

The Communication of Personal Data Messages in Mexico

Predictable *state of the art*: public administration, private developments and legislative efforts 2003 -2004.

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The communication of personal data messages ("PDM") has been a developing field since the emergence of information technologies ("IT"). It is linked to privacy rights, as well with economic exchange terms. Marketing and credit transactions, direct marketing and telemarketing, online and offline promotion, the rising of credit bureaus and the need for modern emergent economies to have an open market for information societies (despite of economic concentration) are reshaping economies. In the middle of such evolution, exchange of personal data messages are a battlefield of this IT new changing ways to make business, to provide for governance and for public administration. This article draws an outline of the legal protection of personal data in Mexico and of the main proceedings and events in this area facing the challenges in 2004. This article has three sections: The first one outlines the frame for PDM legal protection. The second section deals with its administration and enforcement. The third describes important cases, events and facts.

I. LEGAL FRAME

1. Constitution

Stated in the articles 7 and 16 of the Mexican Constitution as an individual guarantee -that is to say the correlative protection that the Mexican State grants to an individual right -, the rights of the private life are conceived as rights of freedom of the person in their spiritual aspect or right of *freedom of privacy*. They traditionally include the inviolability of the address and the inviolability of the correspondence, but article 16 does not include the explicit protection to those concepts that have been extended to cover other more modern ones, among them the right to the informational self-determination or over the own personal data (as it is denominated by the German jurisprudence⁽¹⁾), or also called right of *cybernetic freedom* (as it is

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¹ *Informationelle Selbstbestimmungsrecht* See: BVerfGE 65, 1 (42). <http://www.datenschutz-unddatensicherheit.de/jhrg22/edit9802.htm> Also: http://www.cs.unimagdeburg.de/~sschimke/informationelle_selbstbestimmung.html, <http://ig.cs.tuberlin.de/da/041/Kapitel3.htm>, http://www.datenschutz.mvnet.de/taetberi/tb1/1_1.html, http://www.datenschutz.mvnet.de/taetberi/tb1/1_1.html, <http://www.datenschutz-berlin.de/jahresbe/95/sonstige/an4.htm> and many other.

denominated by the Spanish jurisprudence (*libertad informatica*)(2). Other independent rights related to the previous ones are the right to the own voice and to the own image that constitutes a right of the personality that is contemplated by the civil legislation and by copyright law (intellectual property rights); the right to privacy over the own body and its manifestations; the right to privacy in social life in regard to diverse groups to which the person belongs; the right to Honour, contemplated by the civil jurisprudence; the right to the freedom of disposition and the reservation of the own identity expressed in the moral right of the anonymous author, or to the use of a pseudonym, contemplated in the copyright law; and the right to reserve of the own identity through the information of the own genetic code, which it is not yet anticipated in the Mexican Law.

The 16th Constitutional article in its first paragraph, protects *the person, his/her family, documents or possession*, immunity that can only be broken by written order of the competent authority. Also the tenth paragraph protects *the privacy of the correspondence*

The constitutional reform published in the Official Federal Diary ("DOF") on Wednesday July 3, 1996, adds paragraphs ninth and tenth to the Constitutional 16th article, declaring the inviolability of the private communications, and subdues the intervention to any private communications to the exclusive authorization of the federal judicial authority at request of the federal authority authorized by the law or by the *Ministerio Público* (prosecutor authority) of the corresponding federal entity, establishing its conditions, and excluding the matters of electoral, fiscal, mercantile, civil, labour, or administrative character, and also in the case of the communication of the person under arrest and his/her defender(3). This constitutional reform gave origin to the dispositions contained in its secondary law, the Federal Law against Organized Crime (see *infra*). This is the main foundation of the right to privacy in Mexico, as follows.

« Article 16

«*Nobody can be bothered in its person, family, address, documents or possessions, but by virtue of written order of the competent authority, that*

² Sentence 254 of 1993: it was the first one to recognize such right. Sentence 143 of May 9, 1998: tributary identification number; it is against the law and against the right to associate in free trade unions to use trade union personal information to grant discounts or other benefits; Sentence of November 8, 1999: about the medical diagnosis and the workers consent; Sentences 290 and 292, 2000, against the former Spanish Data Protection Law (LORTAD): there is a fundamental right of *cybernetic freedom* ("libertad informática"). See: <http://www.tribunalconstitucional.es/STC2000/STC2000-290.htm> and <http://www.tribunalconstitucional.es/STC2000/STC2000-292.htm>

³ For a description of the situation before the Constitutional reform and the proposals that drove to it, cfr. Ignacio Carrillo Prieto and Haydée Márquez Haro- La Intervención Telefónica Ilegal. Comparativo Internacional y Propuesta Informativa. (Procuraduría General de la República, México 1995) 197.

finds and motivates the legal cause of the procedure.

