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# MEXICO'S TRANSPARENCY REFORMS: THEORY AND PRACTICE<sup>☆</sup>

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## ABSTRACT

*The experience of Mexico's 2002 transparency reform sheds light on the challenge of translating the promise of legal reform into more open government in practice. An innovative new agency that serves as an interface between citizens and the executive branch of government has demonstrated an uneven but significant capacity to encourage institutional responsiveness. A "culture of transparency" is emerging in both state and society, although the contribution of Mexico's transparency discourse and law to public accountability remains uncertain and contested.*

**Keywords:** Freedom of information; government secrecy; Mexico; transparency.

What difference does transparency make? Many who are committed to democracy and good government have high expectations of the power of the "right to know." Yet it is not an all-powerful magic bullet. By itself, transparency cannot substitute for weaknesses in the rule of law or

<sup>☆</sup>This chapter is a revised and abridged version of Fox and Haight (2007a, 2010).

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representative democracy. After all, many abuses of power are no secret. At the same time, if and when the right to know can be exercised effectively, it can serve as a powerful instrument to guide initiatives for change – and to reinforce other institutions of democracy. Transparent government reveals whether representatives really represent, whether functionaries actually function, and whether the system of justice is truly just.

Although the Mexican public's right to know was first recognized in the Constitution in 1977, the real tools to exercise that right were created in 2002, when an increasingly pluralistic Congress unanimously passed the Federal Law for Transparency and Access to Public Government Information (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental* – LFTAIPG). This led to the creation of a new federal agency, known as the Federal Institute for Access to Public Information (*Instituto Federal de Acceso a la Información Pública* or IFAI).

During more than seven decades of authoritarian, one-party rule, the operation of the Mexican government was shrouded in secrecy, which encouraged corruption and impunity. Individual officials treated public sector information as their own private property, which was both cause and effect of a culture of mutual distrust between the citizenry and the government. In this context, Mexico's right-to-know reform has some potential to bolster the rest of Mexico's democratic institutions by strengthening citizen capacity to both participate in and oversee the governance process. The right-to-know reform has also contributed to the institutionalization of political change in Mexico by demonstrating that there is at least one issue that can generate an effective consensus across Mexico's fractured political spectrum – not only once, with the 2002 law, but twice, with the subsequent all-party consensus around embedding bolstered information rights into the Constitution, in mid-2007.

The implementation of this reform has been driven by the single most important new government agency created since the 2000 elections: the IFAI, which was designed to be an institutional intermediary between citizens and government agencies, dedicated to facilitating access to information about the executive agencies of the federal government. The IFAI is governed by five commissioners, named by the president on rotating appointments, and is tasked with resolving disputes where information requestors feel that an agency response to a request was inappropriate (among many other responsibilities). Appeals cases are then decided by majority rule among the five commissioners. Though lacking the formal constitutional autonomy status of the National Human Rights Commission (CNDH) or the Federal Electoral Institute (IFE), the IFAI commissioners

control their budget, and their appointments have been virtually untouchable. Moreover, as the controversies around the CNDH and IFE's performance have shown, institutional design formulas that appear promising in principle have not been sufficient to ensure their autonomy in practice. By comparison, the IFAI stands out as having managed to demonstrate a judicious track record over its first five years. In the process, the IFAI has become Mexico's ultimate authority in interpreting the new transparency law, and government agencies no longer monopolize control over what information to release and what to keep behind closed doors.

## CONCEPTUAL CONTEXT

By the late twentieth century, citizens' right to information about how they are governed had become widely recognized around the world, joining the freedoms of expression, association, and assembly as fundamental rights – as recognized in Article 19 of the 1948 United Nations Universal Declaration of Human Rights. Like the consolidation of the rule of law and other means of accountability, information rights are part of what one could call a “second generation” of democratic reforms.

Governmental “right to know” reforms encompass two different kinds of strategies for promoting institutional transparency. The first involves mandatory disclosure, which takes the form of a set of minimum standards that public or private agencies must meet proactively, in terms of explaining to the public what they do. Data covered by obligatory disclosure requirements can range from government budgets to private sector emissions of toxic chemicals. These days such disclosure primarily takes place online, and Mexico's IFAI regularly monitors federal agencies in terms of their compliance.

The second main strategy, in contrast, requires citizens themselves to take the initiative, by submitting specific information requests.<sup>1</sup> Various countries, and even different states and agencies within Mexico, have created a wide range of processes for responding to information requests, some more user-friendly than others. In this context, Mexico's experience is distinct from many other countries' because it involved creating a special federal agency dedicated to encouraging citizen information access, including the right to easily appeal if agencies deny their requests.

Analysis of the progress and limitations of the exercise of transparency reforms shows that, in practice, the public sector, the mass media, the private sector, and civil society are all divided about whether to encourage

the right to know. In each sector, powerful interests stand to lose influence if government becomes fully open. Since Max Weber, analysts of organizations have recognized the powerful incentives that drive institutions to seek to limit access to information.<sup>2</sup> If “information is power,” then those who control information will lose power if access becomes fully democratized. Yet now that the principle of transparency has been so widely accepted, at least at the level of discourse, few policy makers openly reveal their opposition to information rights. This poses a dilemma. Rather than eliminating opposition, the perverse effect of today’s unprecedented level of ideological consensus tends to drive the forces in favor of secrecy into the background, underground. In other words, the real opposition to transparency is rarely transparent.

To assess both progress and limitations in the exercise of information rights requires asking the question: What “counts” as transparency, and for whom? Because of the ongoing, behind-the-scenes conflict over how much to reveal to the public, it is fair to say that transparency is today an arena of contested terrain. This suggests the importance of “unpacking” the concept of transparency, specifying what is becoming transparent to whom.

