

# sierra

# terrum.

Briefing, analysis, opinion and insight of legal affairs in Mexico Digital publication by ABOGADOS SIERRA

GOVERNMENT  
CONFIDENTIAL

Lorem ipsum dolor sit amet, consetetur sadipscing elitr, sed diam nonumy eirmod tempor invidunt ut labore et dolore magna aliquyam erat, sed diam voluptua. At vero eos et accusam et justo duo dolores et ea rebum. Stet clita kasd gubergren, no sea takimata

June 15, 2016 year 05 | No. 07

A New Federal Transparency Law,  
same old skepticism.

by Andrés Angulo

P. 01-03

MAY AND JUNE NEWS on  
Mexican Commercial Law

P. 04

Contributor

P. 05

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

# A New Federal Transparency Law, same old skepticism.

*An analysis of the legislative work preceding the New Federal Transparency Law, its provisions and challenges*

*by Andrés Angulo.*

**A**s curious as it may appear for the Mexican government, transparency, control of information, and accountability remains a work in process, rather than a given as one would expect. After almost 2 years of what has been referred to as “intensive legislative work” by both chambers of Congress, a new *Ley Federal de Transparencia y Acceso a la Información Pública* (Federal Law for Transparency and Access to Public Information) has been issued by the Executive branch (the “New Federal Transparency Law”).<sup>1</sup>

Contained within 206 articles is the result of Congress’ intention to comply both with the constitutional reform that came into effect nearly 2 years ago (the “Constitutional Reform”)<sup>2</sup> and the *Ley General de Transparencia y Acceso a la Información Pública* (General Law for Transparency and Access to Public Information) (the “General Law”).<sup>3</sup> As it will be shown below, through the New Federal Transparency Law a considerable effort has indeed been made to modify important aspects that its predecessor lacked. Nonetheless, a feeling of uncertainty and disbelief surrounds all of us which, as individuals and professionals, rely on government’s transparency and the access to public information.

Having said that, the issue to be discussed here focuses on the following questions: Will the New Federal Transparency Law favor the endless fight against corruption inside municipal, state, and federal Governments? Will its entry into force suffice to ensure all branches of the federal Government act in accordance to its new principles, obligations and standards? And generally, will it really accomplish the purpose for which it was created? This being: The protection of a fundamental right.<sup>4</sup>

Before weighing answers to these questions, an analysis of the legislative process that resulted in the New Transparency Law will be made. This process will start with relevant aspects from both the Constitutional Reform, moving forward to the issuance and related provisions of the General Law. Afterwards, a review of the New Transparency Law will intend to provide some insight as to its purpose and innovations. Finally, adding up all the aforesaid, answers to the previous questions will be addressed.

At the very start, important resolutions<sup>5</sup> related to freedom of speech and access to information from the Inter-American Court of Human Rights as well as trends in International Organizations, and even early thesis and jurisprudence by the Mexican Supreme Court of Justice<sup>6</sup> set forth the path for what later on would become the Constitutional Reform. Following that, in 2002, the first *Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental* (Federal Law for Transparency and the right to Access Public Governmental

1.- Decree published in the Official Gazette May 9, 2016. <http://www.diputados.gob.mx/LeyesBiblio/pdf/LFTAIP.pdf>

2.- Decree published in the Official Gazette February 7, de 2014.

3.- The General Law strictly provides for the creation of a federal law that would regulate all matters of transparency and access of information for the Federal level of Government.

4.- A fundamental right for the purpose of this article, will be understood as a human right (as regarded by the Universal Declaration of Human Rights, 1948) that has been duly recognized by Mexico within its Constitution (1917).

5.- Cfr. Corte Interamericana de Derechos Humanos, *Caso Claude Reyes y otros Vs. Chile*, (Fondo, Reparaciones y Costas), Sentencia de 19 de septiembre de 2006, Serie C No 151, párr. 76; *Caso López Álvarez*, Sentencia de 1 de febrero de 2006, Serie C No. 141, párr. 163; *Caso Ricardo Canese*, Sentencia de 31 de agosto de 2004, Serie C No. 111, párr. 77; y *Caso Herrera Ulloa*, Sentencia de 2 de julio de 2004. Serie C No. 107, párr. 108.