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«In all search warrant, that only the judicial authority will be able to produce, it must be expressed in writing the place that is to be inspected, the person or people whom are to be arrested and the objects that are searched for, so as to limit to the stated issues the proceedings, and in concluding them, a detailed record must be written in the presence of two witnesses proposed by the occupant of the place that was inspected or in their absence or refusal, by the authority that practiced the proceedings.

«Private communications are inviolable. The Law will penal sanction any act that attempts against the freedom and privacy of them. Exclusively the federal judicial authority, at the request of the federal authority that is empowered by the law or by the holder of the Ministerio Público (prosecutor authority) of the corresponding federal entity, will be able to authorize the intervention of any private communication. The competent authority, in writing, will have to found and to motivate the legal causes of the request, and also the kind, the subjects, and the duration of the intervention. The federal judicial authority will not be able to grant these authorizations in issues of electoral, fiscal, mercantile, civil, labour, or administrative character, or in the case of the communications of the person under arrest with his/her defender.

«The authorized interventions will adjust to the requirements and limits anticipated in the law. The results of the interventions that do not fulfil these requirements will lack all value as evidence.

«The administrative authority will be able to practice domiciliary visits only to make sure that the sanitary and police regulations have been fulfilled; and to demand the exhibition of books and the indispensable documents to verify that the fiscal dispositions have been fulfilled adhering in these cases to the respective law and the formalities prescribed for the search warrants.

«The correspondence that under cover circulates in the mail will be free of all registries, and its violation will be punished by the law.

«In time of peace no member of the Army will be able to lodge in a private house against the will of the owner, or to impose any benefit. In times of war the military will be able to demand lodging, food and other benefits, in the terms that the corresponding martial law establishes.»

We can appreciate Mexican Constitution still needs to state personal or private data protection, in spite of the mention of the connected guarantees of inviolability of the correspondence (16 Art. paragraph third) and of inviolability of the address (Art. 16 paragraphs two and four). The advance of IT and mass media and their penetration in society urge legislators to bring up to date laws for the protection of the rights of the people in the sphere of their confidentiality and privacy.

2. International treaties

Due to recent Jurisprudence of the Supreme Court of Justice of the Nation ⁽⁴⁾, International Treaties have an immediately inferior hierarchy to that of the Constitution, but superior to federal laws; this is fully applicable to human rights (although it is not always so in other areas, especially in fiscal matter). Mexico has subscribed and ratified the following international conventions related to fundamental rights of privacy ⁽⁵⁾: Universal Declaration of Human Rights (1948) article 12; the articles 5, 9 and 18 of the American Declaration of Rights and Duties of Mankind (1948); the International Pact of Civil and Political Rights (1966) article 17; The American Convention of Human Rights or Pact of San José, Costa Rica (1969) article 11; The Convention regarding Children's Rights (1989) article 16. Also the International Agreement on Telecommunications (Nairobi, 1982) articles 18, 22 and 27, published in the Official Federal Diary ("DOF") on June 29, 1984, and nowadays substituted by the Constitution and Agreement of the International Union of Telecommunications, Nice, France, June 30, 1989, and ratified by Mexico on April 26, 1991, and published in the DOF March 3, 1992. Also outstanding are the dispositions about secret language adopted in the International Telecommunications Union ("ITU"), since the messages can be admitted written in secret language in all the countries, except when the Secretary General of the ITU notifies against it, although they would always to be accepted in traffic. The above-mentioned resolutions are important due to the fact that the most recent international dispositions and of comparative jurisprudence about cryptographic language are linked to national security issues, the antiterrorist battle, and military secrets ⁽⁶⁾.

⁴ Amparo en revisión 1475/98 and Tesis P.LXXVII/99. *Semanario Judicial de la Federación y su Gaceta*, novena época, v. X, November 1999, p. 46. Cfr. Manuel Becerra Ramírez, Jorge Carpizo, Edgar Corzo Sosa, Sergio López Ayllón, *Cuestiones Constitucionales* 3 (julio-diciembre 2000), <http://www.juridicas.unam.mx/publica/rev/cconst/cont/3/cj/cj7.htm>

⁵ A synoptic view of the texts specifically dealing with privacy in those Treaties subscribed by Mexico can be found in: <http://profesor.sis.uia.mx/aveleyra/comunica/privacidad/ti.htm> [February 2004].

⁶ The last published instrument is: Plenipotentiary Conference (Minneapolis, 1998) that contain the amendment Instruments to the Constitution and the Agreement of the International Union of Telecommunications (Geneva, 1992) with the Amendments adopted by the

3. International Obligations in regard to Privacy

Mexico is subscriber of two international conventions regarding protection of personal data, what obliges the country to legislate and to take the corresponding administrative measures: the Organization for Economic Cooperation and Development ("OECD") Directive: Document C(80)58(Last part), of October 1, 1980. In addition, there is the United Nations Organization ("UNO") Assembly General Resolution 44/132, session 44, UN Document A/44/49 (1989). Both sets of Guidelines, OECD and UNO, will have great impact in the public policies of the law and in the new legislative and administrative dispositions that Mexico is about to implement. Special consideration will deserve the OECD's Collection Limitation Principle, Data Quality Principle, and Restricted Use Principle. From the UNO's, there is the principle of accuracy, the principle of the purpose-specification, the principle of interested-person access, and the supervision and sanctions.