Consider, for example, the difference between “downward transparency” – from the state to society, and “upward transparency” – from society to the state. Consider as well the distinction between what one could call “clear transparency” vs. “opaque” or “fuzzy” transparency (Fox, 2007a, 2008). Clear transparency reveals how institutions really behave in practice – what decisions they make, how they make them, where their money goes, and the tangible results of their actions. Opaque transparency, in contrast, refers to information that is only nominally available (accessible in theory but not in practice), data whose significance is not clear, or “information” that is disseminated but turns out to be unreliable. This distinction between clear and opaque is grounded on the premise that clear transparency will produce losers as well as winners – those whose power depended on their discretionary control over information. In this context, the losers will do what they can to merely appear to comply with Mexico’s new combination of legal requirements and civic standards – and they will have incentives to do what they can to roll back minimum transparency standards, if the political opportunity arises.<sup>3</sup> Nevertheless, even clear transparency – by itself – does not guarantee accountability, which would require the intervention of other public sector actors, whose mission is to promote compliance with the rule of law.

Conventional wisdom assumes that transparency somehow inherently generates accountability. Indeed, the definition of accountability is also contested terrain these days – with powerful actors nominally accepting

“responsibility” for mistakes without actually being held accountable. Indeed, the meaning of the term has not yet generated a consensus. For some, accountability involves the process of requiring decision makers to explain and justify their actions – sometimes known as “answerability” (see Schedler, 1999; Fox, 2007b, 2008). For others, only processes that include the threat of actual sanctions for transgressions or poor performance would “count” as accountability. Analysts are only just beginning to go beyond treating transparency and accountability as synonyms, to ask: Under what conditions does transparency generate accountability? Or, one could ask, what kinds of transparency lead to what kinds of accountability? (Fox, 2007a, 2007b).

## HISTORICAL AND COMPARATIVE CONTEXT

Just as public information has become increasingly recognized as fuel for democracy, without which it would run out of steam, secrecy and opacity have long been key instruments of authoritarian rule. Yet in Mexico, the right to transparency has long been on the democratic agenda – though often under other names. Long before the Internet, more traditional forms of public oversight were recognized as necessary to discourage the arbitrary exercise of authority. For example, free and fair elections, referred to by Mexico's historic revolutionary slogan *sufragio efectivo*, depend on the counting of votes in public – for good reason, and more recently bolstered by transparent ballot boxes to assure voters that they were not stuffed in advance.

Yet it was not until Mexico's recent experience with alternation in presidential power that official right-to-know discourse was translated into a comprehensive law that specified how those rights could be exercised in practice. The law emerged from an unusual convergence between civil society intellectuals and media leaders, congressional leaders and legal reformers newly embedded in the executive branch of government. After a vigorous debate, the issue had gained such a remarkably broad base of support that Congress passed the final compromise version unanimously.<sup>4</sup> The law mandates a very explicit presumption in favor of disclosure. That is, unless in a category specifically covered by a clearly bounded exception, the law mandates that all documents and information produced by the federal government should be publicly accessible. To avoid the need for a new constitutional reform at the time the law was originally passed, it was limited to the federal government, and the jurisdiction of the new agency (IFAI) was limited to the executive branch. Yet because of these limitations,

only four years later the issue reentered the policy debate and a constitutional amendment was passed in mid-2007, which ostensibly extended minimum standards to all levels and branches of government.<sup>5</sup>

Compared to the majority of the 86 countries in the world with information rights laws, many of Mexico's federal provisions are strong and user-friendly – much more accessible than the U.S. law, for example.<sup>6</sup> Indeed, Mexico's law is one of the most comprehensive in the developing world – it was clearly the strongest until India followed up with a remarkably broad reform. Yet, in contrast to India, Mexico has a central federal agency charged with ensuring compliance and ruling on citizen appeals to government denials of information requests. In both countries, the national reform followed an electoral shift toward greater pluralism, and then emerged from mutually reinforcing synergy between civil society activists and democratic-minded senior public servants.

Since Mexico's law was passed, many civil society organizations and journalists have worked to encourage its implementation. They monitor government agency compliance, file requests strategically to test the new system's efficacy, encourage media coverage, provide critical support to the IFAI, raise awareness in the states, and invest in training – so that more citizens can learn how to exercise their new information rights effectively.

## **EXPERIENCES WITH INFORMATION RIGHTS IN PRACTICE: AN OVERVIEW<sup>7</sup>**

Of the two main strategies for public access to information about government operations, Mexico's transparency law addressed the first component of obligatory disclosure requirements through a mandate that each government agency or program create a "transparency portal" on their respective Web sites. The information that agencies must publish is detailed in Article 7 of the LFTAIPG and is designed to provide basic information about government operations. Recently, through an initiative of the IFAI, all executive agency transparency portals have been gathered together in one location, with a standardized presentation across all agencies (See <http://portaltransparencia.gob.mx/pot/>).

The second main strategy involves the information request process, through which citizens themselves take the initiative to request specific kinds of federal government information. The IFAI, for the federal agencies in its jurisdiction, uses a Web-based system for information requests

(INFOMEX – also available to state governments to facilitate online access to information at the state level). Requestors can easily fill out an on-line form to solicit information from a federal agency. The request then goes directly to the agency, which responds to the citizen through the same electronic system. Other federal agencies that are autonomous of the executive are subject to the law but not to the IFAI. They are known as “other mandated agencies” (otros sujetos obligados – OSOs) and each has its own request process.<sup>8</sup>

Although state and local governments are not subject to the LFTAIPG, several worked with the IFAI to utilize INFOMEX at the state level (e.g., Mexico City, Chihuahua, and Zacatecas). The 2007 constitutional reform requires all state governments to use electronic tools to facilitate the submission of information requests.

It is important to point out that each agency decides how to respond to citizen requests – not the IFAI. Specifically, the law mandated that federal institutions create a liaison unit (unidad de enlace) to serve as the contact point with citizens. Each agency also has an information committee, which determines whether or not the information requested “exists,” and whether or not it is considered confidential or otherwise “reserved.”

