

## **“FREEDOMINFO.ORG” – 14 DE OCTUBRE DE 2003**

### **THE FREEDOM OF INFORMATION CAMPAIGN IN ARGENTINA**

**BY MARTHA FARMELO**

Imagine the desperation of a transplant patient who in 2001 stopped receiving essential medication from the public hospital she counted on for her survival—and was utterly unable to learn why. With help for the Ombudsman of the city of Buenos Aires, she and other transplant patients used the city’s freedom of information law to demand an explanation from the hospital. After reiterated requests, they learned that the hospital lacked the necessary funds—which allowed them to take appropriate legal action to reclaim that vital supply of medicines.

Imagine, too, the massive, pot-banging protests that precipitated the December 2001 resignations of President Fernando de la Rúa and seven-day President Adolfo Rodríguez Saá, who followed him. The unifying slogan that emerged during the uprisings was “*¡Que se vayan todos!*,” roughly “Out with all of them!,” meaning all politicians, quite literally. Indeed, widespread corruption and privilege among politicians left them so deeply discredited that for more than a year after the uprisings, only a handful could show their faces in public without being yelled at, even spat upon and otherwise chased away.

Sudden, unexplained shortages of transplant medicines and “*¡Que se vayan todos!*” describe some of the context in which Argentine advocates for freedom of information laws have operated in recent years. The city of Buenos Aires passed an excellent freedom of information law in December, 1998. A synergetic combination of politics, personal relationships and perhaps some degree of luck was at play when the lower house of the national Congress passed a similar law in May, 2003—the drafting of which was the result of an entirely novel process of collaboration between civil society and the executive branch.

### **OBSCURE PIONEERS: FREEDOM OF INFORMATION LAWS IN THE PROVINCES**

Argentina is comprised of 23 provinces and the capital city of Buenos Aires, a federal district like Washington, DC. The government of the city of Buenos Aires—its constitution, executive, legislature and courts—are a mere seven years old.

According to the *Centro para la Implementación de Políticas Públicas para la Equidad y el Crecimiento* (Center for Implementation of Public Policies Promoting Equity and Growth, CIPPEC), the city of Buenos Aires and 12 of the 23 provinces enshrine the right to public information in their respective constitutions. Of them, the city of Buenos Aires and five provinces have freedom of information laws.<sup>i</sup>

In addition to the provincial laws, the municipality of General Pueyrredón in the province of Buenos Aires passed a local freedom of information statute in January 2001.<sup>ii</sup> The municipality of Ushuaia in the southernmost province of Tierra del Fuego enunciated the right to public information in its *Carta Orgánica* of March 2002.<sup>iii</sup>

The first freedom of information law in Argentina passed in the province of Río Negro in 1984,<sup>iv</sup> though it only benefits persons residing in the province, as does a 1992 law in the province of Chubut.<sup>v</sup> A 1989 statute in the small, northwestern province of Jujuy established freedom of public information for all persons,<sup>vi</sup> and similar legislation was passed in 2000 in the province of Buenos Aires.<sup>vii</sup>

It appears that these laws are scarcely used, if at all. Alicia Miller is editor of the regional daily *Río Negro*, published in the province of the same name in the eastern Patagonia. According to her, the Río Negro statute is virtually never employed. Her news staff have used it just twice since it was passed, in part because of Argentina's notably weak tradition of investigative journalism.

About ten or twelve years ago, Miller's paper sought to demonstrate that the provincial government had taken out a bank loan to pay salaries, but the information request to the provincial bank was denied. They went to court and lost when the judge ruled that the information solicited constituted a banking secret. "Banking secrets apply only to private individuals, not the government, but the freedom of information law in Río Negro has no mechanism for an appeal," Miller said.

Freedom of information workshops can make a difference. In early September, 2003, Miller attended a seminar for journalists on freedom of expression, held in Buenos Aires. After a discussion of access to public information, she said, "I am determined to use our provincial law once a week from now on."

Sandra Crucianelli is a television journalist in the city of Bahía Blanca in the province of Buenos Aires. She said, "In the city of Buenos Aires, you have a law that is better than the one in the province [of Buenos Aires]." According to her, the provincial law is rarely employed and not particularly helpful. Although standing applies to all persons, information solicitors must justify their request as "legitimate." Worse, the law exempts from disclosure information that might harm someone's "honor," which can be broadly interpreted.

Crucianelli was involved in an information request to the provincial authority that regulates water quality. "We wanted to see the results of the tests of chemicals like lead and mercury in the water to determine if contamination by local companies was exceeding the limits imposed by law. Our request was turned down," she said. "We were told that it could harm the honor of local companies, even though we didn't ask for a list of companies."

The *Fundación Ambiente y Recursos Naturales* (Environment and Natural Resources Foundation, FARN), FARN has been working on these issues since the early 1990s. Daniel Parpinial of FARN's citizen participation program said, "The law in the province of Buenos Aires is confusing. We don't use it. We make reference to international treaties instead." Furthermore, in the province of Buenos Aires, "We've made a number of requests on behalf of neighbors there. They don't give you anything."

## THE NATIONAL CONSTITUTION DECLARES THE RIGHT

The right to obtain public information is amply guaranteed in the 1994 national constitution (Article 75, clause 22), which gives international treaties ratified by Argentina precedence over national laws. Three such treaties make reference to the freedom of information: the Universal Declaration of Human Rights (Article 19), American Convention on Human Rights (Article 13, clause 1) and the International Covenant on Civil and Political Rights (Article 19, clause 2).<sup>viii</sup>

In the absence of a national law, non-governmental organizations (NGOs) have gone to court several times invoking the right to access state information based on the national constitution. The leading case was filed in October 1996 by anthropologist Sofia Tiscornia with assistance from the *Centro de Estudios Legales y Sociales* (Center for Legal and Social Studies, CELS). In 1995 Tiscornia had requested information from the federal police about detentions and deaths in the line of duty for a research project on police violence in the city of Buenos Aires. A federal court ruled in her favor and an appeals court upheld the ruling and ordered the federal police to disclose the information, which they eventually did—years after the initial request.

