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Title: Evolution of freedom of information related law in Spain: new prospects for a more open government

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Abstract

The evolution of FOI law in Spain over the last 30 years is analysed. The process starts with the Constitution of 1978 and goes on with a series of FOI related laws on the management of public administration services, the automatic processing of personal data, the access to environment information, as well as other technological legislation. This legislative package in some ways has contributed to foster and improve freedom of information in the Spanish public and private context. It is concluded that the right to general access of public information in Spain is totally guaranteed but it should be properly recognized with a specific law. Nevertheless, at present Spain lacks a real "Freedom of Information Act".

Introduction

It is now widely recognized that the culture of secrecy which has been a normal way of working of governments for centuries is no longer feasible in the present information and knowledge society. Governments in the knowledge society must provide information to be considered efficient. So, the transformation has begun and it is no longer possible to tell citizens that they have no right to know. As a result, a new era of government transparency is being promoted.

Access to government records and information is an essential requirement for modern government. Access facilitates public knowledge, democratic participation and discussion. It provides an important guard against abuse, mismanagement and corruption. It can also be beneficial to governments themselves – openness and transparency in the decision making process can assist in developing citizens' trust in government actions and in maintaining a civil and democratic society.

The main factor for the adoption of freedom of information (FOI) related laws in Spain was the transition from dictatorship to democracy in 1975 with the publication of the Spanish Constitution in 1978, as well as the process of modernization and adaptation to the new information society principles. Therefore, there is a double reason for FOI laws: a political

approach due to the change in government form and a technological perspective provoked by the expansion of the Internet into everyday life which has increased demand for more information by the public, businesses and civil society groups. Inside governments, the need to modernize record systems and the move towards e-government has created an internal constituency that is promoting the dissemination of information as a goal in itself.

The main objective of this article consists of analysing the most important legislative texts related to FOI passed in Spain and providing an up-to-date assessment of the present situation on freedom of information in Spain.

The Constitution of 1978

The current Spanish Constitution was passed in 1978 and was inspired by the desire to make Spain an advanced society. Its preamble proclaims the will of the Spanish people to "establish an advanced democratic society" and "promote the cultural and economic progress in order to ensure a worthy quality of life for all". So the Spanish Constitution can be identified as the basis for freedom of information legislation in Spain. In this context, it is worthwhile analysing some of its articles relating to information access.

In Article 20.1d the right to know is recognized as one of the "fundamental rights and public freedoms". The article establishes the right to "freely communicate and receive true information through any medium of dissemination. The law shall regulate the right to invoke the clause of conscience and professional secrecy when exercising these freedoms". This article tries to make very clear that the law will not tolerate the systematic infringement of the principal of transparent information practiced by the former regime (Cornella, 1998).

Article 20.2 establishes that "the exercise of these rights cannot be restricted by any form of prior censorship". Villaverde (1995) has discussed Article 20.1.d. at length, maintaining that its recognition of the right of access to "true" information is one of the keys to the democratic system. But from the standpoint of information, the article is not very clear as this "right to be informed" is directly linked to communications media, regardless of their type. In other words, it appears that legislators were more concerned with establishing a principle that would prevent prior censorship than in recognizing the general principle of the right of access to information.

Article 105.b states that the Constitution is not clear on public rights to information. This article deals with public access to government information and begins with the controversial statement, "the law shall regulate" rather than clearly stating that what follows is a

fundamental right. It specifies that "[the law shall regulate] public access to government archives and registers, except in those cases in which access would jeopardize State security or defence, the investigation of crimes, or individual privacy". This article is developed in the Law of 1992 on Rules for Public Administration which will be discussed further on. Suffice it to say here that guaranteeing public access to government information does not necessarily mean that government agencies have a duty to actively disseminate the information in their power.

Article 18.3 establishes that "the secrecy of communication, particularly via postal, telegraph and telephone services, shall be guaranteed unless a court decision is made to the contrary". In a similar way, Article 18.4 establishes that "the law shall limit the use of computerized information in order to guarantee the honour and privacy of all citizens and their families and the full exercise of their rights".

As mentioned above, Article 105.b of the Spanish Constitution states that "[the law shall regulate] public access to government archives and registers, except in those cases in which access would jeopardize State security or defence, the investigation of crimes, or individual privacy". But it is not clear from the wording of the article whether it recognizes that the public's right of general access to information is a principle as described above, or if it is a supplementary right of the democratic system, which guarantees that people with a legitimate interest (because they are involved in a court case, for example, or because the files contain personal information about them) can have access to government files. From the citizen's viewpoint, the important matter is what information can be consulted and by whom. In order to reply to these questions, the Law 30/1992 of November 26th, on Rules for Public Administration, which specifically governs the right of access to public archives and registers, is going to be analysed.

