 552(a) (1982)).

13. Government in the Sunshine Act of 1976, Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552 (1982)).

14. Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. App. 2, § 14 (1982)).

15. Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523 (1978) (codified at 44 U.S.C. § 2201 (1982)).

16. 5 U.S.C. § 552(b) (1982).

confidential commercial or financial information obtained from a person; (5) inter-agency and intra-agency memoranda or letters which by law would not be available to a party in litigation with the agency; (6) personnel, medical and similar files which constitute an unwarranted invasion into personal privacy; (7) investigatory records; (8) reports prepared by, on behalf of or for the use of an agency responsible for the regulation and supervision of financial institutions; and (9) geological and geophysical information concerning maps and wells.¹⁷

B. Enforceability of the Freedom of Information Act

The FOIA's right of access to public records is an enforceable right,¹⁸ a fact which is significant because "the formation of a harmful relationship between the government and the citizenry is more likely to occur when no mechanism exists to compel disclosure of the working papers of the government."¹⁹

Two avenues of recourse are available to persons to whom disclosure is denied:

1. Administrative Appeal

Administrative appeal to the head of the agency must first be exhausted. If, after twenty working days, no answer has been given, the appeal is deemed denied.²⁰

2. Judicial Review

The FOIA specifically vests jurisdiction in the district courts where the complainant resides, has his principal place of business or in which the agency records are situated, or in the District of Columbia.²¹ The courts have the power to enjoin agencies from withholding records and to order them to produce records improperly withheld from the complainant.²² Additionally, the courts have the authority to review *in camera* all the information that the

17. *Id.*

18. 5 U.S.C. § 552(a); 5 U.S.C. § 552a(g) (1982).

19. Moon, *The Freedom of Information Act: A Fundamental Contradiction*, 34 Am. U. L. Rev. 1174 (1985).

20. 5 U.S.C. § 552(a)(6)(C) (1982).

21. 5 U.S.C. § 552(a)(4)(B).

22. *Id.*

agencies intend to withhold and to make a *de novo* determination about the propriety of withholding the information in question.²³ The burden of proof is on the agency to demonstrate that the information requested is within the terms of a particular exemption.²⁴

C. Mechanisms for Encouraging the Use of the Freedom of Information Act

The United States Congress designed two mechanisms to protect against the non-use of the Act based on a fear of high expenses. Fees are limited to standard charges for document searches and duplication.²⁵ Additionally, provisions were established which allowed attorneys' fees and other litigation costs to be assessed against the United States in cases where the complainant has substantially prevailed in an action brought to secure information.²⁶

D. Users of the Freedom of Information Act

The FOIA established the right of any person to have access to government information regardless of any special interest involved.²⁷ The Act is designed to be used by both the ordinary public and the press. Although ordinary persons have not made much use of the Act, the FOIA has been used by the press, corporations, and lawyers as a discovery tool for litigation purposes.

E. Time Limitations on the Provision of Information Under the Freedom of Information Act

Since the inception of the FOIA, agency delays in answering FOIA requests have been a major problem in the effective operation of the FOIA. Therefore, in 1974, amendments to the Act introduced time limitations on the provision of information.²⁸ Agencies must now make a determination concerning the propriety of a request within a period of ten working days.²⁹ In unusual, but enu-

23. *Id.*

24. *Id.*

25. 5 U.S.C. § 552(a)(4)(A).

26. 5 U.S.C. § 552(a)(4)(E).

27. 5 U.S.C. § 552(a)(3)(B).

28. 5 U.S.C. § 552(a).

29. 5 U.S.C. § 552(a)(6)(A)(i).

merated circumstances, the time limitation may be extended for a period not to exceed ten additional working days.³⁰ The appeal of an adverse agency determination must be resolved within a period of twenty working days.³¹

F. Major Problems with the Freedom of Information Act

Implementation of the FOIA was far more expensive than originally expected. It imposes a tremendous drain on the public treasury.³² Unfortunately, no one knows exactly how much the Act costs, and it is nearly impossible to calculate the exact expense because of the many elements involved in such calculation, including the time needed: to process and index the information; to receive the request; to search the records; to examine the information in order to decide the propriety of its release; to notify the requesting party regarding the agency's determination; to determine the outcome of any administrative recourse; and to provide for judicial review and disposition of motions for attorneys' fees and costs, if applicable.

