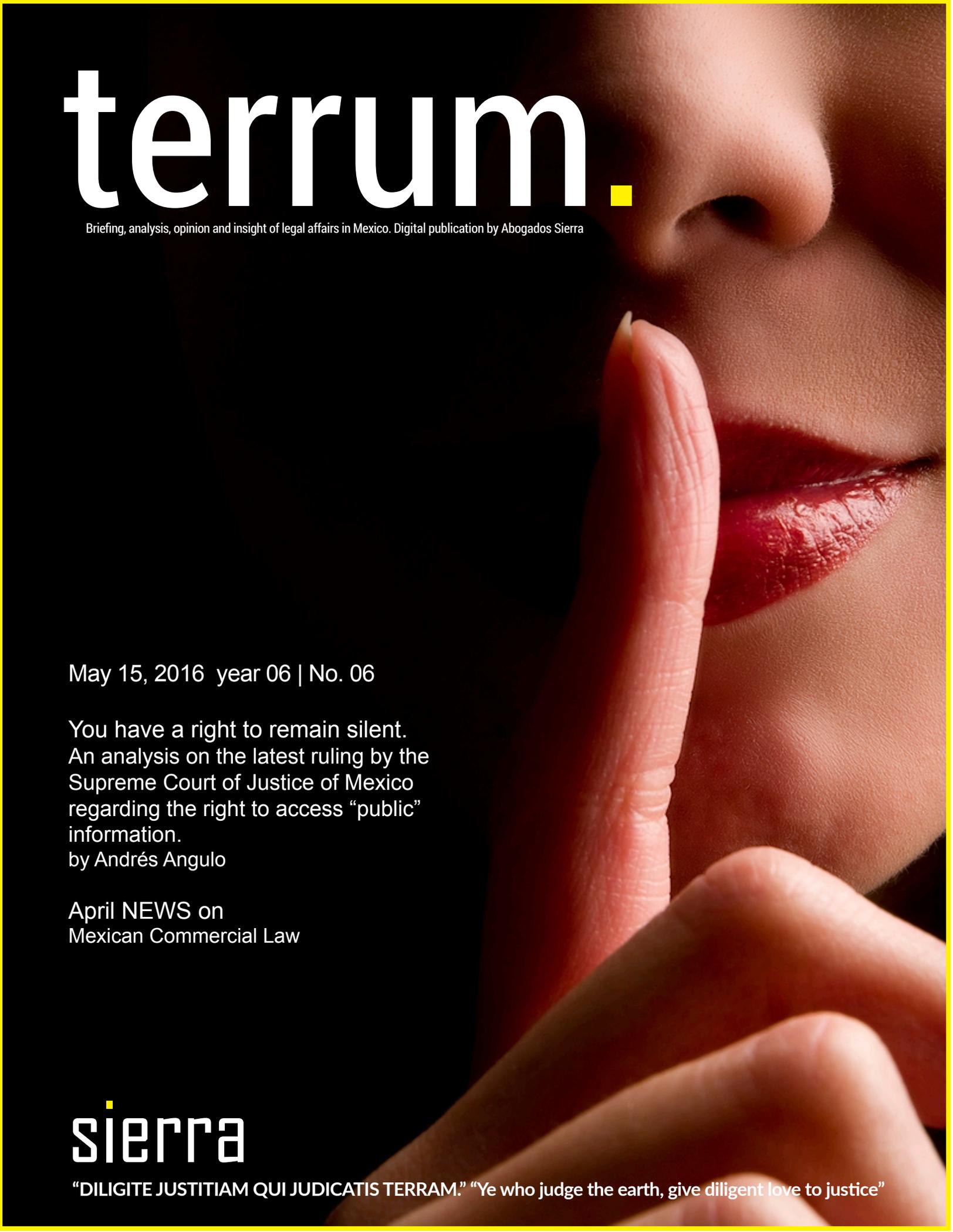


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April NEWS on
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“DILIGITE JUSTITIAM QUI JUDICATIS TERRAM.” “Ye who judge the earth, give diligent love to justice”

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Following the acquisition of a new Boeing 787 “Dreamliner”, among other aircraft, for exclusive use of our Head of State, President Enrique Peña Nieto, and members of the Presidential House, questions were raised regarding its use by people other than members of its office or the Mexican Federal Government. News outlets were flooded with headlines accusing Mr. Peña Nieto and his administration of traveling in Government-owned aircraft to his United Kingdom’s presidential tour, accompanied by people related to him and his family and whose presence, and expenses incurred because of it, were not justified.¹ All this conundrum was obscured by even more dramatic stories of the current President and his family. However, just recently the story found its way back to the headlines. This time however, the issue was presented in regard to access to public information and national security, which inevitably led to the Supreme Court of Justice’s involvement.