4. Guidelines of the OECD

In the American continent only Mexico is part of the OECD from May 18, 1994 together with United States (1960) and Canada (1961). The maximum authority of the Organization, the Council of the OECD, adopted on September 23, 1980 the Recommendation of the Council about the Guidelines for the Protection of Privacy and the free Flow of Personal Data over the border (Document C(80)58(last part), of October 1°, 1980) that has been the foundation for the development of multiple national and international policies, as well as of arduous pursuit tasks (7).

The guidelines of the OECD is composed by eight basic principles that will be translated in diverse ways for the national application of each country member, and that Mexico will take care of incorporating to its internal juridical order. The aforementioned principles, in accordance to the Recommendation and Limits, are: 1. Collection Limitation Principle; 2. Data Quality principle; 3. Principle of Purpose Specification; 4. Restricted Use or

Conference of Plenipotentiary (Kyoto, 1994), DOF, 20 November 2000 (it is not still in vigour in Mexico). Precedent Conferences: Constitution and Agreement of the UIT, Geneva 1992, Modified for the Conference of Plenipotentiary (Kyoto 1994); Constitution and Agreement of the UIT, Málaga, Torremolinos, October 25, 1973, ratified by Mexico, 23 of July 1975, published DOF, 23 January 1976. International Agreement of Telecommunications. General Regulation Final Protocol of the Agreement. Additional protocols to the Agreement Resolutions, Recommendations and Vote. Geneva, Switzerland, December 21, 1959. Ratified by Mexico May 4, 1962. Published: DOF 14 August, 1964. Faith of Misprints DOF 28 August 1964.

⁷ A short version of the OECD Guidelines can be consulted in:
<http://profesor.sis.uia.mx/aveleyra/comunica/privacidad/principiosocde.htm> [February 2004].

Limitation Principle; 5.- Security Safeguards Principle; 6. Openness Principle. 7. Principle of Individual Participation; and 8. Principle of Accountability ⁽⁸⁾.

5. Guidelines of the United Nations

The General Assembly of the Organization of the United Nations adopted on December 14, 1990 the Resolution 45/95, that deals with the limits for the regulation of the computer files of personal data (Document E/CN.4/1990/72) ⁽⁹⁾.

This resolution has had a long and risky life, including among its main moments, the emission of a special Report: E/CN.4/1997/31, the emission of the Document E/CN.4/1997/67, and the Decision of the Commission 1997/122 of April 16, 1997 (E/CN.4/1999/88).

Mexico revised the consultation requested by the Commission of Human Rights, of the Economic and Social Committee of the Organization of the United Nations, in its session Fiftieth third, October 21, 1996, just as it is written in the report E/CN.4/1997/67 of January 23, 1997 ⁽¹⁰⁾.

The limits related to the files of computerized personal data are structured around eight principles, enunciated by the UN as follows: 1. Principle of lawfulness and fairness 2. Principle of Accuracy. 3. Principle of the purpose-specification. 4. Principle of interested person access. 5. Principle of non-discrimination. 6. Power to make exceptions 7. Principle of Security. 8. Supervision and Sanctions. 9. Trans-border data flows. 10. Field of Application: to all, public and private data bases.

6. Secondary laws

Some statutes already dealt with the right to privacy and somehow made reference to personal data. They can be looked up in:

<http://profesor.sis.uia.mx/aveleyra/comunica/privacidad/leyes2.htm>

⁸ Organisation for Economic Co-Operation and Development. OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data. Paris, France, 2002, 62. ISBN 92-64-19719-2. It includes: Declaration on Trans-border Data Flows (1985), and Ministerial Declaration on the Protection of Privacy on Global Networks (1998).

⁹ United Nations Guidelines and Principles can be consulted in Spanish in: UNO website, http://193.194.138.190/spanish/html/menu3/b/71_sp.htm In English: <http://193.194.138.190/html/menu3/b/71.htm> [February 2004]. For a review in Spanish, see: <http://profesor.sis.uia.mx/aveleyra/comunica/privacidad/principios-onu.htm>

¹⁰ <http://www.hri.ca/forthecord1997/documentation/commission/e-cn4-1997-67.htm> , search under "México".

The national legislative panorama has been enriched in 2003 with the decrees issued on the Federal Law of Transparency and Access to the Government Public Information ("LFTAIPG") (11).

