

ACCESS TO INFORMATION AND TRANSPARENCY IN
MÉXICO. COMMENTS ON THE SIGNIFICANCE OF A DEMOC-
RATIC REFORM IN A COMPARATIVE PERSPECTIVE¹

Allan R. Brewer-Carías

Professor, Central University of Venezuela

I began to write this presentation during the days of the Inauguration of President Barack Obama, and as I was asked by John Ackerman to refer in a comparative perspective to the matter of access to information and transparency in Mexico, I thought that it would be interesting to highlight what a new President in the U.S. was proposing on the subject.

And effectively, on his first day in office last month (February 21, 2009), President Obama said, referring to the Government, that “For a long time now, there has been too much secrecy in this city,” expressing that on the contrary, “Transparency and rule of law will be the touchstones of this presidency.” He then ordered that: “Starting today every agency and department should know that this administration stands on the side not of those who seek to withhold information, but those who seek to make it known.”² For such purposes that same day he issued two presidential Memoranda, one on the “Freedom of Information Act,” and the other on “Transparency and Open Government.”

¹ Paper written for comments in the Conference on “Challenges to State Reform in Mexico: Transparency, Elections & criminal Justice,” organized by the Institute of Latin American Studies, *Columbia University* and Instituto de Investigaciones Jurídicas, *Universidad Nacional Autónoma de México*. Columbia University, New York, 19-20 January, 2009.

² Speech at the swearing-in ceremony for Senior Officials of the Executive Office, February 21, 2009. See the report of Sheryl Gay Stolberg “On First Day, Obama Quickly Sets a New Tone”, *The New York Times*, February 22, 2009, p. A1.

Quoting Justice Louis Brandeis who referred to the “sunlight” as “the best of disinfectants,” Obama ordered the Freedom of Information Act to be administered with a clear presumption “in favor of disclosure”, in the sense that “in the face of doubt, openness prevails,” so in general, “The Government should not keep information confidential.” In the second Memorandum, the President affirmed that his “Administration is committed to creating an unprecedented level of openness in Government” considering that “openness will strengthen our democracy and promote efficiency and effectiveness in Government,” adding that: “*Government should be transparent. Transparency promotes accountability and provides information for citizens about what their Government is doing.*”³

This whole concept of transparency in Government responds to the political idea of the “the crystal house” image (*la maison de verre*), that after so many years of opacity began to be developed, associated with the symbolism of the visible and accessible, in contrast to what is closed, mysterious, inaccessible or inexplicable; being transparency related to the sense of tranquility and serenity that results from what can be dominated or rationalized, in contrast to the anguish and perturbation caused by what is mysterious or unknown.⁴

This concept of transparency has been one of the key elements that in the evolution of Public Administration has helped the transformation of the traditional Bureaucratic State into the current Democratic Administrative State of our times, more devoted to citizens than to the King or to the bureaucracy. That Bureaucratic State was the one characterized by Max Weber as an organization seeking “to increase the professional knowledge superiority of public officials precisely by means of secret and of the secrecy of their intentions.”

³ January 21, 2009. Presidencial Memoranda, in www.whitehouse.gov

⁴ Jaime Rodríguez-Arana, “La transparencia en la Administración Pública,” in *Revista Vasca de Administración Pública*, n° 42, Oñati 1995, p. 452.

That is why, he said, bureaucratic governments, because of their tendency, are always “governments that excludes publicity.”⁵

On the contrary, in the contemporary world, openness and transparency are the rules, and that is why any governmental expression in this sense, as the one announced last month must always be welcomed, even in a country like the U.S., with a long tradition in these matters. As we all know, the U.S. was one of the first countries to approve legislation on transparency and access to public information in 1966, in the Freedom of Information Act. Before that year, since 1951 there existed in Finland a statute on access to public information,⁶ being the common trend of both legislative acts, that their enactment was due to legislative initiative provoked by legislative activism regarding the Executive to impose transparency policies, and in both cases, the legislation was promoted by the opposition parties.⁷

Now, after more than forty years of application of such legislation, the same policy of transparency is defined again but at the initiative of the same Executive.

⁵ Max Weber, *Economía y Sociedad*, Vol. II, Fondo de Cultura Económica, México 1969, p. 744.