## TWO FREEDOM OF INFORMATION LAWS IN THE CITY OF BUENOS AIRES

Roberto Saba is a public interest attorney and Executive Director of the *Asociación de Derechos Civiles* (Civil Rights Association), an eight-year-old organization that operates like the American Civil Liberties Union. He said that local environmental organizations were among the first to see the need for a public information law in Argentina—and again, a seminar made a difference. In 1998, while an aide to city legislator Marta Oyhanarte, Saba attended a workshop on access to environmental information held by FARN.

As Saba listened to the foundation's justification for a freedom of information act on the environment, he understood that a full law addressing all types of public information was essential in Argentina. "I had worked in the U.S. and was aware of the Freedom of Information Act, but this workshop moved the issue to the front and center of my screen," he said.

Marta Oyhanarte is a gutsy lawmaker whose career in public office and unwavering commitment to broad civic participation have roots in her tireless quest for truth and justice for the death of her husband, Osvaldo Sivac. In both 1979 and 1985, Sivac was kidnapped for ransom by members of the Argentine security forces. More than two years after the second kidnapping, Oyhanarte learned that her husband had been killed by his captors after the ransom had been paid. In 1989, she co-founded *Poder Ciudadano*, Citizen Power, which promotes civic rights and citizen participation.<sup>ix</sup> Once elected to the city legislature, she denounced corruption among colleagues of her own party.

Immediately after attending the workshop by FARN, Saba proposed to Oyhanarte that she put forward a public information law. The city's constitution contains multiple mechanisms for citizen participation—things like public hearings and plebiscites—and access to public information is a prerequisite for the exercise of each of them.

Within a year, the city of Buenos Aires passed a freedom of information act.

Shortly after speaking with Oyhanarte, Saba set out to draft this law. After researching examples from other countries, he decided to model the draft bill on the U.S. Freedom of Information Act (FOIA). “It seemed like the best example, something short and simple,” he said.

Law 104 establishes standing for all persons to request all information held by the state, though the state is not required to produce information. Information is free, except for the cost of photocopies. The law includes exemptions for banking secrets, professional secrets, and other information exempted by specific laws such as privacy laws. Requests must be made in writing and justification is not required. Replies are due in 10 days, with a one-time postponement of 10 days when absolutely necessary. The law determines that if the information is not provided within the stipulated time frame, the requestor may seek a court injunction to obtain the information, as stipulated in the national and city constitutions.

The first hurdle in passing the law was getting it on the agenda of the legislature’s Justice Commission. The proposed bill was signed by both Marta Oyhanarte and Aníbal Ibarra, which helped move it forward. Ibarra is currently Chief of Government of the City of Buenos Aires and was then Vice President of the city legislature.

What initially appeared a contentious issue became a rallying point for an ever-growing number of supporters of the bill: that of ample standing. Saba intentionally drafted the law to apply to “*toda persona*,” that is, all people. According to administrative law in Argentina, standing is generally limited to those who have an established interest in the matter at hand. One legislator particularly interested in civil rights liked the definition of ample standing, and the notion caught on.

Several legislative aides and colleagues supported the bill. The main point of contention stemmed from confusion between the concept of *habeas data* and full access to information. (*Habeas data* is the right to access one’s personal records in public data bases such as those that track individual credit ratings, or in public ones, such as those of the federal police.)

However, there was little debate of this bill. A combination of support for it and relatively little attention to it appears to have been advantageous. Widespread interest in combating corruption and the emphasis on citizen participation in the city’s constitution led to positive consideration, as well. Furthermore, there were few parties with a vested interest in defeating this legislation at the city level, in contrast to the national level where issues of national defense, internal security and foreign policy come into play.

According to Saba, Law 104 passed unanimously. There is no public record of the vote—another persistent information problem in the national and provincial legislatures.

In November 1999, the city legislature approved an information law specific to environmental information, which is defined in the statute (Law 303).<sup>x</sup> One environmental activist argued that a statute aimed specifically at environmental information is a mistake because information should be gathered under one general law. However, Law 303 also requires the city government to produce information in the form of an environmental registry and an annual environmental report. This law allows for informal, even oral information requests, which must be honored within 15 working days.

## **IMPLEMENTATION OF LAW 104 IN THE CITY OF BUENOS AIRES**

As freedom of information advocates well know, achieving a statute is a far cry from implementing it. Is Law 104 put to use in Buenos Aires, and is it helpful?

The results have been mixed. Roberto Saba said, “For Alicia Oliveira [until recently Ombudsman for the city of Buenos Aires], it was easier to use the freedom of information law as a resident of the city of Buenos Aires than to use the organic law of the ombudsman’s office,” which entitles her to receive information from all city government offices. Environmental organizations have made use of the law as well, but few others have done so.

**Implementation by the Ombudsman’s office.** The city ombudsman’s office was created in 1996. Its mission is to defend the rights and interests of city residents relative to acts or omissions by the government, public service entities and local police. This office addresses problems that arise in areas such as public services, human rights, consumer rights, senior citizens rights, and ecology and environment. The ombudsman’s office has a relatively high profile in the city, and requesting information is one of its central functions.

According to a study by Mariano Nino,<sup>xi</sup> during 2001, the different areas of the ombudsman’s office made 13,868 information requests, of which 9,749 went to city government entities. The total breakdown is as follows:

<b>Entity solicited</b>	<b># of Requests</b>	<b>% of total</b>
City government entities	9,749	70.3
Privatized public service companies	888	6.4
Public service regulatory entities	750	5.4
Private companies	596	4.3
Federal police or other security forces	471	3.4
National entities	430	3.1
Others	984	7.1
Total	13,868	100

Diego Morales is a lawyer at the ombudsman's Research and Studies Institute. According to him, the vast majority of those requests are made on a standard form that invokes Law 104.

According to Nino, three quarters of the 9,749 requests to the city government were submitted to agencies dealing with health, housing, education, government control, social development, public works and services, and environment and urban planning. The largest number of requests—30 percent—went to the *Subsecretaría de Regulación y Fiscalización*, the sub-secretary for government oversight and regulation.

To test the quality of responses, Nino analyzed a sample of 300 requests to the ten most commonly solicited agencies. Of those requests, 13 percent received no reply whatsoever.

For the other 87 percent, the reply took an average of 102 days—nearly three-and-a-half months.<sup>xiii</sup> Only one in ten replies was received within the legal limit of ten days, so the information, once received, was often no longer useful. On December 23, 2002, the ombudsman's office received a reply to a request dated April 16, 1999 on behalf of a city resident concerned about apparently illegal activities of a neighboring business. When the information was received—three-and-a-half years after the initial request—the business had closed down.

