



**Organization for Security and Co-operation in Europe  
Office of the Representative on Freedom of the Media**

**COMMENTS ON THE SECOND DRAFT OF THE LAW ON  
TRANSPARENCY, ACCESS TO INFORMATION AND GOOD  
GOVERNANCE**

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**June 2012**

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## **I. Introduction**

Spain's promotion of a law on access to information should be seen as a positive step taken by the Government. However, as we said in our previous analysis, the first draft law of "Transparency, Access to Information and Good Governance of Spain" did not comply with principles and standards already set by the Human Rights Tribunals or the IGOs, including the "Council of Europe Convention on Access to Official Documents".<sup>1</sup> Moreover, the first draft law did not follow other standards that are considered important, as secondary sources, for an effective regulation on access to information.

Our first report on the previous draft law provided a set of recommendations for improvements in accordance with accepted international standards. Those recommendations were:

- *Include a paragraph at the beginning of the draft law clarifying that access to information is a fundamental right. Change the reference in Article 8 of the draft law to Article 20 of the Spanish Constitution.*
- *Change the wording of Article 2 so that the rule is that all public bodies are obliged to provide information.*
- *Article 9 should be redrafted following the principle of maximum disclosure. Specifically, the limitations included in the definition of Article 9 should be deleted.*
- *Articles 10 to 13 should be redrafted. First, the system of exceptions should be clarified (limitations are also exceptions and their wording should avoid vague or broad definitions); second, the draft law should include a public interest test for all the exceptions (including those related to personal data) that should be clearly drafted.*
- *Article 14 should not require requesters to identify themselves and should not include the need to justify the request, even when it is not an obligation.*

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<sup>1</sup> Adopted by the Committee of Ministers on 27 November 2008 at the 1042bis meeting of the Ministers' Deputies), available at <https://wcd.coe.int/ViewDoc.jsp?id=1377737>

- *Article 21 should be complemented with provisions that give real independence to the body mentioned in it. Moreover, the article could be complemented by giving this body the authority to resolve appeals and oversee the implementation of the law and to promote access to information within the administration.*
- *Articles 22 to 27 should include specific sanctions for violating the right to access information.*
- *The “Additional Disposition First”, paragraph 2, should be deleted and include a provision that establishes that “to the extent of any inconsistency, this Law shall prevail over any other statute.”*

As explained below, those recommendations were not fully taken into account in the new text of the draft law (hereafter the second draft law).<sup>2</sup>

This report provides comments on some of the changes made by the government to the first draft but it does not repeat the reasons that were explained regarding why the recommendations made in our first report were a necessary step to improve the law. In other words, all of those recommendations remain valid to ensure that the second draft law meets international standards.

## **II. Access to information is still not recognized as a fundamental right in the second draft law**

The second draft law fails to clarify that access to information is either an autonomous fundamental right or a right linked to freedom of expression. Article 8 of the second draft maintained the same wording of the first draft, mentioning that access to information is a right linked to Article 105b of the Spanish Constitution, which allows limited access to information.

It is important to highlight that the preamble that preceded the articles of the second draft law (“exposición de motivos”) reinforced the idea that access to information is not a fundamental right linked to article 20 of the Spanish Constitution. The preamble only refers to Art.105b of the Constitution and other laws.

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<sup>2</sup> The draft law can be viewed here: <http://www.leydetransparencia.gob.es/anteproyecto/index.htm>.

### **III. The scope of the 2<sup>nd</sup> draft law is still limited**

Article 2 of the second draft law underwent minimal changes. It is important to underscore that the new draft stipulates that private sector entities that contract with public sector agencies should also provide information. However, this obligation will only be exercised within the specific contract provisions. If, for example, the contract stipulates that some information should not be disclosed, the 2<sup>nd</sup> draft law provides a good instrument for opacity.

Moreover, the 2<sup>nd</sup> draft law maintains the confidentiality of some information from the legislative branch and the judiciary.

### **IV. In the second draft law the definition of information and regulation of exceptions are still in contradiction with international standards**

Article 9 of the 2<sup>nd</sup> draft law still limits the scope of information that could be requested. It exempts all the information that could damage ('perjudicar') national security, defense, foreign relations, public security, as well as information that might damage the prevention, investigation or punishment of crimes or other administrative or disciplinary misconduct. The main change in this article is the use of the word "damage" instead of "affect". It is positive that the specific word change in the 2<sup>nd</sup> draft requires a higher standard for not disclosing information, however, it is problematic, for the reasons explained in the previous report, that Article 9 includes exceptions in the definition of information itself.

Furthermore, and unfortunately, the redrafted limitations and the exceptions (Arts. 10-13) are both still vaguely worded.

It is important to recognize that the second draft law now includes the public interest test (Art.10). However, this test will apply only for the limitations and not for all the exceptions included in the draft. What is potentially more problematic is the idea of the "private interest test", also included in the second draft law.

In conclusion, despite the fact that the second draft law includes some minor changes, it continues to run a high risk of allowing individual discretion to officials who must provide the information to make exceptions.

## **V. It is still impossible to request information anonymously and without disclosing the reason for the request**

By the previous wording of Article 14 of the draft law, individuals who request information “must” (in Spanish ‘deberá’) identify themselves. The current draft law specifies that a request could be presented by any means that enable the identification of the individual requesting the information. The change introduced does not solve clearly the main problem highlighted in our previous report: this identification could potentially lead to retaliation by public officials against individuals requesting information and, for that reason, this obligation creates a chilling effect that causes people to avoid requesting information.

Unfortunately, Article 14 of the second draft law maintains a provision related to the reason for the request. As we said, international standards are clear that reasons should not be requested.

## **VI. The second draft law still has deficiencies related to the independence of the oversight and appeal mechanisms**

The *Agencia Estatal de Transparencia, Evaluación de las Políticas Públicas y de la Calidad de los Servicios* does not offer sufficient guarantees of independence, since it will function within the framework of one Ministry, according to the “Third Final Disposition” of the second draft law. The change introduced in that disposition reinforced the concern about the lack of independence of the agency, since the second draft includes the provision that the president of the agency could be removed, under specific circumstances, by the government.

As mentioned in the previous report, there are many conditions that could influence the real or perceived independence of the body. Among them is the way the head of the office is selected, the term of office and procedures for dismissal.

## **VII. Conclusion**

Although certain changes have been made in the second draft, very few of them could be considered as real improvement. For example, the introduction (Art.17) of a specific sanction for repeated incompletion in deciding the requests for information in the term stipulated by

the law is a positive step.

However, most of the changes are cosmetic and, in general, do not actually improve the law.

It is important to reiterate that the right to access information is a fundamental right in the view of international human rights instruments in Europe and that, in 2004, the OSCE Representative on Freedom of the Media held that: “The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) [...]”.<sup>3</sup>

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<sup>3</sup> See 2004 “Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, hereinafter “Joint Declaration” at <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=319&IID=1>