



TWO STEPS FORWARD, ONE STEP BACK: ASSESSING
THE IMPLEMENTATION OF MEXICO’S FREEDOM
OF INFORMATION ACT

Zachary BOOKMAN*
Juan-Pablo GUERRERO AMPARÁN**

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* Judicial Clerk, United States Court of Appeals for the Ninth Circuit, 2009; J. William Fulbright Fellow, Mexico City, 2008; J.D., Yale Law School; M.P.A., Harvard Kennedy School, 2007.

** Commissioner, Mexico’s Federal Institute for Access to Information; Ph. D. candidate, Political Science and Public Policy, Institut d’Études Politiques de Paris; M.P.P., School of Advanced International Studies (SAIS), Johns Hopkins University.

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A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.

James MADISON, Letter to W. T. Barry,
August 4, 1822

I. INTRODUCTION

“Right to know,” “transparency in government,” “freedom of information” — these phrases form part of the din of a growing international movement, both at the supra-national level and within sovereign nations, to give citizens more knowledge about, and by extension more participation in, the

workings of the institutions that govern their lives. Not only have international norms emerged,¹ but the past decade has seen a veritable explosion of Freedom of Information (“FOI”) laws at the domestic level.² Perhaps the most exciting in a legal sense, and most symbolic from a political perspective, is Mexico’s FOI reform.

During most of the last century, Mexican national life was dominated, in authoritarian fashion, by a single, secretive political machine, the Institutional Revolutionary Party (“PRI”).³ Under PRI, a ruling elite kept a tight-fisted rein on public information. Manipulated press fed Mexican citizens propaganda, government agencies operated in closed-door fashion, policy decisions went unaccompanied by reason or explanation, and political patronage determined electoral succession.⁴

At the start of the 21st century, Mexico occupies a very different position. As early as the 1980s and 1990s, opaque walls surrounding Mexican political life began to give way to democratic change, and by 2000, the executive branch saw a peaceful party transition. The election of President Vicente Fox from the center-right National Action Party (“PAN”)⁵ ushered in an era of unprecedented openness, characterized most emblematically by the 2002 passage of the Federal Law of Transparency and Access to Public Government Information.⁶ The Act made clear, by bold placement in the first article, its intention “to guarantee the access of all persons to information held by federal governing entities.”⁷ It also created the landmark

¹ See *e.g.*, The Atlanta Declaration, International Transparency Conference, Carter Center, February 26-8, 2008, available at: <http://www.cartercenter.org/documents/Atlanta%20Declaration%20and%20Plan%20of%20Action.pdf>; See also *Case of Marcel Claude Reyes et al. v. Chile*, Inter-American Court of Human Rights (September 19, 2006), available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc.

² See David Banisar, *Freedom of Information Around the World: A Global Survey of Access to Government Information Laws*, Privacy International, 2006, available at: <http://www.privacyinternational.org/foi/foisurvey2006.pdf>; John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85 (2006); Thomas Blanton, *The World’s Right to Know*, Foreign Policy, No. 131 (Jul. 2002), at 50.

³ See generally, ALEJANDRA RIOS CAZARES & DAVID A. SHIRK, EVALUATING TRANSPARENCY AND ACCOUNTABILITY IN MEXICO: NATIONAL, LOCAL, AND COMPARATIVE PERSPECTIVES (2007), Ch. 1.

⁴ *Id.*

⁵ See generally, RODERIC AI CAMP, POLITICS IN MEXICO: THE DEMOCRATIC CONSOLIDATION (2006).

⁶ Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental (LFTAIPG). The National Security Archives at George Washington University has an English language translation, available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/laweng.pdf>.

⁷ Federal Transparency and Access to Public Government Information Law, Ch. I, article 1 (self-translation). “Tiene como finalidad proveer lo necesario para garantizar el acceso de toda persona a la información en posesión de los Poderes de la Unión, los

Federal Institute for Access to Public Information (“IFAI”) for enforcing executive branch compliance.⁸ Citizens can now appeal an information denial from a federal agency to an administrative court, receive a decision within 50 days, and if necessary, file suit thereafter in federal court.⁹ Agencies, on the other hand, are afforded 20 days to respond to an initial request,¹⁰ and if found lacking on appeal, they are bound by an IFAI decision.¹¹ Such rulings come down against federal agencies far more often than against requestors,¹² and, perhaps as a result, the law has helped uncover “aviadores” (people on government payrolls, yet not actually employed) and expose wrongdoings in the administration of concessions, bids, licenses, and permits.¹³

Still, critical work is needed to truly deliver on the promises and potential of this legal apparatus. It is estimated that up to 10% of Mexico’s GDP is still mired in corruption.¹⁴ Large swaths of society, particularly indigenous groups and those with low-incomes, are unaware of the law, have difficulty using it, or lack trust in its efficacy.¹⁵ Some executive agencies, even where vested interests have given way to genuine volition, still lack the institutional capacity to actually find and furnish requested information.¹⁶ There is an uneven level of sophistication with regard to data archival, internal organization, public interfacing, record-keeping, and document management. More generally, and perhaps most importantly, pieces of the Mexican trans-

órganos constitucionales autónomos o con autonomía legal, y cualquier otra entidad federal.”

⁸ IFAI (Instituto Federal de Acceso a la Información Pública) maintains a website, available at: <http://www.ifai.org.mx>.

⁹ Federal Transparency and Access to Public Government Information Law, Ch. IV, articles 49, 55, and 59.

¹⁰ *Id.*, Ch. III, article 44.

¹¹ *Id.*, Ch. IV, article 59.

¹² BANISAR, *supra* note 2, at 79, noting by one calculation that in 2005 “IFAI found for the requestor in 42 percent of the cases and confirmed the agency decision in 17 percent of the cases.”

¹³ *Lost in Transition: Bold Ambitions, Limited Results for Human Rights Under Fox*, Human Rights Watch, Ch. 3, n. 84 (2006), available at: <http://www.hrw.org/reports/2006/mexico0506/mexico0506web.pdf>.

¹⁴ See e.g., http://www2.eluniversal.com.mx/pls/impreso/noticia.html?id_nota=31337&tabla=articulos.

¹⁵ See e.g. *Aún hay resistencia a la transparencia: Lujambio*. Interview of Alonso Lujambio, President Commissioner of the IFAI, with José Antonio Gurrea of *El Financiero*. March 7, 2008. “Sin embargo, todavía hay muchos mexicanos que no saben de la existencia de la ley y de las posibilidades que ofrece el uso del derecho a la información. Hay una socialización pendiente y una tarea urgente. En eso estamos.”

¹⁶ Estudio cualitativo y Encuesta 2007, *La cultura de los servidores públicos alrededor de la transparencia*, Centro Internacional de Transparencia y Acceso a la Información (April 22, 2008).

parency regime have begun to backslide. A small number of states have taken measures, of highly dubious constitutionality, to weaken their IFAI equivalents.¹⁷ In the federal system, proposals have been floated to reorganize and potentially defang the law.¹⁸ Whether transparency in Mexico will flourish and push the country toward additional and much-needed reforms in other sectors or whether the enterprise will go the way of the once touted Human Rights Commission is as yet an open question.¹⁹

One of the most fascinating, and indeed compelling, aspects of the Mexican case is that it is not just Mexico that stands to gain. The country has the potential to serve as a global model for, or at least to offer key insights into, the design and implementation of transparency laws in other developing countries. The Dominican Republic, Ecuador, and Peru, which passed FOI laws in 2004,²⁰ and Argentina and Brazil, which have considered similar laws, are watching closely.²¹ Chile recently passed a law that established a commission inspired by IFAI.²² Mexico's recent and ongoing experiences on the path to more open governance may thus highlight the potential, as well as the pitfalls, of FOI laws to fight corruption, promote human rights, and consolidate democratic gains, particularly in the context of Latin America.

And Mexico's fate is not just of interest to other developing nations. The U.S. stands to benefit immensely from strides its southern neighbor makes toward stable democracy, honest government, and robust economic health. Each journalist who reports more effectively on government programs, each victim of state-sponsored violations who more easily obtains redress, and each marginalized civil society actor that enters the sociopolitical fold produces international and North American spillover effects. With this in mind, this paper invites policy makers to consider, or reconsider, modern Mexico through the lens of its FOI enterprise. In particular, the article focuses on the law's passage, its legal structure, achievements to date, and future prospects.

¹⁷ The state of Querétaro led the charge by combining its "órgano garante" with the state human rights commission. The formal press release details some of the changes, available at: http://www.legislaturaqro.gob.mx/index.php?option=com_content&task=view&id=2507&Itemid=2.

¹⁸ For a cursory explanation, see ZACHARY BOOKMAN, Op-ed, *Secrecy Makes a Comeback in Mexico*, LOS ANGELES TIMES, April 22, 2008.

¹⁹ For a look at the human rights analogy, see *Economist* (February 14th, 2008), available at: http://www.economist.com/displayStory.cfm?story_id=10696136.

²⁰ Ackerman, *supra* note 2, at 98. Check the Peruvian case.

²¹ See *e.g.* Chilean debates on the formation of the "Consejo de la Transparencia," available at: http://www.senado.cl/prontus_galeria_noticias/site/artic/20080910/pags/20080910105448.html.

²² The Chilean government chronicles its FOI developments online, available at: www.bcn.cl and www.proaccesso.cl.

The organization is as follows. Part II canvasses the evolution of transparency in Mexico from constitutional reform in the late 1970s through electoral reform and economic liberalization in the 1990s, and the administrative and constitutional achievements of the last decade. To fully situate Mexican FOI in its historical and global context, a brief discussion is provided on the growth of the international transparency movement. Part III analyzes the Mexican effort from a legal lens. What are the law's normative intentions with respect to journalists, academics, business interests, civil society players such as think tanks or advocacy groups, rural and agricultural cooperatives and unions, and ordinary private interests? How does the structure of the law facilitate, or impede, its goals? Part IV presents the first five years of data on the usage and effect of the federal law. This section also includes qualitative assessment, based in part on the authors' experiences, interviews, and observations, of the current state of FOI implementation in Mexico. After considering future prospects, including barriers to further implementation in the coming decades, the paper closes on a sober tone; acknowledging the great strides already made, but cautioning against the view, whether in Mexico or abroad, that an FOI law, even one of this caliber, is capable in the abstract of transforming a closed society.

II. THE EVOLUTION OF MEXICO'S FOIA

FOI in Mexico was not the product of a spontaneous political revelation at the opening of the new millennium, but rather the culmination of a deep history encompassing stakeholders in many sectors over a multi-generational period. Section 1 establishes a constitutional context for the consideration of public information in Mexico. Section 2 addresses the intense multi-decade period of political and economic liberalization that preceded the election of Vicente Fox in 2000. Section 3 examines the civil society success story that catalyzed the passage of Mexico's FOI law. Section 4 parses recent developments related to constitutional reform and state level roll-out. A final word, in Section 5, situates Mexico amid a global flurry of FOI activism and legislation.

1. *Constitutional Context*

Mexico's governing legal document stems from the Constitution of 1917, drafted in the city of Querétaro during the Mexican Revolution.²³ Broadly

²³ See Victor E. Niemeyer, *Revolution at Queretaro: The Mexican Constitutional Convention of 1916-1917*, THE ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI., 417, 173-174 (1975).

speaking, that early modern period of Mexican history was imbued with a democratic-socialist fervor, clearly expressed in a number of constitutional articles. Government transparency was not high on the list of priorities,²⁴ but for purposes of considering the evolution of the issue, article 6 provides the key backdrop. Originally, it stated: “The expression of ideas shall not be subject to any judicial or administrative investigation, unless it offends good morals, infringes the rights of others, incites to crime, or disturbs the public order.”²⁵ Such language left significant room for interpretation, and unsurprisingly, actual practice saw the “expression of ideas” as something of a state-dominated industry in the 20th century.

FOI saw its first explicit constitutional mention in 1977, as a result of “State Reform,” a broadly-named push to open the authoritarian dominance put deeply into question by government repression in the 1960s.²⁶ Linked to freedom of expression, the reform parsimoniously established that “the Right to Information shall be guaranteed by the State.”²⁷ Issa Luna Pla notes that:

[T]he Mexican government announced a political reform that... considered the right of information as a new dimension of Mexican democracy with respect to ideological pluralism and the wealth and diversity of the expression of ideas, opinions, and convictions. Such reform was concretized... into a new sentence in article 6 guaranteeing freedom of expression...²⁸

Regarding the short-term effect of the 1977 Constitutional Amendment, a Human Rights Watch report noted that it “had little impact in practice as attempts to exercise the new constitutional right were generally unsuccessful.”²⁹ Nevertheless, it gave purchase to key developments. The Mexican

A standard English translation of Mexico’s 1917 Constitution is the Becker version, available at: <http://www.historicaltextarchive.com/sections.php?op=viewarticle&artid=123>.

²⁴ Transparency was not much of a constitutional matter in the early 20th century, but nevertheless it was a contemplated concept in the “constitutional consciousness” of some political cultures.

²⁵ *Id.*, article 6, The 1917 Constitution of México, Becker version.

²⁶ The most salient example of government repression is the Tlatelolco Massacre, which took place October 2, 1968. See e.g. KATE DOYLE, *The Tlatelolco Massacre: U.S. Documents on Mexico and the Events of 1968*, available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB99>.

²⁷ *Supra*, note 25, article 6, stating “El derecho a la información será garantizado por el Estado.”

²⁸ ISSA LUNA PLA, MOVIMIENTO SOCIAL DEL DERECHO DE ACCESO A LA INFORMACIÓN EN MÉXICO (México, Instituto de Investigaciones Jurídicas, UNAM) (2009) self-translation.