In principle, the information request process to the executive branch is quite straightforward, especially for those citizens familiar with the Internet. Both the IFAI and civil society organizations have produced useful manuals that clearly explain the procedures (see [www.ifai.gob.mx](http://www.ifai.gob.mx) and [www.mexicotransparente.org.mx](http://www.mexicotransparente.org.mx)). Yet filing a request is often not sufficient to actually access the information requested. This is in part because of the challenges involved in the crucial step of formulating the information request. In practice, filing a successful information request requires that one already possess a great deal of knowledge about what one is looking for. This poses a classic “chicken-and-egg” problem.

For citizens' requests to be successful, they must know exactly where to direct them, otherwise agencies will reply: “that’s not our department.” If an information request deals with an issue that involves more than one agency, then there is a risk that each one will tell the citizen to ask the other. Many citizen requests are directed to federal ministries, when their request involves a distinct agency within the ministry. Just within the executive branch, there are over two hundred federal agencies to which one can direct an information request through INFOMEX.

Even though federal ministries have a great deal of information about their respective agencies and programs, they will often redirect requests about them. Yet the law explicitly states that government offices must



release the information requested if it is in their possession.<sup>9</sup> Responses vary. While the Treasury Ministry frequently redirects requests for information, in the experience of the authors, the Ministry of the Economy tends to respond comprehensively, and responses from the Ministry of the Environment and Natural Resources often clearly direct requestors where to turn. Moreover, if an information request deals with state and local government programs that are funded by federal agencies, there is a risk that each level of government will tell the citizen to ask the other.

Second, for citizens to increase their prospects for a successful information request, they should be familiar with how the government agency itself is organized. It helps if requestors can provide specific details about how to locate the information requested. It helps to specify which office within the agency that is most likely to have the information and to use the agency's own discourse when naming types of documents or data.

These issues come up because the law does not require agencies to produce information to respond to a request. They are only required to provide copies of preexisting documents, when those documents address the question asked. Requestors must therefore rely, to a certain extent, on the goodwill of each office in government agencies to provide the most complete, comprehensive, and accurate response to an information request. Clearly, few citizens possess sufficient knowledge about the information produced by each agency to be able to independently assess whether or not the agency has provided all the relevant information in its possession.

This raises the issue of agency claims that the requested information "does not exist." The law allows agencies to respond to information requests by claiming that the requested information cannot be found or that is not a type of information produced within the institution. Information denials based on agency claims of "non-existence" are growing over time, both in absolute terms and as a share of total requests, reaching 9 percent in 2008.<sup>10</sup> Without inside information, it is very difficult for citizens (or IFAI commissioners) to question these claims, and officials run little risk if they report that they looked for the information requested in their archives but could not find it.

## **PROFILING CITIZEN DEMAND FOR INFORMATION**

The number of information requests to the federal executive branch has been growing steadily since the law first went into effect. As indicated in [Table 1](#), a total of 490,344 information requests had been submitted as of

**Table 1.** Total Information Requests to Executive Branch 2003–2009.

	Total	2003 <sup>a</sup>	2004	2005	2006	2007	2008	2009
Total requests to executive branch agencies	490,344	24,097	37,732	50,127	60,213	94,723	105,250	117,597

Source: IFAI (2010).

<sup>a</sup>Beginning June 12, 2003.

the end of 2009, the vast majority of them electronically (they can also be submitted in writing).

These figures include requests for public information, as well as requests for access to or correction of personal data in possession of the government. Several federal agencies consistently attract the highest numbers of requests. Based on the IFAI's first five years of operation, the most solicited agencies are the Mexican Social Security Institute, the Ministry of Public Education, the Treasury Ministry, and the Health Ministry. Requests to the top 20 most solicited agencies represent 57 percent of the total requests submitted to date (IFAI, 2010). The most requests are directed to the Mexican Social Security Institute, which holds a great deal of personal data, such as medical and employment records. Overall, however, most requests are intended to get a better understanding of how the government works.

## WHO IS REQUESTING INFORMATION?

Many observers wonder about who is requesting information from the government. Unfortunately, the available data on requestors' age, gender, and occupation are too unreliable to generate an accurate profile. The reason is that requestors are asked to self-classify themselves when filing a request, in terms of academia, business, media, government, or "other." Frequent requestors have found that their self-identification can affect their chances of receiving a response – most notably journalists. Many report that identifying themselves as journalists leads agencies to resist providing information. As a result, the official IFAI data are likely to understate of the number of requests for information that come from journalists. Of those who self-identify, approximately two-thirds are male, more than 45% are in the Federal District and more than 11% are government officials (See IFAI, 2008).

One ambiguity in the design of the information access system involves the possibility of filing anonymous requests. Mexico's federal freedom of

information law does not require requestors to provide proof of identity, which allows for the use of pseudonyms. Many possible information requests can touch upon controversial issues and requestors therefore may fear reprisals, notably in cases of whistleblowers, journalists or citizens concerned about corruption. This is one area where the Internet offers a great advantage. If the information requested can be delivered electronically, then anonymity can be preserved. However, if the requestor files a complaint, IFAI hearings call for their personal appearance to give testimony and therefore the loss of anonymity.

### INITIAL AGENCY RESPONSES

How have executive agencies been responding to the increasing numbers of information requests they receive each year? The INFOMEX system gives agencies nine options for categorizing their responses. They can be divided into two groups – responses that provide information in some form and those that deny the request. In 2007, approximately 70 percent of responses implied that information was provided in some form, though not necessarily through INFOMEX, and the remaining 30 percent involved some form of denial of the request, according to the official data (IFAI, 2010). However, there are two major problems with relying on the agency's categorization of their response to determine how often people actually receive the information requested.