III. GOVERNMENT INFORMATION IN MEXICO

A. The History of Mexican Regulation of Access to Government Information

The idea of the regulation of access to government information is not completely foreign to the Mexican system. In 1977, the proponents of a political reform movement designed to stimulate the participation of a variety of political parties in the national political arena took steps toward the inclusion of the right to information in the Mexican legal system.³³ Suggestions regarding the substance of the reform were generated from a national conference arranged by the federal government and open to the public. Some

30. 5 U.S.C. § 552(a)(6)(B).

31. 5 U.S.C. § 552(a)(6)(ii).

32. Koch & Rubin, *A Proposal for Comprehensive Restructuring of the Public Information System*, 1979 DUKE L.J. 1, 5 (1979).

33. The timing of this reform in relation to the electoral process in general has been attributed to the fact that in the 1976 presidential elections, only the dominant party, "Partido Revolucionario Institucional" (PRI), had a candidate. The opposition parties did not present a candidate and the existence of the principle of plurality of parties was thus put in question. F. FERNANDEZ-CHRISTLIEB, *La Discusion Sobre el Derecho a la Informacion en Mexico*, in COMUNICACION Y DEMOCRACIA EN AMERICA LATINA 155 (1982).

of the major concerns included the transformation of the media into an accessible outlet for free political expression and the amendment of the Mexican constitution to incorporate a right to information that would complement the freedom of expression.³⁴

Ultimately, the proposal sent by the President to the Congress included constitutional amendments which would define the structure, operation, and contribution of the political parties to national life. These measures would necessarily change the composition of both the House of Representatives and the Electoral College, and establish a new procedure for challenging Electoral College resolutions before the Supreme Court. Finally, the new amendments would incorporate the right of information into the constitution.³⁵

The presidential initiative referred to the right of information predominantly in relation to the political process. The President explained that the right would be a basic resource which would aid in the development of a more informed, active, and analytical public conscience and inspire the progress of democracy. More specifically, the right of information would provide all political parties with equal and permanent access to radio and television communications.³⁶ One commentator has suggested that the adoption of the right to information therefore was motivated by the need of the government to legitimize itself and strengthen its presence in the vast media markets of radio and television.³⁷

The constitutional reforms were approved by the Permanent Constituent on December 2, 1977, and officially published on December 6, 1977.³⁸ Article 6 of the Mexican constitution was amended to read as follows:

The expression of ideas shall not be the object of any judicial or administrative inquisition, except in the case that it attacks the moral rights of a third person; or in the case that it constitutes a crime or it disturbs the public order. The right of information shall be guaranteed by the state.³⁹

34. The adoption of the right to information was due to the necessity for the government to strengthen its own presence in radio and television, the most penetrating means of communication that the society has and which at the time were controlled by influential private businessmen using their power for mass policy making. *See id.* at 156.

35. LEY DE ORGANIZACIONES POLITICAS Y PROCESOS ELECTORALES (Mex.) (1977).

36. F. FERNANDEZ-CHRISTLIEB, *supra* note 33, at 157.

37. *Id.* at 156-57.

38. 40 D.O. 2 (Dec. 6, 1977) (Mex.).

39. CONST. art. 6 (Mex.). The 1977 reform added only the last sentence regarding the right to information. The remainder of the article, which secures freedom of expression, has

While the constitutional incorporation of the right to information was a great accomplishment, work still remained in order to give concrete meaning to the right.

On February 21, 1980, the House of Representatives Committee on Government and Constitutional Points began to hold public hearings (which continued until August) regarding the passage of a law regulating the new right of information.⁴⁰ All interested persons were invited to participate in the hearings, and discussions focused mainly on the regulation of radio and television media. Two conflicting positions emerged almost immediately. The private concession television monopoly, "Televisa," was absolutely opposed to any kind of regulation. Political parties, unions, political associations, scholars, journalists, and intellectuals, however, favored the issuance of a law which would, among other things, allow and protect a plurality of radio and television stations.⁴¹ This debate over the control of the communications forum presented an opportunity for a variety of interest groups to share power and to exercise freedom of expression through the most influential means. However, the attention given to media concerns resulted in the postponement of discussions on other substantive aspects of the right of access to government information.

