

## **Draft Law on Transparency and Citizen Access to Public Information**

*Translation by Access Info Europe Staff of version leaked to public on 22 September 2010*

### Summary of the preamble

The preamble stresses that transparency is a practice of good governance and access to information is an indicator of the level of democracy of a government. It establishes that the basis of this law is the principle of publicity in public affairs, enshrined in the Spanish Constitution. It states that the right of access to information is recognized in the constitution by Article 105.1b, which establishes the right of access to archives and register.<sup>1</sup> The preamble also highlights the complementary character of this right to the freedom to receive information, recognized as a fundamental right [Article 20.1.d].

The preamble explains that the aim of this law is to improve the access to registers and documents as established by Article 37 of Law 30/1992 on Administrative Procedure, which it recognises needs improvement, and highlights provisions that regulate this “right” in other Spanish laws. It also asserts that this law was drafted following international standards, noting the access to documents legislation of the European Union and the Council of Europe Convention on Access to Official Documents.

It further highlights some of the changes introduced by this law, such as the fact that any person may request information or the establishment of a more streamlined mechanism to ensure faster access to information.

The preamble goes on to present and describe the various chapters of the law.

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<sup>1</sup> Access Info Europe notes that Article 105.1.b does not fall inside the chapter of the Constitution which guarantees fundamental rights and hence does not establish access to records and archives as a “right” in the same sense as freedom of expression and protection of personal data.

## CHAPTER I: GENERAL PROVISIONS

### **Article 1: Purpose**

This aim of this law is,

- a) to define the right of access to public information
- b) to regulate the procedures for its exercise in the field of administrative acts
- c) to establish mechanisms to ensure transparency of public activity

### **Article 2: Public Information**

1. For the purposes of this law, public information is considered to be that information, whatever its support and the form of expression, elaborated or acquired by the public powers in the exercise of their functions and which is held by them.
2. Public information is also considered to be that which is held by other bodies or subjects which provide public services or exercise administrative authority, in so far as it has been generated or obtained in the exercise of its public activities.
3. Excluded from the right of access is information in the process of being prepared, that which is scheduled for general publication, that which requires additional re-elaboration, and in general that which is merely ancillary and used to support the exercise of public activities, such as notes, drafts, opinions, summaries, reports and internal communications, which do not have an official character and are not destined to become part of a file.

### **Article 3: Transparency of public activity and the principle of active publicity.**

1. Public bodies will make available, preferably by electronic means, information whose release is highly relevant to ensuring transparency of its activities, while respecting the exceptions set forth in this law.
2. There will be electronic publication of directives, instructions, circulars, and notes or replies which relate to the interpretation or application of the law, omitting, where relevant, personal data which appears in them.

## **Chapter II: The Right of Access to Public Information**

### **Article 4: Holders of the right of access**

All persons have the right to access, pursuant to a request, public information with no limitations other than those established in this law. It is not necessary to justify the request.

### **Article 5: Limitations to the right of access**

1. The right of access may only be limited when the publication of the requested information might result in harm to:

- a) National security and defence
- b) External Relations
- c) Public safety
- d) The prevention, investigation, and sanction of criminal, administrative or disciplinary offences.
- e) The administrative functions of supervision, inspection and control
- f) Public economic and commercial interests
- g) The integrity of judicial proceedings and the effective administration of justice
- h) The protection of confidentiality or the secrecy required by the decision-making process
- i) The protection of constitutional rights, including professional secrecy, intellectual property and industrial secrets
- j) Private Life and the legitimate interests of private individuals

2. The limitations will be proportionate according to their goal and to the aim of protecting [the interest] and will apply unless a superior public interest justifies disclosure of the information.

### **Article 6: The right of access to public information and the protection of personal data**

1. Requests for access to information which contains personal data fall under the scope of this law. However, when such personal data exclusively refers to the requestor, the applicable norms will be those of personal data protection.
2. Requests for access to information which contains sensitive data or affects private life will be refused except where there is express and written consent by the data subject, or a law authorises it.
3. For the purposes of this law, sensitive data is considered to be that which refers to ideology, union membership, religion, beliefs, racial origin, health and sexuality.
4. Request for access to information which contains personal data that is not of an intimate nature nor affects private life will be processed when the information is directly related to the organisation, functioning and public activity of the body or entity to which the request has been presented.
5. Notwithstanding the above, access will be refused if it is considered that in the case at hand there are special circumstances which cause personal data protection to prevail over the public interest in releasing the information.
6. Any subsequent use of personal data received through the exercise of the right of access will be subject to the rules on personal data protection.