Moreover, the *quality* of the replies was often dreadful. In the majority of cases, the information was neither complete nor entirely pertinent.

Diego Morales' job includes taking legal action on behalf of city residents when government offices fail to provide timely, adequate information. "Going to court takes a lot of time and resources," he said. "We can't do it very often." Fortunately, in many cases, a formal letter from the ombudsman's office with a clear reference to Law 104 is enough to spur the agency in question into compliance.

On May 28, 2002, the Ombudsman sent a letter to the Municipal Housing Commission on behalf of a city resident in poor living conditions and her daughter who suffers multiple disabilities. She said that although she had qualified and been selected for one of 300 new apartments the city built in her slum, she was excluded from the group that received possession of those apartments. On June 20, 2003, the city replied with a letter explaining the status of her request, including the unit assigned to her, pending final approval from city authorities.

Morales said his office has gone to court about ten times in the last two years to force city government agencies to comply with law 104. In one case, residents of a city slum called *Villa de Emergencia 1-11-14* were desperate to learn the government's plans to build a road and improve housing there, which they understood involved relocating numerous families. After more than a year of unanswered information requests, the city housing commission responded to a court injunction with a pile of information—including an "urbanization plan" for the slum in question—which was not useful. "That plan was crafted in the 1970s for an area with a population that was much smaller than it is today," said Morales. It turns out the city has no real plan for *Villa de Emergencia 1-11-14*.

**Implementation by environmental groups.** FARN is one of Argentina's premier environmental organizations and actively promotes citizen participation in civic affairs. According to FARN's Daniel Parpinial, the foundation helped city residents use Law 104 about half a dozen times in the last twelve months. Usually the mere threat of a possible court action spurred the city agency in question to comply with their request, though the information was often late, incomplete, and informal—sometimes in the form of a phone call to the city resident who solicited it. A handful of times, FARN has gone to court seeking an injunction that would force the government agency to comply.

In one case, FARN represented a resident of the city of Buenos Aires who was concerned about the environmental impact of the city's plan to build a rainfall reservoir in his neighborhood. This case involved a separate law that requires the city to do an environmental impact study before proceeding, but FARN also invoked laws 104 and 303. Eventually the resident was able to see and photocopy environmental impact information the city government had on hand.

Javier María García Elorrio is a lawyer at the *Fundación Ciudad* or City Foundation, which is dedicated to improving the quality of urban life in Argentina. "Law 104 works well," he said. It is easier for him to make requests as a private citizen rather than a staff member of the foundation, which requires presenting the organization's by-laws. "Law 104 gives more power to one citizen with one piece of paper than 60 city legislators all together," he added, explaining that city lawmakers' requests often take months to work their way through the legislative bureaucracy, and still yield little or no results.

Like FARN, City Foundation has used Law 104 about five or six times in the last year, and received replies four times. "Normally we receive replies without a court injunction," said García. He once used Law 104 to preserve a public space from commercial use.

In October 2001 García read in the newspaper that the city was planning on allowing restaurants to put outdoor tables on a terrace next to Buenos Aires Design near the Recoleta Cultural Center. García asked the Secretary of Urban Planning to clarify whether or not the city of Buenos Aires considered the terrace a public space, which he believed it to be, and if the city's plan for that space adhered to established rules for its use.

According to García, the city replied confirming that the terrace was, indeed, a public space. The day the restaurants tried to erect large umbrellas to cover outdoor tables, he was on the scene with the city's answer in hand. "They didn't put up the umbrellas," he said, "and there are no businesses operating on that terrace."

Sometimes an information request results in resolution of the problem, even if the request is never answered. Andreína de Luca de Caraballo is a member of a neighborhood association located adjacent to the National Library, whose air conditioners generated excessive noise that disturbed de Luca and other neighbors. The City Foundation assisted de Luca in soliciting copies of all complaints about noise from the air conditioners. Although her request was never honored, her goal was

achieved when the city took measures that reduced the noise. Similarly, an information request by the same neighborhood association regarding unfinished repairs to a nearby park went unanswered but resulted in completion of the work in question.

**Laws and Decrees That Flow From Law 104.** Several access activists agree that since passage of Law 104, the city of Buenos Aires has experienced slow but steady cultural change toward increased freedom of information. Néstor Baragli is an attorney and Senior Advisor on Transparency Policies in the national Anticorruption Office. He cites as examples a string of seven legal norms that flowed from Law 104:<sup>xiii</sup>

1. A June 2000 reproductive health law (#418) that requires the city government to publicize its actions in this area.
2. The December 2000 law (#539) that requires the city to publicize quarterly lists of public works initiated or completed.
3. A September 2000 decree (#1646/2000) that created the *Programa de Acceso a la Información y Transparencia en el Gestión* (Program of Access to Information and Transparency in Management), which seeks international funding to improve access to information and government transparency.<sup>xiv</sup>
4. A March 2001 law (#561) that led the government to publish 3,000 city decrees until then considered “secret.”
5. An April 2001 law that requires the government to post on-line a list of all government officials, personnel and contractors; their remuneration; annual budgets for the three government branches; and related information.
6. A May 2001 resolution requiring the Secretary of Health to post information on-line on all requests for proposals or bidding processes for government contracts.
7. A March 2002 law requiring Secretary of Health to publish detailed information on-line on purchases of supplies and services.

Despite these promising norms, activists say that few persons or organizations outside the ombudsman’s office and environmental groups use Law 104. According to Roberto Saba, this is due in part to a weak culture of exercising one’s civic rights in Argentina, pervasive distrust in the justice system, and the financial costs of taking legal action. Furthermore, there has been no education campaign nor other program to promote implementation, by either a public or private entity. Still, the law is a useful tool for those who employ it, and has served as a precedent for efforts to achieve a national freedom of information act.



## DRAFTING THE NATIONAL BILL: CREATING CONSENSUS BY GOVERNMENT AND CIVIL SOCIETY

According to Saba, as recently as four or five years ago, concern about the need for a national freedom of information law in Argentina was negligible. Although a number of lawmakers had circulated freedom of information bills in the national Congress, their goal appeared limited to improving their image—not passing those bills. An exception was Congresswoman and recent presidential candidate Elisa Carrió, who has dedicated much of her career to fighting corruption in public administration. She presented an information bill in 1998, but after two years without being taken up, it expired.