The first is related to misclassifications of the responses. Some agency responses are categorized as having provided the information requested, when in fact the information is denied in one form or another. This happens most frequently when the agency prepares a memo to explain why they are denying the information, but since they respond with a document sent through INFOMEX, they can classify the empty response as “delivering information.” The second major problem with relying on agency categorizations of their responses is that these categories do not indicate the quality or relevance of the information provided, in the case of an ostensibly positive response from the agency. Without evaluating the content of the actual requests and responses, it is impossible to know whether or not what was provided actually answered the question asked. These issues demonstrate that further research is needed to document to what degree agencies are actually responding to information requests. In 2008, the IFAI's Coordination and Oversight office carried out a detailed study that examined a representative sample of 1,700 agency responses to citizens,

taking into account “multiple” requests – those that included requests for more than one document. In these cases the IFAI found that the actual rate of agency claims that information was “non-existent” actually reached 31.5 percent of responses.<sup>11</sup>

## **PROFILING PROACTIVE GOVERNMENT DISCLOSURE**

Agencies are also mandated by Article 7 of the transparency law to publish basic information about their activities and procedures. The IFAI has been monitoring the executive branch's compliance with these established requirements. The evaluation criteria measure the extent to which the information presented in their “transparency portal” is complete in terms of what is established in the law.<sup>12</sup> The IFAI finds a high degree of compliance with the publication of basic information on government websites. However, these evaluations do not assess the usefulness of the information presented. Their monitoring is limited to whether or not the information presented is complete according to the terms of the law (IFAI, 2009).

Although the 2002 law covers the entire federal government, the IFAI's jurisdiction is currently limited to agencies within the executive branch. This means that the Congress, the judiciary, and autonomous federal agencies were mandated to develop their own procedures for implementing the law. Most of them provide access through processes similar to the IFAI, and have complied with the mandatory disclosure requirements (see López-Ayllón & Arrellano Gault, 2006; Hernández, Iturbe, & Moreno, 2006). The most notable difference with the IFAI's procedures involves the right to appeal.<sup>13</sup> In the case of the IFAI, a group of commissioners rules on appeals, in a process similar to an administrative court of appeals. For the federal institutions not covered by the IFAI, citizens' information access appeals are adjudicated by the same agencies whose denial of information provoked the appeal in the first place. This lack of third-party review of information appeals is a major difference with the IFAI process, and became a subject of controversy in the context of the IFE's denial of public access to the actual ballots cast in the 2006 presidential election. The IFE's information committee ruled against media efforts at an independent recount, ostensibly on the grounds that the ballots did not constitute “public documents” (for further discussion, see Ackerman, 2010). In addition, states and municipalities were not subject to the same requirements until the 2007

constitutional reform, and as a result their procedures, both for requesting information and the appeal of a denial, vary widely in quality and scope. Some states have information access provisions that are at least as strong as the federal government, but most are weaker (see [Gutiérrez & Leal, 2006](#); [Merino, 2006a](#)).

## THE IFAI'S APPEALS PROCESS

Although it is very difficult to assess the quality and relevance of agency responses to information requests, one partial indicator of citizen satisfaction with the information provided by government agencies is the extent to which people file a formal appeal to the IFAI. For requestors, the appeals process is straightforward; citizens do not need lawyers or technical experts. Indeed, the IFAI itself is mandated to assist in transforming a complaint into a legally grounded formal appeal, to help the appellant present the strongest possible case. However, not every citizen who finds an agency response lacking will necessarily file a formal appeal.

The IFAI commissioners have the mandate to rule on whether or not an executive branch agency's response is legitimate. They meet weekly, in public sessions, to rule on citizen appeals. From the beginning, they have been clear in their position that any response, for whatever reason, can be sent to them for appeal. This includes both formal denials and de facto denials. Formal denials involve the classification or reservation of information, whereas de facto denials involve a declaration of "nonexistence" as well as incomplete or inappropriate responses. The number of appeals filed to the IFAI is detailed in [Table 2](#).

The commissioners' possible responses to appeals fall into the following categories: confirm, revoke, modify, verification of lack of reply, stay of the

**Table 2.** Total Appeals Submitted to IFAI and Proportion of Total Requests that are Appealed.

	Accumulated Total	2003 <sup>a</sup>	2004	2005	2006	2007	2008
Total appeals filed with IFAI	19,020	635	1,431	2,639	3,533	4,864	6,053
Percent of total requests	5.1	2.6	3.8	5.3	5.9	5.1	5.6

Source: IFAI (2009) [Annex 2.1].

<sup>a</sup>Starting August 2003.

case, discard, “no show,” and inappropriate. The IFAI classifies these outcomes into three broader categories: those that involve application of the law (known as “core appeals”), those that are based on procedural issues (known as “procedural appeals”), and *positiva ficta*, a unique category of appeals that draws attention to agencies that do not respond to the request within the legally mandated time limit required to produce the information requested.

The trends over time regarding how the IFAI commissioners have ruled in appeals cases are presented in Table 3.

A resolution classified as “confirm” implies that the IFAI has determined that the agency’s response was correct. “Modify” implies that the IFAI neither completely accepts nor completely rejects the response given by the agency, and rather mandates that the agency change their response in some way. In the case of “revoke,” the IFAI has ruled on the side of the requestor.

It is important to point out that the IFAI annual reports categorize “stays of the case” as “procedural appeals.” However, many “stays of the case” imply that the agency has changed its position during the course of the appeal, which in effect grants access to the information requested. This means that these kinds of resolutions have often resulted in the release of a good deal of information to the public through the newly bolstered searchability of IFAI resolutions using the “Zoom” search engine.