This story is both relevant and has a legal impact on regulation and doctrine surrounding Access to Public Information. In a previous edition of Terrum², skepticism over the General and Federal Law for Transparency and Access to Public Information was expressed. Mainly, because no matter how strong a piece of regulation is, or how effective right to access of public information may be, the justification to deny it under grounds of National Security is always more powerful.

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This analysis, will start by reviewing the facts of the three sessions held by the Plenary of the Supreme Court of Justice (further referred to as the “Supreme Court”).³ The issue discussed in these sessions was a motion to revoke filed by the *Consejero Jurídico* (Legal Advisor, further referred to in such way) of the Federal Executive Branch (also referred to as the “Presidential House”). Through it the Presidential House requested the Supreme Court’s intervention to grant the right to reserve as confidential and not disclose information regarding the operation of state-owned aircraft and passengers using them under grounds of National Security. Then issues arising from some of the Justices’ considerations to uphold or dissent will be raised. Through this analysis, we seek an answer to the following questions: Was it wrong to be Skeptical? Did the new General and Federal Law for

1.- Aristegui Noticias; Peña Nieto viajó a Reino Unido con 200 personas, (2015), <http://aristeguinoticias.com/1003/mexico/pena-nieto-viajo-a-reino-unido-con-200-personas-the-huffington-post-nota-y-fotos/>; Porcayo, Omar. Indignan excesos de los Peña Nieto en su visita a Reino Unido, (March, 2015) http://www.huffingtonpost.com/2015/03/09/enrique-pena-nieto-reino-unido_n_6832438.html; Instituto Nacional de Acceso a la Información, CNN Español. Viaje Oficial De Peña Nieto A Londres Costó 7.1 Millones De Pesos: Inai (June, 2015). <http://expansion.mx/nacional/2015/06/15/viaje-oficial-de-pena-nieto-a-londres-costo-71-millones-de-pesos-inai>.

2.- Angulo Andres. A New Federal Transparency Law, same old skepticism.

An analysis of the legislative work preceding the New Federal Transparency Law, its provisions and challenges. (June, 2016) <https://www.asyv.com/images/terrum/2016/jun16t.pdf>

3.- Contenido de las versiones taquigráficas de las sesiones públicas ordinarias del pleno de la Suprema Corte de Justicia de la Nación, celebradas el 28 de marzo, jueves 30 de marzo y 3 de abril, todas del 2017, en relación al Recurso de Revisión en Materia de Seguridad Nacional previsto en la Ley general de Transparencia y Acceso a la Información Pública, promovido por el Consejero Jurídico del Ejecutivo Federal. 1/2015.

Transparency and Access to Public Information strengthen the rights of Mexicans to access public information, especially when through it their government can be held accountable for their unjustified spending and misuse of public resources?

The first issue addressed by the Supreme Court was: what was the Presidential House asked to disclose? *This is it: Flight itineraries and flight plans of all aircraft assigned to the Presidential House covering a period from July to October 2014, as well as the number and names of passengers and crew flying in them.* The Presidential House, being the obliged party to disclose this information, partially disclosed what was asked for by the user. It was limited to: The President and his cabinet's tours, excluding "personal" information of its cabinet and crew, arguing this should be reserved.

The user, as expected, filed a motion to appeal before the *Instituto Nacional de Transparencia y Acceso a la Información Pública* (National Institute for Transparency and the Right to Access Information) (the "INAI"), stating that the information he/she⁴ requested was not limited to the aircraft's operations when the President and/or cabinet were on tour, but all operated flights in general. Before issuing his response to the motion to appeal, the Presidential House did the following:

- (i) Disclose all information regarding its aircraft flights operated outside of tours. However it decided to suppress details which, in its view, should be reserved. These being: Origin and Destination, time of departure and arrival, names, and signatures of the crew; and
- (ii) Present additional information stating that it did not disclose any information regarding "other" passengers (not the crew) that were in flights operated outside tours, arguing it did not have it and enacting a procedural exception in the INAI procedure, known as: *inexistencia* ("nonexistence").⁵

Having done the latter, the Presidential House issued its response. It argued procedural exceptions to try and dismiss the motion to appeal, claiming the motion to appeal lacked a subject matter since most of the information had already been provided and most of it had been disclosed.