²⁹ *Lost In Translation: Bold Ambitions, Limited Results for Human Rights Under Fox*, 2006, available at: <http://www.hrw.org/reports/2006/mexico0506/3.htm>.

Supreme Court soon tied the new constitutional right to the freedom of political opposition, and over the years it increasingly read into it the vindication of other substantive rights.³⁰

That the PRI political machine left much to be desired in carrying out its own Constitutional mandate actually highlights one of this paper's key undercurrents. Freedom of information is only as good as its institutional implementation. An FOI law or even a constitutional reform can be passed for political reasons, such as an effort to assuage an effervescent civil society or the desire to give an appearance, however veiled, of good governance. Legislation, even if strongly drafted, is therefore insufficient, particularly in the developing country context, to guarantee transparency. A truly open society requires a popular culture that demands access and takes ownership of government. Yet, such an assertion merely exposes the underlying question of how to create such a culture to ensure the political class, and adopt transparency as the basis for its legitimacy. What one may deduce from Mexico's experiences, detailed below, is a push-and-pull growth process whereby democratic surges produce official legislation, which through normative change as well as actual reform, re-catalyzes and pushes forward further citizen action.

2. *Pre (PRI)-Fox Developments*

Questions arose in popular debate, as well as in litigation, on how to interpret the new constitutional article and how to legally respect a right of access to information.³¹ Regarding the involvement of Mexico's judiciary, Sergio López Ayllón writes that "in a diverse number of [post-amendment] cases (including decisions in 1992, 1996, and 2002), the Mexican Supreme Court took the opportunity to construct progressively, though not without doubts or an excess of prudence, a subjective right of access to information."³² López Ayllón, however, is quick to remark that "in practice, it was practically impossible to exercise [this right] since the jurisprudence did not establish standards and specific procedures for doing so."³³

³⁰ Guillermo Ortiz Mayagoitia, *Transparencia, Asunto de Derechos Fundamentales Indispensable para la Democracia Constitucional* (June 11, 2008), available at: <http://www.scjn.gob.mx/Portal/SCJN/MediosPub/Noticias/2008/Noticia20080611.htm>.

³¹ Sergio López Ayllón, *Democracia y rendición de cuentas: La Ley Mexicana de transparencia y acceso a la información*, Documentación Administrativa, 273, 140 (September 2005).

³² *Id.*, at 142. For discussion on the details of these cases and further background, see Jose Ramón Cossío Díaz, *El derecho a la información en las resoluciones de la Suprema Corte de Justicia de México* in ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO (2002), at 305.

³³ *Id.*, at 143.

Mexico still needed significant reform, some of which took place in the succeeding decades. A catalyst for progress in the voting arena was the 1988 election in which the leading opposition candidate, Cuauhtémoc Cárdenas, a former PRI member who split off after the nomination of Carlos Salinas de Gortari by the incumbent president, lost a seemingly insurmountable lead due to a highly suspect “caída del sistema” (a collapse of the vote tabulation system).³⁴ In the wake of substantial public ire, the Federal Electoral Institute (“IFE”) was created in 1990 to police campaign spending and media time in the run-up to the 1994 presidential election.³⁵ The most important aspects of this reform included citizen representation on IFE’s General Council, a cleaned-up national voting list, and photo identification cards for electors. Electoral reform continued in the 1990s under Ernesto Zedillo. After admitting to flaws in his own presidential election, Zedillo promoted additional reform, which passed in 1996, giving the IFE full autonomy and creating a more sophisticated balloting system.³⁶

During the late 1980s and 1990s, Mexico was experiencing a roughly contemporaneous period of trade liberalization in which the country’s highly regulated and nationalized economy began to interact more deeply with world markets. This process may have begun as early as 1986, when Mexico signed the General Agreement on Tariffs and Trade.³⁷ By the late 1980s, the Salinas administration started privatizing a number of state-owned corporations, a progression which included the sale in 1990 of Mexico’s telecommunications monopoly to Carlos Slim Helu.³⁸ In 1994, Mexico joined the Organization for Economic Co-operation and Development (OECD),

³⁴ See Andrew Reding, *Mexico at a Crossroads: The 1988 Election and Beyond*, WORLD POLICY JOURNAL 5, No. 3 (Fall 1988). See also Preston, Julia & Dillon, Samuel, *Opening Mexico: The Making of a Democracy*, New York: Farrar, Straus & Giroux, 2004.

³⁵ IFE’s website includes background information on its creation and mandate, available at: <http://www.ife.org.mx/portal/site/ife/menuitem.911a647873b195a841695c16100000f7>.

³⁶ See Joseph L. Klesner, *Electoral Reform in Mexico’s Hegemonic Party System: Perpetuation of Privilege or Democratic Advance?*, August 1997, citing Weldon, Jeffrey A., *Mexico’s ‘Definitive’ Electoral Reform*, Enfoque (Center for U.S.-Mexican Studies, University of California, San Diego), Fall 1996.

³⁷ The General Agreement on Tariffs and Trade (GATT) was replaced in 1994 by the World Trade Organization, which still maintains a list of GATT signatories, including Mexico, and the dates they signed the agreement, available at: http://www.wto.org/English/thewto_e/gattmem_e.htm.

³⁸ For a discussion of Mexico’s economic liberalization and privatization trend, see generally, KEVIN J. MIDDLEBROOK & EDUARDO ZEPEDA, *CONFRONTING DEVELOPMENT: ASSESSING MEXICO’S ECONOMIC AND SOCIAL POLICY CHALLENGES* (2003). For a review of Carlos Slim Helu and his business fortune (ranked as the world’s richest man by *Forbes* magazine in 2006), see David Luhnnow, *The Secrets of the World’s Richest Man*, WALL STREET JOURNAL, August 4, 2007, available at: <http://online.wsj.com/public/article/SB118615255900587380.html>.

a bold move only recently repeated by another Latin American country.³⁹ The most far-reaching development of the decade, however, was the 1992 signing and 1994 implementation of the North American Free Trade Agreement (“NAFTA”) between Canada, the United States, and Mexico.⁴⁰ NAFTA more closely connected the Mexican marketplace with its North American neighbors, allowing for increased flows of goods, people, money, and even increased scrutiny from regulators and media.⁴¹

While the PRI was executing this progressive agenda,⁴² opposition politics in Mexico were gaining ground. In a sort of denouement to an active decade of electoral and economic liberalization, in 1997, Mexico elected a majority of opposition members to Congress for the first time in almost seven decades.⁴³ Momentum crowned in 2000 with the election of Vicente Fox, candidate for the National Action Party (PAN). Although not directly germane to FOI on its face, this event and those just discussed are best seen as part of a multi-sector transformation process. If one defines democracy as the cession of power peacefully from one party to another, Fox’s election marks the (re)birth of Mexican democracy. Causes for this broad course of events are, as previously alluded to, difficult to pinpoint, because the reforms themselves may have been the result of a changing political culture while that culture was undoubtedly coaxed by the reform process itself. Nevertheless, an essential insight is that the actual achievement of transparency legislation in Mexico, detailed below, is but one stage, perhaps a late one, in a deep transition from a closed political system to a more robust and fully functioning democracy.

3. *Grupo Oaxaca*

An oft-repeated criticism of the Fox administration harps on the wasted opportunities to continue apace the multi-decade stretch of political and economic reforms reshaping Mexico upon his ascendance.⁴⁴ For better or

³⁹ For information on Chile’s accession to the OECD, see Latin American Economic Outlook 2008, OECD, available at: <http://www.oecd.org/dataoecd/61/35/39563538.pdf>.

⁴⁰ See generally, William A. Orme Jr., UNDERSTANDING NAFTA: MEXICO, FREE TRADE, AND THE NEW NORTH AMERICA (1996). The NAFTA Secretariat maintains a website providing access to the legal documents, available at: <http://www.nafta-sec-alena.org/DefaultSite/index.html>.

⁴¹ For an updated look at trade flows, see generally, Hufbauer, Gary Clyde *et al.*, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES (2005).

⁴² Throughout this period, the PRI exercised heavy and secretive influence in legislative, judicial, and even private affairs. See generally, JOSÉ ANTONIO CRESPO, PRI: DE LA HEGEMONÍA A LA OPOSICIÓN, UN ESTUDIO COMPARADO, 1994-2001 (2001).

⁴³ *Id.*

⁴⁴ See *e.g.*, JONATHAN FOX ET AL., MEXICO’S RIGHT-TO-KNOW REFORMS 13 (2006); Fredo Arias-King, *Mexico’s Wasted Chance*, THE NATIONAL INTEREST (Winter 2005-6).

worse, the passage of Mexico's FOI law may be the most ambitious and successful achievement of Fox's administration. Interesting questions center on why Fox acted in this particular sphere and on what forces acted upon him. To answer these, one must look to the civil society movement that crystallized shortly after the 2000 election under the rubric "Grupo Oaxaca."

This appellation, bestowed by New York Times correspondent Ginger Thompson,⁴⁵ refers to the more than 100 journalists, human rights activists, scholars, and lawyers who gathered in Oaxaca in May, 2001. Shortly before the meeting, in early 2001, the Fox administration's draft for FOI legislation leaked to the media. This caused the Oaxaca group to counter with its own legislative proposal, the Oaxaca Declaration, which finalized in October of that year. Reports from the U.S.-based National Security Archive ("NSA") indicate that the "Grupo Oaxaca's" efforts resulted in a "sea change" to the government's original draft law.⁴⁶ Kate Doyle, head of the NSA's Mexico Project, noted that civil society pressure "caused a radical turn-about in the conceptualization and drafting of the law inside the government."⁴⁷ The group's effort impacted the autonomy of the regulating body, IFAI, as well as the stance taken towards administrative silence. Describing "positiva ficta," Doyle says, "Article 53 [of the law] resolves in the Grupo Oaxaca's favor the question of what an agency's failure to respond to a request means. [Now] the lack of a response will be considered acceptance of the request, setting in motion the process and deadlines normally associated with an accepted request, with the added advantage of an expedited procedure."⁴⁸ While the government was responsible for initiating Mexico's FOI law in the first place, "sweeping exemptions, gaping loopholes, and [the lack of an] identifiable timetable," were removed from the initial draft law or ironed out as a result of the "the consensus that emerged after months of internal debate" and lobbying from newspapers, academics, and opposition party members. Doyle concludes that changes prompted by the civil society reaction "resulted in a far better proposal —and one that looks, in places, very much like the draft sent by the Grupo Oaxaca."

Doyle's conception of the influence of the Grupo Oaxaca on the final outcome of the legislation is not without contest. Sergio López Ayllón, the federal official in charge of negotiating with civil society and the lead drafter of the final versions of the law, argues that the Oaxaca Group and the Executive proposals coincided on fundamental points and differed pri-

⁴⁵ Ginger Thompson, *Mexicans Move to Pry Open Potentially Explosive Files*, NYT (October 12, 2001), available at: <http://query.nytimes.com/gst/fullpage.html?res=9A06EFD8143FF931A25753C1A9679C8B63>.

⁴⁶ Kate Doyle, *Mexico Passes New Freedom of Information Law*, National Security Archive (May 2, 2002), available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/index3.html>.

⁴⁷ *Id.*

⁴⁸ *Id.*

marily on technical questions and details. López Ayllón notes that some of the main proposals of the Oaxaca Group were even constitutionally unfeasible, including a proposal to grant investigative and sanctioning powers to IFAI.⁴⁹ Juan Francisco Escobedo, a member of the Oaxaca Group, cuts something of a middle ground, acknowledging that what stuck from the civil society proposal was not insignificant, particularly the reach of the law over unions and political parties and the general design of IFAI.⁵⁰ Despite the existence of differing interpretations of the government's position and its interplay with civil society, one may conclude that intervention of the Grupo Oaxaca triggered changes in the government's initial draft law regarding, at the least, the autonomy of the IFAI and the Senate involvement in appointing Commissioners as a means of political legitimacy.

Further more, civil society involvement facilitated the political conditions necessary for obtaining the FOI law's unanimous legislative approval. Having originally pledged delivery of an FOI law in August 2001, President Fox eventually adopted the law on December 1st, "so that he could [still] claim he had fulfilled his promise to produce a law within his first year in office."⁵¹ The uncertainty inherent in a new administration combined with the hurry to meet this self-imposed deadline generated a unique opportunity to pass the law before the most conservative sectors of the federal bureaucracy could undertake a detailed analysis of the initiative. These sectors, including Treasury, Foreign Affairs, and Justice would later oppose FOI reforms. The Act, however, was formally considered by the Mexican Congress upon reconvening in March, and signed into law in June of 2002.

4. State Level Roll-Out

Extending transparency to the states (Mexico has a federal system with 31 states and a federal district) has been a particular focus since November 2005, when a National Transparency Congress was convened in Guadalajara calling for constitutional reform to bind the states, alongside the federal government, to minimum FOI standards.⁵² A 2008 follow-up report on the culture of transparency in Mexico by the Annenberg School at the Uni-

⁴⁹ See Sergio López Ayllón, *La creación de la ley de acceso a la información*, 17, in *TRANSPARENTE AL ESTADO: LA EXPERIENCIA MEXICANA DE ACCESO A LA INFORMACIÓN* (Hugo A. Concha Cantú, Sergio López-Ayllón & Lucy Tacher Epelstein eds., 2004).

⁵⁰ 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*, 3 *REVISTA IBEROAMERICANA DE COMUNICACIÓN*, 39-65 (Fall-Winter 2002).