The 1992 Law on Rules for Public Administration

This law regulates the access to government records and documents by Spanish citizens and includes rules for the access of persons to administrative proceedings.

In accordance with this law, documents can be withheld if the public interest or a third party's interest would be better served by nondisclosure or if the request would affect the effectiveness of the operations of the public service. Access can also be denied if the documents refer to government actions related to constitutional responsibilities, national defence or national security, investigations, business or industrial secrecy or monetary policy. Access to documents which contain personal information is limited to the persons named in the documents. There are also restrictions for information protected by other laws including

classified information, health information, statistics, the civil and central registry, and the law on the historical archives (Banisar, 2004, p.80).

The denial of access to information accessing can be appealed administratively. Therefore, Public Administration is also required to maintain a registry of documents and to publish rules and decisions.

Article 35.a of this law recognizes the right of private citizens "to know, at all times, the status of any procedures in which they are interested parties and to obtain copies of any documents forming part of these procedures". It thus becomes imperative to define what is meant by an interested party. The answer is found in Article 31, which states that "interested parties in administrative procedures are considered as a) those who institute such proceedings by virtue of their individual or collective rights or legitimate interests ; b) those who have not instituted the procedure, but have rights which may be affected by the decision made, and c) those whose individual or collective legitimate interests could be affected by the decision and who appear in the court proceedings before a final decision has been made". This article thus guarantees the right of access to public information as specified above, but does not guarantee the right of general access to public information (Cornella, 1998).

Furthermore, Article 35.h recognizes the right of "access to government registers and archives on the terms established in the Constitution and in this or other laws". For a better understanding of this article, it is necessary to analyse Article 37.1 which states that "citizens have the right of access to the registers and documents which are contained in government archives as part of a file, regardless of the form of expression, written, recorded or in image, or the type of medium in which they appear, provided that these files refer to proceedings concluded by the date of application". The subsequent paragraphs of Article 37 specify the exceptions to this right, which are aimed basically at safeguarding the public interest and individual privacy. The wording makes it difficult to interpret it as establishing a principle of general access to public information; first, because it never clearly defines the meaning of "file" and second, because access is limited to files which have already been closed.

Lastly, it should be noted that Article 38.3 of the law stipulates that "general registers, as well as all government records of documents and correspondence received from private parties or government agencies, should be stored in an electronic format". That is to say, the law recognizes that information technologies should be used to manage registers. This may indicate that the law is still more concerned with computer infrastructure than with using information technologies to guarantee the public's general access to government information.

The 1992 Organic Law on Automatic Processing of Personal Data

Organic Law 5/1992 of October 29, on Automatic Processing of Personal Data (LORTAD), which generally aims to establish a regulatory framework that prevents unlawful trade of personal data in possession of either the public or private sector.

The LORTAD is based on a series of principles related to freedom of information that are mentioned in the following paragraphs:

- Files containing personal data cannot be used for any purpose other than that for which they were originally intended, except with the consent of the parties concerned.
- Personal data contained in files should be "accurate and up-to-date".
- All citizens have the right to know what information is contained in their files and to correct or cancel registrations in which such data appear.
- Protection of certain data is particularly strict: opening files for the exclusive purpose of storing personal data that reveal ideology, beliefs, race or social status is strictly prohibited and inclusion of any of such data in any file must be expressly authorized in writing by the parties concerned.
- Those people responsible for files containing personal data must take the security measures necessary to ensure that such data will not be lost, altered or handled without authorization, and undertake to keep them a professional secret.

Article 11 is particularly important as it stipulates the conditions under which creators of files containing personal data are permitted to assign rights of these files to a third party. Under the terms of the article, "personal data...may only be assigned [to third parties] for purposes directly related to the legitimate activities of the assignor and the assignee and with the prior consent of the party concerned". There are, of course, a number of exceptions (as, for example, when the information is taken from public sources such as telephone books). Paragraph 3 of the article specifies that "the consent [of the party concerned] will not be valid unless it is given to a specific or specifiable assignee or if the purpose of the assignment is not clearly stated".

Article 19 prevents government departments from interchanging data for purposes other than those for which the data files were originally created.

It is evident that one of LORTAD's principal objectives is to prevent trading in personal data, whether by publicly or privately owned organizations or bodies. Before the law came into effect such transactions were quite common in Spain. Moreover, some years later, in 2002,

the Law on Information Society Services and Electronic Commerce would establish some specific criteria for the usage of personal data and their management in an electronic environment.