The main contribution of the LFTAIPG has been the standardization of the principles under which the diverse organs of the State must give treatment to the personal data of the citizens, safeguarding the principles of consent and purpose, and guaranteeing the rights of access and correction to personal data. However, the law lacks better protection for the purpose of guaranteeing greater levels of security for the private data, by having better and suitable law enforcement mechanisms and authorities.

These laws are completed by reforms to the legal framework for information societies ("SIS"), recently enacted (DOF I-23-2004).

7. Freedom of Information Laws

The Federal Law of Transparency and Access to the Government Public Information ("LFTAIPG") (12) went into effect on June 12, 2003 for all the obliged people (the Executive Power with all its dependences and entities in the Federal Public administration; the Legislative and Judicial Powers, the autonomous constitutional organs: Electoral Federal Institute (IFE), Banco de México "BANXICO", and Comisión Nacional de Derechos Humanos (CNDH); the public universities of national reach such as the Universidad Nacional Autónoma de México (UNAM) and the Universidad Autónoma Metropolitana (UAM), they also began to emit their respective legislation of conformity with the transparency and accountability principles of the LFTAIPG, or the regulation to orchestrate the Federal Law starting from that date.

Besides the Federal Law that inspires all them, there are six inferior juridical dispositions that regulate this matter in the Federal Public Administration (Executive power); seven inferior dispositions in the Judicial power and other tribunals; three normative dispositions in the Legislative Power; five for the autonomous constitutional organs; and two for the national public universities. They can be consulted in a synoptic way in:

<http://profesor.sis.uia.mx/aveleyra/comunica/privacidad/correlacion-leyes.htm> (13).

¹¹ DOF Tuesday, June 11, 2002, 11 cfr.: <http://profesor.sis.uia.mx/aveleyra/comunica/leyes/latip.htm> [February 2004]. See it also in: http://www.segob.gob.mx/dof/2002/junio/dof_11-06-2002.pdf

¹² DOF Tuesday, June 11, 2002, 11 cfr.: <http://profesor.sis.uia.mx/aveleyra/comunica/leyes/latip.htm> [July 2003]. See it also in: http://www.segob.gob.mx/dof/2002/junio/dof_11-06-2002.pdf

8. Other related dispositions

The installation of the Unique Identification of Population Registration ("CURP") continues in its final phases. That identification has the particularity of conferring an unique code for each citizen with which one can have direct access to multiple personal data; because of this, it could attempt against the principles of security and consent of the OECD, although it is argued that it fulfils the Limits of the UN (14). Also in process is the installation of the Mexican Consular Registration for the immigrants -documented or illegal aliens- to the United States (15). There are likely to succeed some initiatives promoted by the financial sector concerning free flow of financial information (16).

II. PUBLIC INTEREST AND PRIVATE BUSSINES: PUBLIC ADMINISTRATION AND LOBBYING GROUPS

9. National Authority of Personal Data

There is a National Authority of Personal Data only for the Federal Public Administration: the Federal Institute of Access to Public Information ("IFAI"), which has a General Direction of Personal Data ("DGDP"); technically, it is under the Secretary of Agreements (together with the Executive Ministry, both aid to the plenary session formed by the five Commissioners that meet to solve the controversies presented on the right to access to public information (or to the right of access and rectification of the personal data).(17)

¹³ For a previous version of the research before the issuance of the 2003 regulations, see: Antonio M. Aveleyra, *El Derecho de Acceso a la Información Pública vs. el Derecho de Libertad Informática (¿Conflicto entre el Derecho a la Información y el Derecho a la Intimidad de los Datos Personales?)* aportaciones desde la teoría del derecho. *Jurídica*, Anuario del Departamento de Derecho de la Universidad Iberoamericana 32 (Mexico city 2002) 403-443. Available online: <http://profesor.sis.uia.mx/aveleyra/comunica/privacidad/pdp.htm> . Freedom of information and access to public information laws can be reached at: <http://www.limac.org.mx> , in <http://fidac.org.mx> , <http://atlatl.org.mx> , and in <http://profesor.sis.uia.mx/aveleyra/comunica/leyes/daip/> [February 2004].

¹⁴ See: <http://www.hri.ca/fortherecord1997/documentation/commission/e-cn4-1997-67.htm>
Look under "Mexico" [February 2004].

¹⁵ For a review of the news on these topics, cfr.: <http://profesor.sis.uia.mx/aveleyra/comunica/privacidad/noticias/> [February 2004].

¹⁶ See the excellent research of Rafael del Villar, Alejandro Diaz de León and Johanna Gil Hubert: *Regulación de Protección de Datos y de Sociedades de Información: Una Comparación de Países Seleccionados de América Latina, los Estados Unidos, Canadá y la Unión Europea*. <http://www.banxico.org.mx/gPublicaciones/DocumentosInvestigacion/docinves/doc2001-7/doc2001-7.pdf> . Available in English in: http://www1.worldbank.org/finance/assets/images/Regulation_of_Personal_Data_Protection.pdf [February 2004].

