**ACCESS INFO EUROPE**

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**Comments on Spain’s**

**Open Government Partnership Action Plan (Draft)**

As one of the 55 members of the Open Government Partnership (OGP), the Spanish government will present on 17 April in Brazil its Action Plan for promoting and improving open government.

The OGP is an international initiative which aims to support development of open government policies in all its participating states. A precondition of this multi-stakeholder initiative is that governments hold consultations with civil society before presenting their action plans in Brasilia.

In recent weeks we have seen various countries publishing and holding consultations on their OGP action plans. The Spanish Government has, however, only been able to develop a draft Action Plan which has been shared with Access Info Europe but has not been subject to a formal consultation. In part this is because the government only came to power recently (21 December 2011).

In this document, updated in English on 16 April 2011, Access Info Europe gives its initial reaction to the Action Plan. Access Info Europe stresses that the Action Plan should be subject to a full public consultation as required by the OGP commitments and that the government should commit to doing this during the Brazil summit.

The draft action plan has three sections: an introduction about the current situation in Spain, an introduction with general information about the situation in Spain, then a summary of what has been achieved to date, followed by the commitments that Spain proposes to implement in the next two years.

Access Info Europe disagrees with the Spanish government’s assertion that serious steps have already been taken towards openness and transparency and calls for much stronger measures to be adopted now.

We note that in the Action Plan the Spanish authorities themselves state that “an informed society puts an end to arrogant governance” and for this to happen, we need to create the necessary tools to promote transparency, tools which are still missing from this Action Plan.

Spain remains the only country in the EU with more than one million inhabitants without an access to information law, in spite of government promises since 2004 to adopt one and in spite of a civil society campaign since 2006 calling for the legal framework that would permit people in Spain to enjoy this fundamental right.

Access Info Europe welcomes the proposals contained in the Action Plan to increase the efficiency of government procedures in Spain, but notes that there is a difference between an efficient government (desirable as this is) and a transparent and open one: dictatorships can be efficient; democracies also need to be open and participatory, and it is these mechanisms which need to be given centre stage in the Action Plan.

**II. Open Government measures adopted to date**

The Spanish authorities make a series of claims about achievements to date in promoting open government, reaching back to the 1978 Constitution.

**Transparency**: The Action Plan asserts that “In recent years, a major effort has been underway to make public administration more transparent” citing the 1992 Administrative procedures act as one of these initiatives. Access Info Europe notes that this law contains very limited provisions on access to archives and registers and that the Spanish courts have confirmed that the provisions do not give citizens the right to submit access to information requests.

Furthermore, a series of monitoring studies carried out since 2005 in Spain have shown that administrative silence remains at between 50-60%, which is a serious lack of transparency and communication from the administration to the society

The government also argues that since 2006 Spain has an access to information Law, although this was approved based on the commitments in the Aarhus Convention which is binding on Spain. Spanish environmental organisations note that there are nevertheless levels of administrative silence in response to requests of around 30% and note that public officials are often not aware of the existence of the law.

**Open and Reusable Data**: Spain adopted its law on the reuse of public sector information in 2007 only after being fined by Brussels for not having transposed the EU Directive into Spanish law as required by EU rules. To date, only the central administration has developed a regulation which permits implementing this law.

Spain has a number of open data portals which contain datasets from the national, regional and local level which facilitates access although the situation is complicated by the lack of technical and legal interoperability of these databases.

With respect to the prize received by the administration, it should be noted that although this is positive, it is for the concept of “the most user-friendly data portal in the EU” rather than for the volume of data it holds, which is still limited.

The gap between intentions and practice was recently highlighted by the publication of the state budget in a non-open, non-reusable format. On 3 April 2012 the government answered a member of parliament who asked for the budget in an open format that the information was provided for the specific purpose of being analysed by members of parliament and that “the concept of transparency refers to the quantity of information not to the format in which it is presented.”

This has been frustrating for the civil society groups working to visualise the budgets in order to show how this years’ cuts are affecting different sectors of budget spending.

Responsibility and Public Integrity: last year the government published the assets declarations of all senators and members of parliament. These declarations, many of them incomplete, were published in .PDF format.

**II. The Commitments**

The Spanish government has made commitments in three principle areas: increasing public integrity, a more efficient use of resources, and improving public services.

Access Info Europe recommends that instead the commitments should focus on the four areas of action prioritised by OGP: transparency, public participation, accountability, and technology and innovation.

Transparency: The government proposes, under the heading “Increasing public integrity” that the draft access to information law will move Spain into poll position among the world’s access to information laws.

Access Info Europe does not share this evaluation of the quality of the draft law, in particular because of the very limited scope of information which can be requested.

* The law does not recognise a fundamental right of access to information in line with international standards and jurisprudence;
* The definition of information is too narrow, and excludes much information held by public bodies.
* The law applies only to the administration, and only to the judicial or legislative branches of government in respect of their administrative functions not the remainder of their activities;
* The law contains a series of absolute exceptions which do not include a harm test and the majority of the exceptions are not subject to any public interest test, something required by the Council of Europe Convention on Access to Official Documents .
* The body which will oversee compliance with the right of access to information is not independent and the law does not give details on how it will function or what its powers will be.