⁵¹ *Id.*

⁵² See ISSA LUNA PLA, *MOVIMIENTO SOCIAL DEL DERECHO DE ACCESO A LA INFORMACIÓN EN MÉXICO* (Instituto de Investigaciones Jurídicas, UNAM, 2009).

versity of Pennsylvania explained that “at that meeting, three governors—from Aguascalientes, Chihuahua, and Zacatecas, representing three different political parties, PAN, PRI, and the PRD, respectively—signed the Declaration of Guadalajara along with Maria Marván, IFAI’s then president.”⁵³ Considering the autonomy inherent in Mexico’s federal system, it was acknowledged at the outset that constitutional action was required if “generalized practices and norms” were going to be institutionalized at the state level.⁵⁴

Progress continued in 2006 with state representatives convening at the National Forum for Government Openness, held in the city of Zacatecas, to discuss existing state-level transparency laws and implementation challenges.⁵⁵ Later in the year, at the Second Annual National Transparency Congress, a draft constitutional reform emerged, now known eponymously from its location as the Chihuahua Initiative.⁵⁶ The authors of the Annenberg Report note that “five governors (from Aguascalientes, Chihuahua, the Federal District, Veracruz, and Zacatecas) presented the document to the Political Coordination Assembly in the House of Representatives (la Cámara de Diputados),” which “then adopted the reform as its own.”⁵⁷ Just months later, in March 2007 in the House and April in the Senate, with uncommon tri-partisan congressional support and a minimum of debate, an amendment was approved.⁵⁸ Indeed, the Annenberg authors called it “a testament to the vibrancy of the collaborative partnership that originally advocated for the Transparency Law.”⁵⁹

The successful passage of the amendment offers a glimpse into the deeply political nature of FOI reform. The waning days of Fox’s term (Mexico has single six-year terms of presidential office) were relatively inactive in a pol-

⁵³ *Follow Up Report on The Federal Institute for Access to Information & A Culture of Transparency*, The Annenberg School of Communications, University of Pennsylvania, available at: http://www.global.asc.upenn.edu/docs/FollowUp_Report_January_2008.pdf.

⁵⁴ *Id.* See generally, PEDRO SALAZAR UGARTE, *EL DERECHO DE ACCESO A LA INFORMACIÓN EN LA CONSTITUCIÓN MEXICANA* (2008); MIGUEL CARBONELL ET AL., *HACIA UNA DEMOCRACIA DE CONTENIDOS: LA REFORMA CONSTITUCIONAL EN MATERIA DE TRANSPARENCIA* (2008).

⁵⁵ National Forum for Government Openness and Transparency in Mexico, Zacatecas, Mexico, March 30-31, 2006. Co-sponsored by the World Bank, IFAI, the Government of the State of Zacatecas, and the State Commission for Access to Public Information.

⁵⁶ *Pla*, *supra* note 14, at 190.

⁵⁷ Annenberg Report, *supra* note 42.

⁵⁸ A copy of Mexico’s current constitution with the amendment is posted by the Mexico’s Congress, available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/1.pdf>. The National Security Archive has a brief note as to its significance, available at: <http://www.gwu.edu/~nsarchiv/mexico/constitution.htm>.

⁵⁹ Annenberg Report, *supra* note 42.

icy sense. Transition to the Calderón administration was mired in doubts over the presidential election results. In that setting, “access to information” was an issue on which broad political consensus could be achieved. In addition, IFAI, the “behind-the-scenes” architect of the reform, had considerable political capital and the advantage of perceived political neutrality. An important opportunity thus emerged. By proposing the federal law, which covers the executive branch, as a model for other jurisdictions, the FOI reforms begun in the first years of the Fox administration could be more deeply entrenched.

Like the 2002 federal legislation, the 2007 constitutional reform promoted broad use of electronic tools to facilitate citizen access, conditions of anonymity in the use of FOI, and creation of autonomous bodies to supervise regulation and enforcement. To facilitate the legislative changes mandated by the amendment, IFAI commissioned the writing of a Code of Best Practices (Código de Buenas Prácticas) from the Center for Economic Faculty and Research (“CIDE” or Centro de Investigación y Docencia Económicas) which in turn solicited the help of an array of legislators, officers, and experts.⁶⁰ After a series of drafts, the final product emerged in October 2007 with the aim of facilitating an intended one-year timeframe for passage of state legislation. By the end of 2007, all 31 states, as well as the Federal District of Mexico City, had passed transparency legislation, albeit of divergent strength and efficacy. Outside of the executive branch, however, the legislature, judiciary, and the autonomous constitutional bodies, including the Central Bank, Federal Electoral Institute, and National Commission on Human Rights have so far failed to comply with the obligation to establish independent bodies to oversee citizen complaints.

5. *International Context*

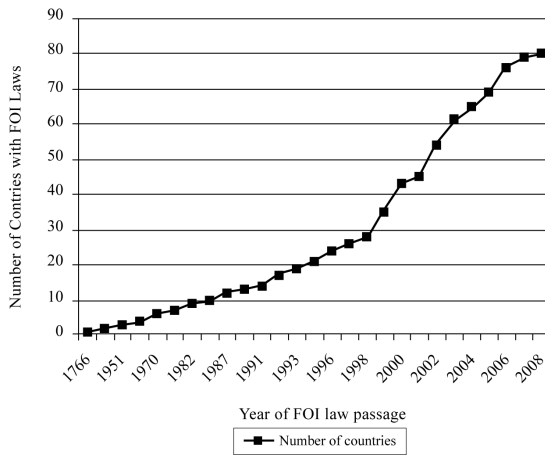
To fully understand the events outlined above, it may be helpful to consider the Mexican struggle as one of the latest in a global push toward FOI. To date, 80 countries have passed “sunshine” legislation, with the majority having done so in just the past ten years.⁶¹ When one plots FOI legislation by year, as done in Figure 1 below, it shows a development that some commentators have called an “explosion.”⁶²

⁶⁰ The Code of Best Practices is posted on IFAI’s website, available at: <http://www.ifai.org.mx/TemasTransparencia/transparenciaRepublica>.

⁶¹ See Banisar, *supra* note 2.

⁶² See *e.g.* Green, Eric, *Freedom of Information Laws Burgeoning Worldwide*, August 29, 2007, available at: <http://www.america.gov/st/washfile-english/2007/August/200708291251141xeneerg0.6091425.html>; see also Ackerman, *supra* note 2.

FIGURE 1. COUNTRIES WITH FOI LEGISLATION LINE GRAPH (BY YEAR)



FIGURES 1 AND 2 SOURCE: Authors based on *supra* note 62 and Ackerman *supra* note 2.

In tracing the evolution of FOI laws, Sweden’s Freedom of the Press Act, passed almost 250 years ago, tops the list.⁶³ Not long after its advent, the French Declaration of Rights of Man in 1789 “called for the right of citizens to review expenditures of the government.”⁶⁴ In the early 19th century, the Americas too were aware of the concept of FOI, as emblemized by Madison’s famous quote that “knowledge will forever govern ignorance: And a people who mean to be their own governors, must arm themselves with the power knowledge gives.”⁶⁵

Despite early recognition, however, the profile of government transparency has seen its greatest expansion in the years since WWII. Article 19 of the UN Declaration of Human Rights passed in a post-war flourish of international cooperation. It states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁶⁶

A few prominent FOI laws, including the U.S. law, followed in the ensuing decades, leading some to label the growth of FOI laws as “a post-war

⁶³ A short historical narrative is given in Andrew McDonald, *What Hope for Freedom of Information in the UK?*, in *TRANSPARENCY: THE KEY TO BETTER GOVERNANCE?* 129 (Christopher & David Held eds., 2006).

⁶⁴ David Banisar, *Freedom of Information International Trends and National Security* (October 2002), available at: http://www.humanrightsinitiative.org/programs/ai/rti/articles/foia_intl_trends_and_nat_sec.pdf, quoting Declaration of the Rights of Man (1789), available at: <http://www.yale.edu/lawweb/avalon/rightsof.htm>.

⁶⁵ James Madison, Letter to W. T. Barry, 1822.

⁶⁶ Universal Declaration of Human Rights, *General Assembly resolution 217 A (III)*, (Dec. 10, 1948), available at: <http://www.un.org/Overview/rights.html>.

trend.”⁶⁷ This is not strictly accurate, though. Most FOI activity has taken place in the last generation, and really the last decade, as Figure 1 above shows.

To further consider the state of FOI in a global context, below is a list of individual countries with FOI laws and the year each law was passed.

FIGURE 2. PASSAGE OF FOI LEGISLATION CHART
(BY COUNTRY AND YEAR)

1766	Sweden	1997	Thailand
1888	Colombia		Ireland
1951	Finland	1998	Israel
1966	United States		Latvia
1970	Denmark	1999	Czech Republic
	Norway		Albania
1978	France		Georgia
1982	Australia		Greece
	New Zealand		Japan
1983	Canada		Liechtenstein
1987	Austria		Trinidad and Tobago
	Philippines	2000	South Africa
1990	Italy		United Kingdom
1991	Netherlands		Boznia and Herzegovina
1992	Hungary		Bulgaria
	Ukraine		Lithuania
	Spain		Moldova
1993	Kazakhstan		Slovakia
	Portugal		Estonia
1994	Belize	2001	Poland
	Belgium		Romania
1996	Iceland	2002	Panama
	Lithuania		
	South Korea		

⁶⁷ Green, *supra* note 52, “Steven Aftergood, a senior research analyst at the Washington-based Federation of American Scientists, agreed with Fuchs that the world has seen a ‘real post-Cold War wave of freedom of information laws.’”

FIGURE 2. PASSAGE OF FOI LEGISLATION CHART
(BY COUNTRY AND YEAR)

	Pakistan		Switzerland
	Mexico		Ecuador
	Jamaica	2005	Antigua & Barbuda
	Peru		Azerbaijan
	Tajikistan		Germany
	Uzbekistan		Uganda
	Zimbabwe		Taiwan
2003	Angola	2006	Cayman Islands
	Croatia		Honduras
	India		Kyrgyzstan
	Kosovo		Macedonia
	Armenia		Nepal
	Slovenia		Nicaragua
	St. Vincent & Grenadines	2007	China
	Turkey		Jordan
2004	Dominican Republic	2008	Chile
	Serbia		Cook Islands

It is interesting to note, as *Freedominfo.org* has, that “out of the 38 poorest countries classified by the World Bank as Highly Indebted Poor Countries (HIPC), none has an FOI law.”⁶⁸ An obverse look is also telling: almost a third of countries with FOI laws (25 in total) are counted among the most developed countries, including those in Western Europe and North America, along with Japan, South Korea, Australia, New Zealand, and Israel.

Before any generalizations are made regarding the efficacy of FOI legislation, a note of caution is in order. As Ackerman and Sandoval-Ballesteros have decried, there is a dearth of scholarly attention on the issue.⁶⁹ The transparency movement has gained notice among government officials, courts, lawyers, and academics, as evidenced in part by the recent Atlanta Conference on Transparency⁷⁰ and the landmark 2006 ruling by the Inter-

⁶⁸ See Freedominfo.org survey, available at: <http://www.freedominfo.org/features/20060322.htm>.

⁶⁹ Ackerman, *supra* note 2 at 87.

⁷⁰ See *e.g.*, The Atlanta Declaration, International Transparency Conference, Carter

American Court of Human Rights in the *Case of Marcel Claude Reyes et al. v. Chile*.⁷¹ But there is still a sizeable gap between political involvement in terms of the boom in FOI legislation and what the world actually knows, both empirically and theoretically, about transparency. Do FOI laws reduce corruption? Promote economic growth? Consolidate young democracies? Affirmative answers to these questions have probably animated the passage of FOI laws in developing countries, particularly in Latin America, but outright conclusions are difficult to draw in light of scant research in the field.⁷²

III. THE WRITTEN WORD

It will be helpful before going further to quickly flesh out the definitional differences between the many terms used in the FOI colloquy. This is done in Section 1. Section 2 canvasses the legal intentions behind Mexico's FOI law. What did the law hope to accomplish? In the face of competing models, how and why did Mexico choose its particular course? Section 3 examines the language of the law and the legal structures it created. How does IFAI function? Is it a model worth replicating? How significant are the FOI exceptions the law allocates? For the sake of clarity, Section 4 differentiates an FOI law from other types of transparency regulation, using targeted transparency policies as an example.

1. *Vocabulary of Transparency*

The push toward transparency, in Mexico and at the global level, involves many different stakeholders within government, among civil society members such as NGOs and think-tanks, from academia, and within the private sector. With a cacophony of voices and a multiplicity of terms, it can be difficult at times to know exactly what is being said. The following breakdown is neither definitive nor comprehensive, but meant merely to differentiate some of the most commonly used phrases.

Center, February 26-8, 2008, available at: <http://www.cartercenter.org/documents/Atlanta%20Declaration%20and%20Plan%20of%20Action.pdf>.

⁷¹ *Case of Marcel Claude Reyes et al. v. Chile*, Inter-American Court of Human Rights (September 19, 2006) (holding that article 13 of the American Convention on Human Rights provides for a full right of access to information held by public bodies).

⁷² One notable attempt to remedy the deficit in FOI scholarship is that of Fung, Archon, Mary Graham & David Weil, *THE POLITICAL ECONOMY OF TRANSPARENCY: WHAT MAKES DISCLOSURE POLICIES SUSTAINABLE?*, Institute for Government Innovation (Winter 2002).

A. *Transparency*

Transparency refers to the architecture or the full gauge of the secrecy of a society. In other words, it refers to “[t]he degree to which information is available to outsiders that enables them to have informed voice in decisions and/or assess the decisions made by insiders.”⁷³ As a result, transparency encompasses “many elements: open government, with access to official forums, and institutions that respond to the citizen; freedom of information laws, protection of public interest disclosure (whistle blowing); a free press practicing investigative journalism; and a lively civil society sector campaigning for openness of all these kinds.”⁷⁴ In sum, transparency is the complete bag. As an aside, it should be evident how difficult it is to “measure” transparency given that it involves so many variables throughout the state.⁷⁵

B. *Access to Information*

ATI, as it is sometimes called, refers to a citizen’s ability to find out about the inner workings of his or her government. The concept involves a high degree of “ownership” in the sense that democratic government, or self-government to use Jefferson’s phrase,⁷⁶ is merely a portion of the citizenry working on behalf of the greater whole. Put succinctly, “[a]ccess to information allows for informed participation by people who have a right to be involved in decisions that affect their lives.”⁷⁷ Because this is but one component of the above, ATI is different, far narrower, than the concept of transparency as a whole.

