

National Security and Transparency

The Case of Mexico

Alonso Gómez-Robledo Verduzco*



Ivan Stephens/Cuartoscuro

Ministry of Public Security monitoring center. National security and access to information policies must not be at odds, but balanced.

The incredible ideological confrontation between East and West that would end with the dismemberment of the Soviet Union and the end of bi-polar equilibrium was followed by a period seemingly characterized by a diversification of the factors in conflict and the transition from a focus on the geopolitical sphere to that of geo-economic rivalries.

Overnight, the world was subject to profound transformations, in which the hierarchy of national security threats and risks changed, and technological progress sped up along with the massification of information. All of this imposed changes in mentality and organization on states, since the patterns and reference points inherited from the recent past had become obsolete.

* Researcher at the Institute for Legal Research and member of the UNAM Board of Governors. Former IFAI commissioner.

The virulence of all these phenomena substantially changed forms of power, elevating access to information to a strategic priority, making it, therefore, a national security issue. In this sense, control over “information flows” became a component of the first water for state economies. The so-called “principle of popular sovereignty” began to be completely affected by the old, deeply-rooted “rule of secrecy.” This can be seen on three successive planes: deficient flow—or even the complete absence of flow—of information to the citizenry; the absence of consultations with the population; and the non-existence of public officials’ authentic responsibility *vis-à-vis* the citizenry.

It was long ago demonstrated that one of the fundamental requirements of every democracy is undoubtedly ensuring that its citizens have access to the greatest amount of and most useful information possible. In that sense, as Thomas Paine used to say, a democratic rule of law makes sense with the existence

of a public that is truthfully informed about the content of its own government's affairs. Along those same lines, a particularly relevant case is the impeachment proceedings against President Richard Nixon for the famous Watergate scandal. During the proceedings, the U.S. Congress, instead of immediately and unflinchingly directing the operations, first sought considerable support from the public. The revelations made to the citizenry were much more important and had a much greater impact on parliamentary oversight than any other kind of report solely presented to Congress. The House Judiciary Committee proposed that President Nixon be impeached and tried by the Senate for having directed a criminal conspiracy to cover up the scandal.¹

The traditional doctrine of what are called *arcana imperii* (the most intimate secrets of those in power), which maintains that the power of the state is all the more effective the more hidden it is from the eyes of the common people, gradually became what we now know as “official secrets.” According to Norberto Bobbio, this term is applicable to areas considered vital and transcendental for state security and stability.

Just like in the United States, Canada, or France, in Mexico even the most ardent defenders of administrative transparency also unwaveringly recognize the existence of certain types of information in the hands of the different branches of government that, under certain circumstances, legitimately can and must be classified as reserved or confidential.

Freedoms and rights frequently presented as contradictory mark the need for us to seek a balance between what must be communicable and what can be temporarily kept back. Thus, the right to access to information must be reconciled with the demands of a possible military secret, on-going diplomatic negotiations, or presumed damage to financial stability, as well as in the face of the primordial right of respect for privacy.

It is a matter, no doubt, of making a democratic, lawful system viable, but without this implying that something that must be reserved or confidential be confused with “discretionary secrecy,” since that would be the equivalent of corrupting the structure of the system that, by definition, is being preserved.

In order to achieve an appropriate equilibrium between transparency and the justifications for classifying information, to protect both public and private interests, each country's laws on transparency establish a series of limitations or exceptions to the fundamental right of access to information.

It was long ago demonstrated that one undoubtedly fundamental requirement of every democracy is ensuring citizens access to the greatest amount of information possible.

However, it should always be kept in mind that these specific restrictions, like any stipulation that restricts a public freedom, must always be the object of “strict interpretation.” Despite this important rule of interpretation, very often in practice, we see that the formulation of these restrictions is not free from ambiguities and uncertainties; this naturally gives rise to extremely extensive —not to say arbitrary— interpretations.

Almost all legislation regulating transparency and access to information —or at least the best known— give the government the faculty of not publishing information that falls under one of the exceptions or limitations, but what is often not emphasized enough is that the law does not oblige government bodies to do this. In other words, it is a legal faculty, not a legal obligation.