**Article 7. Partial Access**

1. If the requested information falls under one of the listed exceptions, wherever possible partial access will be granted, omitting the information affected by the exception, unless this results in distorted or meaningless information.
2. When the information contains the personal data of a third persons, access will be granted provided that it is possible to anonymise the requested information without diminishing the transparency aims of this law.
3. If partial access is granted, the withholding of the information falling under exceptions shall be guaranteed, as should the notification and evidence of [which information] has been withheld.

**Article 8: Scope of time limits**

The limits on the right of access to information contemplated in this Chapter will only apply during the period of time determined by law or while the reasons which justify them still hold.

### **CHAPTER III: PROCEDURE FOR ACCESSING PUBLIC INFORMATION AT THE ADMINISTRATIVE LEVEL**

#### **Article 9: Public information in the field of administrative activity**

1. The procedure set out in this Chapter applies to the information held by the public administration, public law bodies which are dependent on or linked to the public administration, including public universities, and to public law corporations and other physical or legal persons which provide public services or exercise administrative powers.
2. This procedure will also be applied to public powers not included in the preceding clause with respect to information related to their administrative activities. The publicity of the rest of their activities will be governed by specific norms.

#### **Article 10: Access to information requests**

1. Requests should be directed to the organ or entity who holds the information and will be decided upon by the competent body operating under the rules of each entity, which will be published in accordance with the provisions of Article 17.1.a) of this law.
2. The request can be sent by any medium, including electronic, provided that the following information appears:
  - a. the identity of the requestor
  - b. a precise indication of the requested information, without the need to indentify a concrete document or file
  - c. where relevant, the preferred format for receipt of the information,
  - d. a contact address to which communications related to the request can be sent.
3. When a request for information is formulated in an imprecise manner, the requester will be asked to clarify it, giving them a period of ten days and in the case of no response taking the request as withdrawn. To this effect, assistance will be given taking into account, where appropriate, the special needs of some groups [of requesters].
4. The requester may state the reasons for making public the information. This motivation can never be demanded and its absence will never justify the competent body from answering within the conditions established by this law.

#### **Article 11: Reasons for non-acceptance of requests**

A motivated refusal to process the request will be given when

- a) it refers to information excluded from the right of access or which is not held by the organ or body to which it has been sent, except when that organ or body knows which is the responsible body, in which case they will transfer [the request], informing the requestor about this.
- b) it is considered abusive for its manifestly unreasonable or repetitive character, which is not justified by the goals of transparency pursued by this law.

#### **Article 12: Third party interventions**

1. When requests refer to information that affects the rights or interests of third parties, as defined in articles 5 and 6, the body charged with taking a decision will forward the request to those affected whenever their representations could determine the final decision [about whether to release the information]. The forwarding of this request will be carried out without mentioning the identity of the requester and within a 20 day time limit.

2. The time limit for taking a decision on the request will be suspended by the forwarding of the request until the affected third party makes his position known or until 20 days have passed [from the forwarding of the request].

#### **Article 13: Collaboration between public administrations**

When the information requested is held by a body or entity to which the request was presented but was received from another public body which is the author or creator of the information in question, the information requests will be passed to that body which will decide about access, letting the requester know that this has been done.

#### **Article 14: Time frames for the decisions, and the meaning of silence**

1. Decisions on access requests will be taken and communicated to the applicant as soon as possible, and in any event, within a maximum time limit of 30 days starting from the day on which the competent body receives the request; without prejudice to articles 12 and 13.

When the volume or complexity of the information requested make it impossible to comply with the timeframe, this can be increased by another 30 days, in which case the requester shall be informed within 10 days from the receipt of the request.

2. If, within the maximum time limit prescribed for the decision and notification [of a decision] no response has been received, the requester should submit a confirmatory application to the competent body within ten days, failing which the request will be understood as having been withdrawn. If, during the 30 days following the submission of this confirmatory application, no response has been received from the competent body, it should be understood that the request has been granted [=positive administrative silence].

#### **Article 15: Decision**

1. The decision will be in writing and will be communicated to the requester and, where applicable, to the affected third party. When the request is granted, totally or partially, it will indicate the means, and where applicable, the time-limits and conditions for access, which should guarantee the effective enjoyment of the right and the integrity of the information.

When the decision grants total or partial access to information affecting a third party that has objected to its release, the information can only be accessed once the time limit for the third party to submit an appeal has passed with no appeal having been presented during that time.

2. Decisions that deny, wholly or partially, access to the information requested must be motivated, as must decisions granting access in which a third party has been involved, and those decisions in which access is granted in a different manner to that initially requested.