Law 38/1995 on the right of access to information relating to the environment

This law implements the European Directive 90/313/EEC on Access to Environmental Information, repealed by Directive 2003/4 of 28 January 2003. It was adopted after the European Commission found that the above mentioned Law on Public Administration was not adequate and started infringement proceedings against Spain in 1992. The incorporation of Spain to the European Union thus fostered the adoption of European legislation related to access to information and it can be considered of benefit to Spanish citizens and business.

The 1998 General Telecommunications Law

The obligation imposed by the European Union to liberalise telecommunications, coupled with the growing proliferation of information dissemination technology, forced the Spanish government to establish various rules and regulations to get rid of the telecommunications monopoly without ceasing to offer this public service. Therefore, after having produced specific rules and regulations to liberalise the telephone service, the use of different types of technology was promoted (Caridad, 2001, p. 54).

Some of the main important objectives of this law are linked to the freedom of information and equal access to telecommunication services, such as:

- a. To grant the administration the faculties needed to ensure free market conditions favouring the people's right to access universal information services.
- b. To regulate the public service obligations of the public network operators, in order to guarantee the protection of general interests in the liberalised market.
- c. To distribute competence on telecommunications among the various bodies of Spain's State Administration.
- d. To make the rates applied to these technological services uniform.

This and other laws to this respect have led to the existence of several telecommunications operators in Spain, thereby allowing for a decrease in prices and the opportunity to select various forms of access to telecommunications services, including the Internet, from among different operators and access providers. That is to say, offering a better access to information services.

The 1999 Organic Law on the Protection of Personal Data

This is the Spanish law that would be equivalent to a "Data Protection Act" which allows individuals to access and correct records about themselves held by public and private bodies. It is worthwhile pointing out some relevant articles related to freedom of information topics. Article 4 establishes that personal data shall be stored in a way which permits the right of access to be exercised, unless lawfully deleted.

Article 15 is concentrated on the right of access and regulates that the "data subject shall have the right to request and obtain free of charge information on his personal data subjected to processing, on the origin of such data and on their communication or intended communication". Moreover, "the information may be obtained by simply displaying the data for consultation or by indicating the data subjected to processing in writing, or in a copy, fax or photocopy, whether certified a true copy or not, in legible and intelligible form, and without using keys or codes which require the use of specific devices.

Article 28 refers to data included in sources accessible to the public. In this field, the law regulates that personal data contained in the publicity register or on the lists of persons belonging to professional associations must be limited to those strictly necessary to fulfil the purpose for which each list is intended. The inclusion of additional data by the bodies responsible for maintaining these sources shall require the consent of the data subject, which may be revoked at any time. Furthermore, data subjects shall have the right to require the body responsible for maintaining the lists of professional associations to indicate, free of charge, that their data may not be used for the purposes of publicity or market research.

Finally, this law is enforced by the Spanish Data Protection Authority, also called Data Protection Agency, which is considered a body under public law, with its own legal personality and unlimited public and private legal capacity, which acts fully independently of the public administrations in the performance of its duties.

The Spanish Ombudsman's opinion

The Ombudsman recommended in 2002 that agencies make access with 15 days for files for with an interest and 30 days for general access and not overuse the exception on effectiveness of the public administration. Government bodies are also required to maintain a registry of documents and publish acts and decisions. But unfortunately, this situation is not always accurate.

An extensive report published in October 2005 by Sutentia and The Open Society Justice Initiative concludes that nearly 60 percent of the requests filed under the Law 30/1992 for the study were unanswered. From requests filed under the Law 38/1995 on the right of access to information relating to the environment, only 30 percent were answered correctly, while 20 percent were answered late and the remaining 50 percent were never answered. The report recommends that Spain needs to adopt a FOI law according to international standards because Law 30/1992 is not enough to guarantee an adequate right of access.

There was considerable controversy about information over the blame for the 11 March 2004 Madrid train bombings. The government selectively declassified documents in March 2004 after it lost the election in an effort to show that ETA was responsible for the bombings. The Prime Minister, Jose Luis Rodriguez Zapatero said in December 2004 that his predecessor Jose Maria Aznar had destroyed all computer files relating to the investigation of the bombings when he left office. Zapatero received the €12,000 bill by the computer consulting firm for the destruction of the files (Banisar, 2006). Therefore, this is an example on the big gaps that future Spanish law on FOI should cover.

Other legislation related to freedom of information

Once mentioned the most relevant Spanish legislation related to freedom of information, it is worthwhile pointing out some other legislation which includes specific topics linked to freedom of information and which can be used to provide a better assessment of the present situation in Spain (IDABC, 2005). In the last few years Spanish law has undergone a huge development in different technological fields, such as: e-commerce, e-communication, e-government and e-signatures. Nevertheless, a freedom of information act has not been developed.