In September 1981, the Mexican weekly magazine, *Proceso*, published a draft of the "General Law of Social Communication," the culmination of a project attributed to the Social Communication Office of the President.⁴² This ambitious project sought to structure a national system of social communication by creating five organs of the federal government which, in varying degrees, would participate in the management and implementation of the system. The draft also contained provisions concerning the information privileges of the press, radio, television, films, theater, musical and cultural spectacles, record and video production, teleinformation, and news and publicity agencies.⁴³

The proposed law recognized the public and societal interest in governmental activities and accordingly imposed upon the government the obligation to guarantee to every citizen access to all

been contained in the Mexican constitution since 1857, and is the equivalent of the first amendment to the Constitution of the United States of America.

40. F. FERNANDEZ-CHRISTLIEB, *supra* note 33.

41. *Id.* at 158.

42. 256 *PROCESO*, Sept. 28, 1981 (Mex.).

43. *Id.*

information produced in the course of any of those activities.⁴⁴ The only information exempt from the right of public access would be information deemed classified by competent authority, and personnel files with limited or reserved access established by law. However, information deemed exempt could only be classified as such for a period of two to ten years.⁴⁵ One of the newly-created organs, an inter-agency commission, would have the responsibility of coordinating the official publication and diffusion of information of the Federal Public Administration.⁴⁶

There were many flaws in the proposed law. It neglected to identify the "competent authority" which would classify information; it did not establish a procedure for requesting information from the agencies; it did not provide for a mechanism of enforcement; and its delineations of exemptions from disclosure were vague. Although these details could have been left to the rule-making power of the President, such important issues arguably merit Congressional definition.

The main problem with the General Law of Social Communication project was its over-inclusiveness. The law attempted to regulate too many areas at the same time. This overbreadth prompted an observer to warn that it was especially important to avoid the temptation of fusing into one law so many different subjects, each of which deserved special and individual attention. Better legislative treatment would have consisted of a greater variety of separate laws, classified according to related subjects.⁴⁷

One Mexican scholar has commented that the activities surrounding the passage of a substantive regulatory law were "frozen" due to the pressures applied by those parties profiting from the status quo.⁴⁸ Another scholar predicted that no actual changes or improvements regarding freedom of information would be felt, even with the new constitutional guarantees, because differences remained between the written and real constitution.⁴⁹ While technically nothing has changed, because Mexico has not yet passed a

44. *Id.*

45. *Id.*

46. *Id.*

47. Barragan-Barragan, *Derecho de la Comunicacion e Informacion* in II INTRODUCCION AL DERECHO MEXICANO 1431 (1981). In fact, Mexican legislation regulating communication is organized in such a system.

48. L. BORRAS, *HISTORIA DEL PERIODISMO MEXICANO, DEL OCASO PORFIRISTA AL DERECHO A LA INFORMACION* 82 (1983).

49. F. FERNANDEZ-CHRISTLIEB, *LOS MEDIOS DE DIFUSION MASIVA EN MEXICO* 215 (1982).

regulatory law, it is important to note that social changes occur very slowly, and Mexico has taken the first positive steps toward real progress on the informational front.

B. Current Legal Status of Public Access to Government Information

1. Discretionary Secrecy

While Mexico does not currently have a law of public access to government information, neither does it maintain a law similar to the Official Secrets Act of Great Britain, which clearly establishes the principle of secrecy in government.⁵⁰ The study of a variety of laws leads to the conclusion that the Mexican system is one of "discretionary secrecy," whereby the Executive Office makes the decision to withhold administrative information or to refuse access to documents.⁵¹

"La Ley General de Bienes Nacionales" (Law of National Property) classifies national property into goods of the public domain and goods of the private domain of the Federation. This law establishes only the ownership of goods, and does not concern the disclosure of the information contained in them.⁵²

Public goods consist of chattels of federal ownership which are not normally replaceable, such as the documents, files and archives of the federal government.⁵³ The principle of public domain implies that national property is specially protected by a law which expressly forbids its acquisition by private people. Public goods remain national property until they are submitted to a special presidential process of disincorporation, whereby they can be authorized for sale.