When the mere indication of the existence or not of information could invoke one of the exceptions to the right of access, this will be stated.

3. In the case that a negative decision be founded on the existence of intellectual or industrial property rights of third parties, if the identity is known, the physical or legal person involved, or alternatively the information provider, will be identified.

4. Decisions on subjects contained within this law put an end to the administrative proceedings and are to be appealed following administrative litigation proceedings, regardless of the bodies or entities involved.

#### **Article 16: Access modalities and fees**

1. When it is requested that information be supplied in a specific format, access should be given in this format except:

- a) when the information has been previously published and the requester can easily access it; in which case, the public body can opt to inform the requester about where they can access the information.
- b) when it is not possible to make available to the requester the information in the form chosen, in particular in cases in which *in situ* access could cause a loss or harm to the original support, or when it is not possible to make a copy in the requested format due to the inexistence of technical equipment, or when the modality of access chosen could affect intellectual property rights.

2. Access *in situ* to information will be free of charge. In the case of archives, libraries and museums, costs will be decided by the specific legislation.

#### **Article 17: Complementary measures**

1. The organs and entities included in the scope of this procedure will take additional measures to ensure the effective enjoyment of the right of access to public information. To this effect:

a) They will inform to the citizens about the issues and activities under their competence and about the right of access to information and the ways they can exercise it. they will also inform about the department, service or entity competent to decide on the request for access to information.

b) They will train the people who will be in charge of implementing or deciding on the procedures and practices set forth in this law.

c) They will establish rules for managing the information that will make it easy to locate and release, as well as clear and pre-established procedures for the conservation and destruction of documents.

2. The administration will promote the use of the network of offices for attention to citizens (Red60) for a ensure compliance with the provision of this law.

3. All Ministries will maintain permanently up-to-date and available to the public in the corresponding information units and on their websites the organigram of the organisation and its dependent bodies, informative guides about administrative procedures, the services and benefits available from the Ministry and its public bodies, and will include in their respective Service Menus information about the content of the right of access and the procedures to make it effective, as well the proactive publication measures undertaken.

4. At the level of the National State Administration there shall be publication on the respective websites the ministerial budgets and those of their public bodies, with a description of the budget elements and the data necessary to follow their execution.

5. Economical and statistical information in power of the administration whose publication is particularly relevant will be published in a periodic and foreseeable manner, in an accessible format, giving the sources, methodological notes and models used.

**CHAPTER IV**  
**APPEALS TO THE SPANISH AGENCY FOR DATA PROTECTION AND ACCESS TO INFORMATION**

**Article 18: Appealing to the Spanish Agency for Data Protection and Access to Information**

1. The information requestor and affected third parties, may make a complaint to the Spanish Agency for Data Protection and Access to Information against the decision on access in the procedure established in the previous chapter delivered by a General Administration of the State or by a subsidiary or linked to it or whose activity is under their control or supervision.

That complaint, which is optional, replaces the administrative appeal, under 10 under Article 107.2 of the Act 30/1992 of 26 November on the legal system of Public Administrations and Common Administrative Procedure.

2. The complaint must be lodged within a maximum of thirty days from the day after notification of the decision.

3. Once the complaint is received, the agency shall transmit it to the body or entity who holds the information, so that they provide, along with their claims, the facts, within a deadline of ten days.

The complaint will also be transferred to anyone who has intervened in the prior procedure, with a deadline of ten days to make observations [or objections].

4. Once the information and observations have been received, or the deadline has passed, the Spanish Agency for Data Protection and Access to Information Director will take a decision. The decision will be notified to the claimant, to the body or entity who holds the information, and when appropriate, to third parties concerned. If the decision grants access, the modality of access and the deadline to make it effective should be indicated. That deadline will start after the deadline for a legal challenge appeal is over and if no appeal has been launched.

5. The deadline for decisions is two months. In case of silence from the Agency, the complaint will be understood to have been rejected.

**Additional Clause I**

1. The right of access to information generated, obtained and held by legislative or judicial bodies in the conduct of their functions will be exercised according to their norms of organisation and functioning. Access to the Constitutional Court, the General Council of the Judicial Power, and the Court of Accounts will also be exercised according to their norms of organisation and functioning.

2. Unless expressly provided otherwise, the provisions contained in Chapters I and II of this Act shall be regarded as common rules of the right of access to public information.

**Additional Clause II**

1. For those with the status of interested parties in an ongoing administrative proceeding, the access to documents relating to such proceedings shall be governed by the law on administrative procedure.