6.- ACCESO A LA INFORMACIÓN. SU NATURALEZA COMO GARANTÍAS INDIVIDUAL Y SOCIAL. Tesis: P./J. 54/2008Semana Judicial de la Federación y su Gaceta Novena Época 169574. 4 de 6 Pleno Tomo XXVII, Junio de 2008 Pag. 743 Jurisprudencia (Constitucional).

Information) was issued. This Law from 2002, opened the way for a new amendment to article 6 from the Mexican Constitution in 2007. This established the ground floor upon which the right to access information would grow. Moreover, in 2014 the Constitutional Reform came into effect. It provided for a substantial amendment to Article 6 (of the Mexican Constitution), fully legitimizing the right to access information as fundamental. It (the Constitutional Reform) also broadened the number of *Sujetos Obligados* (Obligated Subjects),<sup>7</sup> outlined the integration of a federal organism, and provided a set of principles under which a national system would operate (the “National System”). Yet, the Constitutional Reform expressly stated that all the aforesaid would be achieved by the creation of a newly enacted legal statute.

So basically what we are left with is a General Law, and a New Federal Transparency Law. They both regulate under exactly the same principles but were apparently created for completely different purposes. Based on their contents it may seem as if the only difference is that the first one has 10 more articles than the second one (although length never has been a sign of better regulation). This is because, all provisions, standards, considerations set forth in the General Law seem to have been identically transcribed into the New Federal Transparency Law with the exception of its applicability and generic contents.

*“No legislative work, however greatly constructed it may be, will ever be able to win this battle so as long its underlying purpose is put in second place and bureaucratic and underqualified officials are in charge of its interpretation and execution.”*

Ironically enough, while this new trend in public accountability and fight against corruption, push for transparency, and laws being issued and reformed were taking place, some of the worst scandals regarding the highest levels of government occurred. These ranged from acts of corruption, lack of accountability and transparency in governments funds, to dubious results in government biddings. Nonetheless, the New Federal Transparency Law, contrary to its predecessor whom apparently masterly failed in ensuring that for which was created, intends to bring light back to the obscured corners of the Federal Government by providing the following:

1. It broadens the list of those considered as *Sujetos Obligados* (Obligated Subjects). However certain restrictions to the right to Access information and control by the Transparency Committees, have been imposed in those considered as National Security Agencies (*Centro de Investigación y Seguridad Nacional (CISEN)*; *Subprocuraduría Especializada en Investigación de Delincuencia Organizada (SIEDO)*, *Estado Mayor Presidencial*; *Comisión Federal de Competencia Económica (COFECE*, among others).
2. Limit on classified information under the grounds of National Security and disturbance or potential damage to State Affairs. The New Federal Transparency Law as opposed to its predecessor regulates this issue purely as an exception. Ideally Meaning a branch of Federal Government, as they often do, can no longer claim that a request for let’s say: *authorization granted to a Mexican air carrier to operate route MEX-IAH-MEX*, could affect National Security or disturb any State Affairs, thus classifying it. The New Federal Transparency seeks to do that by requesting the corresponding Government branch to present evidentiary support to the damage that could be caused.<sup>8</sup>

7.- Any authority, entity, or organ from the Executive, Legislative and Judicial Power, autonomous organs, political parties, public trusts and funds, any persona física o moral (individuals or corporations) or union which receives or manages public resources or performs acts of authority; at three levels of government.

8.- This is perhaps one of the innovations we all remain more skeptical about. Because it has largely been used in the most absurd cases. Where the information requested is even expressly considered as public.

3. The term in which the information requested must be provided was shortened to 3 days. This takes into account justifiable delays that the Transparency Agencies may enforce when the information requested is lengthy or its location is complicated.<sup>8</sup>

4. The *Sujetos Obligados* (Obligated Subjects) will have to modify their internal regulations in accordance to the New Federal Transparency Law in a year's time after its entry into force. Its aim is to avoid any conflict between laws. Where any Federal Government branch may argue their internal regulations forces them to act in different ways than provided by the New Federal Transparency Law.