The freedom of information issue came to the fore after the 1999 presidential election was won by *La Alianza*, a political alliance between the middle class Radical party and the newer FREPASO, a progressive coalition. Radical Fernando de la Rúa and the FREPASO's Carlos "Chacho" Alvarez won the presidency and vice-presidency, respectively, largely on audacious promises to eliminate entrenched government corruption. Many Argentines consider corruption emblematic of the presidency of Carlos Menem, who held office from 1989 to 1999. During the campaign, Ricardo Gil Lavedra—who later became Justice Minister—asked Saba to draft an access to information bill as part of de la Rúa's anticorruption platform.

One of the *Alianza's* first measures was to create the *Oficina Anticorrupción* (OA), an Anticorruption Office.<sup>xv</sup> According to the OA's Néstor Baragli, Chacho Alvarez envisioned that this office would conduct extensive investigations into corruption during the Menem years, take perpetrators to court and publish a "CONADEP" on corruption—referring to the 1984 official report that detailed the grisly human rights abuses committed during of the dictatorship of 1976 to 1983. (CONADEP stands for National Commission on the Disappearance of Persons).

According to Baragli, it became clear early on that thorough investigations of official corruption would be almost impossible to implement, in part because of the scope of the problem. Moreover, it became clear that prevention would be far more effective than investigations.

In October 2000, Chacho Alvarez resigned the vice-presidency to protest the promotion of the labor minister to de la Rúa's Chief of Staff despite his connections to a ghastly bribery scandal in the Senate linked to the President's inner circle. Still, the OA has survived and enjoys a reputation of relative prestige and political independence, due partly to its willingness to investigate corruption on the part of *Alianza* members.

The OA crafted an entirely novel process called *Procedimiento de Elaboración Participada de Normas* (EPN) in which government officials and civil society come to consensus on specific measures to send to Congress. EPN was inspired by the process of administrative rule-making in the United States in which non-governmental experts help formulate regulations.<sup>xvi</sup> The goals of EPN include greater transparency

in the process of drafting laws, a technically higher quality law, and wide support for the bill among government actors and civil society. EPN was first used for a law to regulate lobbying.<sup>xvii</sup> The OA spent several months in 2001 leading an EPN for a freedom of information law, which gave considerable political weight to the bill crafted during the process.<sup>xviii</sup>

First, the OA called upon Roberto Saba to draft a bill that served as the basis for discussion, and was modeled after the capital's Law 104. The OA then held four workshops in June 2001 attended by an average of 20 persons each to present and discuss the law. These events were held for business persons; media owners and managers; journalists; and academics, NGOs and consulting firms.<sup>xix</sup>

These workshops were helpful for generating consensus about the content of the bill—and the need for such a law. In the fourth workshop, a number of academics specializing in constitutional law argued initially that Argentina had a “hyperinflation” of laws and did not need another one, especially since the right to obtain public information is established in the national constitution. By the end of the workshop, many were convinced of the usefulness of such a statute.

OA staff also held meetings with individuals and organizations interested in this project. The OA posted the bill on its internet site and on that of the Ministry of Justice and received numerous opinions by electronic and regular mail. The OA published advertisements in two national dailies that described the bill, provided the website on which it was posted, and encouraged Argentines to contact the OA with their opinions and suggestions.

During this process, the OA was contacted by a number of government employees involved in administering public information. They expressed concern that a freedom of information law could jeopardize their positions since they might be sanctioned by their superiors for complying with the law—or sanctioned by the courts for failing to do so. They were also worried that such a law might contradict prevailing regulations that prohibit disclosure of certain government information. How would they know which rules to follow?

To air and address these concerns, the OA held a fifth workshop in July 2001 for government employees—the best attended of all.<sup>xx</sup> Participants represented entities such as the Central Bank, the National Communications Commission, the National General Accounting Office, the National Institute of Industrial Technology, and the National Institute of Statistics and Census. Finally, after incorporating modifications suggested during the consultative process, the OA held a sixth workshop with a group of civil society organizations to discuss the fine points of the final version of the bill.<sup>xxi</sup>

The bill includes the right for all persons to solicit and obtain information that is complete, truthful, suitable and timely from all government entities (including executive, legislative and judicial bodies) and those private entities that have received contracts or funding from the government (Articles 1 and 5). Information must be provided within 20 working days (Article 4). The law includes the right to seek a court injunction if the information is delayed or incomplete, if the law is otherwise not followed (Article 6). Exemptions are made for information protected under

specific laws, including banking secrets and data related to defense, national security, foreign policy, financial-economic policy, tax policy and scientific-technical policy. Sensitive personal information is exempted as per Law 25.326 (Article 7).

## THE PLAYERS, NATIONAL AND INTERNATIONAL

Going into this process, several staff at the OA and members of key NGOs knew each other well and shared a common framework for conceptualizing a broad freedom of information law. Roberto de Michele, then the OA's Director of Planning of Transparency, Roberto Saba, and Néstor Baragli all had worked at *Poder Ciudadano*. De Michele had been President and Saba Executive Director.

"We all had a shared vision of corruption and freedom of information that goes beyond the punitive," said Baragli. "We believe in the notion that corruption thrives in the dark, and when you open the door and let the light in, it dies. So it's not just about punishment, it's about letting in the light," he said.

On the other hand, the main players in this last workshop and in the process in general include NGOs with diverse missions and ideological tendencies.<sup>xxii</sup> For example, the progressive Center for Legal and Social Studies is dedicated primarily to political and socio-economic human rights issues. The *Centro para la Implementación de Políticas Públicas para la Equidad y el Crecimiento* (Center for Implementation of Public Policies Promoting Equity and Growth, CIPPEC) is more focused on issues of transparency in government. Throughout the process, FARN has remained active on this issue, as well. In Argentina, other sectors of civil society such as the women's movement or consumer groups have yet to recognize the value to their work of access to public information, perhaps in part because the issue has been framed primarily in terms of anti-corruption and, though to a lesser extent, freedom of expression.

Also, with rare exception, Argentina's journalists have *not* been players in the struggle for access to public information. In fact, only four showed up to the OA workshop designed specifically for them. One observer argued that many Argentine journalists are arrogant, have extremely well-placed informants and perhaps fear ceding influence to other journalists who would make use of public information.