2. The Role of the Civil Servant

Federal civil servants in Mexico are accorded special legal status. They are regulated by "La Ley de los Trabajadores al Servicio

50. Official Secrets Act, 1911, 1 & 2 Geo. 5, ch. 28; Official Secrets Act, 1920, 10 & 11 Geo. 5, ch. 75; Official Secrets Act, 1939, 2 & 3 Geo. 6, ch. 121.

51. See D. ROWAT, ADMINISTRATIVE SECRECY IN DEVELOPED COUNTRIES 19 (1979), for a discussion of the concept of "discretionary secrecy."

52. Ley General de Bienes Nacionales, capitulo I, arts. 2(xi) & 5, 370:5 D.O. 14 (Jan. 8, 1982) (Mex.).

53. Ley General de Bienes Nacionales, capitulo VII, art. 85, 370:5 D.O. 30 (Jan. 8, 1982) (Mex.).

del Estado," which imposes upon them the general obligation to maintain the secrecy of all job-related knowledge.⁵⁴ The law also establishes that a civil servant can be terminated only for good cause as determined by a resolution of the Federal Tribunal of Conciliation and Arbitration. Not surprisingly, an example of good cause is the revelation of any secret or reserved affair about which the civil servant has knowledge through his work.⁵⁵

"La Ley Federal de Responsabilidades de los Servidores Públicos" (the Law of Public Servant Responsibilities) mandates that every public servant has the duty to examine and protect the documents and information to which he has access because of his job from undue disclosure, removal, or destruction.⁵⁶ Public servants who enter the Foreign Service have an obligation to remain silent regarding all matters of which they have knowledge because of their position. This obligation remains binding even after they have left the service if the disclosure could prejudice national interests.⁵⁷

The Federal Tax Code imposes a special obligation upon personnel who intervene in the application of tributary provisions not to divulge information concerning tax returns and data submitted by taxpayers or third persons related to the taxpayers, and the data obtained during verification. The silence requirement does not include special cases delineated by the tax laws or cases where the information must be given to officials in charge of the management or defense of federal tax matters, to judicial authorities in criminal proceedings, or to tribunals that resolve alimony questions.⁵⁸

One of the felonies which public servants may be charged with committing — "Undue Exercise of Public Service" — is deemed to occur when the servant, by himself or through others, minimizes, destroys, hides, or transforms information or documents that are under his custody or to which he has access or knowledge by virtue of his job or commission.⁵⁹

54. Ley de los Trabajadores al Servicio del Estado art. 44 (IV) (Trueba ed.).

55. *Id.* at art. 46(V)(e).

56. Ley Federal de Responsabilidades de los Servidores Públicos art. 47(IV) (Trueba ed. 198_).

57. Ley Organica del Servicio Exterior Mexicano, capitulo VII, art. 45, 370:5 D.O. 6 (Jan. 8, 1982) (Mex.).

58. C.F.F. art. 69 (Mex.).

59. C.C.D.F. art. 214(iv) (Mex.).

A general crime that can be committed by any person is the "Revelation of Secrets," whereby the perpetrator, without the agreement of the one who could be damaged, reveals a secret or a confidential communication which he had received through his work position. The penalty is more severe if the crime is committed by a public servant.⁶⁰

It must be noted that the law is silent about the proper authority and the criteria for classifying and disclosing information held by the federal government. It is therefore assumed that the President has the authority to exercise that power.