The majority of appeals have required that IFAI commissioners make substantive decisions about whether or not the agency’s response was appropriate. The proportions of appeals that result in the various categories of IFAI resolutions are presented in Table 4, which shows that in 2008,

**Table 3.** Total Numbers of Resolved Appeals, by Category of IFAI Resolution, 2003–2008.

Resolutions to Appeals	Total	2003 <sup>a</sup>	2004	2005	2006	2007	2008
Core appeals	9,885	255	794	1,344	1,757	2,641	3,055
Confirm	3,154	73	209	346	524	803	1,178
Modify	3,847	96	280	475	652	1,181	1,174
Revoke	2,884	86	305	523	581	657	703
Verification of lack of reply	189	8	10	2	14	86	189
Procedural appeals	7,826	179	502	979	1,618	2,045	2,548
Total decisions	18,029	442	1,309	2,325	3,389	4,772	5,792

Source: IFAI (2009, p. 21).

<sup>a</sup>Starting August 2003.

**Table 4.** Proportions of IFAI Resolutions as Percentages of Total Appeals Resolved, 2008.

	Resolutions as a Share of Total Appeals (%)	Percent of Total Appeals Resolved
Core appeals	52.7	100
Confirm	20.3	38.6
Modify	20.3	38.4
Revoke	12.1	23.0
Verification (positiva ficta)	3.3	
Procedural appeals	44.0	

*Source:* IFAI (2009, p. 23).

in IFAI commissioners have either rejected or modified the agency's response in 32.4% of the cases, which account for 77% of the cases that actually produced rulings (i.e., subtracting cases involving procedural issues). The commissioners have ruled fully in favor of the agency in only 20.3% of the cases with decisions, though that reflected a substantial increase over the 2003–2007 average (15.9 percent). Overall, however, they tend to interpret the law in favor of disclosure. However, as noted earlier, appeals involving agency claims that the information requested “does not exist” are difficult to disprove, and the “burden of proof” falls squarely on the requestor (see, e.g., the test case detailed in [Fox & Haight, 2007b](#)). The IFAI does sometimes rule against the agency in such cases, but has not exercised its capacity to carry out its own independent investigations of agency claims of “non-existence.”<sup>14</sup> The commissioners' ruling then becomes obligatory for the agency, and sets a kind of precedent for future cases. Agencies are also permitted to challenge IFAI resolutions by filing their own appeals through the court system, though the IFAI often wins these cases.

IFAI rulings are published on their Web site, including supporting documents. If an agency is required to release information, it is usually given ten working days to respond and deliver. [Table 5](#) highlights more specifically how often agencies are instructed to release information through IFAI resolutions. Note that the 2008 data indicate a substantial decrease in the share of resolutions that mandate information release, compared to the historical trend. This may be related to the changing composition and therefore perspectives among IFAI commissioners. This change may also be related to a change in the composition of agencies involved in requests, since some are more open than others to citizen requests.

**Table 5.** Frequency and Proportion of IFAI Resolutions that Instruct Agencies to Release Information.

Resolutions with Instructions	Accumulated Total	2003 <sup>a</sup>	2004	2005	2006	2007	2008
Totals	7,202	275	680	1,153	1,395	1,945	1,754
Percent of total complaints	37.9	43.2	47.5	43.7	39.5	40.0	29.6

Source: IFAI, "Estadísticas del SISI," [www.ifai.gob.mx](http://www.ifai.gob.mx), Accessed April 11, 2009 and Information requests nos. 0673800076608, 0673800018807, 0673800026809, Fox and Haight (2010, p. 150).

<sup>a</sup>Information request system in operation beginning June 12, 2003.

## CHALLENGES TO COMPLIANCE WITH THE LFTAIPG AND IFAI MANDATES

Agency compliance with IFAI mandates to release information cannot be taken for granted. The IFAI has two systems for monitoring compliance, but they are incomplete. First, the IFAI records the receipt of official agency statements that claim to have complied with an IFAI resolution. Second, IFAI's verification office learns of inadequate responses when alerted by appellant complaints. Third, since this system has proven to be inadequate, the IFAI's verification office has begun tracking agency responses itself, although the results have not yet been made public (Fox, Haight, & Palmer-Rubin, forthcoming).

Citizens have two possible recourses if dissatisfied with an agency's response to an IFAI mandate. First, an appellant can request the IFAI's continued involvement in the case by making an official complaint to its Department for Coordination and Monitoring of the Federal Public Administration. Once a complaint is filed, IFAI staff work directly with the agency to encourage compliance with the mandate, using their informal powers of persuasion, since they lack the tangible threat of sanction. In addition, appellants can file an appeal through the courts, to report that the agency has violated their rights. This arduous legal path has rarely been followed.

The IFAI received a total of 618 complaints from citizens who were dissatisfied with agency responses to IFAI decisions, as of August, 2008.<sup>15</sup> However, these data appear to be incomplete, since many requestors deal with noncompliance more informally, through phone calls to IFAI staff. These 618 complaints refer only to those cases in which the initial attempts at resolution



were unsuccessful, and therefore the complaints began a more formal process of investigation and resolution. They represented 4 percent of the total number of appeals decisions. The specific agencies that stand out for having received the most complaints for noncompliance with IFAI mandates to release information include the Ministry of Public Education, the Attorney General's Office and the Ministry of Public Administration (SFP).

One of the main constraints on the appeals process involves the IFAI's lack of capacity to enforce its decisions. Instead, the IFAI must forward its recommendations for sanctions to the Ministry of Public Administration (SFP). This is because the transparency law relies on the Law of Responsibilities of Public Servants to sanction noncompliance, through the SFP's Offices for Internal Control. This system is designed to hold staff responsible for individual transgressions. However, because of the "many hands" involved in any given policy decision, it is often extremely difficult to charge any one specific individual for agency noncompliance with an IFAI mandate.<sup>16</sup> Notably, the SFP itself is one of the federal agencies that most frequently ignores IFAI decisions (Fox & Haight, 2010). In practice, relying on the SFP system to sanction noncompliance with IFAI mandates has had limited tangible results, allowing senior staff to evade responsibility.