Daniel Santoro is the political editor for *Clarín* (Argentina's mostly widely-read newspaper) and an advocate for freedom of expression and access to public information. In 1995, he broke the story on then-President Carlos Menem's illegal sale of arms to Ecuador and Croatia, which led to a criminal investigation of Menem and his collaborators. He believes that journalists' scant interest in a freedom of information law is due in part to a lack of information about the usefulness of such a statute. The Argentine press is used to working nearly exclusively with oral sources and is simply not accustomed to utilizing public documents. Unfortunately, this situation is reflected in a dearth of coverage of the use of existing laws and of stories based on information released under the law.

To convince journalists of the law's utility, the OA held a special two-day workshop exclusively for them. Santiago O'Donnell of the conservative daily *La Nación* described his use of the U.S. Freedom of Information Act to obtain information from

the U.S. Drug Enforcement Administration. These documents served as the basis for an eight-part series that shed light on the illegal activities of Alfredo Yabrán, a notoriously shady businessman. Yabrán had close links to former President Menem and committed suicide in confusing circumstances. This workshop had an unusual twist: rather than the journalists convincing public officials of the need for a FOIA, the Minister of Justice made those arguments to journalists.

While journalists themselves have been loathe to support this law, *La Nación* and the progressive daily *Página/12* have both run editorials supporting passage of the national freedom of information law.<sup>xxiii</sup> Reflecting the ideological diversity of the NGOs that back this law, support in the media stretches across the ideological spectrum.

A number of international players contributed to moving the process forward, as well. Germany's Konrad Adenauer Foundation sponsored the workshop for journalists in which O'Donnell discussed the U.S. FOIA, and held similar seminars to analyze issues and strategies on access to information. Recommendations from the latter events were sent to the pertinent lawmakers in the lower house of Congress.

Groups like the British Council, the Washington-based Inter-American Dialogue and the London-based Article 19 met with legislators, sponsored activities (many of which were attended by legislators), and otherwise spoke out in Argentina in favor of passage of the law. Some argued that countries with a freedom of information law have better scores in the international Corruption Perceptions Index, in which Argentina currently sits at number 92 of 113 countries rated. In an August, 2003 visit to Buenos Aires, Peter Eigen, Chairman of Transparency International, was a tireless advocate of the law as he met with Argentine President Néstor Kirchner, participated in workshops and spoke to legislators and the press.

U.S. embassy staff has supported the project, too. Furthermore, on a recent visit to Argentina, Assistant Secretary of State for Western Hemisphere Affairs Roger Noriega reiterated U.S. interest in measures that fight corruption and strengthen the rule of law.

## **MOVING THE BILL FORWARD: LOBBYING AND SUCCESS IN THE LOWER HOUSE OF CONGRESS**

The EPN came to a formal end in November, 2001. The following month President de la Rúa resigned in the midst of massive public protest, as did Adolfo Rodríguez Saá after him. In early January 2001, Eduardo Duhalde assumed the presidency, which he turned over to President Néstor Kirchner on May 25, 2003. "We've lived through a number of Presidents and Justice Ministers," said Baragli. "We would send the law to the Justice Minister, and it would come back. We'd send it to the new Justice Minister, and it would come back," he said. Finally, President Duhalde sent it to the Congress as part of a political reform package. Remember "*¡Que se vayan todos!*," or "Out with all of them!:" Duhalde did so in the context of a severe crisis in Argentina's democratic institutions and amidst promises to clean up government corruption.

During 2002 and 2003, civil society groups have diligently lobbied Congress to pass the law. Over the last 18 months they held myriad meetings with lawmakers, including the presidents of the lower house of Congress and of its Commission of Constitutional Affairs, often with half-a-dozen NGO representatives present at a time. They sent numerous letters to lawmakers—often 25 or 30 at a time—and mobilized groups of citizens to send letters, too. They met with the Justice Minister to ask that he spur movement on the law. In September, 2002 FARN held a 300-person workshop on this law at its national colloquium.

In addition, NGOs participated in a formal national dialogues process on political reform sponsored by the Catholic church and the United Nations Development Program. The *Mesa del Diálogo Argentino*, the group of institutions leading this process, spent six weeks gathering congressional signatures in favor of the freedom of information law and achieved 160 endorsements.

The *Foro Social por la Transparencia* is a group of 30 organizations working for political reform. In May 2002 they generated greater public awareness of the bill during an event called the *Cabildo Abierto* in which they publicized and proposed a series of laws aimed at greater transparency in government, which included the information access law.

The OA has lobbied for the law, as well. Roberto de Michele sent letters to a number of legislators offering to explain the process by which the law was created and to provide technical assistance for their deliberations.

The NGO lobbying activities on this issue have required considerable resources to plan and coordinate. Most of that work was conducted by María Baron, director of the Transparency Area at CIPPEC. According to Roberto Saba, Baron also coordinated a veritable army of volunteers who have showered lawmakers with phone calls pushing them to vote in favor of the law. *Poder Ciudadano* also mobilized a volunteer corps for citizen lobbying for this law.

In addition, in June, 2002 five organizations presented a document entitled *Requisitos Mínimos para una Ley de Acceso a la Información* (*Minimum Requirements for an Information Access Law*) to the Commission of Constitutional Affairs of the lower house of Congress.<sup>xxiv</sup> This appears on the CIPPEC website, although CIPPEC is not a co-author.

Finally, on May 8, 2003, the lower house passed the bill.<sup>xxv</sup> Why then? After months and months of lobbying, what finally led to success?

In the moment the vote took place, Argentina was immersed in political chaos. The first-round presidential election held April 27, 2003, was closely disputed between five candidates. In a legal and political spectacle that threatened to prevent the election from occurring at all, bitter infighting precluded the Peronist party from holding a primary and agreeing on a single candidate, and instead, three contenders ran. With less than two percent support, the 112-year old Radical party of former President Fernando de la Rúa barely emerged from that embarrassing polling category called “Others.”

Although former President Carlos Menem beat fellow Peronist Néstor Kirchner in the first round, at the time the law was passed, polls showed that Kirchner would likely trounce Menem in the May 18 run-off by as much as 30 points. On May 15 Menem withdrew from the race, leaving Kirchner president with the slimmest voter mandate in Argentina history.