3. Access to Statistical and Geographical Information

"La Ley de Informacion Estadistica y Geografica" (Law of Statistical and Geographical Information) establishes that data and statements provided in connection with statistical proposals or civil administrative registers will be managed under the principle of confidentiality and cannot be revealed in an individualized form.⁶¹ At the appropriate times, the information will be revealed in a manner which will maintain the anonymity of the informants. The law gives suppliers of information the right to request the correction of data which they can prove is inaccurate, incomplete, or obsolete, and allows them the opportunity to argue before administrative or judicial authorities regarding all facts and circumstances which prove that the principle of confidentiality has been disregarded. Finally, the law imposes upon the Executive Branch the obligation to regulate the circulation and public access to the statistical and geographical information.⁶²

B. Agencies Involved in the Regulation of Information

For the most part, two agencies are primarily involved in the regulation and management of information in the Mexican government. One, the Secretariat of Government, is responsible for the formulation, regulation, and conduct of the social communication policy of the federal government; the authorization, coordination, supervision, and evaluation of the social communication programs of the agencies of the public sector; and the management of the

60. *Id.* at arts. 210-11.

61. *Ley de Informacion Estadistica y Geografica*, capitulo I, arts. 5, 37-38 (Mex.).

62. *Id.*

Official Gazette and the National Archives.⁶³ The second agency, the Secretariat of Programming and Budget, regulates the coordination and development of the national services of statistics and geographic information as well as the information services of all the agencies and instrumentalities of the Federal Public Administration.⁶⁴

The Secretariat of the Comptroller General is also indirectly related to the management of information. This agency plans, organizes, and coordinates the system of government control and evaluation; enacts rules concerning the instruments and procedures of control of the Federal Public Administration; provides pre-approved opinions of projects for regulating the administration of material resources; and supervises the agencies and instrumentalities for compliance with norms concerning the use, conservation, and destiny of chattels and administrative resources.⁶⁵

The National General Archive is an organ of the Secretariat of Government. It is the central consulting entity for the Federal Executive regarding the administrative and historic archives of the Federal Public Administration. Among other duties, the National General Archive is in charge of designing systems, techniques, and procedures for increasing efficiency of the federal archives; issuing policies and guidelines for the establishment of operative relations between the various public offices in charge of archives; and advising agencies regarding the appropriate handling and management of documents.⁶⁶

C. Information Published by the Federal Government

Presently, the Mexican government publishes a considerable amount of information about its activities, some of which is required by law to be made public and some of which is released voluntarily.

The Federal Civil Code expressly mandates that regulations, circulars and any other general observance provisions take effect

63. Ley Organica de la Administracion Publica Federal arts. 27 (iii), (xviii), (xxx), (xxxi), 339:42 D.O. 4 (Dec. 29, 1976) (Mex.).

64. *Id.* at art. 32(xvii).

65. *Id.* at art. 32 (I), (II), (viii), (ix).

66. Acuerdo Por El Que Se Dispone Que El Archivo General de la Nacion Sera la Entidad Central y De Consulta Del Ejecutivo Federal en el Manejo de los Archivos Administrativos e Historicos de la Administracion Publica Federal, *Presidential Decree*, 361:10 D.O. 4 (July 14, 1980) (Mex.).

three days after their publication in the Official Gazette or on the day designated in the provision (provided the proposal had been previously published).⁶⁷

"La Ley del Diario Oficial de la Federacion y Gacetas Gubernamentales" (The Official Gazette Act) mandates that all decrees, regulations, and orders of the Federal Executive and circulars and orders of the federal agencies must be published in the Official Gazette.⁶⁸

"La Ley Organica de la Administracion Publica Federal" (Organic Law of Federal Public Administration) imposes upon Mexican agencies (called secretariats and departments) the obligation to publish in the Official Gazette all decrees delegating authority to public servants, and ascribing offices and manuals of general organization.⁶⁹

"La Ley de Planeacion" (Planning Law) requires that the National Plan of Development and the Sectorial Programs of the Federal Government must be published in the Official Gazette. The National Plan of Development must be constructed within the first six months after the President takes office. The Plan must establish the priorities and strategies of the integral development of the country, specifying the resources to be used, the people responsible for the execution, and the guidelines governing global, sectorial, and regional policy.⁷⁰

D. Public Registers

The Federal Government of Mexico maintains many registers through which records are available to the public for examination and copying. Among the most important are the Public Register of Federal Property, which keeps records concerning real property transactions made by the federal government;⁷¹ the Public Register of Commerce, which publicizes the juridical acts of mercantile en-

67. C.C.D.F. arts. 3-5 (Mex.).

68. *Ley del Diario Oficial de la Federacion y Gacetas Gubernamentales* art. 3 (I-III), (VI), 399:37 D.O. 3 (Dec. 24, 1986) (Mex.).