C. *Right to Know*

The U.S. government describes its FOIA as a law providing “that any person has a right, enforceable in court, to obtain access to federal agency

⁷³ THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD (Ann Florini ed., 2007).

⁷⁴ Paul Sturges, *Corruption, Transparency, and ICTs*, INTERNATIONAL JOURNAL OF INFORMATION ETHICS 2 (November 2004).

⁷⁵ In the case of the Mexican federal government, transparency is often applied specifically to the proactive information published by departments and entities regarding many basic features of their business, including the directory of public servants, salaries, contracts and procurement, organizational framework, subsidies, and authorizations.

⁷⁶ See e.g. Jefferson, Thomas, “Every man, and every body of men on earth, possesses the right of self-government.” Opinion on Residence Bill, 1790.

⁷⁷ IFI Transparency Resource: Bank Information Center, available at: www.freedominfo.org.

records.”⁷⁸ This definition centers on the granting of a legal right to information. Such a right may exist independently of, or subordinate to, the political or philosophical conception of a human right to government information. With regard to FOI, it seems apt to consider a “right to know” as part and parcel of a right to self-government and therefore perhaps in the realm of a human right. Indeed, democratic government can only exist with the knowledge, consent, and participation of the populace. Stated differently, autocracy or communism cannot function or exist if all citizens know about and are involved in governance.⁷⁹

D. *Freedom of Information Act (FOIA)*

A FOIA refers to the specific legislative grant offering access to information in government files on behalf of the citizenry. Many think a “right to information can only be effectively exercised and implemented on the basis of laws, regulating this right in accordance with international standards.”⁸⁰ While this proposition may seem intuitive, the case of England may serve as a counterweight to the idea that a FOIA is a necessary component for government transparency. That country enjoyed a relatively high degree of transparency before passage of its law, and it is unclear what effect its recent (2005) FOI experiment has had on government administration.⁸¹

2. *Normative Aims*

By way of introduction to the normative potential of Mexico’s transparency law, it is worth considering the *Reyes* ruling briefly mentioned above. Decided in 2006 by the Inter-American Court on Human Rights, the case was originally filed in 1998 by a member of the Chilean parliament along with two environmental activists. Together, they sent an ATI request to the Chilean government requesting copies of background checks and environmental reports on U.S.-based logging company Trillium Corporation, which was operating in the Lengua forest in the Rio Condor valley of Tierra del Fuego. Although such information was in existence by virtue of Chil-

⁷⁸ *Agency Views on Changes Resulting from New Administration Policy*, Report to the Ranking Minority Member, Committee on the Judiciary, U.S. Senate. US GAO (Sept. 2003), available at: <http://www.gao.gov/new.items/d03981.pdf>.

⁷⁹ The implications of classifying a “right to know” as a human right, some of which may be negative, are regrettably outside the scope of this article.

⁸⁰ Freedom of Information Advocates Network, available at: www.Foiadvocates.net.

⁸¹ The UK government maintains an independent website, available at: <http://www.ico.gov.uk>. In October 2006, the government commissioned a private study on the costs of administering the FOI law, available at: <http://www.foi.gov.uk/reference/foi-independent-review.pdf>.

can law requiring it as a condition precedent to the business enterprise, the only information received was the value of Trillium's investment.

The Court found this withholding violated article 13 (freedom of thought and expression) of the American Convention on Human Rights⁸² which, as the Court stated:

[S]hould be understood as a positive obligation on the part of the State to provide access to the information it holds; this is necessary to avoid abuses by government officials, to promote accountability and transparency within the State, and to allow a substantial and informed public debate that ensures there are effective recourses against such abuses.⁸³

The Court limned a wide ambit for the right of access to information, especially with regard to public concessions, on the basis that ATI "enables civil society to control the actions of the Government to which it has entrusted the protection of its interests."⁸⁴

While not binding on other countries in a domestic law sense, this ruling holds powerful normative sway. It doubtlessly fed off the growing global transparency movement (indeed the court referenced a "regional consensus... about the importance of access to public information"),⁸⁵ and in return, the opinion offers deep interpretative support to certain overarching principles undergirding national laws. Such domestic principles, in general, have the power on a national scale to filter into the public consciousness or even to affect routine bureaucratic processes. For Mexico, the normative power of its law could prove its strongest asset and the best hope the country has for continuing its democratic progression.

A. FOI Principles

So what are these principles in Mexico's case? There are at least four. First, article 2 of Mexico's FOI law affirms that information in possession of the state is public, implying (and in fact stating elsewhere) that reserved information constitutes a temporary exception to the general rule that information belongs to individuals, third parties and private entities.⁸⁶ This is a

⁸² Signed at the Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica, November 22, 1969, available at: http://www.hrcr.org/docs/American_Convention/oashr.html.

⁸³ *Case of Marcel Claude Reyes et al. v. Chile*, Inter-American Court of Human Rights (September 19, 2006) at 34, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc.

⁸⁴ *Id.*

⁸⁵ *Id.* at 41.

⁸⁶ *Supra* note 6, article 2.

simple but powerful affirmation of democratic values because, by extension, an individual need not identify him or herself or explain why he or she wants information. Simply speaking, government information already belongs to the people.

This leads directly to the second principle, namely, the idea of limited exceptions to the public character of government information. Articles 13 and 14 list contexts in which information “shall be deemed as privileged,” including situations of national security, economic stability, and individuals’ health and safety.⁸⁷ Article 15 checks to some extent the open-ended nature of this classification by stating that privileged information “may remain as such for a period of up to twelve years” and that “said information may be declassified when the causes that originated [it] are terminated or when the reserve period has been completed.”⁸⁸

A third principle, embodied in article 6, centers on the notion of maximum openness. As the law states, “in the interpretation of this law the principle of publicity of information in possession of the compelled bodies should be favored.”⁸⁹ This “maximum disclosure and accessibility” standard embodies in microcosmic form the watershed change the law represents. It builds on the previous principles, declaring that, *ceteris paribus*, information should be released or disseminated. Any “tie” goes to the citizen.

A fourth principle, universal access, is no less democratic than the previous three. Distilled in article 40, the law states that “any person” may make a request for access to information.⁹⁰ Although deceptively simple, the language again carries great import. Not only are agencies and other government organs forbidden from discriminating on the basis of sex, race, income and other categories, but Mexican citizenship or nationality is not even required. A picture presents itself: a law that 1) allows absolutely anyone to request information, without the need for identification, 2) for the request to be interpreted in favor of access, and 3) if not subject to a series of exceptions, themselves of limited extent and duration, for the information to be released by the requested body.

B. *FOI Objectives*

If not readily apparent from the passage of the law or the underlying principles animating it, article 4 openly lists the law’s objectives. The first two objectives aim to “[p]rovide whatever is necessary so that anyone may have access to information by means of simple and fast procedures” and to “[m]ake public management transparent by means of spreading the infor-

⁸⁷ *Id.* at article 13, I, III, IV respectively.

⁸⁸ *Id.* at article 15.

⁸⁹ *Id.* at article 6.

⁹⁰ *Id.* at article 40.

mation created by the compelled bodies.”⁹¹ The fourth (of six) states the goal of promoting “accountability to citizens, so that they are able to assess the performance of the compelled bodies.”⁹² A final objective goes so far as to state an intention to “contribute to the democratization of Mexican society.”⁹³

Because these proclamations are lofty and far-reaching, one might be tempted to label them generic or superficial. After all, there is a fine line between an ambitious scope and empty rhetoric. But such pronouncements add muscle to the principles noted above by anchoring them to overarching objectives. Administrative practice is the ultimate arbiter of the law’s success, but, as mentioned, a body of normative promises carries weight in that collectively it may influence, albeit subtly, the decision-making of transparency actors and the broader cultural conditions that serve to check government actors.

Article 7 pushes this idea further by mandating an array of basic items public bodies must provide from the outset, online among other places.⁹⁴ Among the requisite disclosures are a breakdown of organizational structure; directory and salaries of public officials; services rendered; information on allocated budgets; licenses, permits, and authorizations granted; and hiring agreements.⁹⁵ Although not comprehensive, this proactive measure — to be updated every three months — not only provides a host of useful information that by itself may empower citizens, but it also sets a tone of openness that may help permeate layers of time-hardened, secretive operating procedures. Accompanied by normative claims, this approach helps establish a referential transparency framework that judges, citizens, agency personnel, and even future legislators can point to when defending, using, or promoting the access to information.

The power of a normative framework lies on the margin. Whether within the confines of government, such as agency personnel or IFAI Commissioners, or from the perspective of the citizen requestor, including the very impetus to file a request and what information to seek, a robust sociopolitical context can both lead and support the routine exercise of a citizen’s right to know.

3. *Legal Structure*

In contrast to overarching transparency principles and their ability to color or even push forward a sociopolitical culture, a discussion of formal

⁹¹ *Id.* at article 4, I, II.

⁹² *Id.* at article 4, IV.

⁹³ *Id.* at article 4, VI.

⁹⁴ *Id.* at article 9.

⁹⁵ *Id.* at article 7.

legal or institutional structures treats the explicit mechanisms by which an FOI law functions. In Mexico's case, the most striking and innovative institutional creation is the Federal Institute for Access to Information.

A. IFAI

The IFAI is a specialized, operationally independent executive branch agency with a multi-purpose charge. Article 33 states that, as a body, it is designed for "promoting and disseminating the use of the right of access to information; deciding if a request... is accepted or denied; and protecting all personal data under the custody of the departments and entities [of the Federal Public Administration]."⁹⁶ The following breakdown of IFAI's principal functions provides an ordered visual representation of the entity's multifarious duties.

FIGURE 3. PRINCIPAL FUNCTIONS OF IFAI CHART⁹⁷

<i>Appeals Resolution</i>	<i>Regulatory</i>	<i>Supervisory</i>	<i>Promotion and Dissemination</i>	<i>Administrative</i>
<ul style="list-style-type: none"> • Resolve information disputes arising from application denials by federal dependencies. 	<ul style="list-style-type: none"> • Manage, maintain, and protect personal data. • Classifying confidential information. • Criteria for document archival. 	<ul style="list-style-type: none"> • Monitor FOI among federal entities and dependencies. 	<ul style="list-style-type: none"> • Spread knowledge of the right to access. • Empower public servants. • Promote academic research. • Facilitate inter-agency collaboration. 	<ul style="list-style-type: none"> • Independently manage operations, including finances, human resources, and juridical.

The creation of a separate executive agency to administer the law, including an administrative court for resolving information disputes, was nothing short of a novel concept. By way of contrast, U.S. information appeals must be filed in the same agency that issued a rejection or provided an unsatisfactory response.⁹⁸ IFAI hears disputes only from within the exec-

⁹⁶ *Id.* at article 33.

⁹⁷ Translated and adapted from Atzimba Baltazar Macías & Juan Pablo Guerrero Amparán, *El Instituto Federal de Acceso a la Información Pública: la construcción institucional*, in *TRANSPARENTE AL ESTADO: LA EXPERIENCIA MEXICANA DE ACCESO A LA INFORMACIÓN* (Hugo A. Concha Cantú, Sergio López-Ayllón & Lucy Tacher Epelstein eds., 2004), p. 59.

⁹⁸ See 5 U.S.C. Sec. 552.

utive branch (home to some 250 federal agencies),⁹⁹ but it does so as an entirely separate entity which preserves an important measure of objective scrutiny. In addition, if the IFAI Commissioners (five in total, serving for staggered 7 year terms)¹⁰⁰ rule in favor of the requestor on an agency's refusal or inadequate response, the opinion binds the agency. The case is done. A citizen whose request is not granted may, on the other hand, continue the appeals process in the federal court system.

There are a few notable drawbacks to this otherwise enlightened design. First, IFAI's rulings are not enforceable by IFAI, but instead require the heavy hand of the Ministry of Public Function, which manages the federal government's three million public servants.¹⁰¹ If a ruling goes unheeded, the most IFAI can do is send a recommendation for action to this Ministry which is ultimately subordinate to the President. While a public pronouncement followed by the weight of an administrative judgment and increased scrutiny is often enough to command respect, it is not the same as having a swift, binding, and independent sanctioning mechanism.

A second concern involves the federal court system, which badly needs reform. In the U.S., as well as in many other countries, a citizen can expect reasonably timely case resolution and the country as a whole benefits from *stare decisis*, the creation of precedent. Mexico's system, however, neither uses a well-developed system of precedent (a ruling applies only to the party that wins the case!) nor has it adequate administrative and technical capacity to handle the case volume.¹⁰² The legal claim of a citizen requestor on appeal from an adverse IFAI ruling to a federal court is only as strong as the court system that will ultimately hear the appeal.

A third concern deals with the nature of IFAI's autonomy. Though accorded operational, budgetary, and decisional independence by law,¹⁰³ this sounds better than it is. Operationally, the institution still has to apply, through the Treasury Department, to Congress for a yearly budget approval. Any truly progressive action on the part of the agency could thus jeopardize future revenues. A more independent design would include a minimum budget allocation, perhaps a minimum percentage growth per year, in order to shield the IFAI from retaliatory congressional inclinations.