¹⁷ The intended structure of DGDP/IFAI will have one Director General; under, one Area Director of Protection of Personal Data; a Sub Director of Confidential Information; a Data Bases Director; a Data Bases Sub Director; a Chief of the Department of Data Base Maintenance; an Executive Assistant; and an Administrative Assistant. (IFAI's answer to public information request, July 22, 2003, information confirmed in February 2004).

We still do not know if the Federal Law of Personal Data, approved in the Senate in 2002 (¹⁸), but still to be discussed by the present LIX Legislature of the Chamber of Representatives (Deputies), integrated July 7, 2003, which sessions started on September 2003, will modify the nature, attributions and functions of the organ of national authority in the matter. There is a chance for the lobbying groups of issuing another law project(s), or joining the first one (¹⁹). As it seems, senator's Garcia Torres newest initiative contemplates building up a new national authority of personal data, the Instituto Nacional de Datos Personales. This amendment of the original project and of the approved Law Initiative (still pending for approval in the Representatives Chamber) may be backed up by the federal administration (SHCP, Banxico, SE), and may cause the legislative process start again from the beginning. The conformation of the political parties' fractions in the lower Chamber may cause an stagnation for this initiative, which is not in the top priorities of the political agenda.

If it is not legislated otherwise, and in accordance to what is now stated in the LFTAIPG, the DGDP would not have attributions to intervene in matters

¹⁸ Minuta con Proyecto de Decreto por el que se Expide la Ley Federal de Protección de Datos Personales - abril 30, 2002. Legislatura LVIII, Año 2, Período 2, No. Gaceta 55, Date April 30, 2002. <http://www.senado.gob.mx/gaceta/107/107m.html> [February 2004].

¹⁹ COFEMER (Comisión Federal de Mejora Regulatoria, Secretaría de Economía), issued a legal opinion against the law as enacted in the Upper chamber, available at: <http://profesor.sis.uia.mx/aveleyra/comunica/privacidad/opinion-cofemer.doc> Garcia Torres original initiative was modified by Banxico's team withdrawing from it the right of privacy for corporations; establishing the rules for the information societies in a separate law, Ley para Regular las Sociedades de Información Crediticia, enacted in January 15, 2002; and establishing IFAI as national authority. A review of Banxico's opinions from Senator Antonio Garcia Torres, at the Antigua, Guatemala, --meeting organized by the Spanish Government Agencia Española de Protección de Datos for the Ibero-american Governmental Data Agencies-- is available at: <http://profesor.sis.uia.mx/aveleyra/comunica/privacidad/antigua/garcia-torres.doc> (accordingly to public information granted by IFAI's delegate to that meeting, the General Director for Studies and Research, Dr. Eduardo Guerrero Gutiérrez).

The terms of debate are as follows: COFEMER and BANXICO, separately, argued for the conformation of markets for information societies, i. e., credit bureaus and marketing businesses; to introduce data comptroller's duties and rights; competition conditions for the information societies.

It is un-accurate to sustain as a Banxico's proposal the mandatory sell of the credit bureau's shares as it has been said, but it is seen as a convenient measure the political persuasion for the de-investment of the main shareholders (Banks), which are at the same time the main users of the services of Buró de Crédito (Trans Union + Dun & Bradstreet + Banks) from the monopolistic credit society --due to the fact that the other formerly operating credit bureaus companies, linked to some of the main American companies i.e. Equifax, since mid 1996 till the beginning of 2000 in which was closed, and to local Mexican capitals--, fall into bankruptcy because, among other things, of the high transaction costs derived from a very poorly designed concept of "sharable data base" which was approved by some of the second level officers in the Secretaría de Hacienda, as it was issued in the several governmental regulations (art. 33 of Ley para Regular las Agrupaciones Financieras, related to the following regulations: DOF February 15, 1995; September 1997; December 27, 1996; March 18, 2002; August 14, 2003), all of which were recently superseded by the Ley para Regular las Sociedades de Información Crediticia, DOF January 15, 2002, with its most recent amendments in January 23, 2004; for the previous facts cfr. the outstanding research of Rafael del Villar *et alii*, Regulación de Protección de Datos y de Sociedades de Información: Una Comparación de Países Seleccionados de América Latina, los Estados Unidos, Canadá y la Unión Europea, cit. at note 16 *supra*.

The conformation of an open market for information societies including the credit bureaus, giving more efficiency to the economic system and real care for the fundamental rights of the people, is a strong need in Mexico which has to be satisfied sooner or later! A legal framework for credit reports reselling; to include the "opt-out" system instead of the "opt-in" followed in the law (that is, not to require the consent of the personal data owner *prior* to the creation of the database, but the possibility of excluding of the personal data *afterwards*); and the review of the procedural framework for the enforcement of the personal data protection law, were some other arguments discussed among COFEMER team and the supporters of Garcia Torres's first proposal.

of personal data of the other powers of the State (the Legislative and the Judicial Branches), neither does it have authority over organs or in matters of the federal entities (local or municipal government).