69. *Ley Organica de la Administracion Publica Federal*, tit II, arts. 16-19, 339:42 D.O. 3 (Dec. 29, 1976) (Mex.).

70. *Ley de Planeacion*, capitulo 4 arts. 21, 23, 30.

71. See *Ley General de Bienes Nacionales* arts. 83, 85, 370:5 D.O. 3 (Jan. 8, 1982) (Mex.). For a statement of legislative intent with regard to this law by then-President Portillo, see *Reglamento del Registro Publico de la Propiedad Federal*, 349:43 D.O. 9 (Aug. 30, 1978) (Mex.).

terprises;⁷² the Public Register of Mining, which contains records related to mining business;⁷³ and the Public Register of Archeology, Artistic and Historic Treasures.⁷⁴

E. The Right to Petition

Presently, when citizens desire information which is held by the federal government, they may exercise their Constitutional Right of Petition, which requires them to submit a written, respectful, and peaceful application. The authorities must answer any petition in a non-specific, albeit short, period of time.⁷⁵ The problem with the use of this right is that it has not been regulated by law. The Supreme Court interpretation requires only that public servants answer the petition, not necessarily in an absolutely affirmative or negative manner, provided that they explain the reasoning for their decision.

F. Information Required for Discovery

The federal government has an obligation to provide information to individuals involved in litigation. In the case of litigation between individuals, the "Codigo Federal de Procedimientos Civiles" (Federal Code of Civil Procedure) establishes that public documents produced by the government are appropriate for use as proof and evidence.⁷⁶ Furthermore, every person, including the State, has an obligation to assist the tribunals in their search for the truth. Accordingly, every person must present, without delay, any documents requested which are under his power.⁷⁷

In the case of lawsuits against the federal government, "Juicio de Amparo" is the procedure by which individuals request that a federal judge or the Supreme Court annul unconstitutional acts of the government. "La Ley de Amparo" (Mexican *Habeas Corpus*) requires the defendant authorities to present information which

72. Reglamento del Registro Publico de Comercio art. 1, reprinted in CODIGO DE COMERCIO (coleccion Porrua 1988).

73. Ley Reglamentaria del Artículo 27 Constitucional en Materia Minera art. 1, 339:21 D.O. 12 (Nov. 29, 1976) (Mex.).

74. Ley Federal Sobre Monumentos y Zonas Arqueologicas Artisticos e Historicos art. 21, 312:4 D.O. 18 (May 6, 1972) (Mex.).

75. CONST. art. 8 (Mex.).

76. C.F.P.C. capitulo III, art. 129 (Mex.).

77. *Id.* at art. 90.

sets forth legal principles sufficient to uphold the constitutionality of the contested acts.⁷⁸ This law also establishes the obligation of the authorities to provide all documents which the tribunal might order.⁷⁹

Notwithstanding the above-mentioned general obligations of the authorities to furnish information to the courts, neither the Federal Code of Civil Procedure nor the "Ley de Amparo" specify whether the authorities can refuse to provide information on the grounds that it is confidential. In cases of controversy, the courts must determine if the authorities may or may not withhold the information in question.

