

Access to Information Held by the Federal Judicial Branch

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There is no question that the implementation of the Federal Law on Transparency and Access to Public Government Information has been quite difficult and, in some aspects, even chaotic, but still the advances with regard to the situation prevailing prior to this law taking effect are clearly positive.

As part of the learning process that both the authorities as well as individuals have had to go through to understand the meaning and scope of the Law, the case of the federal judicial branch of government has been of particular importance. The courts have, at some points, been overly zealous, but they have also demonstrated a capacity for correction and even a certain modesty in the face of public criticism. It is an approach that speaks very well of the judicial officials and has no less merit despite being singular.

The first regulatory additions decided by the Supreme Court as well as the Federal Judicature Council in further defining article 61 of the Law — which is based on stipulations contained in previous regulations on access to information held by the judicial and legislative branches, as well as the autonomous constitutional bodies — was plagued by some severe limitations that went beyond the sense of the Law and that, very possibly, violated several international treaties in effect in Mexico as regards access to information and freedom of expression. I am referring to agreements 9/2003 adopted by the full Supreme Court and 30/2003 of the Federal Judicature Council.¹ These rulings established, for ex-

¹ The text of these rulings can be consulted in Carbonell, Miguel, *Derecho a la información. Legislación básica* (Mexico: Porrúa, 2003) pp. 129 and subsequent pages. A commentary on these agreements can be found in Carbonell, Miguel, “El

ample that files in criminal and family law cases represent reserved information, which is why they could be consulted only after 12 years had passed, counted from when they were archived.

This situation took a turn for the worse on December 15, 2003, when the *Diario Oficial de la Federación* — the daily gazette — published agreement 13/2003 adopted by the full session of the Court, which modified the previously mentioned ruling 9/2003.² In agreement 13/2003, the Court ruled, among other questions, that the files in criminal and family law cases that had concluded before the Law on Transparency had entered into effect should be considered reserved information for 36 years. Criticism, as could be expected, was not long in coming. Without resorting to legal arguments, the Court extended the timeframe established in the Law on Transparency for reserved information (that is, from 12 years according to article 15 of the Law) and offered a closed and opaque approach that was unjustifiable from any point of view.

The final stop in this journey marked by errors and misunderstandings was the “Regulatory Decree of the Supreme Court and the Federal Judicature Council for the Federal Law on Transparency and Access to the Public Government Information”, approved by the full session of both courts on March 30 and published in the *Diario Oficial de la Federación* on April 2, 2004.

In general terms, and with the expectation that it will pass the difficult tests that await it during its implementation, it can be said that the regulatory decree clearly represents an approach based on greater openness. It overcomes the de-

derecho de acceso a la información y el Poder Judicial de la Federación”, *Derecho Comparado de la Información*, no. 3 (Mexico, January-June 2004) pp. 189-199.

² The Federal Judicature Council also had to amend a very serious error in ruling 30/2003, which it did through agreement 76/2003, approved by the Council session on November 5, 2003.

fects of its predecessors and very positively raises the bar on judicial transparency and openness within the Mexican state.

Among the different comments that could be made in relation to the regulatory decree, I feel that it is necessary to delve further into at least the following aspects:

The first important point to be made is that, contrary to what occurred with the previously mentioned agreements issued during 2003, the new regulatory decree establishes regulations that are specific to the Supreme Court and the other federal judicial branch courts. However, it should be noted that the Electoral Tribunal is not included in the regulatory decree. As is known, the Electoral Tribunal has its own regulatory decree in relation to access to information,³ but since the previously mentioned regulatory decree encompasses the entire issue of access to information, it should have included the tribunal having jurisdiction in electoral conflicts. The important questions to consider are the following: what were the reasons for leaving the Electoral Tribunal outside the domain of the new regulatory decree? what underlying differences exist between the Tribunal and the other federal judicial organs that justify a separate regulatory decree?

The second point that is worthwhile to comment on and that is unquestionably is the most important, is that the previous regulatory decree was changed and in the new version, differences are no longer in relation to the subject matter of the judicial file for effects of accessing its content. It should be recalled that, as has been pointed out in preceding para-

³ This is the General Agreement that establishes the bodies, criteria, and institutional procedures for transparency and access to public information of the Federal Judicial Branch's Electoral Tribunal, which was approved by the latter's Administration Commission on June 9, 2003. The text can be consulted in Carbonell, Miguel, *Derecho a la información. Legislación básica, cit.*, pp. 205 and subsequent pages.

graphs, the previous regulatory decree established exceptions to transparency considerations in criminal and family law cases. The new regulatory decree eliminates these limitations and establishes a general regulation.