The proactive publication provisions of the draft law (“Transparency”) do contain solid proposals but are not particularly progressive compared with the provisions existing in other countries and given that Spain needs to overcome a long history of not making information proactively public.

**Recommendations**:

Access Info Europe recommends that the Action Plan:

* Make clear promise to adopt and access to information law which recognises the fundamental right of access to information in lines with the jurisprudence of the European Court of Human Rights and the General Comment of the UN Human Rights Committee;
* Contain a clear commitment to sign the Council of Europe Convention on Access to Official Documents, which implies that it will adopt an access to information law with a broad definition of information and with each and every exception subject to the harm and public interest tests;
* Ensure that the body charged with overseeing and promoting the access to information law has an adequate budget, with sufficient powers of inspection and sanction, and that the independence of this body is guaranteed, including by having it elected by parliament.

**Transparency and Accountability of Development Aid**

The commitment to make aid spending transparent should include more detailed information on what specific measures will be taken to achieve transparency of development aid, including by specifying which data will be published in the future.

**Citizen Participation**: the participation of members of the public in decision making of is one of the key pillars of the Open Government Partnership. The Spanish action plan is, however, very weak on this – indeed, proposals on citizen participation are noticeable by their absence.

Spain does not have a developed culture of public consultation in decision making, nor in the development and implementation of government decisions. The obstacles include the lack of transparency and the lack of mechanism for commenting on planned policies or on draft laws. In fact, except when the government specifically announces it to the media, it is difficult to know when the Council of Ministers will discuss a proposed law.

It is true that the Government held a public consultation on the draft access to information law but this isolated initiative cannot be taken to constitute a new policy of civic engagement: for this move to become a precedent, the government should adopt a law which makes it obligatory to hold public consultations as a norm in the process of adoption of laws.

The future law should also ensure that the government overcomes the shortcomings of the recent consultation:

* Having a clearly stated deadline for all consultations which should run for long enough to give the public time to respond (e.g.: not during a holiday period);
* Ensuring that the IT platform is stable;
* Having contact information for those who are having difficulty making submissions;
* Having a clear plan for what will be done with submissions after they have been made.

The current situation is that civil society in Spain is awaiting the new version of the law once the submissions – including that from the 55 members of the Coalición Pro Acceso which was one of a total of over 3,600 submissions made – have been processed and taken into account. We also call on the government to listen to the 85,000 members of the public who signed the Avaaz petition calling for a stronger law on access to information. Access Info Europe is calling for full transparency around any consultation process, which on the access to information law includes making public the submissions received.

With respect to use of social media, Access Info Europe notes that the use of Twitter to denounce cases of illegal drugs trafficking could be construed as a service which the public is being asked to offer to the government and not vice versa. Access Info Europe calls for a more developed, coherent and realistic plan for how the government will use social media to disseminate information and to permit participation in and contributions to government decision making.

***Recommendations***

The Action Plan should propose specific mechanisms about when and how public authorities will hold public consultations. The criteria for doing so should include the nature of the decision and in some cases, the interest of the public in participating in the debate (which requires the government to develop objective indicators for measuring this interest).

The Action Plan should also make clear the mechanisms will for responding to public consultations and should ensure the full transparency of all contributions as well as of the responses on the part of public authorities.

**Publication of Criminal Statistics:** the Action Plan proposes that, from April onwards, the public will have access to statistics on levels of criminality which will be made public on a quarterly basis.

Welcoming any step towards greater transparency, Access Info Europe is concerned about this commitment because it implicitly indicates that other statistics will not be available. This situation would be in direct conflict with the assertion that Spain’s access to information law is at the vanguard of world laws.

The access to information law should guarantee the basis for the publication of all statistical and other information in the hands of public authorities, independently of other pre-existing rules unless they guarantee greater transparency.

Furthermore, the Action Plan should make clear that not only the statistics will be available but the data bases which underlie them so that non-governmental actors can evaluate and use that data.

***Recommendations***: The access to information law should include proactive publication of statistical information and should permit the public to request any information which is not public (subject to limited exceptions). The law should also require that all such data is published in an open and reusable format.

**Other Proposals in Spain’s Action Plan**

The following proposals have been put forward by Spain in its Action Plan although access to information is concerned that they are at best tangentially related to the OGP objectives and so, although they could be considered as positive, will not directly contribute to advancing open government in Spain:

* **Law on Budget Stability and Financial Sustainability**

The Action Plan includes a referenced to the draft law which will guarantee the fiscal discipline required by the European Union. Although this is without a doubt important for a country going through a profound economic crisis, it is not at all clear to us how this directly relates to the Open Government Partnership. The government could, for example, indicate how it will make public more information about budgets and budget spending.

* **Reform of the Subsidy Law**

This reform, which seems to be aimed at creating more objectivity when it comes to subsidies, could indicate whether it will also lead to greater publication of information about subsidies, including greater transparency of the process of providing subsidies.

* **Making it easy to start a business**

The proposal to facilitate the creation of businesses in a period of just 24 hours and the setting up of advice networks for business persons is related to improving the way the bureaucracy works in Spain but not to open government in and of itself.