III. ADOPTING A LAW OF PUBLIC ACCESS TO GOVERNMENT INFORMATION IN MEXICO

A. *Advantages of and Obstacles to the Passage of an Information Law in Mexico*

Mexico is still in great need of a strong law that will define and assure public access to government information. The ability to locate desired information is only the first step. It must be supported by an enforceable right of access to the information. Mexico need not adopt an exact replica of the Freedom of Information Act of the United States. In fact, such legislation would not be possible or useful because the terms of the legal systems of the two countries are different. For example, the United States grants attorneys' fees in litigation against the government, but Mexico does not engage in similar practice. However, an exercise in comparative law can help Mexico to design a law that caters to its own unique needs, while learning from the experiences of other countries. One commentator, in analyzing the status of freedom of information in Great Britain compared with the present situation in Mexico, states:

Unfortunately, in Mexico, there is no cohesive popular movement for open government, and not much evidence of any general understanding of the issues. Partly this is in the nature of the subject; if people do not know what information exists, the form in which it is held or its whereabouts, it is not altogether

78. LEY DE AMPARO art. 149, reprinted in M. ROMERO & G. PIMENTEL, *LEY DE AMPARO* 579-80 (1983).

79. *Id.* at art. 152.

surprising if they appear to be unconcerned by its inaccessibility. In this sense the problem is circular.⁸⁰

There also is skepticism that an information law will not have any real effect. The Mexican journalist, Miguel Angel Granados-Chapa, noted that the Mexican tradition of "*obedezcase pero no se cumpla*"⁸¹ (literally: obey but do not comply) has encouraged the Mexican citizenry to disbelieve in juridical institutions. Accordingly,

it is clear that the effectiveness with which citizens enjoy the right to know about their government, in the end, will depend not only upon the laws but upon the genius of the people, the climate of the times, and to the extent to which those who govern acknowledge that they are indeed servants and not the master of the governed.⁸²

Because the press would be a direct beneficiary of the right of access to government information, it could lobby support in favor of adoption of the law, as well as explain and encourage public acceptance and utilization of the right.

The major impediment to the adoption of an information law is the cost. Mexico is currently experiencing a serious economic crisis and the government's priority is to reduce the internal deficit by cutting public expenditures. However, proper access to government information is part of an administrative modernization,⁸³ and should be ranked as a priority project. As the founder of the International Freedom of Information Institute once stated:

80. See Smith, *Open Government and Consumers in Britain* in *FREEDOM OF INFORMATION TRENDS IN THE INFORMATION AGE* 126 (T. Riley & H. Relyea, eds. 1983).

81. The Mexican historian Toribio Esquivel-Obregon explained that *obedezcase pero no se cumpla* was a formula used by Cortes against resolutions of the Monarch that would have caused irreparable damage if they would have been enforced. Thus, it was an institution that protected justice. T. ESQUIVEL-OBREGON, *APUNTES PARA LA HISTORIA DEL DERECHO EN MEXICO* 268 (1984).

The Mexican perception seems to be that regulatory laws are naive aspirations which hide the realities of legal society which do not correspond to established textual definitions. M. GRANADOS-CHAPA, *COMUNICACION Y POLITICA* 8 (1986).

82. J. WIGGINS, *FREEDOM OF SECRECY* 71 (1964).

83. Since 1984, the Mexican government has been implementing a program called "administrative simplification," with the goal of reducing, making agile, and giving transparency to the procedures that take place in the agencies and instrumentalities of the federal government. See *Acuerdo Que Dispone las Acciones Concretas que Las Independencias y Entidades de la Administracion Publica Federal Deberan Instrumentar para la Simplificacion Administrativa al fin de Reducir, Agilizar y Dar Transparencia a los Procedimientos y Tramites que se Realizan Ante Ellas, Presidential Decree, 373:28 D.O. 5* (Aug. 8, 1984) (Mex.).

People are tired of the old ways of Government, with the problems of inaccessibility, growing inflation, a burgeoning bureaucracy and many other problems. I am convinced that what is needed is more accountability of governments, which would include more information laws, or people are going to throw away the current institutions and replace them with something far worse. The time for Government to act is now and to take up their responsibility.⁸⁴

The adoption of an information law would provide a perfect vehicle for reinforcing community participation in national problems. The government must rely on the people to implement public changes, and if the people know specifically what the government is doing and the problems that it is confronting, they will be better able to understand and cooperate. A freedom of information law will also encourage the government to exercise greater self-control over its vast bureaucracy; it can aid in the detection of problems and the preparation of effective responses. Additionally, adoption of the law may enliven the policy of "moral renovation."⁸⁵ Currently, although there exists no law granting access to government information, corruption causes the leakage of some information. The information law may not eliminate illegal activities, but it will help to lessen such corruption.