IFAI's leadership faces a challenge here. On the one hand, for their decisions to have credibility, the potential for sanctions is necessary. On the other hand, the IFAI's capacity to function depends heavily on collaborative working relationships with agencies, notably with each agency's information committees and liaison units. Internally within the IFAI, there is a strong desire to cooperate with agencies in their responses to citizen requests, and in their encouragement of compliance with IFAI resolutions in those cases where the commissioners have decided in favor of disclosure. Rather than create an environment of adversarial conflict between the IFAI and executive-branch agencies, they prefer to try persuasion.<sup>17</sup>

## **THE EVOLUTION OF MEXICO'S INFORMATION POLICY DEBATE**

Mexico's information policy debate has many different dimensions and involves an increasing number of actors. At the broadest level, however, key changes in the terms of public debate have unfolded in three major arenas: the role of the IFAI itself, the new debate over a "second generation" of

information reforms, and the question of how to resolve the commitment to public disclosure with the right to privacy:

1. The first major development to note in the information policy debate since the 2002 federal law is that the IFAI itself has become a major public actor in its own right. In the course of its brief and unprecedented trajectory, the IFAI has established a significant degree of public credibility, especially with the media and intelligentsia. In contrast to the rest of the federal government, the IFAI was built from scratch after Mexico's historic 2000 elections, and therefore, it did not inherit the burden of the legacy of the past. The IFAI has demonstrated some degree of autonomy from executive authority, and its commissioners also recognize that their credibility depends in part on the public's perception of their autonomy.<sup>18</sup>
2. Second, the difference between state and federal standards for information rights raised broader issues of federalism (See [Merino, 2006b](#)). Most state laws are significantly weaker than the federal law – in some cases they more closely resemble “state secrets” laws than tools for citizen access (e.g., Oaxaca, Guerrero). To ensure that Mexico's different public institutions meet a shared minimum standard, many observers agreed that a constitutional reform would be necessary. Governors from all three major political parties, as well as the IFAI's own commissioners, led the call for such a constitutional amendment. The reform was approved unanimously in Congress and quickly ratified by the states in mid-2007, in spite of persistent polarization in the political party system. Not coincidentally, perhaps, the Constitutional reform does not cover transparency of public funds used by private entities, such as political parties and parastatal trust funds (*fideicomisos*) (see [Pulido, 2007](#)). As of the end of the one-year period allowed for compliance with this constitutional mandate, however, none of the states with very low information rights standards had improved them. In the notable case of Querétaro, that state actually weakened its information access system following the constitutional reform, and the state of Jalisco's information agency was seriously threatened. Notably, the federal Attorney General's office declined to exercise its legal opportunity to challenge the constitutionality of Querétaro's rollback of information rights standards, sending a subtle but powerful signal to other state governments. In a federal system, the persistent weakness of state level information rights is a major gap.
3. The debate over how to reconcile public information rights with citizens' right to privacy is more incipient but very significant for the future.

In contrast to the constitutional amendment's mandate for minimum national standards across different levels and bodies of government, the issues here are less clear-cut. There are direct trade-offs between individuals' right to privacy and the public's right to know. In some cases, the right to privacy of personal data that is in public records may seem straightforward, as in the case of individuals' medical and tax information. However, the question of public disclosure of information about who receives government subsidies has entered into conflict with laws that favor the confidentiality of business-related information – as in the high profile case of Mexico's banking secrecy laws. This issue has revealed a major imbalance in the federal law – while government agencies must disclose how their budgets are allocated, private actors that receive public funds are not required to be publicly accountable.<sup>19</sup> The question of public access to property records raises similar issues, since individuals' right to privacy can conflict with the public's interest in exposing “inexplicable enrichment,” or revealing public officials' potential conflicts of interest. As in so many policy issues involving the more technical side of information access, the devil will be in the details.

## THE CULTURE OF TRANSPARENCY

In principle, many can agree on the importance of “the culture of transparency” – perhaps because it can be understood in so many different ways. This is a broad umbrella term that refers to changes in the beliefs, practices, and expectations, embedded in both the state and the society, about the public's right to know. Clearly, this idea goes beyond legal formalities, since legal changes do not automatically create a widely shared recognition that government information belongs to the citizenry, rather than being the patrimony of officials. The term implies that attitudinal changes are needed for functionaries to accept the public's right to know – especially since, in practice, the threat of tangible sanctions for noncompliance is so weak. A 2007 survey of more than 1,200 federal officials regarding their attitudes towards information access reforms revealed substantial skepticism, to say the least. The survey was based on a random sample of administrators at the rank of area head or director general. More than 43 percent agreed with the statement “most information requests are used by requestors for some personal benefit,” and 30 percent reported that since the information law went into effect, “some officials save fewer

work-related documents.” When asked when information should be “protected” from the public, 45 percent agreed with “when the superior has not authorized its release,” and 53 percent agreed with “when we suspect that the information will be used to attack the entity” (for details, see [Probabalística, 2007](#)). These attitudes help to understand the growing issue of agency claims that information requested does not exist.

To promote the culture of transparency also implies a series of changes in civil society, involving the horizontal spread of the right to know as part of the broader “right to have rights.” Mexico’s years of civil society mobilization, reinforced by the IFAI’s public media campaigns, appear to have made a difference. According to a major public opinion survey, when asked, “Do you or do you not have the right to access the information generated by the government,” 89 percent responded in the affirmative. Their reasons included “Because I am Mexican” (25 percent), “Because I pay taxes” (14 percent), “Because it’s the government’s obligation” (22 percent), and “All of the above” (27 percent). The survey also reported that 64 percent had heard of the IFAI. Yet only 15 percent reported that they had requested information from the government (see [Luna, 2006](#), pp. 67–68, 72, 80).