2. Specific rules will apply to access to the states secrets, the civil register, the property register, the companies register, the register of criminals, public statistics, the electoral register, the register of

inhabitants (“*padron*”), administrative registers used for Administration of Justice, health information, and other materials which have a specific regime of access to information.

3. The provisions of this law will apply to access to environmental information, [information] destined for commercial reuse, and [information] held in historical archives, unless foreseen their respective regulatory norms. The Spanish Agency for Data Protection and Access to Information will exercise its functions with respect to the application of those norms at the state level.

4. The provisions of Chapter II of this Act shall apply to privately owned files supported, in whole or in part, with public funds.

**Additional Clause III. Modification of article 37 from law 30/1992 about Legal Regime of Public Administrations and Common Administrative Procedure**

Article 37 of law 30/1992 on the Legal Regime of Public Administrations and Common Administrative Procedure will now state:

*"Article 37. The right of access to public information:*

*Citizens have right to access to public information in the terms and conditions established in the Law on transparency and access of citizens to public information."*

**Additional Clause IV. Modification of article 70.3 from the Law 7/1985 that regulates the basis of the local regime.**

Article 70.3 from the Law 7/1985 that regulates the basis of the local regime, will now state:

*"All citizens have the right to obtain copies and certificates accrediting arrangements of local government and their precedents, as well as to search files and records in the terms set forth in Law X/X of X of X on transparency and access of citizens to public information"*

**Additional Clause V: Modification of Chapter VI of Organic Law 15/1999 of 13 December on Protection of Data of Personal Character**

1. The Spanish Agency for Data Protection will now be called Spanish Agency for Data Protection and Access to Information.

The references to the Spanish Agency for Data Protection Act 15/1999, of December 13, Protection of Personal Data in the standards referred to in the third transitional provision of this Act, as well as any other regulations, shall be construed as made to the Spanish Agency for Data Protection and Access to Information.

2. The first paragraph of Article 37 shall read as follows:

I. The functions of the Data Protection Agency and Access to Information are:

a) To ensure compliance with data protection legislation, transparency and access to information and monitor their implementation, particularly with regards to rights to information, access, rectification, opposition and cancellation of data.

b) Issuing permits under the Act or its regulations.

c) To issue, if any, and without prejudice to the competence of other organs, the precise instructions to adequate the treatments to the principles of this law and legislation on transparency and access to information.

d) Responding to petitions and complaints from those who are affected.

- e) To issue non-binding legal opinions at the request of the [bodies obliged under this law] on complying with the provisions of data protection legislation and on transparency and access to information.
- f) Providing information to people about their rights regarding treatment of personal data and transparency and access to information.
- g) Requiring those responsible and in charge of the processing [of data], after hearing them, to adopt measures necessary to adapt the data processing to the provisions of this law and, where appropriate, order the cessation of treatment and the cancellation of the files, when not in accordance with its provisions.
- h) Requiring those responsible and in charge of access to public information, to adopt measures necessary to ensure the effectiveness of legislation on transparency and access to information and, where appropriate, order the disclosure or the reservation of public information, as appropriate.
- i) To exercise disciplinary powers in the manner prescribed in Title VII of this law.
- j) To report, on a mandatory basis, on draft of general legislation which develops this law or the legislation on transparency and access to public information.
- k) To obtain from those responsible for the files and those in possession of public information such assistance and information deemed necessary for the performance of their duties.
- l) To ensure the publicity of the existence of files with personal data, for which regularly a list of these files will be published with additional information that the Director of the Agency should deem necessary.
- m) To write and submit an annual report to the Ministers of Presidency and Justice.
- n) To control and issue necessary permissions in relation to international flows of data, and perform the duties of international cooperation on protection of personal data.
- o) Ensure compliance with the Law on the Public Statistics states regarding the collection of statistics data and statistical confidentiality and to give precise instructions, issuing opinions on the security of the files kept solely for statistical purposes and exercising the power referred to in Article 46.
- p) Any others conferred by law or regulations.

3. The Consultative Council establish in Article 38 will include "A representative of archivists and librarians, as proposed by the Spanish Association of Archivists, Librarians, Archaeologists, Museum workers, and documentalists."

#### **Final clause I: Competences**

In relation to the implementation of this law by government departments, Chapters I and II, Chapter III, except paragraphs 2 to 5 of Article 17 and Additional Provisions second, third and fourth, are held under 10 provisions of Article 149.I.15a of the Constitution, which places the competence on the basis of the legal regime for public administrations and common administrative procedure.

#### **Final clause II: Entry into force**

This Law will come into force 3 month after its publication in the Official Gazette (*Boletín Oficial del Estado*.)