Access to government information will enhance public confidence and stimulate economic development by providing some degree of certainty and specificity regarding circumstances that affect fundamental aspects of life. For example, a review of government information may provide the knowledge that medications have been properly tested, that information contained in personal files is accurate, and that the decision to deconcentrate a particular industry was based on a sound study. An information law can also be instrumental in strengthening the historical memory of the country, thereby reinforcing the importance of protecting, for the public good, important documents which from time to time have been destroyed by public administrators.

B. Recommendations

The following are some suggestions for the drafting of an ef-

84. Riley, *Foreword: What is This Thing Called FOIA?* in *FREEDOM OF INFORMATION TRENDS IN THE INFORMATION AGE*, *supra* note 80, at 2.

85. This policy was first undertaken by the last administration in 1982.

fective freedom of information act in Mexico:

1. Mexico should issue a special, exclusive law regulating only public access to government information. A past attempt at regulating the entire system of national communication with one single law proved to be impossible. One law for each subject in the communication field is a better approach and will work to build the information system step by step.

2. The federal agencies currently involved with government information regulation (the Secretariat of Government, the National Archive, and the Secretariat of Programming and Budget in coordination with the Secretariat of the Comptroller General) should work together to propose an effective system of access to government information. The President would submit for Congressional consideration a project based on administrative practice and possibilities, rather than an unreasonable utopic system.

3. The above-mentioned agencies should create only one new organ, to control the implementation, coordination, and supervision of the information access system.

4. The Secretariat of the Comptroller General, which currently manages the system of government control and evaluation, is the most appropriate agency to supervise the information regulatory commission.

5. The law must specify which areas of the Federal Public Administration are subject to the law. This is especially important in the case of the nationalized bank system, which should merit special treatment.

6. The obligation of the public servant to disclose information must be clearly established.

7. A strong enforcement policy must be established to ensure the success of the right of access to government information. One possibility would be the provision of an administrative recourse before the superior of the public servant who has denied the disclosure of the information, with the right to a later appeal of that decision to the Secretariat of the Comptroller General. Judicial review should be available for cases involving constitutional problems.

8. Exemptions from disclosure must be specifically defined and the use of general concepts such as "public interest" or "against good customs" must be avoided.

9. Competent and specific authorization for the classification of information must be established.

10. A precise system of fees must be designed in order to ascertain the financial impact of the law. Reductions and exemptions of fees must be determined only for very special cases, and a deep pocket system must be created in order to avoid corruption.

11. Agencies must be given time to organize themselves for compliance with the new law. More specifically, an efficient system of index and disclosure should be created.

12. Personnel must be specifically trained and familiarized with the responsibilities and procedures for answering the information requests.

13. The law should not be retroactive, and except in the cases of personal files, agencies should have a duty to disclose only information that has been produced since the implementation of the law.

14. Providers of information should be granted as much confidentiality as possible. A procedure must be established for the notification of people about whom information has been requested, and should include the subjects requested.

15. A system of compatibility with other laws must be organized. Secrecy provisions in all laws must be identified in order to determine whether special treatment should be afforded.

16. In order to save time and money, requirements for the publication of information must be implemented. Additional criteria for the voluntary publication of information must be prepared.

17. Simultaneous with the passage of the law, a publicity campaign should be launched in order to educate the people about the existence and possible uses of the law.

IV. CONCLUSION

The most vital, yet most difficult, aspect of implementing a freedom of information law is making the decision to act. Contrary to popular belief, change within the government is possible and worthwhile, even though implementation of a new law will cause short-run hardships for government administration. Creativity, energy and time are necessary for the design of the system, the adoption of the law and the administrative preparation for its operation. Once the initial procedures are completed and a commitment

to disclosure has been made, the government must learn to cope with the embarrassment that may accompany disclosure of certain information. Ultimately, however, the decision to adopt a system of public access to government information will lead to a healthier and stronger government. If secrecy practices are continued, existing problems will remain undetected and true social and legal progress will be impossible.