In the field of **e-commerce legislation**, the Law 34/2002 on Information Society Services and Electronic Commerce of July 11th, 2002 implements the EU E-Commerce Directive (2000/31/EC).

The law states that the operators of electronic communications networks and services and the service providers may not use the data held there under for purposes other than those indicated in the paragraph below or other purposes permitted by the Act and must take appropriate security measures to avoid the loss or alteration of such data and unauthorised access to such data.

Article 21 on prohibition of unsolicited commercial communications through electronic mail or equivalent means of electronic communication establishes that it is prohibited to send advertising or promotional communications by electronic mail or another equivalent means of electronic communication when not solicited or expressly authorised in advance by the recipient of the communications. Moreover, article 22 includes that “when service providers employ devices for the storage and recovery of data from terminal equipment, they shall inform recipients of the use and finality of such devices in a clear and comprehensive manner, offering recipients the opportunity to refuse, by a simple means and free of charge, to allow their data to be processed”.

In the field of **e-communications legislation**, the General Telecommunications Law 32/2003, of 3 November 2003, implements into Spanish law the new EU regulatory framework for electronic communications. Transposition was completed with the adoption of the new Regulation on electronic communication markets in December 2004.

Article 33, dedicated to secrecy of communications, holds that operators who run public electronic communications networks or deliver publicly available electronic communications services must guarantee the secrecy of communications in accordance with articles 18.3 and 55.2 of the Constitution and must therefore take the necessary technical measures accordingly.

Article 34 on personal data protection establishes that operators who run public electronic communications networks or deliver publicly available electronic communications services must guarantee that in the exercise of their activity personal data is protected pursuant to current legislation.

The operators to which the paragraph above refers must take the appropriate technical and management measures to uphold security in the operation of their network or in the delivery of their services, with the purpose of guaranteeing the levels of personal data protection required by the rules implementing this Act on this matter. Where there is any particular danger that the security of the public electronic communications network may be violated, the operator running said network or delivering the electronic communications service shall inform subscribers of said risk and the measures that should be taken.

In the field of **e-government legislation** it is important to point out that there is currently no overall e-government legislation in Spain. However, a number of decrees regulate generic aspects of the development of e-government in the country, in particular Royal Decree 263/1996 of 16 February 1996 on the use of electronic and telematic techniques in the public

administration (modified by Royal Decree 209/2003 of 21 February 2003 on the use of telematic registers and notifications and of electronic certificates) and Royal Decree 589/2005 of 20 May 2005 on the organisations in charge of electronic administration.

E-government services represent an opportunity for improving access to public information, achieving administrative transparency and more intensive citizen participation. Nevertheless, as the implementation of e-government services in Spain is based on efficiency and economic criteria, the development of different services is not equal. Thus the Spanish e-government fiscal services are the most developed and sophisticated in Europe, and an example to other countries (Lara, 2002). It can be said that e-government legislation is helping to take into consideration more freedom of information resources, but its implementation is not based on general access to information criteria.

In the field of **e-signatures legislation**, the Law 59/2003 of 19 December 2003 on Electronic Signature replaced a Royal Decree of 1999 on Digital Signatures. It transposes the European Directive 1999/93/EC on a Community framework for electronic signatures, and is aimed at promoting a widespread use of electronic signatures for e-commerce and e-government. Amongst other provisions, the law clarifies relevant concepts and terminology, introduces a electronic signature for legal entities, promotes certification industry's self-regulation, establishes a legal framework for the future development of a national electronic ID card and regulates the electronic access to public information services.

Conclusions

The legal situation in Spain from the late 70s to the early years of the twenty first century has undergone very deep changes. A series of laws on the management of public administration services, the automatic processing of personal data, the access to environment information, as well as other technological legislation related to freedom of information has been passed. This package of legislation provides a clear idea of the present situation in Spain. It is important however to highlight the fact that Spain lacks a real "Freedom of Information Act".

If the right of general access to public information in Spain is to be properly recognized and guaranteed, the country probably needs a specific law, similar to other European countries. Spain is one of the few countries in Europe that does not have a dedicated access to information law. Monitoring studies, notably that carried out by the Open Society Justice Initiative and Sustentia in 2004, have shown that the current provisions of administrative law are failing to guarantee the right to information.

The lack of a specific FOI law is hindering the development of the information industry in Spain, preventing it from occupying a position consonant with that of the country's economic position on the world stage. The main reason for this is that in Spain, as in the most other countries, the public sector is the principal producer of information, much of which cannot be used without the participation of the private sector. Public-private synergies should be encouraged. But without a law on general access to public information, information will not be transparent enough to make this possible. That is to say, the inexistence of a specific FOI law can cause long term economic constraints on Spain's economy.

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