As for decisional independence, the commissioners are appointed by the President (subject to Senatorial veto). Although their terms outlast the President's, there is an undeniable sway. For example, at the end of 2006, after

⁹⁹ See e.g. *Report on The Federal Institute for Access to Information & A Culture of Transparency*, The Annenberg School of Communications, University of Pennsylvania, p. 12.

¹⁰⁰ *Supra* note 6, article 34.

¹⁰¹ Secretaría de la Función Pública.

¹⁰² See e.g. ANA LAURA MAGALONI, *THE JUICIO EJECUTIVO MERCANTIL IN THE FEDERAL DISTRICT COURTS OF MEXICO: A STUDY OF USES AND USERS AND THEIR IMPLICATIONS FOR JUDICIAL REFORM* (2002).

¹⁰³ *Supra* note 6, at article 33.

widespread recognition of a “declared and manifest” friendship between President Calderón and the President Commissioner of IFAI, Alonso Lujambio Irazábal, IFAI’s commissioners held a public debate about how to address possible conflicts of interest.¹⁰⁴ A 3-2 vote favored a “soft” approach.¹⁰⁵ Three years later, in April 2009, Lujambio resigned from the IFAI to accept an offer from Calderón as Secretary of Education. Despite the oath of independence required of IFAI commissioners upon ascendance to their official posts, in his acceptance speech, Lujambio was quick to declare “personal and institutional loyalty” to President Calderón.¹⁰⁶ In practical terms, Lujambio’s move means that, with the conclusion of the seven year terms of two other commissioners, President Calderón will appoint three information commissioners in a single year. He already appointed one in 2007. To prevent further erosion of IFAI independence, deeper public scrutiny of the candidates is needed as well as greater Senate oversight in the confirmation process. Most important, commissioners’ terms should be lengthened. Although the comparison is slightly inapposite, in many countries, Supreme Court Justices serve 15 years or more for precisely this reason.¹⁰⁷ In addition, it might be worth forbidding commissioners from holding appointed executive positions for a lengthy period of time, or at all, after serving in the IFAI. While severe, this would control political ambition that might lead a commissioner to rule in favor of, or act in a partial manner toward, the executive branch.

B. *Other Institutions*

Mexico’s FOI law applies to the three branches of government, legislative, judicial and executive, as well as autonomous constitutional entities such as the Bank of Mexico, the Federal Electoral Institute (IFE), the National Commission for Human Rights (CNDH) and the National Autonomous University of Mexico (UNAM). It compels the branches and the autonomous entities to pass internal regulations ensuring compliance.

¹⁰⁴ Numerous newspaper articles and editorials were published on IFAI conflicts of interest. See JONATHAN FOX *et al.*, MEXICO’S RIGHT-TO-KNOW REFORMS. CIVIL SOCIETY PERSPECTIVES, Fundar, Woodrow Wilson (2007), p. 55; John Ackerman, *El Instituto Federal de Acceso a la Información Pública: diseño, desempeño y sociedad civil*, CIESAS, Universidad Veracruzana, pp. 39-41.

¹⁰⁵ *Id.*

¹⁰⁶ Lujambio stated, in pertinent part: “While assuming this new responsibility, I hereby manifest my personal and institutional loyalty to you, Mister President.” See Dresser, Denise, “*Lo que realmente estaban pensando*”, PROCESO, April 12, 2009, p. 48.

¹⁰⁷ In the U.S., Justices serve life tenure “during good behavior,” article III, U.S. Const., though most countries (and U.S. states) place term or age limits. Calabresi, Steven & Lindgren, James, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. L. & PUB. P. 3 (2006).

By way of comparison, the U.S. law (and many others) applies only to federal agencies, entities, and corporations.¹⁰⁸ This contrast is not telling, however. The judicial and legislative bodies in the U.S. have upheld long traditions of open records, debates, and opinions, while the same cannot be said of Mexico's counterparts. Moreover, Mexico's judicial and legislative bodies are given substantial latitude in adopting their own institutions and procedures.¹⁰⁹ Part III of the law, particularly article 61, states that the Federal Legislative Power, the Judicial Power, the Federal Electoral Tribunal, and the autonomous constitutional bodies "shall establish by means of rules or agreements of a general character, the bodies, criteria and institutional procedures to make available access to information to the people, in compliance with the principles and time limits established in this law."¹¹⁰ This arrangement can introduce the potential for conflicts of interest when complaints for information denials stem from the bodies in charge of reviewing the cases. Further, in light of Mexico's thick bureaucracy and secretive traditions, the ample discretion afforded these institutions over FOI implementation is disheartening when considered along with their apathetic and dilatory responses to the law's mandates.

C. *IFAI Equivalents*

In addition to its general administrative and promotional functions, IFAI serves as an administrative court of appeals for those individuals whose information requests to the executive agencies are denied (or responded to unsatisfactorily). Likewise, the non-executive agency bodies that fall under the law's purview must set up "an internal unit responsible for enforcing the Law, for resolving appeals."¹¹¹ In a majority of cases, this mandate is satisfied by the creation of a collegial body (*cuerpo colegiado*).¹¹² The Mexican Senate, for example, has the Committee for Guaranteeing Access to Information and Transparency, composed of a representative from each parliamentary party. The Federal Judicial Power also has a dedicated commission made up of several of its members.¹¹³ The Federal Electoral Institute (IFE), one of the autonomous constitutional bodies, has a complicated system involving an Advisory Commission made up of *Consejeros Electorales* [Electoral Advisors] named by the Advisor General of IFE, and non-voting representation from the various political parties. While it is difficult to draw

¹⁰⁸ See *e.g.* ARCHON FUNG, MARY GRAHAM & DAVID WEIL, *FULL DISCLOSURE* (2007), at 26, offering a brief overview of the evolution of the U.S. FOI law.

¹⁰⁹ *Id.* at ch. III.

¹¹⁰ *Id.* at article 61.

¹¹¹ *Id.* at article 61, VII.

¹¹² See López Ayllón, *supra* note 29, at 155.

¹¹³ *Id.* at 155.

preliminary conclusions about how well these myriad institutions function, one wonders if they could have been folded into the IFAI umbrella. This would have centralized the operation, making it more accountable and subject to scrutiny, while still preserving the bodies' independence.

D. *Liaison Units*

The United States has information officers in the executive agencies, responsible for managing the response mechanisms for incoming information requests. Mexico has "unidades de enlace" in each federal dependency and entity. These liaison units serve as an interface between requestor and agency. Article 28 of the FOI law lists the various functions of the liaison units, which include collecting and disseminating the information in article 7 (that which must be published proactively); receiving and processing information requests; assisting interested parties in creating requests, including providing them with departmental information if necessary; and keeping records of requests, results, and costs.¹¹⁴ These bodies, scattered across the entire government, serve as the point of initial contact for users of the FOI law.

E. *Information Committees*

The law mandates the creation of information committees alongside the liaison units in each governmental entity. The committees are made up of an internal comptroller, the head of the liaison unit, and a public servant designated by the head of the agency. Article 29 lists the functions of the information committees, which include "the juridical responsibility of denying information requests, establishing the inexistence of requested information, generating specific criteria for the classification of documents, and coordinating the classification and conservation of administrative archives."¹¹⁵ This body presents the potential point of friction between agencies and dependencies and the public at large, because the information committees are charged with making the hard decisions on freedom of information requests. IFAI cases come from those requests for information that are rejected by these bodies.

F. *Fees*

FOI can be expensive. For example, "by the mid-1990s," the U.S. "executive branch was processing more than half a million requests for information each year at a cost of about \$100 million."¹¹⁶ 2008 will show a mul-

¹¹⁴ *Supra* note 6, at article 28.

¹¹⁵ López Ayllón, *supra* note 31, at 153, paraphrasing article 29, FOI law *supra* note 6.

¹¹⁶ ARCHON FUNG, MARY GRAHAM & DAVID WEIL, FULL DISCLOSURE (2007).

multiple of this. Who should bear these costs? While ultimately borne by taxpayers in any scheme, with a progressive taxation scheme and questions of user and benefit concentration, it matters whether payments come from up-front fees or government coffers.

Mexico decided to force the government to absorb the vast majority of administrative costs associated with its law's administration. Agencies ask for remuneration of postage and delivery. There are also nominal fees for the costs of reproducing documents, set out in Chapter IX of the law.¹¹⁷ In an early stage, this generous posture is a good way to encourage filings.

4. *Differentiation*

In France and other countries, three different pieces of legislation regulate what the Mexican law does alone: access to administrative documents; correction, transfer, and security of personal data; and a law of archives. Yet, to appreciate the depth and breadth of Mexico's FOI law, it is useful to recognize what the law does not do. There is an important distinction, for instance, between public FOI laws and other types of transparency-related regulations, namely, those that cover private actors. In *FULL DISCLOSURE*, Fung *et al.* focus their efforts on analyzing targeted transparency policies. They define the difference as follows: “[i]nstead of aiming to generally improve public deliberation and officials’ accountability, targeted transparency aims to reduce specific risks or performance problems through selective disclosure by corporations and other organizations.”¹¹⁸ Examples abound, including nutritional information labels, car safety ratings, and school performance.

One can quickly discern that though both efforts fall under the rubric of transparency policy, they treat different actors. The authors note that targeted transparency is woven together by the following characteristics: “1) mandated public disclosure, 2) by corporations or other private or public organizations, 3) of standardized, comparable, and disaggregated information, 4) regarding specific products or practices, 5) to further a defined public purpose.”¹¹⁹ This creates an action cycle, they argue, in which “1) information users perceive and understand newly disclosed information, 2) and therefore choose safer, healthier, or better-quality goods and services, 3) information disclosers perceive and understand users’ changed choices, 4) and therefore improve practices or products, 5) that in turn reduce risks or improve services.”¹²⁰

¹¹⁷ *Supra* note 6, at Ch. 9.

¹¹⁸ Fung, *supra*, at 5.

¹¹⁹ *Id.* at 6.

¹²⁰ *Id.*

The authors of the study argue that targeted policies can work under the right circumstances. A successful “action cycle” is also the hope for, and perhaps the *raison d’être* of FOI laws, but the verdict is not yet in. The next section addresses qualitatively and quantitatively (not definitively) the case in Mexico.

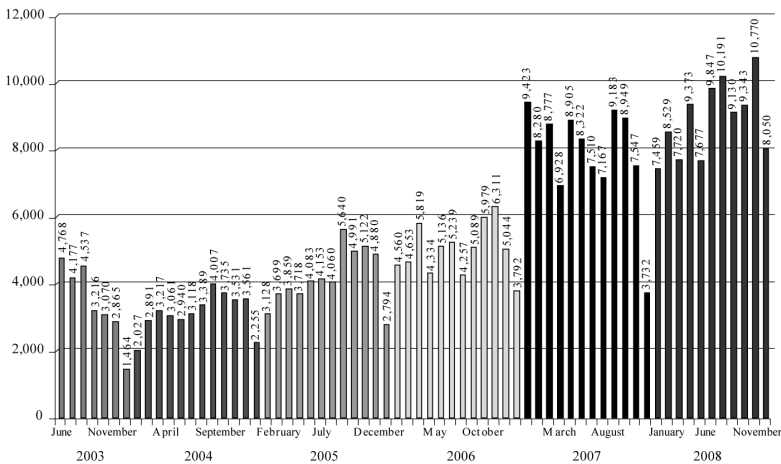
IV. THE STATE OF IMPLEMENTATION

With anyone, anywhere in the world able to access government information in Mexico, the first question is how many do so. What are the numbers? This inquiry is addressed using data on initial information requests, IFAI complaints, and judicial appeals. The section then turns to correlative follow-up questions. From which government entities are individuals requesting information? Who, exactly, is requesting information? How do people, physically, make requests? These issues are treated serially, with a final section devoted to the successes Mexico can boast of so far, and more importantly, to outstanding challenges to continued implementation.

1. *Petitioner Requests, IFAI Complaints, and Judicial Appeals*

Close to 360,000 information requests have been filed since Mexico’s FOI law went into effect on June 12, 2003.¹²¹ The figures are laid out below, by year and month.

FIGURE 4. INFORMATION REQUESTS BAR GRAPH



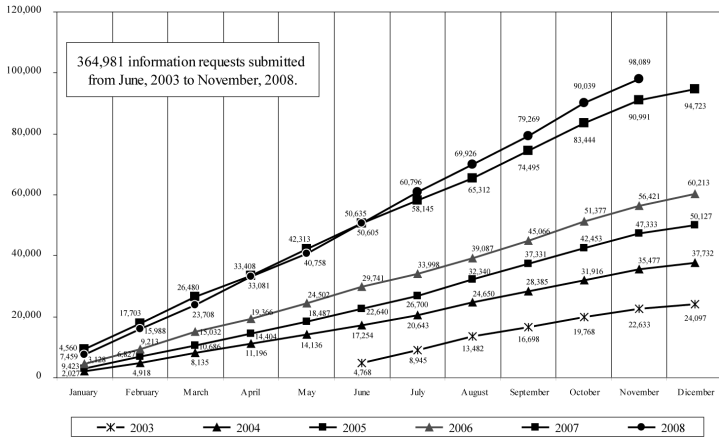
FIGURES 4-18 SOURCE: IFAI, available at: <http://www.ifai.org.mx/gobierno/#estadisticas>.

¹²¹ More than 1,000 requests were filed the first day.

Requests per year during 2007 and 2008 are roughly twice as high on a monthly basis compared to 2003 and 2004.