As it is now conceived the DGDP-IFAI has not authority (jurisdiction) when the personal data is in the hands of private people or entities, even those destined to provide information. We hope the comprehensive Personal Data Law to be enacted will solve those problems conferring IFAI attributions enough.

Besides DGDP-IFAI we can find multiple organs for the protection of data, belonging to different branches of the State, always linked to the right of access to public information.

But we are also in front of an authority lack of coordination, and legislative emptiness in other sectors such as the particular individuals and the private corporations. Nowadays there are several separate governmental agencies dealing with personal financial data: Ministry of Finance (SHCP); Central Bank (BANXICO); Comisión Nacional Bancaria y de Valores (CNBV); financial services users agency (CONDUSEF); Consumers' agency (PROFECO), and the vast amount of transparency offices ("Unidades de Enlace") established after the enactment of the Transparency and Public Information Law (LFTAIPG). There are many other offices that we could mention ⁽²⁰⁾.

The best legal option would be to have a national authority with characteristics and functions similar to those of the national agencies for the protection of data⁽²¹⁾ of the member countries of the European Community, which is a requirement to establish cooperation agreements: a similar level of protection conferred by Law, with a national authority responsible for its application ⁽²²⁾.

10. Law Enforcement

²⁰ Accordingly with Ley Orgánica de la Administración Pública Federal, article 26, there are 18 Secretarías (Ministries) and one *Consejería Jurídica* in the Central Public Administration. Besides that we have the *Administración Pública Paraestatal* (decentralized organs, corporations with public investment, national banks, national credit organizations, national insurance and guarantees organizations, trusts). For an analysis of the extent of the personal data managed by the Federal Public Administration in Mexico, see: <http://profesor.sis.uia.mx/aveleyra/comunica/privacidad/dp-apf.htm> [February 2004].

²¹ 12 Cfr. Aveleyra, Antonio.- Órganos Nacionales relacionados con la protección de datos personales. Universidad Iberoamericana, July 2003. <http://profesor.sis.uia.mx/aveleyra/comunica/privacidad/onpdp.htm> [February 2004].

²² Argentina, per example, obtained the certification of having an equal level data protection in the European Union: COMMISSION DECISION of 30/06/2003 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data in Argentina. See: http://europa.eu.int/comm/internal_market/privacy/docs/adequacy/decision-c2003-1731/decisionargentine_en.pdf and also <http://www.protecciondedatos.com.ar/decen1731.htm>

There are administrative and judicial instances to enforce the Law regarding the access to government public information and personal data. In order to guarantee the minimum rights written down in the Law, there are procedures for the access and correction of data, as well as the appeal for review, both in an administrative instance. If the person persists on the dissent of the matter, he/she can go to the judicial instance, either by means of the *Juicio de Amparo* (a safe, fast and effective procedure to safeguard the individual rights granted by the Constitution to all citizens and persons), or another procedure before the tribunals.

11. Related Non Governmental Organizations

At the present time there are no civil organizations specialized exclusively in the procurement and legal protection of the privacy rights. There are, on the other hand, various associations and centres dedicated to the study, publication and promotion of transparency, right to know and access to public information. Libertad de Información México ("LIMAC") (Freedom of Information Mexico); Fundación Información y Democracia ("FIDAC") (Foundation Information and Democracy); Proyecto Atlatl; the Universidad Nacional Autónoma de México (UNAM) in the Instituto de Investigaciones Jurídicas (Law Research Institute) and Facultad de Derecho (Law School), and the Centro de Investigación y Docencia Económica (Center for Research and Economic Teaching) (CIDE), and the Programa Iberoamericano de Derecho de la Información, Universidad Iberoamericana (UIA), among others, are in charge of it ⁽²³⁾.

III. MAIN FACTS AND EVENTS INFLUENCING THE FATE OF PDM REGULATION AND DEVELOPMENT

12. The Personal Data and the Private Sector

It is necessary to consider the rights of the citizens' privacy in front of the other citizens, in front of the diverse civil organizations, and in front of the companies, some of them big and powerful trans-national corporations, others simply oriented to provide personal information in a small measure and with narrow purposes, but always outside of the personal use of a single holder. Explicit law regulation in respect to personal data is required in a democratic system with civil liberties constitutionally granted. The contractual relationships justify the possession of personal information by

²³ For a survey of the NGO's process, see: Talli Nauman, Mexico's Right-to-Know movement Citizen's Action in the Americas n. 4, February 2003, <http://www.americaspolicy.org/citizen-action/series/04-rtk.html> For a listing of some of the NGO's see: http://www.americaspolicy.org/citizen-action/series/04-rtk_body.html#mexican

several people and organizations that information is used for certain purposes, and for a certain cost, and it becomes merchandise in the current productive cycle. The rights of people's privacy can suffer abuses if there is not an explicit regulation on direct marketing in the consumer protection dispositions. It is needed, on the other hand, to promote open markets for information societies.