⁶ In 1766, a statute was passed in Sweden on the same subject of access to information.

⁷ Regarding the FIOA, its origin drives from the creation during the fifties of both Senate and Representative Commissions in order to resolve the lack of effective access to information according to the provisions of the 1946 Administrative Procedure Act whose provisions, although being very important at the time, were described by Representative John E. Moss, as part of the “bureaucratic theory” that allowed each public entity to decide the type of information considered convenient to reach the public (See Pierre-Francois Divier, “Etats-Unis L’Administration Transparente: L’accès des citoyens américains aux documents officiels,” in *Revue du Droit Public et de la Science Politique en France et a l’étranger*, n° 1, Librairie Générale de Droit et de Jurisprudence, Paris 1975, p. 64 ; Miguel Revenga Sánchez, *El imperio de la política. Seguridad nacional y secreto de Estado en el sistema constitucional norteamericano*, Ariel, Madrid 1995, p. 153). FOIA was later reformed in 1974 and 1976 in order to make it more effective. In the same years, after the *Watergate* and the *Pentagon Papers* scandals, two new statutes were sanctioned: the *Federal Privacy Act* and the *Federal Government in the Sunshine Act*.

Something similar happened in Mexico, in 2002, with the Federal Law on Transparency and Access to Public Governmental Information,⁸ sanctioned at the initiative of NGO's (Oaxaca Group, for instance) and based on a Draft submitted to the Congress by the Executive⁹ (Fox Government), and most important, with the big difference that in this case, the legislation was devoted to guaranty the enforcement of a constitutional right incorporated in the Mexican Constitution in 1977 through an amendment establishing the citizens' right to information.

The Mexican Constitution, in effect, in contrast with the U. S. Constitution where no fundamental right to have access to public information can be found, article 6 provides for the citizen's right to information that the "the State shall guaranty" (article 6). It was then based on this constitutional right and regarding public information, although 15 years later, that the Federal Law was approved having among its purposes to contribute to the democratization of Mexican Society and to guaranty the effective enforcement of the rule of law; to guaranty the right of everybody to have access to information; to seek for the transparency of public service through the diffusion of public information; to reinforce the possibility for public accountability; and to protect personal data on public registries (article 6).

In addition, and in order to broaden the scope of its protection, the Federal Law expressly provided that the right to have access to public information was to be interpreted not only in conformity with the Constitution, but also with the provisions of the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the American Convention on Human Rights; the Convention

See James Michael, "Freedom of information in the United States," in *Public access to government-held information* (Norman Marsh Editor), Steven & Son LTD, London 1987.

⁸ Some articles of the Law were reformed in 2006

⁹ By the *Ministro de Gobernación* Santiago Creel, of the Fox Administration.

on the elimination of any kind of discrimination against women, and the other international instruments ratified by México (article 6); and in addition, to the interpretation given to those instruments by the specialized international institutions, referring to the Inter American Commission on Human Rights and to the Inter American Court on Human Rights.¹⁰

With this legislation a transparency and openness policy began to be implemented in Mexico in order to resolve the never ending conflict between “secrecy” and “openness” that all Public Administrations have experienced. A conflict that has existed not only in the cases of atavistic secrecy situations that for so many years have been the rule, and not the exception, in many of the Latin American Public Administrations, but also, in cases of circumstantial secrecy situations that have developed for instance, as a consequence of the Post War spy

¹⁰ This very important declaration of subjection to international rules and principles, inherent to a democratic government, contrasts with the situation in other countries like my own country (Venezuela), where unfortunately, the Supreme Tribunal of Justice not only has ruled that on matter of freedom of expression the Recommendations of the Inter American Commission are not obligatory in the country, but that the decisions themselves of the Inter American Court on Human Rights are non enforceable in the country. This was decided last December 2008, regarding the decision of the Inter-American Court of Human Rights, on August 5th, 2008, issued in the *Apitz Barbera y otros (“Corte Primera de lo Contencioso Administrativo”) vs. Venezuela* Case, in which the Court ruled that the Venezuelan State had violated the judicial guaranties of various dismissed judges established in the American Convention of Human Rights, condemning the State to pay them due compensation, to reinstate them to a similar position in the Judiciary, and to publish part of the decision in Venezuelan newspapers (See decision on Excepción Preliminar, Fondo, Reparaciones y Costas, Serie C No. 182, in www.corteidh.or.cr). Nonetheless, on December 12, 2008, the Constitutional Chamber of the Supreme Tribunal of Venezuela issued the decision No. 1939, (Expediente: 08-1572), Case: *Abogados Gustavo Álvarez Arias y otros*, declaring that the aforementioned Inter American Court on Human Rights decision of August 5, 2008, was non enforceable (*inejecutable*) in Venezuela, asking the Executive to denounce the American Convention of Human Rights, and accusing the Inter American Court of having usurped powers of the Supreme Tribunal.