The agreements adopted during 2003 offered a very strict interpretation of articles 8 and 14, fraction IV of the Law on Transparency, which place limitations on access to judicial information. In other words, the agreements were based on the understanding that the Law (in article 8) limited access to information to those files involving cases that were already concluded.

The new regulatory decree, on the contrary, clearly indicates that any person will be able to have access to the file in any stage of the judicial process (article 7). The same article, however, establishes a differentiation depending on whether one wishes to consult information derived from the court rulings or information on how the different parties conducted themselves during the judicial proceeding. In the former case, access is immediate, that is, the decisions can be consulted as soon as they have been issued. For the latter case, access is circumscribed to what the parties involved have indicated with respect to opening up their personal data⁴ and to the reserved or confidential nature of the evidence presented by the different sides during the trial. Due to its importance, it could perhaps be useful to include the text of article 7 of the Regulatory Decree, which is the following:

Article 7: The sentences to be implemented and the other public resolutions can be consulted once they are issued and the

⁴ With this in mind, it is important to recall what is stipulated in article 8, first paragraph of the Regulatory Degree. As is known, the right of the parties to oppose the release of their personal data is contained in article 8 of the Law on Transparency, whose text reads as follows: 'The federal judicial branch should make its rulings public once the case has concluded; the different sides can oppose the release of their personal data.'

terms under which access is granted to them will be determined, initially, by the respective access to information offices.

In the case of public rulings handed down even when the respective definitive sentence has not been issued, the access unit will request that the Supreme Court, the Council or the respective jurisdictional organ, furnish an electronic version of such decisions, with the unit having the obligation, depending on the case, to suppress the personal data of the parties involved.

The analysis of the legal, reserved or confidential nature of the evidence and other documentation contained in a judicial file, can be undertaken once the respective definitive sentence has been passed and the case is concluded.

When a file contains evidence and other documentation provided by the parties involving information that is legally considered to be reserved or confidential, the archive cannot be physically consulted. But access will be granted to a printed or electronic version of the rest of the documentation contained in said file.

Based on this norm, the argument can be legally made that access to the information contained in judicial files is available as of the beginning of the legal process, save in the case of the previously mentioned exceptions regarding information provided by the parties involved or when they so indicate that such material should be reserved in relation to personal data. The content of article 7 of the regulatory decree is consistent with the general principle of openness established by article 5 of the same regulation, whose text states that: 'The information held by the Supreme Court, the Council, and the jurisdictional organs, is public, save for the exceptions stipulated in the Law.'

In the 14th whereas clause of the regulatory decree. It is specifically stipulated that the restrictions included in articles 8 and 14 fraction IV of the Law

refer exclusively to the evidence and documentation contained in the judicial files, and therefore the rulings that are issued during the course of a legal proceeding constitute public information once they have been issued, and if they are requested before the respective definitive sentence is handed down, access can be provided in a printed or electronic version of such rulings, even though in this version, and depending on the case, the personal data of the parties involved are suppressed.

The 28th whereas clause, in discussing the same topic, stipulates that ‘in relation to the evidence and documentation contained in the judicial files, access will be granted... once the respective definitive sentence has been issued.’

A third important point has to do with the files that are part of the historical archives of the federal judicial branch of government, which are being safeguarded by the Supreme Court. In the 2003 agreements, strong limitations were established for consulting files in criminal and family law cases that had been archived before the Law on Transparency came into effect. The new regulatory decree changes that restrictive approach and allows for complete consultation of the files, independently of the type of law involved. The first paragraph of article 6 of the regulatory decree stipulates that

the files of federal judicial system cases that have been concluded can be consulted by any person in the offices in which they are kept and during business hours, fulfilling the requirements that guarantee the integrity of the documentation that they contain, which will be established by the respective Transparency Commissions.

The second paragraph of the same article 6 anticipates the possibility, albeit very limited, that the parties in the legal proceedings will oppose their personal data being made available to the public. This paragraph reads as follows:

Of the documentation contained in the files of court cases that have concluded (and) that are being safeguarded by the Supreme Court or jurisdictional organs, data that has been furnished by the parties to the dispute can only be considered reserved or confidential when such a request has been expressly indicated at the moment in which the information was presented in the trial and such a classification is based on the stipulations contained in some international treaty or in a law approved by Congress or the state legislatures.