Telephone calls, advertising promotion by postal mail and by electronic mail; not requested fax; etc., constitute intrusions in the private life that should require by law consent of people to be included and/or excluded, previous or later, in a database with marketing purposes. Another very important aspect is the credit reports, where the personal data of the people subject of credit are used with the purpose of guaranteeing the viability of the domestic financial system of the country, that is to say, the public interest. But credit information can also be abused in several ways: when the instalments are enlarged more than it is reasonable; also in the case of the "right to forget" or "right to oblivion": the report of insolvency should not be prolonged for more than a reasonable number of years, i. e. five, after regularization (such is the term fixed by the Colombian jurisprudence. The usual term in Mexico is seven years. ⁽²⁴⁾). Other practices to follow are the personal sensitive data processing within the financial, marketing or credit report in the same database, (situation prohibited by the European Directive, although it is an usual practice in some of the American marketing).

All the above-mentioned is important because it is necessary that the next Federal Law of Personal Data contemplates appropriate and thoroughly all those suppositions where the rights of the citizen's privacy over his/her data find a balance with the rights of the society to know them, as well as the proper design of the attributions and powers of the organ or national authority in the matter ⁽²⁵⁾.

But above all, making sure the enforcement of the law, there is a unique chance to enact a personal data comprehensive law which take into

²⁴ For personal credits the right to oblivion is seven years (as stated in the Article 23 of Ley de Sociedades de Información Crediticia), but the credit shall be completely closed or already paid; "with no juridical relation" which means paid freely and with no enforcement of lawyer's firms or debt collection agencies; and "with no judicial sentence against the debtor" and only when the credit is not more than 300,000 UDI's, around one million pesos Mexican currency. For societies there is no right to oblivion. Cf.: <http://www.burodecredito.com.mx> There are some reports stating that there are still real estate practices demanding for a term of fifteen years to be able to obtain a mortgage credit, which is against the law.

²⁵ Among the local groups of interest to take into consideration we shall mention Asociación Mexicana de Mercadotecnia Directa <http://www.ammd.org> and some other marketing and information societies. There are a number of international organizations, laws, treaties, conventions and standards, from which Mexico can take advantage from, by knowing their experiences. Some of them are referred in: <http://profesor.sis.uia.mx/aveleyra/comunica/privacidad/oirpdp.htm>

consideration the people's needs, the use of the information for the benefit and fulfilment of the real needs of ordinary people, boosting the economic system, reducing transaction costs and expanding Mexican internal markets.

13. Recent cases of importance

Although we could find some more ⁽²⁶⁾, three matters have mainly monopolized the attention of the media in regard to privacy. The first one, the persecution of the companies that, violating the principle of the consent of the holders of the data, made use of diverse databases like the federal electoral census, the vehicle registration, the registration of the driving licenses, etc., to sell them to the North American companies "Choicepoint" and other ones; which became suppliers of the government of the United States, especially of the government agency INS (Immigration and Naturalization Service), among others. The facts were already known (EPIC had given the news more than one year before, including copy of the document as a proof ⁽²⁷⁾), but the matter didn't take entity until the newspaper *Reforma*, of Mexico City, published in its front page the news on April 13, 2003, and from that date on continued to investigate the facts spreading the news to other media ⁽²⁸⁾.

The second important matter is related with the implementation of diverse control measures in the borders of the United States and Mexico, and of Mexico and Guatemala. The fight against the terrorism is important, and has forced to measures of biometric identification of prompt implementation, as well as to the United States government's critic to the security of the consular documents of identification of Mexicans that ended up as valid identifications with effect before the authorities of the United States ⁽²⁹⁾, although the measures in the antiterrorism fight seek to harden

²⁶ Among them see: CNDH finds violations to privacy in INBA and makes a recommendation: http://www.cndh.org.mx/Principal/document/Comunicacion_Social/boletines/jun2003/bol_084.htm; US Department of State Human Rights Report 2002 includes other cases: <http://www.state.gov/g/drl/rls/hrrpt/2002/> and <http://www.state.gov/documents/organization/19593.doc> under number 1 "f)". Other cases are referred in Reporte Situación de los Derechos Humanos en Mexico de la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos en México, available in: <http://profesor.sis.uia.mx/aveleyra/comunica/privacidad/oirpdp.htm> <http://www.gobernacion.gob.mx/archnov/diagdhm.pdf> y en: http://www.cinu.org.mx/prensa/especiales/2003/dh_2003/index.htm see particularly Recomendación 14, page VIII, and chapter 2.3.1 Otros Derechos Civiles, Derecho a la Libertad de Expresión y Derecho a la Información, p 64 y related notes (196 to 221) [February 2004].