syndrome that marked the Cold War era, or of the Post 9/11 War against Terror.¹¹

In order to impose transparency and to guaranty the right to have access to public information, the 2002 Mexican Federal Transparency Law also defined the presumption in favor of publicity, providing that the interpretation of its provisions must be done in favor of the “principle of greatest publicity” in public entities, that is, contrary to secrecy.

But as has always happened with these legislations, the sole declarations of principles they contain do not resolve the conflict between secrecy and openness, particularly because of the broad sort of exceptions also established in the statutes, directly declaring some information as confidential, and leaving in the hands of the Head of Public Administration Offices (article 16) the power to declare other information as “reserved.” In all these cases, the information remains out of the reach of citizens, and regarding it, no right to access of information can then effectively exist.

The problem in the Mexican Law does not refer to the information that its Article 18 considers as “confidential,” referring to the one filed by individuals before Public Administration with their petition, and to their personal data contained in registers that require their consent in order to be released or distributed.¹² The problem exists regarding the power that the statute assigns to the head officials of all public entities to classify certain information as reserved for a period of 12 years

¹¹ That is why the new Memoranda of President Obama have been considered as the reversal of the post 9/11 policy that makes it easier for the government agencies to deny requests for records under the Freedom of Information Act. See the report of Sheryl Gay Stolberg “On First Day, Obama Quickly Sets a New Tone”, *The New York Times*, February 22, 2009, p. A1

¹² Regarding personal information contained in public registries, it is not considered as confidential.

(article 15),¹³ regarding information whose diffusion could compromise national security, public security or national defense; that could affect the direction of international negotiations or relations; that could harm the financial, economic or monetary stability of the country; that could place personal life, security and health in danger; and that could seriously affect law enforcement activities, crime prevention, justice, tax collection, migration control, and procedural strategies in judicial or administrative proceedings before its final resolution (article 15).

It is true that the Law expressly excludes from this broad scope of reserved information those that are related to grave violations of human rights and crimes against humanity (article 14), but undoubtedly, the broad wording used in the enumeration for the classification of information as reserved could lead to contradict the same openness purposes of the Law.

Anyway, in order to avoid this distortion and to control the possible deviations of its application, the Law has created a Federal Institute of Access to Public Information in charge of eventually deciding on the rejection of petitions filed seeking access to information, and for the protection of personal data existing in public entities archives (article 34). The Law, in order to guaranty the right to petition for information, has also established a precise term of 20 days for the official response to be issued; and most importantly, has provided for the presumption of an “affirmative response” (“positive silence”) by considering the petition as granted once the term for response has elapsed without express decision. In this regard, the Transparency Law has changed in this field the general rule established in the 1994 Federal Law on Administrative Procedures that in a contrary sense established the general presumption of “negative

¹³ In the U.S. FIAO, the term is of 25 years.

response” in the absence of a timely answer to petitions, considering in such cases, as its denial (article 17).

Regarding the problem of the exemptions to the right to information and to the right to have access to information, it can be considered as aggravated in the Law, because in addition to all those cases in which the authorities can classify certain information as reserved, the text of the Law has also directly classified other information as such, without the need for any further authority declaration. This refers to information that has already been declared in a previous statute as confidential, like the commercial, industrial, fiscal, banking or trust secrets. Also it refers to preliminary investigations files; to the files of judicial or administrative procedures not yet definitively decided; to public official liability procedures not yet definitively decided; and to opinions, suggestions or points of view given by public officials in all deliberative procedures until a definitive decision is adopted. All these exceptions, unfortunately, are an open door to more secrecy (article 14).