This means that, even in the cases in which the government, strictly applying the legal norms, may refuse to hand over a document, at the same time, it will have the legal possibility of “opening the file” if it considers that this would better serve the public interest.²

Our current Federal Law on Transparency and Access to Public Governmental Information (LFTAIIPG), in effect since June 11, 2002, stipulates that information may be classified if its dissemination could compromise national security, public safety, or national defense (Article 13, Subsection 1).³

For information to be classified for reasons of national security, it is not sufficient for its content to be related to the matters protected (as with all the other suppositions of Article 13), but —and this is extremely important— the existence of objective factors that make it possible to determine if the dissemination of said information would cause present, probable, and specific harm to the interests protected by the legal precept must also be taken into consideration.⁴

Now, when is national security supposed to be compromised? According to the eleventh stipulation of the “Lineamientos generales para la clasificación y desclasificación de la información de las dependencias y entidades de la ad-

ministración pública federal” (General Guidelines for Federal Bodies for Classifying and Declassifying Information), in principle, national security is compromised when the dissemination of the information puts at risk actions whose aim is to protect the integrity, stability, and permanence of the Mexican state, its democratic governance, and the external defense or internal security of the federation.⁵

From here on, we can say that one of the most obvious situations in which national security would be put at risk would be when the dissemination of the information would be an obstacle to or would affect intelligence or counterintelligence activities.⁶

In a complaint filed against the Ministry of Foreign Relations (SRE-4262/07), the complainant went to the IFAI when the ministry refused to hand over the “number of DEA agents in Mexico, as well as their circumstances and locations.” In response, the ministry argued that the specific information had been declared classified for a period of 12 years, with the possibility of prolonging that time (Article 15), among other reasons because it could compromise national security.

One of the most curious points about this case was that the IFAI found a meticulously detailed report by none other than DEA Chief of Intelligence Anthony Placido dated February 7, 2008 on the U.S. Embassy website. In this report, Mr. Placido expressly referred to his country’s obligations in the framework of the Mérida Initiative, saying, “DEA works with a congressionally funded Special Investigative Unit made up of approximately 227 police officers assigned to thirteen locations around the country,” adding that in 2007 alone, more than 80 extraditions had been effected to the United States.⁷ Because the anti-narcotics agency itself had already made the information requested public on several occasions, the IFAI revoked the “classified” nature of the information about the number of DEA agents in our country and accredited by the Ministry of Foreign Relations. It also instructed the ministry to turn over the information requested in the generic form of statistics within a period not to exceed 10 business days after the notification, since, according to Article 18 of the law on transparency, information found in public registries or sources available to the public was not considered confidential, that is, “classified.”

In another another complaint, this time brought against the Center for Investigation and National Security (CISEN-2941/06), the applicant had requested “the list of names of those who have been agents of said center since its creation to date (September 2006) and who served the institution as

Freedoms and rights frequently presented as contradictory mark the need for us to seek a balance between what must be communicable and what can be temporarily kept back. Thus, the right to access to information must be reconciled with the demands of security.

informers in the state of Jalisco, as well as the pay they received for this service.”

In this case, the IFAI ruled that turning over the names of the government employees and external persons who provided information to the CISEN would make both identifiable. This would mean they could be located precisely, which would affect not only the center’s strategies for carrying out its intelligence and counterintelligence activities, but could also affect the security and safety of the persons whose job it is to turn over information. This would constitute a threat or risk to national security efforts.

However, on the other hand, the IFAI also stated that, given that internal personal work inside the CISEN who do not carry out activities directly related to intelligence and counterintelligence activities, the name of these public servants should in principle be public, according to the LFTAIPG, which mandates those subject to it to make available to the public the directory of public servants, from the level of department head or its equivalent and up (Art. 7-III).

Thus, on the one hand, the IFAI confirmed the classified nature for a period of 12 years of the names of CISEN employees who carry out intelligence and counterintelligence activities, as well as of those persons hired by it who provide information so it can carry out its work. On the other hand, however, and along these same lines, the IFAI quashed the CISEN’s answer about pay to its informants, underlining in its text that, while the information should be given, by no means should it be correlated with the specific employees’ names.