5. Commissioners from the *Instituto Nacional de Transparencia y Acceso a la Información Pública* (National Institute for Transparency and the Right to Access Information) (the "INAI") may be excused from any proceedings when they feel one or various situations forbids them to solve with independence and impartiality.

No question can be raised about the legislative work done by both chambers of Congress, and the INAI in order to come up with two important pieces of legal statute to regulate the right to access information and government's transparency. However, as it has been shown, harsher conditions for authorities have been imposed, procedures have been more effective and more subjects are now under the INAI's vigilant eye, yet this is not something new to all who have witnessed constant battles against corruption and government secrecy. No legislative work, however greatly constructed it may be, will never be able to win this battle so as long its underlying purpose is put in second place and bureaucratic and underqualified officials are in charge of its interpretation and execution.

The ball, it could be said, is now in the civilians and corporations court. Government has apparently *made his part* in coming up with updated and internationally recognized legislation. With an uncertain attitude, one may seek to exercise its now regarded as *fundamental* right to access information. Expecting to receive an answer in 3 days without any absurd negative response under the grounds of National Security. Or even worse one where it is said that, even though the New Federal Transparency Law has come into effect, they are still in an *adaptation process* and no actual changes to the way the system works will be noticeable until their internal regulations have been amended.

Leaving the negative thoughts aside, the New Federal Transparency Law has provided useful tools to lawyers to seek better ways to exercise pressure on the Mexican Government when requesting access to public information and cutting corners to avoid easy ways out. Therefore answering the last question: will it really accomplish the purpose for which it was created? Well, although the purpose of its creation is yet to be fulfilled, the only way to accomplish said purpose is by a blend of: intense work and demands by civilians and corporations, a renewed will to be a part of government decision making and allowing for that to happen, and a structural change in both the Government's officials in charge and their true commitment to their public service.

9.- *Unfortunately this has always been used against and not in favor of those requesting for information. Authorities may use this to elaborate complicated responses and hide information that could have easily been provided.*

## **UN rights office urges Mexico to investigate summary executions.**

A spokesperson for the UN Office of the High Commissioner for Human Rights on Friday repeated its earlier request for the Mexican government to investigate human rights violations in Tlatlaya in Mexico State. Among the human rights violations alleged are the deaths of 22 people, including the summary execution of 12 individuals. Spokesperson Ravina Shamdasani spoke to reporters, restating the UN's concern with the poorly performed investigation, including the handling of seven military personnel that were arrested and charged in connection with the killings. That same year, the Miguel Agustín Pro human rights center in Mexico announced that there is evidence that high-ranking Mexican officers gave soldiers orders to kill criminals prior to an army mass slaying of suspected cartel members in June 2014. In 2013 the UN Special Rapporteur on extrajudicial summary or arbitrary executions, Christof Heyns, urged Mexico's government to better protect against human rights abuses, specifically with respect to the military's use of force against civilians. [www.jurist.org](http://www.jurist.org) 20/05/2016.

## **Mexican tax demand prompts NAFTA challenge ahead of 3 Amigos summit.**

A Canadian mining company's NAFTA challenge against Mexico could throw a wrench into the "Three Amigos" summit on June 29, when the leaders of Canada, the United States and Mexico will gather in Ottawa. Primero Mining Corp., which owns the San Dimas gold-silver mine in Durango, Mexico, has launched the challenge against the Mexican government saying the Mexican tax authorities are trying to improperly collect more taxes from the company. Ernest Mast, president and CEO of Primero, said that would cost the company nearly \$100 million US. "Our company would be under significant financial stress if that occurred and we'd have to re-evaluate our investment in Mexico," Mast told CBC News. The dispute is about how the company is taxed on the sale of silver. In 2012, a Mexican court ruled Primero should be taxed based on what's known as the "realized price" of its silver, which is a little over \$4 US an ounce. The realized value is much lower than the market price for silver, which is currently above \$16 US per ounce. "This is a very serious issue because you're talking about the fiscal stability of Canadian investment in Mexico, which is at risk here," Mast said. Mast said he hopes the matter is cleared up before the three world leaders meet in June, but wants more assistance from the Canadian government to resolve the issue. [cbc.ca](http://cbc.ca) 29/05/16.