But in any case, the sanctioning of a statute like the 2002 Federal Law on Transparency and access to governmental public information and its enforcement, for anybody that has been involved in Latin American Public Administration reform processes, more than a reform, it can be considered as the beginning of an administrative revolution that although will need many years in order to produce definitive results, has already produced an important sense of openness in Public Administration in Mexico, which can even be perceived in news media reports in a way never before imagined.

The result of this process has also been the approval in 2007 of a new constitutional amendment regarding the same article 6 of the Constitution in order to add to the initial declaration of the right to information that the State must guaranty, also with constitutional rank the following principles that all public entities and agencies must

follow for such purposes. In the first place, the aforementioned presumption of publicity, that is, the principle that all information in possession of any authority or public entity is to be considered public, being the exception to the rule, its temporal declaration as reserved based on public interest motives. That is why, in the interpretation of the constitutional right, the 2002 Federal Law provides for the principle that “greatest publicity must always prevail.” This is also the same presumption in favor of disclosure defined in President Obama’s Memorandum of January 21, 2009, so in case of doubt, openness must prevail; but with the great difference that in México, it is now a provision of the Constitution, as an entrenched right of the people, and not just an Executive policy expressed regarding the application of a statute that can be changed by other governments, as has happened in the past.

The other principles included in the 2007 Mexican constitutional reform amendment, already developed in the Federal Law, are the express provision of everybody’s right to have information related to private life and personal data duly protected; and the right to have cost-free access to public information, to personal data and to its rectification. For such purpose, legislation must provide for the adequate means in order to guaranty access to information and also, simple and prompt review procedures before impartial, autonomous and specialized entities.

The 2002 Mexican legislation was not the first statute on these matters in Latin America. In Colombia in 1985 a Law No. 57 on publicity of official and administrative documents was sanctioned and in January of 2002, before the Mexican Law, in Panama was sanctioned the Law No. 6 on provisions for transparency in public management and on habeas data action. Beside these cases, the fact is that in all the other laws passed in Latin America in the past six years, the Mexican Federal Law has had a definitive influence in their drafting when

referring to transparency and to the right of access to public information.¹⁴ It has been the case of the statutes approved Peru in 2003 (Law No. 27806 on Transparency and access to public information); in Ecuador in 2004 (Organic Law on Transparency and access to public information), and the same year in Dominican Republic (General Law No. 200-04 on the Free access to public information); in Honduras in 2006 (Law of Transparency and access to public information); in Nicaragua in 2007 (Law No. 621-2007 of access to information); and in Chile (Law on Transparency and access to information), in Guatemala (Law on access to public information), and in Uruguay (Law No. 18381 on access to public information and on the *amparo informativo*), the same year 2008.

All these Laws in order to promote transparency of administrative functions in all public entities establish the right of access to information as a fundamental right of all persons; expressly presume that all information produced by public entities is to be considered public, except regarding confidential documents or those declared as reserved; almost all establish the affirmative response presumption in the absence of express answer to petition on information; they oblige public entities to publicize the information concerning their organization or functioning. Nonetheless, in many of these laws, and departing from the Mexican precedent, specific provisions are established for the judicial protection of the right to have access to information, also setting forth for the so called habeas data action, which is a sort of *amparo informativo* as it is called in the Uruguayan Law.

In effect, even though Mexico is the country of birth of the *amparo* action, in these matter of the right to have access to information, the Mexican regime in general term when compared with the other Latin American provisions, failed to guaranty in the Constitution and in the

¹⁴ The Federal law also had a significant importance in the drafting of the States' legislation.

Law the habeas data action, that is, the specific judicial mean designed to guaranty the protection of the information rights without the need to previously exhaust any administrative review recourses. This specific habeas data action, originally established for the protection of personal data and progressively extended for the protection of the right to have access to public information, has been established in the Constitutions of Argentina, Brazil, Ecuador, Paraguay, Peru and Venezuela, in addition to the other judicial means for the protection of human rights like the amparo and the habeas corpus actions. In other countries such recourse has been established by statute (Panamá, Uruguay).