Changes in the culture of transparency within civil society involve not only new expectations but also new practices. Here, the effective exercise of information rights requires significant investments in learning – involving both the technical side of how to make requests and the broader strategic question of what to request. This involves incorporating the exercise of information rights into broader campaigns in defense of the public interest. Increasingly, civil society organizations are making this investment in learning how to use the new tool kit. The tangible impacts, though promising, remain incipient and vary widely across issue areas.

Even IFAI commissioners have expressed concern about what they consider to be the narrow social base of those who actually use the official information request system. As of the end of 2008, approximately 7,000 accounted for more than half of the total information requests submitted through the formal executive branch request system ([Amparán, 2009](#)). These data suggest that the information request system is largely a domain of specialists, engaging a relatively small number of citizens. There is much truth to this, and there is a long way to go before a substantial fraction of the citizenry learns how and why to exercise their information rights. Yet these data also suggest a somewhat incomplete picture of the degree of civil society resonance of the right to know, for several reasons. First, for many of those who use the system even just once – if it resolves a major issue for

that individual, then that certainly “counts” as impact. Moreover, it is important to consider that the “right to know” goes beyond the exercise of formal information rights through filing requests through the IFAI. On the one hand, thanks to obligatory disclosure requirements, a significant amount of basic information about government programs is now publicly available without the need for a formal request. On the other hand, civil society organizations take the right to know one step further, with their own independent monitoring and evaluation of the public sector. Second, even if many information requests originate from a few thousand specialists, such as journalists and civil society activists, the impact of their requests is magnified by their capacity to disseminate their findings through the mass media and in their strategic roles as opinion makers. Third, Mexico’s public sector also includes other tools for information access, including a new “citizen attention” programs and social audit processes. Some of these innovations combine information access and ombudsman functions, as in the case of the Oportunidades’ social program’s “Citizen Attention” office, which each year receives more information requests than the entire executive branch covered by the IFAI.<sup>20</sup> In addition, the thousands of complaints that Mexicans file with state and federal human rights commissions also constitute a citizen right-to-know demand, insofar as they constitute a call for official recognition that a government agency violated human rights. This constitutes a limited form of “answerability,” given that human rights commissions in Mexico, as in most countries, are limited to shining a public spotlight by investigating and verifying citizen claims.

Changes in the culture of transparency, in both state and society, should be measured not only in terms of changing expectations and standards of openness, but also in terms of attitudes toward secrecy and the withholding of public information. Tolerance for official secrecy reflects the other side of the coin of the culture of transparency. Now that such practices are against the law, when will they be seen and treated as illegitimate violations of the public trust? In other words, if we understand the culture of transparency as grounded in actual practices, change will be slow if functionaries can continue to reject the new norms with impunity.

## CONCLUSIONS

How does the experience of information rights in practice in Mexico inform our understanding of the right to know? This brings us back to the broader context, in which the right to know is both an instrument that the public can

use as well as a “safeguard,” in the sense of a mechanism that can protect the public from abuses of power.<sup>21</sup> From this perspective, one of the main potential impacts of the right to know unfolds in an arena that is impossible to measure with precision, involving those abuses of power that do not happen, thanks to the risk of scandal and possible formal or informal sanctions.

We also need to recognize that the term “safeguard” – in Spanish the term is *candado*, literally, “padlock” – has multiple meanings. Locks are tools whose effectiveness depends greatly on those who deploy them. First and foremost, one has to find the key and know how to use it. So far, one of the main characteristics of practical experiences with transparency and the right to information access is that their impact depends both on the capacity to exercise the right, as well as on the capacity to act on the basis of the information that is made public. This is why the strength of any institutional safeguard depends to a great deal on its place within the entire system of the protection of citizen rights, just as any chain is only as strong as its weakest link. When we consider the right to know in this context, its impact depends greatly on the capacity of all the other public institutions whose mission is to promote and defend public accountability and the rule of law (for further discussion, see the contributions to [Ackerman, 2008](#)).

To conclude, the effectiveness of the right to know also depends on processes of learning, within both civil society and the public sector. The fact that a second generation of constitutional reforms moved forward in 2007, to raise Mexico's minimum national standards for transparency, indicates that this process of learning has made advances in a short period of time. The translation of new official discourse into actual state practices, however, is an arduous and contested process. The construction of any right is a long-term process, and the right to know is no exception.

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## NOTES

1. Some public interest groups take the right-to-know further by generating their own information about government performance, through independent policy

evaluations, budget monitoring, and citizen report cards. These initiatives operate at local, national and international levels around the world, although few integrated policy monitoring across these levels. On the “vertical integration” of civil society policy monitoring, see *Fox (2001)*.

2. As Weber pointed out “Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret ... in so far as it can, it hides its knowledge and action from criticism ... [E]verywhere that ... power interests ... are at stake ... we find secrecy ... The concept of the ‘official secret’ is the specific invention of bureaucracy, and nothing is so fanatically defended by the bureaucracy as this attitude ... Bureaucracy naturally seeks a poorly informed and hence a powerless parliament – at least insofar as ignorance somehow agrees with the bureaucracy’s interests ...” cited in *Gerth and Mills (1946, pp. 233–234)*.

3. For further discussion of the political economy of winners and losers in the transparency process, see *Fung, Graham, and Weil (2007)*.

4. On the origins of the law, compare *Escobedo (2004)* and *López-Ayllón (2005)*.

5. On the basis of the limited results after the one year allowed for compliance by state governments, it turns out that in practice, Mexican constitutional reforms are not binding on the states (e.g., *Méndez Lara, 2009*).

6. For a full list, see *Vluegels (2008)*. For cross-national comparative discussions, see *Mendel (2009)* and *Open Society Justice Initiative (2006)*, among others. See also international experiences reported at: [www.freedominfo.org/](http://www.freedominfo.org/).