## **'Germany in Mexico' Dual Year, commercial and cultural alliance celebrated by Foreign Minister Steinmeier.**

Under the theme "Alliance for the Future," the two countries have organized 120 projects and more than 1,000 individual events in 13 Mexican cities in order to strengthen ties between Mexico and Germany. A goal of the "Dual Year" is to give greater visibility to Mexican-German relations. Mexican President Enrique Peña Nieto had visited Berlin in April to mark the start of the yearlong series of events in Germany. Germany and Mexico cooperate across a range of issues at the bilateral and international level. Germany is Mexico's fifth-largest trading partner, and Mexico is a major center of investment and production of German automobiles. As part of the yearlong events being organized, Mexican professor of math and computer science at the Free University of Berlin, Raul Rojas, is to provide 10 Mexican universities with scale models of self-driving cars developed by his team. The two sides will then work to further develop this cutting-edge technology. Projects like this will help to further cooperation between Mexico and Germany in the automotive industry. [dw.com](http://dw.com) 31/05/2016.

## **BP to pay shareholders \$175 million in class action settlement.**

BP stated Thursday that it has agreed to pay \$175 million to shareholders in a securities class action suit against the company relating back to the 2010 BP Gulf of Mexico oil spill. Shareholders claimed the company misled them on the extent of the damages arising from the spill. In February of last year District Court Judge Carl Barbier of the US District Court for the Eastern District of Louisiana rejected a motion by BP to reduce the civil fine payable under the Clean Water Act. BP's appeal sought to reduce the fine per barrel from the \$4,300 proposed by the US government to \$3,000 per barrel. In December 2014 the US Supreme Court declined to review a settlement with BP resulting from the 2010 Deepwater Horizon disaster. In August 2014 a federal district court in Louisiana ruled that BP was grossly negligent and bears a majority of the blame for the 2010 Deepwater Horizon disaster. [www.jurist.org](http://www.jurist.org) 03/06/16.

## **Mexico's Ruling Party Loses Gubernatorial Races in Several States.**

### **PRI's losses include Veracruz, which it hadn't lost in 87 years**

Mexico's ruling party lost several key states, including oil-rich Veracruz, to the opposition in Sunday's gubernatorial elections, a blow to the administration of President Enrique Peña Nieto and an indication voters are growing weary of scandals. [www.wsj.com](http://www.wsj.com) 06/06/2016.

# terrum.

Briefing, analysis, opinion and insight of legal affairs in Mexico.

## CONTRIBUTORS

### ANDRES ANGULO

Attorney at Law: Admitted to practice law in 2013. Mr. Andres Angulo, of Mexican nationality obtained his law degree at Tecnologico de Monterrey, México.

LANGUAGES: Spanish and English.

PRACTICE AREAS: Transactional, Regulatory and Aviation law.

e-mail: [aangulo@asyv.com](mailto:aangulo@asyv.com)

## sierra

Prol. Reforma No. 1190 25th Floor,  
Santa Fe México D.F. 05349  
t. (52.55) 52.92.78.14  
f. (52.55) 52.92.78.06  
[www.asyv.com](http://www.asyv.com) / [www.asyv.aero](http://www.asyv.aero)

The articles appearing on this and on all other issues of Terrum reflect the views and knowledge only of the individuals that have written the same and do not constitute or should be construed to contain legal advice given by such writers, by this firm or by any of its members or employees. The articles and contents of this newsletter are not intended to be relied upon as legal opinions. The editors of this newsletter and the partners and members of Abogados Sierra SC shall not be liable for any comments made, errors incurred, insufficiencies or inaccuracies related to any of the contents of this free newsletter, which should be regarded only as an informational courtesy to all recipients of the same.