If there was any doubt on the scope of the stipulations contained in article 6 of the regulatory decree, in its transitory article five, it states that

the physical consultation of files involving jurisdictional or administrative proceedings that had concluded before June 12, 2003 and were safeguarded by the Supreme Court, the Council, or the jurisdictional organs, will be allowed without any further restrictions than those necessary for their preservation.

Another important point involves not making personal data public. In addition to what has already been commented, it would perhaps be worthwhile to point out that the regulatory decree does not allow any exceptions to be made in relation to the names of the parties involved in the litigation, which in any event will be made public.

The second paragraph of article 8 of the regulatory decree establishes the possibility that even when one of the parties has not opposed the release of its personal data in terms of the final part of article 8 of the Law, said data will not be made public when it could 'somehow affect the personal dignity or cause irreparable harm' to the individual concerned. This is a norm that is correct and relevant, provided a restrictive criteria is applied to its interpretation.

What is curious is that even in these cases, the regulatory decree requires that the name of the party involved be re-

leased, as stipulated in the same second paragraph of article 8. In comparative law, both national as well as that of other countries and international law, there are cases in which the name of the parties involved is considered to be reserved information. For example, on occasions, the files are identified as “X, Y, and Z versus Belgium”, to protect the identity of minors or of individuals who have been victims of crimes that generate a special social sensibility (such as those of a sexual nature).

In this sense, it can be reported that in the case of *Newspaper Co. vs. Superior Court*, the U.S. Supreme Court ruled that the advisability of restricting access to judicial information in criminal cases when, for example, a victim is under age in crimes of a sexual character and is presenting testimony⁵. This criteria is quite understandable because it tends to protect the higher interest of the child.

There are cases in which a certain interest can take precedence over the interest to know information on what takes place in a courtroom. This can, at times, include keeping the names of the parties involved as reserved information. Perhaps it would be prudent to make some kind of exception for ‘sensitive cases’, in which the names of one of the parties in a trial would not be released.

An aspect of the regulatory decree that should be positively viewed is its stipulation that the information that proactively should be made available for public access according to article 7 of the Law, should be updated monthly (article 11). This is a measure that is much more committed to transparency than is the case with the corresponding requirement applied to the federal executive branch, which updates its information every three months, in accordance with article 10 of the regulatory decree of the Law on Transparency issued by the country’s president.

⁵ In the case of *Newspaper Co. vs. Superior Court*, 457 U.S. 596.

In conclusion, it can be argued that the regulatory decree issued by the Supreme Court and the Federal Judicature Council represents an advance with regard to the agreements that had been adopted by the same bodies a few months previously. Could it have been possible to have gone further on the level of transparency and access to judicial information? In the current situation in which the Law was enacted, the answer would be negative. Perhaps in the future, if an attempt is made to enact a legislative reform, it would be possible to generate a dynamic favoring a greater informational opening (for example allowing access to the evidence and documentation provided by the parties involved as soon as it is included in the court files).

In any event, the fact is that with the approval of the regulatory decree, Mexican society now has a reasonable instrument for guaranteeing transparency in exercising a right that has increasingly greater importance in the Mexican political system and that is a key component in every democratic system. Only to the extent that an independent judicial system exists and that it adopts its decisions in the public light, can we aspire to consolidate a democratic system.⁶

What is most positive in this whole process is that the federal judicial branch has had the capacity and the sensibility to move from a closed approach characteristic of dictatorial governments to levels of transparency that are more than acceptable in any democratic system. In the whereas clauses of the regulatory decree, this change in direction is justified by appealing to the experience acquired after several months of applying the agreements adopted in 2003 and in response to 'the opinions expressed in the communi-

⁶ On this point, see Carbonell, Miguel, Fix Fierro, Héctor and Vázquez, Rodolfo (editors), *Jueces y derecho. Problemas contemporáneos* (Mexico: UNAM, Porrúa, 2004), especially the essays by Manuel Atienza 'Virtudes judiciales' and Luigi Ferrajoli, 'Jurisdicción y democracia'.

cations media' (whereas clause 12). This aim of introducing such modifications brings honor to the members of the federal judicial system and indicates that a dialogue involving public opinion, academic sectors, and the courts can at times produce results. Hopefully this will be the beginning of a process of greater exchange of ideas among these three sectors. If this occurs, there can be no question that enormous benefits will result for the entire Mexican population.