7. For further discussion of the implementation of Mexico’s information rights laws, see also *Concha Cantú, López-Ayllón, & Tacher Epelstein (2005)*, *Bookman and Amparán (2009)* and *Fox et al. (forthcoming)*. For analysis of public interest group efforts across issue areas, see *Fox, Haight, Hofbauer, and Sánchez (2007)* and for analysis of initiatives in a specific state, see *Fox, García-Jiménez and Haight (2009)* and *Méndez Lara (2009)*.

8. These OSOs include the Congress, the Senate, the Federal Auditing Service, the Federal Electoral Institute, the Bank of Mexico, the Supreme Court (as well as the highest electoral, agrarian, fiscal, and labor courts, and the federal judicial council), the National Human Rights Commission, Institute of the National Fund for Housing for Workers, as well as the Autonomous Metropolitan University (UAM), the Autonomous University of Chapingo, and the National Autonomous University of Mexico (UNAM). See *López-Ayllón and Arrellano Gault (2006)*.

9. Article 3 of the LFTAIPG defines information subject to the law as: “Information: That which is contained in the documents, with any title, that are generated, obtained, acquired, transformed, or housed by any government body.”

10. Juan Pablo Guerrero (IFAI Commissioner) “Sobre el grave problema de la respuesta de “inexistencia de la información” (o la incompetencia del sujeto obligado) ante solicitudes de acceso a entidades y dependencias de la Administración Pública Federal,” January 30, 2009.

11. Personal email communication, Juan Pablo Guerrero, IFAI Commissioner, January 30, 2009. Combined with other agency responses that did not produce information, such as “it’s not our department” and claims of confidentiality, the total share of negative responses to requests with multiple components reached

60%. This finding is consistent with an independent comparison of the content of information requests and agency responses, also based on a representative sample, which found that the quality of responses dropped sharply in the cases of complex requests. See Doyle, Franzblau, and Martinez-Morales (2008).

12. For a recent independent evaluation of government information sites, see *Política Digital* (2009).

13. The IFAI refers to this process as filing a “recurso.” The process is not a formal legal appeal insofar as the IFAI is not part of the judicial system, but it does act in practice as an administrative tribunal.

14. For a notable example, one 2007 case involved a controversy over conflicting government agency reports regarding the cause of death of an elderly indigenous woman in rural Veracruz, Sra. Ernestina Ascencio Rosario. Family members reported that before she died, she told them that she had been brutally gang-raped by soldiers. This was confirmed by the first state medical examiners' report, but the official story later changed. Before federal agencies had made public their findings, President Calderon declared to the press that she had died from chronic gastritis. In this context, a citizen asked the president's office for the information that provided the basis for his claim. That office reported that an “exhaustive search” did not produce any such information. The citizen filed an appeal, noting “since this involves a presidential declaration on such a sensitive issue, there must be some document that supports it.” The official response claimed that the law applied only to documents, and therefore did not include conversations with other government officials. The IFAI commissioners accepted this point, but ruled in favor of “modifying” the government's claim on strictly procedural grounds, insofar as the claim of “non-existence” and its legally required supporting document was not properly delivered to the requester. In addition, the IFAI ruling included a reconstruction of the key events of the case, including press accounts, noting that the IFAI found it “surprising” that there were no relevant documents to support the president's declarations, especially in light of both the state government's medical report and a prior initial report by the National Human Rights Commission that supported the victim's family's allegations. The IFAI resolution went even further, noting that “for the President of the Republic to make a judgment regarding a tragic event, while the investigation was still ongoing, without the documentary [evidence] needed to support his declarations, conflicts with the principle of public disclosure and the goals of the [public information] law.” Three of the five commissioners dissented from this last affirmation, however, arguing that it went beyond IFAI's mandate. On the debate, see Chapa (2007). In the end, the president's office fulfilled the procedural requirement while the mystery behind the case continued. For the official account, see the full IFAI ruling, July 4, 2007, at [www.ifai.org.mx/resoluciones/2007/1494.pdf](http://www.ifai.org.mx/resoluciones/2007/1494.pdf).

15. Information request no. 0673800018807.

16. On “the problem of many hands,” see Thompson (1987).

17. Interviews with staff of the Office for Coordination and Monitoring of the Federal Public Administration, November 2006.

18. Notably, however, a November 22, 2006, debate among the IFAI commissioners about how to address their own possible conflicts of interest led to a two to three votes in favor of a “soft” approach.



19. Notable examples of official transparency in this arena are the innovative reports of the Office of the Federal Superior Auditor regarding the public accounts for 2005. These reports highlight the manner in which large companies were able to avoid paying federal taxes, with large-scale macroeconomic impacts, though apparently all was well within the law (no specific names were mentioned) – as reported in *Córdova (2007)*.

20. In 2006, for example, Mexico's flagship social program Oportunidades received more than 87,000 "citizen demands" for information (including complaints), in contrast to the 60,000 information requests directed through the IFAI (*Fox, 2007b*). The fact that, by definition, all those Oportunidades information requestors are citizens (mothers) in extreme poverty, reveals a more complete picture of the "social profile" of citizen demand for public information in Mexico. This "Citizen Attention" office is an excellent example of a "targeted transparency" initiative, a reform strategy that differs from general request-based approaches because it is designed to provide specific kinds of information with specific groups of interested stakeholders. See *Fung et al. (2007)*.

21. On the subject of institutional "safeguards," see the studies presented at the international seminar "Candados y derechos: Protección de programas sociales y construcción de ciudadanía," sponsored by the United Nations Development Programme, Mexico City, April 25–27, [www.seminarioprotecciondeprogramas.org.mx/](http://www.seminarioprotecciondeprogramas.org.mx/), accessed January 29, 2009.

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