After all submissions by both the user and the Presidential House were filed, the INAI issued its final resolution (further referred to the "INAI's Final Resolution"). Through it, (i) it denied the motion to dismiss requested by the Presidential House; (ii) it confirmed some of the information reserved regarding aircraft's flights performed outside of tours; (iii) ordered the Presidential house to disclose all information regarding passengers (other than the crew and cabinet) that were in flights operated during the Presidential tours; and (iv) ordered the disclosure of information regarding the origin and destination, departure and arrival times, and routes of flights operated by the Presidential House's aircraft outside of its tours.

The Executive's Legal Advisor disagreed with the INAI's Final Resolution. As a result, it filed a motion to revoke⁶ INAI's Final Resolution, provided in article 6, section A, subsection VIII, seventh paragraph of the Mexican

4.- According to the applicable law the identity of the user requesting information before the INAI remains anonymous. Until it files a motion to appeal. However, the name was kept anonymous during the Supreme Court's sessions. Thus, we cannot make a specific reference to the identity of the user.

5.- Nonexistence exception, is a right of the obliged party to deny disclosure of information it claims it does not possess. This does not necessarily mean the information does not exist but, in most cases, it is not within its capacity to disclose it or is not physically located in its files. But, this right is paired with an obligation, which in this case at hand was not complied with, this being that the obliged party claiming the non-existence of information must point the user to the correct government entity where he could get the information. Unfortunately, since this additional information was presented by the Presidential House after the user had filed his motion to appeal before the INAI, he/she made no claim to this regard. It all came down to the INAI's final decision.

6.- This motion can only be exercised by the Executive's legal Advisor and grants competence over the Supreme Court, as the only Mexican Court of Law that can resolve this motion.

Constitution (further referred to as the “Motion to Revoke”) before the Supreme Court. Being the second time that this extraordinary motion has been used in the past, the Supreme Court was still faced with questions regarding the very nature of the motion. It had to do that, before even going over the arguments set forth by the Executive’s Legal advisor to revoke the INAI’s Final Resolution.

In accordance to the Supreme Court’s Plenary proceedings, the Motion to Revoke was studied at first by only one of the 11 Justices: Justice Laynez Potiensky. He then presented a draft of the resolution to the rest of the Plenary, composed of only 10 Justices this time, with the absence of Justice Franco-Gonzalez-Salas. In his draft of the resolution, and his amendment presented before the second session, Justice Laynez argued that: (i) the Motion to Revoke did start a second instance and thus Justices were able to review not only the merits of the motion but procedural issues raised by the claimant against INAI’s Final Resolution where it denied the motion to Dismiss; and (ii) that the information the INAI ordered the Presidential House to disclose, should not be done in the manner set forth by the INAI, and it should only be limited to the origin and destination of the flights operated by the Presidential House’s aircraft.

Of the remaining justices, the majority was in favor of the draft of the resolution regarding the procedural issues but, they disagreed on the merits. In fact, most of the remaining justices voted against any type of disclosure. Their main argument was that, disclosing information of that sort would result in a misinterpretation on the presidential agenda, which in turn could lead to unnecessary and disruptive conclusion by the society, and most importantly it could lead to a pattern interpretation of the Head of the Executive’s activities and pose a threat to his integrity. As a result, they argued the information had to be reserved under grounds of National Security.

Justice Cossio Diaz, typically known for his dissenting opinions, was completely against the draft of the resolution and any form of reserve whatsoever. He claimed in a dissenting and particular vote that any form of reserve is a threat to a right that has escalated from just a civil right to a human right. That no citizen should be denied the ability to access information and that granting such an amount of effectiveness over this motion would result in an easy get away by which the Head of the Executive, could easily trump binding resolutions by the INAI and dismantle the whole purpose of the transparency and access of information reform. However, this was only one vote over six who voted in favor of the Motion to Revoke and denial of any sort of disclosure of information. The remaining three also voted in favor but made particular votes as well.