On this matter of judicial protection, the Federal Law in Mexico has only established the possibility to have access to the Judiciary (article 59) in order to challenge the definitive decisions of the Federal Institute of Access to Public Information through a judicial review of administrative action procedure or through an amparo suit; when those decisions are adopted resolving revision administrative recourses filed before it against the final decisions of the corresponding administrative entities denying information (article 49). That is, following the U.S. trend, the possibility to have access to judicial protection of the right to have access to public information in Mexico, is subjected to the previous exhaustion of administrative recourses and decisions, *first*, within the corresponding Public Administration that has the information and denies it, and *second*, before the Federal Institute of Access to Public Information.

This is an important pattern of the Mexican system that contrast with other Latin American legislation, where the access to judicial protection of the right to have access to public information is immediate and direct, without the need to previously exhaust any administrative recourses before Public Administration of Independent Agencies.

It is the case, for instance, of the 2002 Law on Transparency and Access to information of Panamá, promulgated before the Mexican Law, in which the action of habeas data was established in order to guaranty the right of every person to have access to public information as established in the law, in the cases in which the public official responsible for the registry, the archive or the data bank containing the requested information or personal data, denies the information or provides it in an insufficient or inexact way (article 17). In such cases, an habeas data action can be filed before the same Superior Courts competent to decide in general on matters of amparo actions, when the action refers to public officials that are responsible of municipal or provincial registries or archives. In case of public officials with jurisdiction over more that two provinces or in the whole Republic, the competent court to decide the habeas data action is the Supreme Court of Justice (article 18).

This habeas data action must be decided in a procedure governed by the same rules of the action of amparo, without formalities and without the need of attorney's assistance.

In this same sense, the last of the Latin American Laws referred to the right to have access to public information, which is the Uruguayan 2008 Law, also has provided for a special judicial "action of access to information" (*amparo informativo*) that everybody has in order to have his right to have access to information fully guaranteed. This action can be filed by any interested person or his representatives (article 24) against any public official obliged by the Law, when he denies giving the requested information or the information is not released in the terms established in the Law. The competent courts to decide the action are in general the First Instance courts with jurisdiction in civil matters or in contentious administrative matters (article 23), and the procedure to be applied is established in the same Law in a very expeditious way (article 25) and without judicial procedural incidents (arti-

cle 30), providing for a public hearing that must take place within the following three days under the direction of the court, in which the parties must argue their claims and file the corresponding proofs. The final decision must be issued within the next twenty four hours (article 26). In any case, the courts have broad powers to adopt the needed provisional measures in order to protect the right or freedom claimed to have been violated (article 27). The final judicial decision must determine what is needed to be done in order to guaranty the right to have access to public information, within a term that most not exceed more than 15 days (Article 28). These decisions are subjected to appeal and to a second instance review (articles 29).

In the case of Ecuador, where also a Law Organic Law on Transparency and access to public information was passed in 2004, since 1997, the Constitutional Judicial Review Law, in addition to the habeas corpus and amparo actions for the protection of human right, has established the action of habeas data, specifically in order to guaranty any person the right to have access to information related to the claimant or his properties, and to know the use and purpose of the data (article 34). The habeas data recourse that can be filed before any court or tribunal (article 37) has the purpose of seeking from the corresponding entity to give the information in a complete, clear and certain way; to obtain the rectification or suppression of information and to avoid its disclosure to third parties; and to obtain copies and verification of the correction or suppression of information (article 35). Nonetheless, the habeas data action will not proceed when professional secrecy could be affected; when justice can be obstructed; and in cases of reserved documents because national security reasons (article 36). The procedure in the habeas data recourse also imposes the need for the court to convene for a public hearing that must take place in a term of 8 days, and the final decision must be adopted in the following two days (article 38). The defendant must give the information within the next eight days, with an explanation of it (article 39), and the decision is subjected