“It was the perfect scenario [for passing the bill],” said one observer. “The Peronists were totally fragmented and the Radicals were dead.” According to Roberto Saba, although freedom of information was not a public issue, it was present in the minds of many lawmakers. Furthermore, several legislators put their political weight behind the bill, especially those like Congresswoman Elisa Carrió, who presented a bill back in 1998.

### **ARGUMENTS IN FAVOR OF THE LAW, POINTS OF DEBATE AND THE BILL’S DETRACTORS**

The arguments in favor of the law made by the OA, NGOs and other freedom of information advocates were aptly summarized in the justification signed by President Duhalde’s Chief of Staff when the bill was put forward to the Congress in March 2002.<sup>xxvi</sup> These arguments include the following:

- Freedom of access to public information is the best antidote to government corruption—a deeply prevalent and persistent problem in Argentina.
- Access to public information is necessary for citizens to monitor and control government acts, and therefore key to the semi-participatory democracy enshrined in the Argentine constitution, and to democracy in general.
- Access to public information improves the public’s image of government institutions, which will benefit the state at a time when the credibility of Argentine public institutions is at an all time low.
- The right to solicit public information flows from the accepted principle of the public record of government acts, and decisions on which information is disclosed should not reside in government officials.
- Freedom of information is a component of freedom of expression, which is necessary for the robust public debate so critical to the exercise of democracy. (The document cites the U.S. Supreme Court ruling in *New York Times v. Sullivan* that protected free expression by a journalist in the interest of uninhibited, robust and ample public debate.)
- State-held information is owned by all citizens since taxpayer money is used to obtain and produce it.
- Although the national constitution contains the right to information, in the absence of a national law, the exercise of this right is not operational and is subject to the discretion of the public officials who receive such requests. (The document cites the U.S. FOIA.)

- This law is necessary for reversing the tendency to “darkness and hiding” that exists in all of Argentina’s government bureaucracy.

Indeed, Argentina is faced with the challenge of reversing what access advocates and others call “the culture of secrecy,” which is the overriding norm in Argentine government. According to CIPPEC’s María Baron and *Poder Ciudadano*’s Francisco Cullen, during a study conducted by *Poder Ciudadano* in 1999 and 2000, typical replies to simple information requests in institutions such as public hospitals or the city legislature included, “We don’t know who you are,” “Why do you want this information?,” and “We’ll call you.”<sup>xxvii</sup>

Carolina Varsky is the Director of the Memory and Struggle against Impunity for State Terrorism program at CELS. According to her, “[Government employees] say, ‘No’ automatically, even when the information requested may be posted on the internet. They might not know it,” she said.

The culture of secrecy is institutionalized in numerous laws and decrees.<sup>xxviii</sup> First and foremost, all activities of the *Servicio de Inteligencia del Estado* (National Intelligence Service, SIDE), including its organization, function and documentation, are considered state secrets. Other examples include Law 21.526 on bank secrets and Law 25.326 on personal information. Law 11.683 on fiscal procedures determines that all information presented to the federal tax administration is secret.

A quick look at the secrecy issue leads directly to the freedom of information law’s principal opponents. More than one observer sees the SIDE as the principal force behind the opposition to this law. The SIDE has a notorious history of alleged corruption and other illegal activity.

The law’s prospects are complicated by the fact that the head of the Senate’s Commission on Constitutional Affairs is none other than Cristina Fernández de Kirchner, President Néstor Kirchner’s wife. Some suspect that she may block passage of this legislation because the President can not afford to anger the SIDE with a freedom of information law. The President has already challenged powerful institutions such as military, the federal police and the financial establishment with a sequence of progressive policies on human rights and other issues.

Such institutions are precisely those that would join the SIDE in opposing the freedom of information law. Financial entities are used to operating with highly elevated levels of secrecy, and are undoubtedly concerned about banking information becoming public.

Furthermore, near total secrecy was key to the systematic torture and disappearance of approximately 30,000 people during the last dictatorship. At present, awareness of and sensitivity to the issue of military participation in those human rights abuses are high. Since assuming office on May 25, 2003, President Kirchner has taken bold steps to bring the perpetrators to justice. These measures include opening the door for the courts to study extradition requests of military officials, and urging the Congress to nullify the so-called impunity laws that put an end to the trials of those who conceived and carried out the repression, which it did in August, 2003.

However, the situation in Congress is more complex than a struggle over a FOIA-type bill. Just when the Senate Constitutional Affairs Commission is debating a freedom of information law, its Defense Commission is debating a comprehensive bill to regulate state secrets—despite the battery of existing secrecy laws. This law would determine what information can be classified, by whom and for how long, which, among other things, is entirely relevant to efforts to establish truth and justice for the crimes of the last dictatorship. According to several information advocates, the SIDE is one of the principal forces promoting the secrecy bill.

The secrecy bill drafts under discussion limit standing to Argentine citizens only. Furthermore, although the information law says information can only be classified by law or decree, that is, by Congress or the President, the secrecy law would allow lower-level officials such as the minister of defense to classify information. To address this situation, in September, 2003 the original authors of *Minimum Requirements* document and CIPPEC prepared a second version of that document that adds criteria on information classification.

The simultaneous consideration of the freedom of information bill and the secrecy bill has led to a debate about the possibility of unifying the two bills into one. Naturally, freedom of information advocates wholly agree on the principle that full access to public information must be the norm and any exemptions the exception. How to achieve this principle given that the secrecy law would make exemptions the rule?

Many freedom of information advocates are adamantly opposed to unification of the two bills—unless the secrecy provisions are confined to the bill’s article that describes exemptions. Others argue that unification is preferable to the possibility that the two bills go forward separately since the secrecy law could be passed and the freedom of information law left behind.

Given the Senate’s composition, unless the first lady and her fellow Peronist lawmakers line up beyond the freedom of information bill, it is unlikely that it will be passed. Meanwhile, the impeachment proceedings against Supreme Court justice Eduardo Moliné O’Connor have slowed up treatment of the access law.

## LESSONS LEARNED

**Make explicit and insist on minimum requirements, rather than any particular version of the law.** According to Roberto Saba, one of the most important strategies was the document entitled *Minimum Requirements for a Public Information Access Law*. This document was signed by five NGOs and presented to the Commission of Constitutional Affairs of the lower house of Congress. “It was important that we not be bound to one particular version of the law, but rather insist on the minimum basic components that the final law must contain,” he said. This helps confine the debate to rights and principles and is an effective strategy for avoiding identification with any one group or political party’s version of the law, which could create unnecessary opposition.



