

ACCESS INFO EUROPE

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Madrid, 4 October 2013

Your Excellency,

I am writing to inform for your government about our concerns over Spain's future transparency and access to information law.

This Spanish government is moving closer to adopting an access to information law which, in key respects, falls below international standards and would not significantly advance transparency and open government in Spain.

The law is currently in the Senate, with the deadline for amendments finishing on Tuesday 8 October.

The draft law, in our analysis, scores just 68 out of 150 points on an internationally recognised rating (see <http://www.access-info.org/en/spain/486-rti-rating-spanish-law>). The main issues are detailed in the annex to this letter.

The draft has been repeatedly criticised by international bodies such as the Organization for Security and Cooperation in Europe. In her most recent statement the OSCE's Representative for Freedom of the Media said that the law would go so far as to "restrict access to information in Spain" (see here <http://www.osce.org/fom/104897>) and once again called for it to be brought into line with international standards, urging the Senate to take the OSCE's concerns into account.

Access Info Europe – along with the 65-member civil society platform the *Coalición Pro Acceso* of which it is a founder member – has welcomed the legislative initiative for an access to information law. It would end the current anomaly whereby Spain is the only large, developed democracy and the only country in the European Union with over one million inhabitants not to have this essential democratic instrument. Spain is also one of the few members of the Open Government Partnership not to have an access to information law.

The importance and indeed urgency of addressing this situation should not, however, be a pretext for adopting substandard regulation.

To give an example of one problem, the law excludes (Article 15) any access to "summaries", "communications", and "internal reports", which seems to include any reports not destined for publication, making application of the law potentially arbitrary and certainly narrowing its scope.

Access Info Europe in February 2013 paid €3000 in court costs to the Spanish state after losing litigation before the Supreme Court in which we had sought access to information which included reports on what Spain is doing to implement the UN Convention against

Corruption. We know from answers to parliamentary questions that the information we sought exist – in the form of reports - but we were denied a right to request them, something which will not change with the future law in its current shape.

At times of crisis more than ever, the Spanish public needs access to information about what the government is doing. Information is needed to hold the government to account, to ensure financial probity, and to reduce risks of corruption. Open government improves efficiency and effectiveness in the spending of public funds. Transparency is essential for participation in – and hence the quality of - decision making, and contributes to securing the democratic legitimacy of laws and policies. Spain is currently passing through a crucial phase in its democratic, social and economic history, and transparency and it urgently needs a legal mechanism to shore up open and participatory government.

If this current very poor state of transparency is to change, a much stronger legal instrument is needed, taking into account the multiple changes recommended by the various national and international experts.

These are the main concerns which we wanted to bring to your attention. I would be delighted to hold a meeting with Your Excellency and/or relevant members of your staff in order to discuss further these concerns.

Yours faithfully



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Annex: Main issues with Spain's draft Transparency Law

The main concerns around which there is broad consensus are:

- » **Right to information not established:** In spite of European Court of Human Rights jurisprudence, many European constitutions and the EU treaties all recognising a fundamental right of access to information or documents, the current draft law does not establish a right (this would require the adoption of an Organic Law as was done with data protection). The biggest consequence of this will be the complications when it comes to applying the new norm across Spain's complicated federal system.
- » **Privacy will prevail:** Another crucial consequence is that the law does not have the same status as the right to privacy, which is strongly regulated in Spain and vigorously applied to deny access to information containing the names of individuals.
- » **Limited scope:** The scope of the proposed law is limited to bodies which are subject to administrative law, and in particular does not apply to all information held by the legislative and judicial branches.
- » **Limited information:** The notorious Article 15 of the law excludes vast amounts of information from the right to ask, including "auxiliary or supporting information such as the content of notes, drafts, opinions, summaries, and communications and internal reports shared within or between public bodies."
- » **Defers to other laws:** A further provision, the First Additional Disposition, makes the transparency law secondary to any information which is subject to a "specific legal regime for access to the information." This is a vague get-out clause which currently makes it impossible even to assess the impact of the future transparency law: a comprehensive legislative review is needed; given that access to information is a fundamental right, this clause should be dropped.
- » **Weak oversight:** The proposed oversight body (the "Transparency Agency") is dependent on the government and its powers are not specified in the draft law. Experience from other countries shows that an independent oversight body such as an information commissioner is essential during the implementation phase.

Further information can be found at www.access-info.org