to appeal before the Constitutional Tribunal (article 42). But in addition to this habeas data action, in Ecuador, the 2004 Organic Law on Transparency and access to public information specifically provides for a “recourse for access to information,” established without prejudice of the amparo action in order to judicially guaranty the right to have access to public information (article 22). This recourse can be filed by anybody whose request for any kind of information established in the Law has been tacitly or expressly denied, whether by the express rejection of the request, of when receiving incomplete, altered or false information, including cases in which the rejection of information is based in the reserved or confidential character of the requested information. The recourse can be directly filed before any first instance court or tribunal of the domicile of the public official having the information, and the court within the following 24 hours must also convene for a public hearing on the matter. The final decision must be issued in no more that two days after the hearing, even if the public official that has the requested information do not show up to the hearing. The requested information must be given to the court within the following eight days, and in case of reserved or confidential information that fact must be proved. When the court finds that this qualification is correct it must confirm the denial of the information requested. In contrary case the court must order the authority to release the information in 24 hours, and this decision can be appealed before the Constitutional Tribunal when the public official sustains the confidentiality or reserved character of the information. In this case, the Ecuadorian Law also assigns the competent courts broad powers to adopt preliminary measures in cases in which the information could be at risk of occultation, disappearance or destruction.

In Peru, the matter of the protection of the right to have access to information is not established in the 2003 Law No. 27806 on Transparency and access to public information, but in the 2004 General Code on Constitutional Procedure, in which in addition to the actions of amparo

and of habeas corpus, the process of habeas data has been also provided. This constitutional process has been established in particular for the protection of the constitutional rights to have access to information and for the personal of familiar intimacy to be protected (article 2, 5 and 6), and in particular, in order to guaranty the access to all information gathered by public entities whatever could be its form of expression, and to know, update, include, suppress or rectify information or data referred to the claimant gathered in any form in public or private institutions giving services of access to third parties. This right includes the possibility to ask for the suppression of to impede the rendering of sensible or private character information that could affect constitutional rights (article 61). The habeas data action can only be filed once the interested person has made the request before the corresponding authority and the same has been rejected, or when filed the request, the authority has not given a response in a term of 10 days or 2 days according to the claimed right (article 62). The corresponding court have the power to request from the defendant all the information it deem necessary (article 63), and the procedure to be applicable is the same established in the Code for the action of amparo, except regarding the need for an attorney that in this case is facultative (article 65).

In addition, the habeas data recourse has been established only for the protection of personal data guarantying the right to have access to official records or data bank that contain it and the rights to rectify or correct such information, in the 1988 Constitution of Brazil, which was the first Latin American country to have constitutionalized this recourse (Article 5, LXXII); in the Constitution of Argentina (1994 Reform) (article 43); and in the 1992 Constitution of Paraguay (article 135). It is also the case of Venezuela where the 1999 Constitution provides for the action of habeas data, in order to guaranty the peoples' right to have access to the information and data concerning themselves contained in official or private registries or data banks, as well as to know about the use made of that information and about its purpose, and to petition be-

fore the competent court for its updating, rectification or destruction in cases of erroneous records or when it unlawfully affects the petitioner's rights (Article 28). The same provision of the Constitution, guaranties the right of everybody to have access to documents of any nature containing information of interest to communities or group of persons. The foregoing is established without prejudice to the confidentiality of sources from which information is received by journalists, or to secrecy in other professions as may be determined by law. Nonetheless, the lack of legislative developments regarding this habeas data action within the authoritarian government that has developed in the country during that past decade (1999-2009) have reduced the scope of this action; having the Constitutional Chamber of the Supreme Tribunal reserved for itself the decisions of the cases.

On the other hand, it must also be mentioned that the important step taken in Mexico in 1977 to guaranty the right to information and to have access to it in the text of the Constitution (article 6), has been followed only by some Latin American countries. This is the case of the 1988 Brazilian Constitution, which contains a declaration regarding the guaranty of "the right of everybody to have access to information" (article 5, XIV). In Colombia, the 1991 Constitution of Colombia only provides for the right to have access to public documents as a right of the opposition political parties (article 112), and in Peru, the Constitution of 2000 establishes the right of everybody to request from public entities without expressing any particular motive, the information needed, and to received it in the term established by law. Only information referred to privacy and those expressly established by law because of security reasons, are excluded; and the information services cannot render information that could affect personal or family intimacy (article 2, 5 and 6). In the case of the 1999 Venezuelan Constitution, the citizens' rights to be informed and to have access to administrative information is also expressed (articles 28 and 147). The Constitution, in effect, establishes the right of all citizens to be promptly and truly informed by