**Personal relationships count.** Undoubtedly, relationships among like-minded individuals made an enormous difference—especially links between members of the government and NGO representatives. In Argentina, these relationships reached as high as the *Alianza's* Justice Minister, Ricardo Gil Lavedra, who was a judge during the historic trials of the junta leaders of the last dictatorship. Lavedra appointed the OA's top officials, many of whom had worked in or were otherwise connected to organizations that formulated and lobbied for this law.

**Where personal relationships don't exist, they can be developed—even across ideological lines.** The NGOs that have collaborated intensively on this project for nearly two years have very diverse profiles and ideological bents. In many cases they do not normally work together. Nonetheless, this group perceived a common interest and acted upon it in a concerted and sustained manner—no small feat in a country known for its sectarianism. Roberto Saba pointed out that this group of allies got to know each other and coalesced during the EPN process.

**Joint action thrives with a coordinator.** The groups consulted for this report agreed that CIPPEC's María Baron played a fundamental role in advancing the national legislation in her capacity as informal coordinator of lobbying by civil society organizations. According to Baron, her role was designed to keep all efforts moving in one direction. She also made sure that all participants had the same information, that the information was timely, and that all participants could generate ideas for how to proceed. She observed that at times, the coordinator must make decisions in unforeseen circumstances, so the individuals and organizations involved must trust her and endow her with that responsibility.<sup>xxix</sup>

**The press is a key actor, as well.** Naturally, the media plays a critical role in bringing issues such as access to public information to the fore of public debate. María Baron points out that the media is particularly necessary in advancing a new law, particularly given legislators' sensitivity to press coverage of their issues and actions. As such, the media must be regarded and cultivated as a key actor. A communications strategy that effectively engages the media in covering the issue is key to any legislative campaign for freedom of public information. Although the Argentine press has not covered stories based on information released, it has paid some attention to Congress' consideration of the national law.<sup>xxx</sup>

**Lawmakers' unfamiliarity with the issue can be advantageous.** Legislators' scant awareness of the information issue allowed civil society organizations to transmit their ideas and knowledge without confronting many preconceived positions. In this context, international networks and successful examples from other countries make a profound difference in the process of achieving an access law.

## FUTURE CHALLENGES

In the short run, activists must work hard to ensure that the access law is passed, that it retain the minimum basic elements that make it effective, and that secrecy and exemptions are the exception, not the rule. As Roberto Saba points out, Argentines must not only create awareness of the need for access to information but also make clear the *right* to public information. He argues for establishing a tradition of public

interest law related to public information and for compelling judges to construct relevant case law. These are enormous challenges in countries like Argentina that have a weak culture of exercising civic rights, high levels of distrust in the courts and limited respect for the rule of law.

Moreover, the culture of secrecy will not change spontaneously. Rather, citizens must actively reclaim *and exercise* their right to public information. Saba believes that to both achieve passage of the law and later implement it, activists must market its utility to different sectors of civil society. To raise awareness among the media, he suggested holding a contest for journalism graduates in investigative journalism based on information obtained with Law 104. At the same time, implementation will require preparing government employees to comply with the law, and access activists will need to address the battery of existing secrecy laws.

Access advocates have a tough road ahead, but a critical one. In a country of discredited politicians and weak democratic institutions, the practice of seeking public information can change the lives of transplant patients or slum residents *and* aid in the process of rebuilding credible and effective Argentine government.

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<sup>i</sup> For a comparative chart summarizing the situation in the provinces, see

[http://cippec.org/espanol/derechodeacceso/archivos/Cuadro\\_20comparativo.pdf](http://cippec.org/espanol/derechodeacceso/archivos/Cuadro_20comparativo.pdf).

<sup>ii</sup> See [http://cippec.org/espanol/derechodeacceso/archivos/Municipio\\_20Gral\\_20Pueyrredon\\_20-20Ordenanza.pdf](http://cippec.org/espanol/derechodeacceso/archivos/Municipio_20Gral_20Pueyrredon_20-20Ordenanza.pdf).

<sup>iii</sup> See <http://cippec.org/espanol/derechodeacceso/archivos/Municipio%20de%20Ushuaia%20-%20Carta%20Organica.pdf>.

<sup>iv</sup> For Law 1829 see <http://cippec.org/espanol/derechodeacceso/archivos/Rio%20Negro%20-%20Ley%20Acceso%20Info.pdf>.

<sup>v</sup> For Law 3764 see <http://cippec.org/espanol/derechodeacceso/archivos/Chubut%20-%20Ley%20Acceso%20Info.pdf>.

<sup>vi</sup> For Law 4444 see <http://cippec.org/espanol/derechodeacceso/archivos/Jujuy%20-%20Ley%20Acceso%20Info.pdf>.

<sup>vii</sup> For Law 12.475 see <http://cippec.org/espanol/derechodeacceso/archivos/Prov%20de%20BsAs%20-%20Ley%2012475.pdf>.

<sup>viii</sup> For article 75, clause 22 of the national constitution, the pertinent articles of the three international treaties and those of treaties that do not have constitutional status, see <http://cippec.org/espanol/derechodeacceso/archivos/Derecho%20Constitucional%20de%20Acceso.pdf>.

<sup>ix</sup> During the 1990s *Poder Ciudadano* focused on access to public information as a prerequisite for transparency in government, but not as an individual or collective “right.”

<sup>x</sup> For Law 303 see <http://www.farn.org.ar/bd/ecolegis/tc/3347.html>.

<sup>xi</sup> Mariano Nino, “*Reforma del Estado y transparencia. Administración Pública, organismos de control y ciudadanía*,” Informe Final Beca Estímulo Universidad de Buenos Aires, Facultad de Ciencias Sociales, 2002-2003.

<sup>xii</sup> Sixteen percent of requests went to the Subsecretary of Environment and Urban Planning. The most requested agency (the *Subsecretaría de Regulación y Fiscalización*) had the worst delay in responding of all—an average of 176 days. Only the Culture Secretary had a 100 percent response rate, but it delayed an average of 72 days in responding.