²⁷ <http://www.epic.org/privacy/publicrecords/inschoicepoint.pdf>

²⁸ Cfr. the news: <http://profesor.sis.uia.mx/aveleyra/comunica/privacidad/noticias/> [February 2004].

²⁹ See: http://www.eluniversal.com.mx/pls/impreso/noticia.html?id_nota=157874&tabla=notas

the standards on the part of authorities of the American government. Private companies began to sell chips for medical purposes or for security and location of persons (³⁰).

A third matter refers to the opening of the secret files from the government relative to the events of 1968 and the denominated "dirty war" (³¹) against the social movements and *guerilla* fighters of the decade of the seventies. This opening happened in the previous stage to the existence of the LFTAIPG. It is written in its article 14 *in fine* (and it is repeated later on by the diverse laws in the matter, especially those of the Judicial power) that it will not be considered reserved all information related with the investigation of serious violations of fundamental rights or those considered crimes against mankind (*delitos de lesa humanidad*) that appears in the public files. Serious violations to human rights in the past were the slaughters of 1968 (³²30), of 1971 (³³), the "dirty war", as well as the abuses of the Secret Police Corps. (³⁴)

14. Anti-terrorist battle and erosion of private life: impact on Mexico of the policies of the United States. The common border and the bi-national security issues.

The records of the negotiations between the United States and the European Community in regard to the protection of personal data point out a difficult way. The rights of people should not be in conflict with national security, although the experience frequently dictates the opposite in this stage post 9-11. The bi-national agenda US-Mexico should contemplate safeguards of the human rights of the immigrants, whether they be legal immigrants or illegal aliens, including collaboration from the authorities on both sides of the frontier to guarantee the respect to the fundamental rights of people, which includes the establishment of clear rules and principles for the treatment of the personal data, in conformity with international law and with the principles accepted by both countries, in harmony with the systems that better guarantee, because of its high standards, the protection of the

³⁰ Private companies in Mexico began to sell chips for medical purposes or for security and location of persons: v.gr. http://www.eluniversal.com.mx/pls/impreso/noticia.html?id_nota=158107&tabla=notas

³¹ Kate Doyle. Human Rights and the Dirty War in Mexico. <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB89/>

³² Kate Doyle. Tlatelolco Massacre: Declassified U. S. Documents on Mexico and the Events of 1968 <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB10/intro.htm> The declassified documents available in: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB10/nsaebb10.htm>

³³ Kate Doyle. The Corpus Christi Massacre. <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB91/>

³⁴ A review of the news, in: <http://profesor.sis.uia.mx/aveleyra/comunica/privacidad/noticias/> [July 2003].

human rights in this matter, trying to offer the homologation in particular with the protective system of the European Union, and also trying to find the roads for the summing up of the bi-national Agreement for the Exchange of Data, similar to the Safe Harbour Agreement between the State Members of the European Community and the United States. We shall follow carefully the Patriot Acts I and II proceedings, and its related agenda ⁽³⁵⁾ as well as their *countermeasures* ⁽³⁶⁾. The Foreign Intelligence Surveillance Act (FISA) and related regulations are to be considered in the bi-national security talks ⁽³⁷⁾ involving privacy.

³⁵ See: http://www.fas.org/irp/congress/2002_hr/ ; <http://www.cdt.org/security/usapatriot/hearings.shtml> ; <http://www.epic.org/privacy/terrorism/usapatriot/> ; <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12126&c=207> Overviews and analysis in: http://www.eff.org/Privacy/Surveillance/Terrorism_militias/20011031_eff_usa_patriot_analysis.php ; also in : <http://www.abanet.org/irr/hr/winter02/podesta.html> and http://www.eff.org/Privacy/Surveillance/Terrorism_militias/20011031_eff_usa_patriot_analysis.php

³⁶ There are many reviews to the reactions aroused by Patriot Act I and II and favouring the American's civil liberties; cfr. per example, The Bill of Rights Defense Committee <http://www.bordc.org/> ; Repeal Now <http://www.repealnow.com/> ; several local enactments can be seen in: <http://multihome.www.opus1.com/ian/private/2003/06/13/> ; <http://www.cotse.net/privacy/patriot.htm> ; <http://mail.vex.net:99/pipermail/wclp/2003-March/001781.html> ; <http://www.efn.org/%7Elcbordc/lcbordcresolution.htm> ; <http://www.globalpolicy.org/wtc/liberties/2003/0507broward.htm>. The most important reaction against Patriot Act is, perhaps, a Congress hearing intending to protect threatened civil liberties.

³⁷ See: <http://www.epic.org/privacy/terrorism/fisa/>