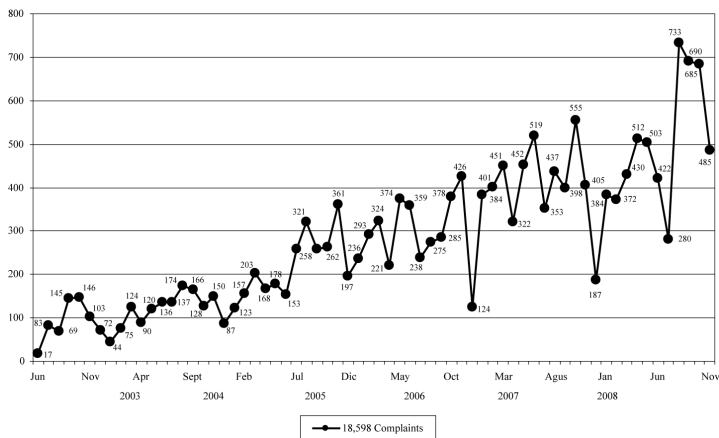
The following figure, a line-graph representation of the data above, shows initial requests have almost quadrupled in five years.

FIGURE 5. INFORMATION REQUESTS LINE GRAPH (BY YEAR)



Of those initial requests that become complaints to IFAI, Figure 6 below shows a similar upward trend since the law's inception. In total, there have been about 18,500 complaints, the majority of which have come in the past two years.

FIGURE 6. IFAI COMPLAINTS LINE GRAPH



Because the graph above includes individual numbers by month, one can see a recurrent dip in complaints filed around the winter holidays, particularly in December. Overall, the number of complaints in 2007 and

2008, like the number of requests, are close to four times as high as in 2003 and 2004.

The most common causes of complaint include a basic summary denial of information, incomplete or only partial access, or the incomprehensibility of information received. Troublingly, a growing phenomenon regards request responses citing the inexistence of requested information. Because the FOI law grants access to information contained in pre-existing documents, agencies and departments can legitimately declare requested documents are not in existence if indeed that is the case.¹²² Does this encourage less documentation? It does. Out of the total number of responses, inexistence as an answer grew from 2.6% in 2003 to 9.1% in 2008, more than three times. Most worrisome is that a non-negligible percentage of agency answers are, upon examination, actually evasive or unresponsive.¹²³

The figure below aggregates numerical data from the preceding discussions on initial requests and IFAI complaints to show the proportional rates at each level, including the response rate, the complaint rate, and the access rate (the rate at which the information requested is provided) of IFAI decisions. The roughly 200 appeals (called *amparos*), which have been filed in the federal court system against IFAI by requestors, are also shown, along with the appeals rate and affirmation rate from the federal courts.

FIGURE 7. REQUEST, RESPONSE, IFAI COMPLAINT,
JUDICIAL APPEAL CHART

<i>Requests, Responses, IFAI Complaints, Judicial Appeals (by year, with rates)</i>							
	2003	2004	2005	2006	2007	2008	Total
Total Requests	24,097	37,732	50,127	60,213	94,723	94,023	360,915
Complaints Filed	635	1,431	2,639	3,533	4,864	5,496	18,598
Complaint Rate	2.64%	3.79%	5.26%	5.87%	5.13%	5.85%	5.15%
Access Rulings	156	465	1016	1046	1736	2034	6452
Access Rate	25%	33%	39%	30%	36%	37%	35%
Judicial Appeals	30	53	19	47	7	39	195
Appeals Rate	5%	4%	1%	1%	0.14%	1%	1%

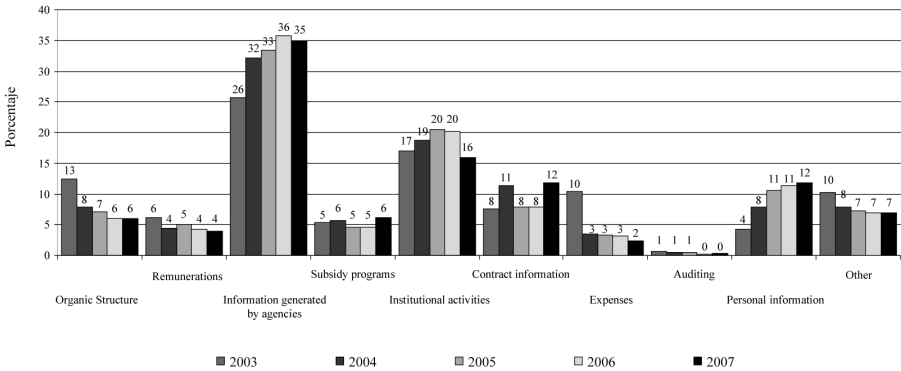
¹²² See article 46.

¹²³ According to new IFAI studies, up to 15% of those responses claimed to be positive by government agencies may in fact be negative.

By a margin of more than 2 to 1, Mexico’s Department of Social Security, which oversees pensions and medical records, trumps the next closest agencies, the Ministries of Education, the Treasury, Environment and Natural Resources, and Health.

The following figure breaks down requests into subject matter in an effort to show the kinds of information solicited from government agencies. The largest proportion of requests, by far, is dedicated to information generated by agency dependencies, such as reports, minutes of meetings, communications, and subject-specific analyses. Institutional activities, such as programs, projects, and internal regulations, holds the second highest place by year.

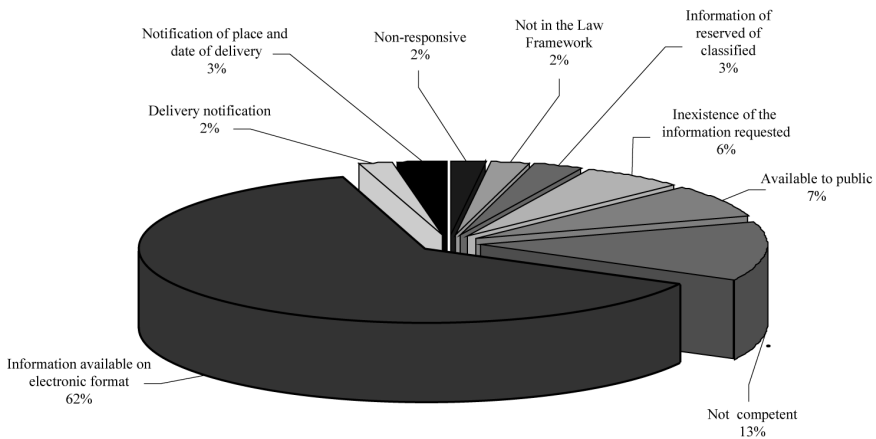
FIGURE 9. REQUESTS BY SUBJECT BAR GRAPH



On average, agencies respond to access to information petitions in 11 work-days or about two weeks.¹²⁴ They deliver a variety of answers, the types of which are presented in the figure below along with the answer type’s proportional representation. By adding the quantity of responses indicating information that is already publicly available (say, on the web platform) to that which is electronically or otherwise delivered, one can see just under three-fourths of requested information is delivered in full.

¹²⁴ This information is provided in weekly and monthly reports generated by the Director General of Coordination and Oversight of IFAI.

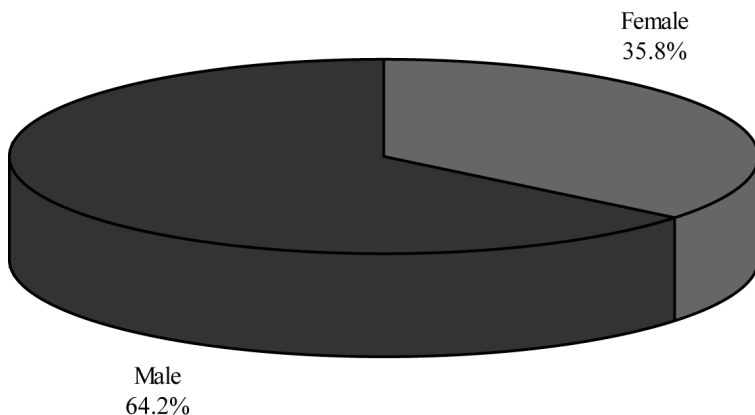
FIGURE 10. AGENCY RESPONSE PIE CHART



3. Requestors

User profile information is available to IFAI by way of the applicants themselves, given voluntarily and without rigorous verification.¹²⁵ Although far from perfect, 65% of users take the time to provide personal details, allowing for at least a sketch of the user population. Starting with a simple gender breakdown, the figure below shows that men are close to two times as likely to make an information request.¹²⁶

FIGURE 11. REQUEST PERCENTAGE BY GENDER PIE CHART

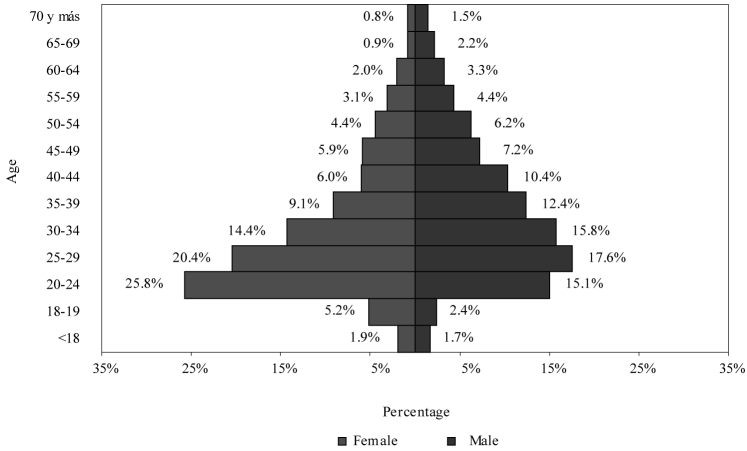


¹²⁵ Anonymous requesting grants a degree of security to applicants, but it means that an accurate user profile is hard to achieve.

¹²⁶ This information is not broken out by year, but instead aggregated over the life of the law. It is intended to provide a snapshot picture of the law's user base after five years in effect.

The following figure plots requestors' age by gender, showing that females request information at slightly younger ages than their male counterparts. This fact may reflect broader educational trends in Mexico, such as increasing college and university opportunities for women.

FIGURE 12. REPORTED AGE BY GENDER GRAPH



The figure below breaks out the request percentage by requestor's age, by year.

FIGURE 13. REQUEST PERCENTAGE BY AGE BAR GRAPH

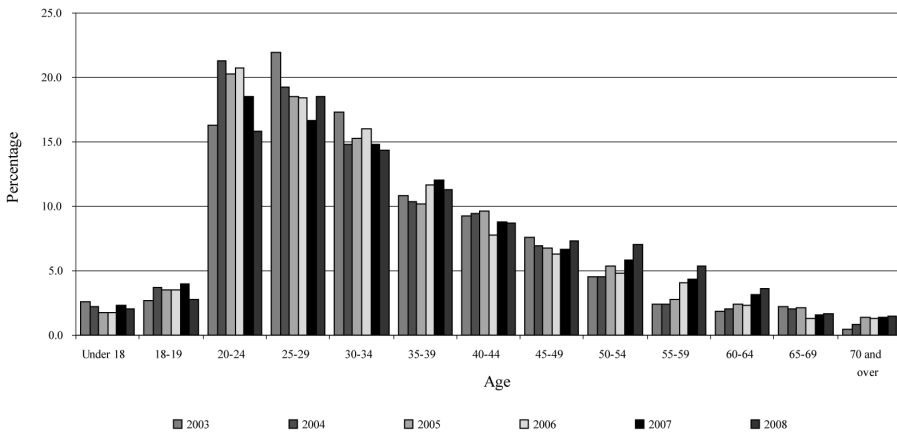
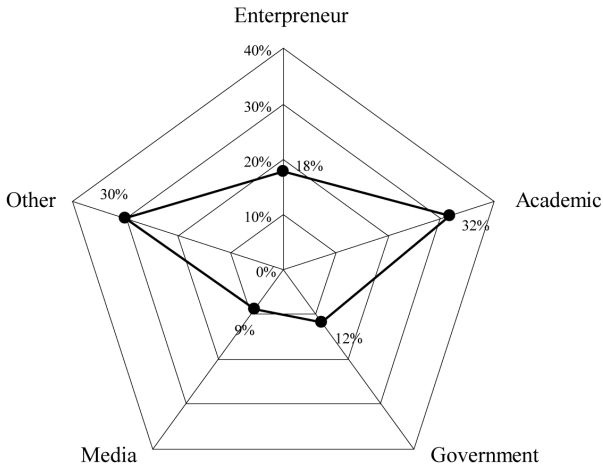


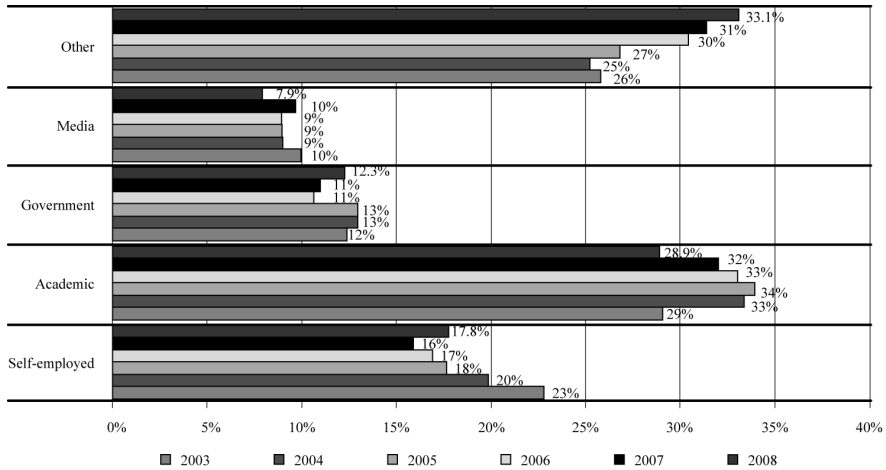
Figure 14 below gives an occupational assessment, listing the four most popular fields (academia, journalism, government work, and private businesses) as well as a catch-all, along with their percentage representation over the life of the law.