From the latter, it can be drawn that National Security did not cease to be the main argument by which the right to access information can be blocked. One of the biggest issues with this recourse (Motion to Revoke), granted in favor of the Legal Advisor of the Executive, is that not only can it be used to reduce the level of accountability of the Federal Government but, it could also pose a threat against the constitutional right of audience from the user and the INAI; whose arguments and grounds of an already binding resolution cease to exist during the whole new instance that is carried out before the Supreme Court. Thus, the only two parties to access the proceeding are the Supreme Court and the Legal Advisor. Therefore, the user and the INAI do not get a chance to raise claims as to the reason the information was requested on the first place, or whether there is a true argument to protect National Security.

Finally, as it was foreseen, National Security can still be used as grounds to deny a full disclosure and access to public information. However, in the context of the issue presented before, what is even more worrying is that the proceeding before the Supreme Court lacks the inclusion of a third party that has an interest in preserving a final resolution issued by the INAI, or the INAI itself. Finally, it is unfortunate to realize the Supreme Court of Justice, through its approach in the case at hand has benefited the Government’s right to remain silent over the human right to access information.

Mexico doubles down on pivot away from U.S.

Mexican officials started talks with their counterparts in the European Union to update their own free trade agreement initially signed in 2000. In 2013 Mexico and the EU had for the first time this talks in order to deal with a new trade agreement, both parts were continually expressing their interest for a new agreement, but it became urgent just after Trump took office. The intention of Mexico of expanding their commerce opportunities doesn't stop in the EU talks, afterwards Mexican officials held to Argentina for the celebration of the World Economic Forum's Latin America and expressed their intention of buying more goods from Brazil and Argentina. <http://money.cnn.com/2017/04/03/news/economy/mexico-pivots-eu-trade-talks/index.html> 03/04/2017.

Middle Class in U.S. far worse than counterparts abroad, Study Finds.

Middle-class Americans have fared worse in many ways than their counterparts in economically advanced countries in Western Europe in recent decades. A shrinking middle class is not necessarily cause for alarm, if the reason for the contraction is that more people are moving up the income ladder. The proportion at the top did rise, but so did the proportion at the bottom. Moreover, the middle-income group was smaller — and the groups at either extreme larger — in the United States than in any of the 11 Western European countries studied. As a result, the citizens are shifting their political stance, one clear proof of this is the number of born and raised democrats that decided to vote for Mr Trump due to its promises of helping the middle-income class. <https://www.nytimes.com/2017/04/24/business/economy/middle-class-united-states-europe-pew.html> 24/04/2017.

U.S., North Korea Flex Military Muscles as Tensions Simmer.

The U.S. and North Korea both showed off their military prowess on Tuesday as nations in the region stepped up diplomatic talks to defuse a brewing crisis over Kim Jong Un's nuclear program. With nuclear-powered USS Michigan in the South Korean port and an aircraft carrier near the Korean Peninsula, President Donald Trump is seeking to maximize pressure on Kim's regime to give up its nuclear program. China has sought to calm tensions on the Korean Peninsula by emphasizing diplomacy. <https://www.bloomberg.com/politics/articles/2017-04-25/u-s-north-korea-flex-military-muscles-as-tensions-remain-high> 25/04/17.

Nasdaq tops 6,000 mark for first time ever.

The Nasdaq, home to many of the biggest tech companies in America, hit the 6,000 mark for the first time ever on Tuesday. The milestone comes more than 17 years after the Nasdaq first topped 5,000. Strong sales and profits from the likes of Apple, Google owner Alphabet, Microsoft and Facebook are a big reason behind the index's surge during the past few years. Ironically enough, President Trump deserves a chunk of credit for the most recent surge in tech stocks as well. Apple, Microsoft, Alphabet, Oracle and Cisco are among the many tech giants that could benefit from Trump's call to let companies bring back, or repatriate, cash sitting overseas at a one-time lower tax rate. <http://money.cnn.com/2017/04/25/investing/nasdaq-6000-tech-stocks/index.html> 25/04/17.

Where is NAFTA? New tariffs imposed by the US.

Prime Minister Justin Trudeau warned Tuesday that Canada and the U.S. could suffer a "thickening" border as the Trump administration imposes new tariffs on softwood lumber and trade tensions between the two countries escalate. Trudeau commented a day after the announcement of new U.S. duties of up to 24 percent on softwood lumber entering the U.S. from Canada. Trudeau, leader of Canada's Liberal Party, said the two countries are economically interconnected, but it's not a one-way relationship. <http://abcnews.go.com/International/wireStory/canadian-pm-responds-lumber-tariffs-imposed-us-47008749> 25/04/2017.

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