<sup>xiii</sup> See *Acceso a la Información en la República Argentina* by Néstor Baragli, Nicolás Raigorodsky and Nicolás Gómez, in *Probidad*, June 2003. See <http://www.revistaprobidad.info/23/004.html>.

<sup>xiv</sup> With funds from the city government and the Inter-American Development Bank, this program has been cataloguing and publishing on-line all city government laws, regulations, other norms, and government acts, all with a sophisticated search function, and is doing so retrospectively, as well (see [http://www.buenosaires.gov.ar/areas/leg\\_tecnica/sin/?menu\\_id=672](http://www.buenosaires.gov.ar/areas/leg_tecnica/sin/?menu_id=672)). This program also initiated an electronic version of the *Boletín Oficial*, the official city government record (see [http://www2.buenosaires.gov.ar/areas/leg\\_tecnica/index.asp](http://www2.buenosaires.gov.ar/areas/leg_tecnica/index.asp)).

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<sup>xv</sup> For the OA's website, see <http://www.anticorruptcion.jus.gov.ar/>.

<sup>xvi</sup> For information on rule-making, see

[http://www.businesslaw.gov/content\\_page.cfm?contentid=20607](http://www.businesslaw.gov/content_page.cfm?contentid=20607).

<sup>xvii</sup> The EPN for the lobby law indisputably yielded a better quality product. The original draft bill would have created a register of lobbyists. The EPN revealed that since there is no tradition or profession of lobbyists in Argentina, a register would have been useless. Instead, the OA created a pilot project in which government officials post their agendas on the internet so one can see the persons with whom they meet. So far two OA officials are participating. See

<http://www.anticorruptcion.jus.gov.ar/agendas.asp>.

<sup>xviii</sup> For the bill produced by the EPN see

<http://cippec.org/espanol/derechodeacceso/archivos/Proyecto%20presentado%20por%20OA.pdf>.

<sup>xix</sup> For transcripts of these workshops see

<http://www.anticorruptcion.jus.gov.ar/VERS%20TAQUIGR%20TALLER%20040601%20ACC%20INF.pdf>, <http://www.anticorruptcion.jus.gov.ar/VERS%20TAQUIGR%20TALLER%20040601-2%20ACC%20INF.pdf>,

<http://www.anticorruptcion.jus.gov.ar/VERS%20TAQUIGR%20TALLER%20050601%20ACC%20INF.pdf>,

<http://www.anticorruptcion.jus.gov.ar/VERS%20TAQUIGR%20TALLER%20060601%20ACC%20INF.pdf>.

<sup>xx</sup> For a transcript of this workshop see

<http://www.anticorruptcion.jus.gov.ar/VERS%20TAQUIGR%20TALLER%20040701%20ACC%20INF.pdf>.

<sup>xxi</sup> For the final version presented to Congress see

<http://www.anticorruptcion.jus.gov.ar/Prov%20final%20Acc%20inf.pdf>.

<sup>xxii</sup> For a list of organizations that actively support freedom of information legislation, see

<http://cippec.org/espanol/derechodeacceso/archivos/Listado%20de%20OSCs.pdf>.

<sup>xxiii</sup> See, for example, [http://www.lanacion.com.ar/03/05/18/do\\_497006.asp?origen=amigoenvio](http://www.lanacion.com.ar/03/05/18/do_497006.asp?origen=amigoenvio).

<sup>xxiv</sup> For a copy of this document see

<http://cippec.org/espanol/derechodeacceso/archivos/Requisitos%20Minimos.pdf>.

<sup>xxv</sup> For the version passed by the Lower House, see

<http://cippec.org/espanol/derechodeacceso/archivos/Dictamen%20Com%20As%20Constituc.pdf>.

<sup>xxvi</sup> See

<http://www.anticorruptcion.jus.gov.ar/PROY%20ORIG%20ACC%20INF%20FUNDAMENTOS.pdf>.

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<sup>xxviii</sup> For a list of Argentina's secrecy laws see

<http://cippec.org/espanol/derechodeacceso/archivos/Leyes%20vigentes%20que%20preven%20el%20secreto.pdf>.

<sup>xxix</sup> María Baron relocated to Washington, DC in late August, 2003 but continues her coordinating activities at CIPPEC.

<sup>xxx</sup> For a list of press coverage see <http://cippec.org/espanol/derechodeacceso/archivos/Prensa%2002-03.pdf> and <http://cippec.org/espanol/derechodeacceso/archivos/Prensa%20Enero-Junio%202003.pdf>.

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## THE FREEDOM OF INFORMATION CAMPAIGN IN ARGENTINA

by Martha Farmelo

Posted October 14, 2003

*Buenos Aires-based journalist Martha Farmelo reports for [freedominfo.org](http://freedominfo.org) on Argentina's current campaign for a freedom of information law, which was passed in May 2003 by the lower house of the national congress and is now pending in the senate. Farmelo describes the workings of pioneer access laws in the city of Buenos Aires, the constructive role of the city ombudsman and the national Anti-Corruption Office, and lessons learned from the continuing campaign effort.*

### Introduction

Imagine the desperation of a transplant patient who in 2001 stopped receiving essential medication from the public hospital she counted on for her survival-and was utterly unable to learn why. With help for the Ombudsman of the city of Buenos Aires, she and other transplant patients used the city's freedom of information law to demand an explanation from the hospital. After reiterated requests, they learned that the hospital lacked the necessary funds-which allowed them to take appropriate legal action to reclaim that vital supply of medicines.

Imagine, too, the massive, pot-banging protests that precipitated the December 2001 resignations of President Fernando de la Rúa and seven-day President Adolfo Rodríguez Saá, who followed him. The unifying slogan that emerged during the uprisings was "¡Que se vayan todos!," roughly "Out with all of them!," meaning all politicians, quite literally. Indeed, widespread corruption and privilege among politicians left them so deeply discredited that for more than a year after the uprisings, only a handful could show their faces in public without being yelled at, even spat upon and otherwise chased away.

Sudden, unexplained shortages of transplant medicines and "¡Que se vayan todos!" describe some of the context in which Argentine advocates for freedom of information laws have operated in recent years. The city of Buenos Aires passed an excellent freedom of information law in December, 1998. A synergetic combination of politics, personal relationships and perhaps some degree of luck was at play when the lower house of the national Congress passed a similar law in May, 2003-the drafting of which was the result of an entirely novel process of collaboration between civil society and the executive branch.

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