In another complaint, this time brought against the President’s Office (7966/10), the complainant requested, first of all, information about how many members of the Presidential Guard had been assigned to private persons by federal executive order, and secondly, how many had been assigned to members of the cabinet. The President’s Office responded that it considered the information classified because it was a matter of national security.

The IFAI revoked the classification invoked by the Presidential Guard, arguing that informing about the total number of guard members assigned to personal security or to security for cabinet members by no means made it possible to deduce how many had been assigned to each of the individuals receiving that special protection.

In a complaint against Mexico's government-owned oil company, Pemex (2997/07), the applicant expressed his/her objection to the state-owned company's having refused to provide the "Atlas of institutional risk concluded in 2006." Pemex argued that it considered that, according to the LFTAIPG, and the Law of National Security (Article 13, Subsection 1, and Article 5, Subsection 1, Paragraph 12, respectively), the dissemination of that information would clearly put national security at risk. However, the unfortunate December 26, 2005 Law of National Security is not only far from the transparency it purports to defend, but it also contradicts the LFTAIPG itself. Thus, for example, its Article 51 adds two causes for being able to classify information, stating that "information classified for reasons of national security is that whose application implies revealing norms, procedures, methods, sources, technical specifications, technology, or useful equipment for generating intelligence for national security, regardless of the nature or origin of the documents it appears in or... whose publication can be used to update or further a threat."

We can also mention other norms that contradict the LFTAIPG, among others Article 52 of the Law of National Security, which clearly states, "The publication of non-classified information, generated or archived by the Center (CISEN), will invariably be done following the principle of confidential government information [*sic*]." This is particularly serious since the principle of interpretation that the law establishes must prevail in handling governmental information in our country is the principle of "the maximum publicity," established not only in the LFTAIPG, but, as if that were not enough, in Article 6, Paragraph 2 of the Constitution. This article states

One of the most obvious situations that would put national security at risk would be when the dissemination of the information could be an obstacle to or affect intelligence or counterintelligence activities.

that all information in the possession of any federal, state, or municipal authority, body, or entity is public and shall only be classified temporarily for reasons of public interest in the terms established by law. In interpreting this right, the principle of maximum publicity must prevail.

When the IFAI requested access to the atlas of risk, it was able to verify that it contained maps or satellite photographs that covered the entire republic, which showed perfectly the pipelines in any given area, as well as its geographical position, through identification of locales, municipalities, and state boundaries. They also show the coordinates and intersections of the pipelines used by all of Pemex's subsidiaries, the different kinds of products that each one transports, etc. The atlas also included Pemex's comprehensive information system, with its data bases, which would make it possible to carry out vulnerability analyses of the infrastructure in the case of any kind of national, regional, state, or municipal disaster.

Therefore, the IFAI confirmed the validity of Pemex's classifying the information, fundamentally because disseminating the "institutional atlas of pipeline risk" could update or increase a threat to national security, given the importance, quantity, and quality of the detailed information it includes.

In other words, in this case, the IFAI did find that there was a specific threat to national security, taking into account that the atlas reveals the vulnerable points of the country's oil infrastructure, potentially exposing it to acts that could destroy or disable it.

Lastly, we should recognize that it is very true that there will frequently be a tension specific to the relationship between transparency in information and the classification of information considered a matter of national security. Specialist Eduardo Guerrero Gutiérrez, in a brilliant study following the example of Professor Geoffrey Stone, states that a dilemma between informational openness and national security appears when the dissemination of a government secret is harmful to national security and, at the same time valuable for transparency and accountability.⁸

Does the value of giving access to information go beyond or surmount a potential danger in a matter of national security? In the absence of absolutely objective criteria, it will not be easy to reconcile the important national interests related to national security with the equally important interests of an open society. In this sense, and in a very illustrative way, Professor Stone offers the following example: suppose a government does a serious study about the efficacy of its security measures in certain nuclear energy plants, and comes to the

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

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

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

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

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

NOTES

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

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

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

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

⁵ *Ibid.*

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

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

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

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

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