FIGURE 14. REPORTED OCCUPATION GRAPH



The figure below breaks this data out into its yearly percentage representation.

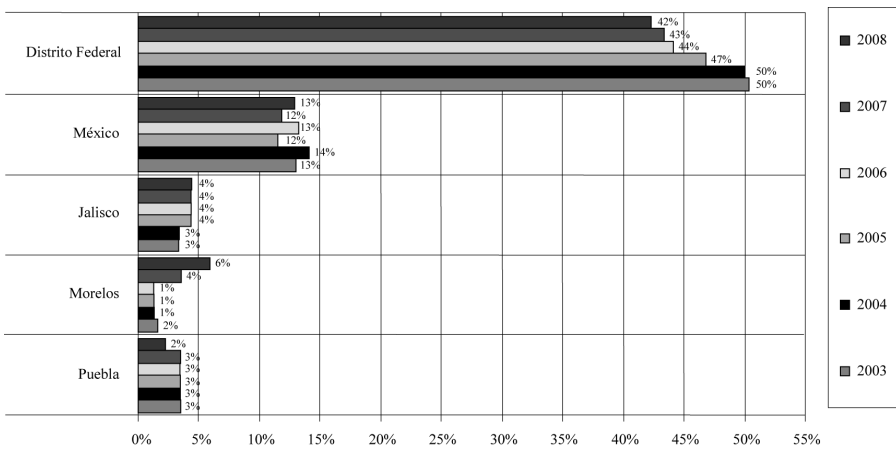
FIGURE 15. REPORTED OCCUPATION BAR GRAPH (BY YEAR)



Two rough trends are apparent in the figure above, namely, that those who are self-employed and those in “other” fields are using the law increasingly. While media, academia and government work are expected bastions of requestors, it is a positive sign to see the private sector and “others” taking ownership of the law, or at least demonstrating that the value proposition of making a request for information has shifted favorably.

To round out the user profile, consider the figure below, which contains the five federal states (including the Federal District) from where the most information requests originate. The numbers are dominated by people in the federal government’s backyard. Close to half the information requests received by federal agencies come from the Federal District (Mexico City). Adding the metropolitan surroundings, including those in the states of Mexico and Puebla, the numbers jump by a third.

FIGURE 16. REQUEST ORIGIN BAR GRAPH (BY YEAR)



According to the data, 64% are male, 55% live in the Mexico City Metropolitan Area, and 54% are between 20 and 34 years old. On a professional basis, 32% locate themselves in the academic sector, 18% in the business sector, 12% are bureaucrats, and 9% work in media. With this in mind, one can flesh out a hypothetically average user, probably a young metropolitan male with an income and education level higher than the national average (due both to geographical and occupational concerns).

Not to be overlooked is the concentration of demand for public information. From June 2003 to October 2008, over 350,000 information requests were filed, but they were done by only 129,000 SISI users. A mere 7,000 of these users accounted for half the requests. The further one burrows, the more concentrated the demand: 270 users made up 21% of the total number of requests; only 36 users accounted for 32,000 requests (close to 10%). The figure below offers a startling view of request activity.

FIGURE 17. DEMAND CONCENTRATION CHART
Registered users to file electronic applications
As of October 31st, 2008

<i>Requests</i>	<i>Number of users</i>	<i>Total requests</i>	
1	95,233	95,233	27%
2	16,517	33,034	9%
3-5	10,597	38,379	11%
6-10	3,523	26,263	7%
11-20	1,837	26,625	7%
21-50	1,124	34,668	10%
51-100	382	26,599	7%
101-200	146	20,498	6%
201-300	64	15,386	4%
301-400	24	8,161	2%
401-500	16	7,223	2%
501-1000	14	9,719	3%
Over a 1000	6	15,143	4%
Total	129,483	356,931	100%

If access to information can change the behavior of public authorities by virtue of a diverse cross-section of the population observing or monitoring their behavior, then the concentration of demand exhibited above is cause for concern. It might undermine the positive effects of the right to know, because the broad base is more pinpointed than previously thought. The public deliberation that takes place at IFAI may countervail this proposition, however. Given that the “individuals” behind information requests are frequently journalists, specialized civil society activists, or organizations, cases often have a large reach. When issues are promulgated to a wide audience by way of a front page national newspaper, perhaps for days on end, a single request can have a multiplying effect.¹²⁷

4. *Technology Platform*

One of the distinguishing aspects of the Mexican case is the level of technological sophistication embedded in the law’s administration. The figure

¹²⁷ Some examples on the importance of newspaper dissemination of transparency stories can be found in JONATHAN FOX ET AL., MEXICO’S RIGHT-TO-KNOW REFORMS. CIVIL SOCIETY PERSPECTIVES, Fundar, Woodrow Wilson (2007).

below shows electronic requests and responses as a percentage of total requests and responses. The numbers make it clear that Mexico's FOI system is almost wholly digital.

FIGURE 18. ELECTRONIC REQUESTS CHART

	2003	2004	2005	2006	2007	2008	Total
Electronic Requests	22,488	35,055	47,874	57,739	92,261	91,514	346,931
Written Requests	1,609	2,677	2,253	2,474	2,462	2,509	13,984
Electronic Requests as % of Total	93%	93%	96%	96%	97%	97%	96%
<i>Total Requests</i>	24,097	37,732	50,127	60,213	94,723	94,023	360,915
Electronic Responses	19,831	31,744	42,673	51,169	81,439	79,584	306,440
Written Responses	1,445	2,369	1,925	1,929	1,948	2,087	11,703
Electronic Responses as % of Total	93%	93%	96%	96%	98%	97%	96%
<i>Total Responses</i>	21,276	34,113	44,598	53,098	83,387	81,671	318,143

The use of electronic tools is a principle reason Mexico's law has been internationally recognized. If Mexico can continue apace its rapid growth and dissemination of the right to know, the innovations discussed below could form a global model for FOI implementation.¹²⁸

A. System for Information Petitions

The Sistema de Solicitudes de Información (SISI) allows a petitioner to file a request for information, follow-up on the request, retrieve the agen-

¹²⁸ Mexico's electronic FOI platform was chosen as one of the "Top 20" programs of the 2007 IBM Innovations Award in Transforming Government, administered by the Ash Institute for Democratic Governance and Innovation at the John F. Kennedy School of Government at Harvard University.

cy's response, and file an appeal if the response is unsatisfactory—all online.¹²⁹ This robust platform delivers on the claim that information requests can be submitted from anywhere in the world, at any time.¹³⁰ And while one can still request information personally or by mail, about 97% of Mexico's requests are made electronically.

SISI's electronic request system has also been utilized at the state and municipal levels of government, under the name Infomex (*Información México*).¹³¹ The 2007 constitutional reform, which extended right to information mandates to all state governments, required the adoption of tools to provide access. Infomex allows local governments to adapt the system to their own particular needs and local legislation. Currently, a number of states, as well as the Federal District, are either implementing or using the system.¹³²

B. ZOOM

To facilitate access to previous information requests, an advanced web-based search engine known as ZOOM was developed to permit users to search the universe of electronic information requests submitted to the Federal Executive Branch, their corresponding responses from government agencies, and any appeals filed, along with their resolutions. Users can search by keyword, phrase, date, or agency. This facilitates the work of specialists and academics, and it also improves the efficiency of government agencies because they can search for precedents and check for previous responses and compliance.

C. Portal-Transparencia

The third electronic innovation is the Transparency Portal (Portal de Transparencia or POT),¹³³ which organizes, systematizes, and homogenizes the presentation of basic operational information online.¹³⁴ This allows users access to the majority of Executive Branch agency compliance with mandatory disclosure requirements in a single location, meaning users

¹²⁹ The implementation of these technologies was paid for out of IFAI's annual budget of roughly \$20 million.

¹³⁰ See SISI's platform, available at: <http://www.sisi.org.mx>.

¹³¹ The project was facilitated by a World Bank grant of \$470,000 USD.

¹³² These states include Coahuila, Chihuahua, the Federal District, Hidalgo, Jalisco, Morelos, Nuevo León and Veracruz. Aguascalientes, Baja California, Chiapas, Colima, Guerrero, Oaxaca, San Luis Potosí, Sinaloa, Tabasco, Tamaulipas, Tlaxcala and Zacatecas are still in the implementation process.

¹³³ Available at: Portaltransparencia.gob.mx.

¹³⁴ This information may include directories, audits, budgets, and operational rules.

are no longer required to consult agencies' individual websites. POT makes it possible, for example, to find out how many procurement contracts the national oil company, Pemex, has signed with IBM, while also providing the number of contracts IBM has signed with all other agencies within the Federal Public Administration. In its first year and a half of operation, the portal has registered more than 18 million visits, averaging approximately 30,000 searches per day.¹³⁵ Roughly 25% of traffic pertains to the directory of public officials; 17% to salaries and benefits; 15% to procurement and contracts; and 6% to authorizations, licenses, and concessions.¹³⁶

5. *The Value Proposition*

Mexico's technology platform addresses, and raises, a number of problems with the country's FOI challenge. The following subsections consider successes and barriers to the current implementation. Key areas of concern are *a)* dissemination, *b)* monitoring and compliance, *c)* publicity and media, *d)* citizen trust, *e)* request quality, and *f)* poverty.

A. Dissemination, Centralization, and Transaction Costs

Given that Mexico is territorially large, has a geographically dispersed population, and that transportation and communication systems outside the capital are often unreliable and relatively expensive, the centralization (on the Web) of the FOI system reduces transaction costs for users.¹³⁷ By providing citizens with electronic means with which to request information, retrieve an agency's response, search previous requests, and consult agency information, citizens are offered the possibility of exercising their information rights without having to travel to Mexico City or rely for delivery on an inefficient postal service.¹³⁸

Highlighted by this achievement, however, is the fact that Internet penetration is still in its nascent stages in Mexico. Estimates show only 23 million people have consistent web access, representing approximately 20% of the country's population of 110 million.¹³⁹ The number of individuals who can regularly and reliably access the Internet is an issue stretching far out-

¹³⁵ See e.g. Elizabeth Velasco, *The Government Receives 13,646,000 Information Hits In Almost A Year*, LA JORNADA, December 22, 2008.

¹³⁶ *Id.*

¹³⁷ See generally, Ronald Coase, *The Nature of the Firm*, ECONOMICA, Vol. 4, No. 16, November, 1937.

¹³⁸ See e.g. Giselle Abramovich, *USPS to Improve Mexican Mail*, DM News, August 21, 2007, available at: <http://www.dmnews.com/USPS-to-improve-Mexican-mail/article/98233>.

¹³⁹ See Internet World Stats, available at: <http://www.internetworldstats.com/central.htm>.

side the confines of FOI, touching on economic development in general. But as it stands, the tremendous benefits of the centralized FOI platform are not fully leveraged. After all, transaction cost calculations do not apply to those without virtual access. Complexity is another issue, or rather a flip-side of the sophistication of Mexico's technology. Assuming increased Internet access in the coming decades, how usable will the technology platform be for a wide audience of differing levels of experience with computers and the Internet? This is less of a critical issue and more a future caution for policy makers to take into account the need to keep technical aspects as simple as possible as Internet penetration and site development progress.

A more pressing concern involves the relationship between federal and state jurisdictions.¹⁴⁰ Currently, the main information technologies are primarily limited to the federal government, with access at the local level limited only to those states and municipalities that have adopted Infomex. Considering the vast body of state-level information, SISI should be integrated into Infomex to permit users to access public information at all levels of government in any state through a single portal.

B. Monitoring, Compliance, Incentives, and Trust

Mexico's FOI apparatus encourages a range of different types of governmental oversight by virtue of a realigned incentive structure for the parties involved. From the perspective of the IFAI, a web-based system facilitates the monitoring of agency compliance and reduces the cost of supervision. Because statistics and agency responses can be gathered electronically, the IFAI can more easily spot trends and identify roadblocks to access. It can therefore intervene to address problems as they arise.

Within the ranks of the bureaucracy, the FOI apparatus encourages the diminution of a variety of institutional obstacles to transparency. First, public officials are increasingly held in check by virtue of knowing that every administrative document is the potential subject of an information request. The risk of being caught in a foolish mistake has risen substantially, as has the damage a mistake or wrongdoing could cause. Second, public officials are themselves frequent users of the law and thus serve as a type of internal check. Access to information regarding the workings of other public agencies and officials not only furthers efficiency and productivity within government business, but it also may aid in the fight against corruption by al-

¹⁴⁰ A caveat: The figures above have been associated with the agencies in the federal system. Because so much of the business of daily life is conducted at the local or regional level, a measure of transparency in general depends in large part on the actions of states and municipalities. Although important aspect of this paper, a close analytical inquiry into this substrata (the numbers at least) is left for another endeavor.

lowing the reproduction of a system of informed insiders. Scandalous information is more likely to leak and agency personnel are better able to serve as witnesses in whistle-blowing situations. Third, because requests can be anonymous, the current system prevents dwelling on questions of *who* is requesting information and *why*. The practice of discretionary handouts or hold-ins has been quelled because an information request now *must* be addressed unless it falls under narrowly defined exception classifications.

From the citizens' vantage, submission of information requests through a system where the user has complete control over what personal data can be accessed by government agencies provides protection against a perceived power imbalance. With time, one might expect government officials to grow more comfortable with the public aspect of their duties, while citizens concurrently gain confidence in their right to demand accountability. This is not to say that trust or citizen confidence in the bureaucracy is the goal. A degree of skepticism on the part of all government players is salutary to a democratic system that relies on checks and balances. Of more concern is a properly aligned incentive structure where citizens find it worth their time and energy to access government files. An administrative oversight body like IFAI can ensure compliance, or at least raise the stakes of non-compliance, while reminding government officials of the constituency for whom they work.