Public Administration regarding the situation of the procedures in which they have direct interest, and to know about the definitive resolutions therein adopted; to be notified of administrative acts and to be informed on the course of the procedure (Article 147). In addition, the same constitutional provision also establishes the individual right of everybody to have access to administrative archives and registries, only subject to "acceptable limits imposed in a democratic society related to the national or foreign security, to criminal investigation, to the intimacy of private life, all according to the statutes regulating the matter of secret or confidential documents classification." The same article prohibits any previous censorship referring to public officials regarding the information they could give referring to matters under their responsibility.

Nonetheless, the most important aspects on this matter is that constitutional declarations of rights to transparency and to have access to public information, and its guaranty by means of statutes like all those that are in force in Latin America, although being a very important step towards the democratization of Public Administration, are not enough in order to guaranty its enforceability.

Other elements are indispensable for such purpose, like for instance, the need for a real configuration of a professional, stable and effective Civil Service that could adopt the principle of transparency as one of its own values. A system of public servants that is subjected to political changes and at the mercy of the changes of governments, or to the political parties' will, or to the will of a Head of State, is completely incompatible with the principle of public presumption of information and of free access, particularly because, on the contrary, secrecy is the principle that can guaranty their survival.

On the other hand, in order to really guaranty the right to information, the previous existence of such information is also indispensable, in the sense that it must be previously gathered in good and safe

organized public registries and archives. A Public Administration without memory regarding its own information, a situation that exists in many of our countries where no culture of preserving information exists or in which a deliberate policy of destruction of historic documents prevail, citizens cannot have a real guaranty to have access to information or to be informed, except regarding what the public official in charge wants to inform or can inform.

Another element is indispensable in order to guaranty the right to have access to public information, and it is the existence of a free press that can diffuse the cases of lack of transparency and that could claim for openness. In this regard, for instance, the progress made since the sixties in the U. S. in these matters, in addition to the Legislative activism, can undoubtedly be credited to the effective guaranty of the freedom of expression and of a free press that have helped and encouraged it. But of course, the media's right to inform is only one aspect of the matter, being the most important one the right of citizens to be informed, and not only what and when the press or other media wants to inform.

Without liberty of expression and freedom of press, no guaranty of the citizen's right to be informed and to have access to public information can be guaranteed,¹⁵ and in fact no possibility exist for ordinary

¹⁵ That is why, in the same way I considered that it was important to stress the significance of the first Executive decision adopted last month by President Obama on his first day in office, proclaiming the policy of Transparency and Openness in Government, it was also important to register the reaction of some reporters assailing the new Government that same day of lack of transparency, only because media photographers were not allowed to witness the second oath given the President that same day by the Chief Justice of the Supreme Court, a fact that, nonetheless, everybody was duly informed through an official photograph. The importance aspect resulting from that situation is that the right of everybody to be informed and to have access to public information cannot just be mistaken with the right of every news media to be present in any public act. The right to be informed is one thing and the right to search for information and to inform is another.

citizen to be inform about when for instance, the lack of transparency mark some governmental actions.

For instance, I began this Presentation by praising the announcements of President Obama in his Inauguration on matters of transparency and openness in Government which was informed to ordinary citizens through the press, and now, one month later, it is also possible for ordinary citizens to be aware of perhaps some retrocession in that policy, also informed by the press, like the state-secret argument made last week by a lawyer of the Justice Department before a U.S. Court of Appeal, in a very criticized case where serious allegations of torture have been made regarding the extraordinary rendition program designed by the previous Administration.¹⁶ That is why, eventually, no possibility to claim for transparency could be really achieved without a free press; and free press can only exist in democracies. That is why transparency and openness in Government are democratic policies, designed to strengthen the democratization of Public Administration, that are incompatible with authoritarian governments.

New York, February 20, 2009.

¹⁶ See John Schwartz, "Obama Backs Off A Reversal On Secrets," in *The New York Times*, February 10, 2009, pp. A12 and A16, and the Editorial on "Continuity of the Wrong Kind," in *The New York Times*, February 11, 2009, p. A30.