C. *Publicity and Media*

Mexico's FOI infrastructure, particularly the ZOOM and POT search engines, fortify the media's ability to conduct genuine investigative reporting. For example, despite high levels of government resistance, a series of citizen requests and subsequent appeals resulted in an IFAI mandate that the Savings & Loan Institute (IPAB - Instituto para la Protección al Ahorro Bancario) release records related to the decision-making process that resulted in the privatization of the banking system.¹⁴¹ Other salient examples include the publicity of files related to federal investigations into crimes committed during the "dirty war;" release of the procedures used for calculating official economic projections; disclosure of public trust funds previously classified as banking secrets; institutional emails; subsidy beneficiaries; and disclosure of the Office of the President's shopping list, which resulted in the cessation of expensive clothing purchases for the First Lady.¹⁴² At

¹⁴¹ Mario di Costanzo, *The Bailout of the Banking System: Transparency Issues*, in Jonathan Fox *et al.*, *supra* note 98, p. 177.

¹⁴² See Juan Pablo Guerrero, *The Right to Know in Mexico: the Challenge of Dissemination*, in FOCUS ON CITIZENS; PUBLIC ENGAGEMENT FOR BETTER POLICY & SERVICES, OECD, Gov/PGC (2008), pp. 210-212.

play in each case, was a discrete request in combination with promotional media coverage. Combating superficial government-fed press coverage will take far more than the FOI landscape can manage alone (it is necessary, not sufficient), but laying the groundwork for meaningful inquiry and providing useful research tools is a start.

D. *Request Quality*

While SISI allows the IFAI to monitor agency responses to a limited extent, it does not allow them to verify the quality and relevance of the information provided. This presents a serious limitation to the IFAI's work since it is essentially confined to ensuring that agencies reply within the time limit established and only roughly in the manner requested by the user. Full monitoring of compliance with the law's mandates will require verification that the information provided through SISI meets the substantive demands of the original request. Studies speaking to this are underway, but a full understanding of response quality is not yet available.¹⁴³

E. *Poverty and Education*

By most accounts, Mexico has not performed well with respect to the law having a transformative impact on the lives of the poor. One program showed cause for optimism by having tested a provisionally effective and scalable method of bringing "outsiders" and civil society actors into the fold. Launched by IFAI, with the support of the William & Flora Hewlett Foundation, in August 2005, the Communities Project (*Proyecto Comunidades*) promoted the use of Mexico's FOI law within various social groups deemed unlikely to exert their right of access.¹⁴⁴ The project operated in 116 communities across 9 states, and in collaboration with 20 different local organizations. Forty percent of the participants were from indigenous backgrounds, 60% were women, and 70% lived on less than \$2 per day.¹⁴⁵ The

¹⁴³ IFAI developed an evaluation system of the quality of agency responses called Sistema de Evaluación 2009. Its debut is expected in 2009. See also Jonathan Fox & Elizabeth Haight, *¿Como responden las instituciones a las resoluciones del IFAI?: Un estudio piloto. El caso de la Secretaría de Hacienda y Crédito Público, 2005-2006*, available at: <http://www.ifai.org.mx/ProyectoComunidades>, in Información del Proyecto a disposición del Órgano Interno de Control, 2B Segundo Informe.

¹⁴⁴ The Hewlett Foundation grant was \$750,000. The Program received in 2007 a special internal recognition as the "grant of the year" in the Governance Agenda of William & Flora Hewlett Foundation. A longer description of some of its impacts can be found in Juan Pablo Guerrero, *supra* note 134.

¹⁴⁵ Beneficiaries were diverse, including teenage groups, women, street children, farm-

program sought to make a right to information relevant by linking it to a range of issues, including the environment, reproductive health, intra-family violence, sustainable economic activities, and human rights.

Some notable successes are listed below:

- *Colectivo Ecologista*, in the State of Jalisco, supported a local community's efforts to obtain information regarding the territorial status of the community's land. After requesting information on government conservation programs, the landowners decided to reject developer's offers. They kept title to their properties and formed an association to sponsor projects dealing with protection of natural resources and ecologically sustainable development.
- Poor women in the state of Veracruz discovered their names on the lists of various public health and housing programs. They were eligible for a host of benefits. Their requests also turned up a number of incongruities, such as men on the list of beneficiaries for pap smears and mammograms.
- Federal prisoners in Monterrey, Nuevo León, many of whom were too poor to afford legal counsel, used the FOI law to gain access to their personal files. Initial information requests were denied by the bureau of prisons, but the prisoners appealed and in a precedent-setting ruling won a right to such information for prisoners nationwide. As a direct result, over a third of the group walked free, most having initially been convicted for petty offenses.

Despite the promise behind these early successes, the Communities Program was cut in early 2008, after only a two-year pilot. Given that evidence showed the project was having a profound impact on the communities in which it operated, this was a premature and wasteful move.¹⁴⁶ More than a year after cancellation of the program, no institutional alternative has been implemented.¹⁴⁷

ers, artisans, educators, prisoners, municipal authorities, and indigenous people who can only speak *Nahuatl* and *Mixteco*.

¹⁴⁶ An independent impact evaluation conducted by researchers at Mexico's National Autonomous University (UNAM), found that 9 out of 10 participants reported exercising their right to know helped them resolve community problems, and 8 out of 10 affirmed they would continue to exercise their right after the project. Follow-up reports also indicated that under certain circumstances, members started an incipient appropriation process, which both strengthened group identity and forged ties with social actors, non-governmental organizations, and state and local governments.

¹⁴⁷ A broad description of the "Proyecto Comunidades" is forthcoming. See Juan Pablo Guerrero & Mayli Sepúlveda, *El derecho a saber en grupos marginados: la experiencia del Proyecto Comunidades*.

V. CONCLUSION

Three key problems have presented themselves. First, federal lawmakers have violated their own constitutional reform by failing to create specialized bodies to review and resolve, independently, complaints in those branches of government not covered by the 2002 law, namely, the Mexican Congress and the judiciary. This indifference laced with a strong smell of impunity, was emulated by the constitutional agencies (Central Bank, Federal Elections Institute, Human Rights Commission) which were supposed to create their own independent transparency regulation bodies. They, too, have not seriously acted.

Second, paradoxically, the Calderón government, which openly supported the 2007 Constitutional Reform, has proved itself less transparent than its predecessor administration. The claim of “inexistence” as an agency response to FOI petitions has mushroomed. In 2008, almost one out of every ten responses declared information to be inexistent (8,208 times), leading to a corresponding rise in IFAI complaints. In fact, this cause of complaint rose 30% per year for the past two years. Worse, IFAI’s rulings are ignored by agencies almost without consequence, particularly, but not solely, by the Attorney General’s Office. The pretext of national security as a reason for classifying public information also sets a dangerous trend.¹⁴⁸ Another example of the backsliding under Calderón’s watch concerns the denial of access, for life, to the requested 2006 election ballots.

Third, the impact of transparency and the right to know on corruption has been unimpressive. A bulky transparency apparatus has not shown a reliable reduction of corruption or a rise in accountability per se. The reasons are deeply rooted in the Mexican political system, which lacks a robust ombudsman’s office; protection for whistle-blowers; legislation against conflicts of interest; and efficient and precedential judicial administration. An FOI law alone is a blunt tool to fight corruption entrenched in the sociopolitical fabric. Like sunlight shining on a polluted puddle, transparency seems to have disclosed additional wrongdoings and corruption in Mexico without really cleaning the water.

The last year saw the addition of a worrisome development. As part of a broad reform of the Public Security system, the Mexican Congress amended article 16 of the Code of Federal Penal Regulations.¹⁴⁹ In late 2008, it re-injected a heavy dose of secrecy into affairs of the Attorney General’s office. Whereas the original FOI law put past investigations and completed

¹⁴⁸ See Daniel Lizárraga, *El dogma de la opacidad*, PROCESO, Feb. 22, 2009, at 34.

¹⁴⁹ Miguel Ángel Granados Chapa, *Oscuro Ministerio Público*, REFORMA, Dec. 22, 2008; Juan Ciudadano, *MP: Quebrado y Escondido*, REFORMA, Dec. 22, 2008; Daniel Lizárraga, *Candado a la transparencia*, PROCESO, Dec. 24, 2008; Mauricio Merino, *La venganza de los políticos*, EL UNIVERSAL, Dec. 24, 2008.

inquiries into the public domain, the new legislation keeps them in the private realm of the prosecutor indefinitely when brought to court and for up to twelve years where investigators resolve not to prosecute. This reform triggered strong condemnation from IFAI's commissioners who called it "the first great retrocession" since the law's passage.¹⁵⁰ Notably, the issue still generated internal division at IFAI. The commissioners voted 3-2 to adopt the new Code's stance on forbidding access to closed investigation files. A positive development emerged in February 2009, however, when the National Human Rights Commission presented the issue to the Supreme Court, which agreed to review the case. It is thus possible that the 2007 Constitutional Reform may prove a containment wall against dangerous legal regressions on the constitutional right to know. Supreme Court resolutions on similar matters show cause for optimism, but the unconstitutionality of the Penal Code reform is as yet an open question. As an aside, the IFAI's vocal response is curious in light of earlier setbacks such as Querétaro's renegade effort earlier in the year to gut its IFAI equivalent in blatant contravention of the Constitution. Although grave, the Penal Code amendment is not the first great retrogression in Mexican FOI. Calling it so signals more about the combative and internecine politics gripping IFAI's governing body than anything else.

Finally, two related macro issues weigh heavily on Mexico's FOI prospects, or perhaps dwarf the agenda altogether. First, as the global economy suffers its worst recession in the post-war years, Mexico is sure to suffer economically.¹⁵¹ A combination of currency devaluation, unemployment and inflation may push transparency onto the backburner, especially if the political agenda is overburdened by social unrest. Mexico's economy is already plagued by bureaucratic inefficiency and the remnants of its autocratic past. But if the 2006 election is any guide, many voters find free market promises unbecoming or disingenuous.¹⁵² Caught in a difficult cycle, Mexico cannot provide opportunity for enough of its citizens, and this, ironically, encourages disenchantment over further democratic and economic reform. Yet, nothing could be more important to the future of Mexico's FOI regime than stable growth.

¹⁵⁰ María de la Luz González, *Pide PGR a IFAI frenar las descalificaciones*, EL UNIVERSAL, December 20, 2008. The official stand of IFAI on the matter is available at: http://www.ifai.org.mx/pdf/sala_prensa/publicaciones/comunicados/2008/ComunicadoIFAI046.pdf.

¹⁵¹ See *e.g.* *Crisis Management in Mexico*, THE ECONOMIST, November 12, 2008, available at: http://www.economist.com/displayStory.cfm?story_id=12587590.

¹⁵² Reminiscent of the Bush-Gore 2000 U.S. presidential election, Mexico's Federal Electoral Tribunal ordered a partial recount of the 2006 presidential election results after widespread irregularities. It then declared Felipe Calderón president-elect. His opponent, Andrés Manuel López Obrador, famous for his socialist policies toward the poor, was widely popular as mayor of Mexico City. See *e.g.* López Obrador, Andrés Manuel, *Re-counting Our Way to Democracy*, Op-Ed, N. Y. TIMES, August 11, 2006.

The second elephant in the room, drug trafficking and organized crime, presents the greatest threat to FOI in particular and the country's political-economic stability in general. Mexico is buckling under the weight of the War on Drugs.¹⁵³ Under the Bush administration, the United States tightened the border and dramatically raised the street sale prices, and thus profit, associated with the drug trade. South American drug trafficking took root in Mexico, and the situation, especially in Northern states, now reaches epic proportions. Journalists and judges have been killed by the scores;¹⁵⁴ police by the hundreds; ordinary citizens by the thousands.¹⁵⁵ With respect to the recent reform of article 16 of the Penal Code, one wonders what effect organized crime had on legislators' motivations, whether through a desire to fight back more aggressively or outright corruption. Suffice it to say, this challenge is immense, and, along with it, may come a strong urge to put on hold or brush aside the country's accountability efforts in the name of swift or sweeping responses.

That would be a mistake. Security and freedom stand and fall together. If the myriad concerns outlined above are any clue, Mexico's FOI apparatus is less likely to perish in one fell swoop than it is to suffer a slow-form legislative nullification. Mexico's remarkable FOI achievements demonstrate the transformative power civil society can wield over administrative decision-making and ordinary citizens' empowerment. The law is dead letter, however, to the extent the public sits idly by as it dies from a thousand cuts. The transparency community must fight on and fight harder for its freedoms. The Mexican government must bear its burden of managing the dual challenges of economic growth and drugs and crime with broad-based, balanced, and steadfast responses. And the rest of North America, the United States and Canada, must recognize that Mexico is too important to fail, and that the gains, domestic and supranational, are too promising for any other course.

In sum, FOI prospects in Mexico deserve a sober appraisal. With a promising start, a disappointing recent past, and a daunting near-term future, the outlook is not sanguine. A transparency law, however well-conceived, is not a panacea. It rises and falls with the general health of the state. Freedom of information reaches no further than the political will that imbues it. With the final script unwritten on this bold FOI enterprise, the world watches hopefully to see if Mexico can pull it off.

¹⁵³ See e.g. *Spot the Drug Trafficker*, THE ECONOMIST, October 30, 2008, available at: http://www.economist.com/displayStory.cfm?story_id=12514107.

¹⁵⁴ See e.g. *Reporters covering Mexico drug wars risk their lives*, L. A. TIMES, July 6, 2008 (noting at least 30 journalists were killed since 2000).

¹⁵⁵ See *Death Toll in Mexico's Drug War Surges*, L. A. TIMES, December 9, 2008 ("In a chilling assessment of Mexico's drug war, the country's top prosecutor said Monday that more than 5,000 people had been killed in drug violence so far this year").

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