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JOURNALISM, INSTITUTIONAL COMMUNICATION AND TRANSPARENCY: LESSONS LEARNED FROM THE COVID-19 HEALTH CRISIS

**Periodismo, comunicación institucional y transparencia: aprendizajes de la crisis
sanitaria del COVID-19**

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Abstract

Introduction: The objective of the article is to extract learnings for the modification and improvement of the regulatory norms of transparency in Spain, in exceptional situations such as the state of alarm, so that it serves purposes such as to facilitate the accountability and work of journalism professionals. **Methodology:** For this, an analysis of the controversy on the lack of government transparency in the context of the state of alarm is carried out, performing a reconstruction of the milestones and circumstances that occurred between the months of March and May 2020 in relation to the State's government transparency, combining various sources of information such as statistics, CIS survey data, press news, legal reports and bibliography. **Results:** the analysis confirms the insufficiencies of the transparency regulations detected in the literature by experts and journalists. Among them, the lack of recognition of access to public information as a fundamental right, the excess of deadlines to respond to requests for access, the limited use to develop data journalism or the weakness of the Council of Transparency and Good Governance, apart from a general lack of provisions to make accountability effective in health and the use of emergency contracts.

Keywords: Covid-19; Transparency; Freedom of information; Journalism; Right of access; Health data; Emergency contracts.

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Resumen

Introducción: El objetivo del artículo es extraer aprendizajes para la modificación y mejora de las normas reguladoras de la transparencia en España ante situaciones excepcionales como el estado de alarma, de modo que sirva a finalidades como facilitar la rendición de cuentas y a la labor de los profesionales del periodismo. **Metodología:** para ello, se realiza un análisis de la controversia sobre la falta de transparencia gubernamental en el contexto del estado de alarma, realizando una reconstrucción de los hitos y circunstancias acontecidas entre los meses de marzo y mayo de 2020 con relación a la transparencia gubernamental del Estado, combinando para ello diversas fuentes de información como estadísticas, datos de encuestas del CIS, noticias de prensa, informes jurídicos y bibliografía. **Resultados:** el análisis confirma las insuficiencias de la normativa de transparencia detectadas en la literatura por expertos y periodistas. Entre ellas, la falta de un reconocimiento del acceso a la información pública como derecho fundamental, el exceso de los plazos para obtener respuesta a solicitudes de acceso, la escasa utilidad para desarrollar el periodismo de datos o la debilidad del Consejo de la Transparencia y Buen Gobierno, aparte de una falta general de previsiones para hacer eficaz la rendición de cuentas en materia sanitaria y ante la utilización de los contratos de emergencia.

Palabras clave: Covid-19; transparencia; libertad de información; periodismo; derecho de acceso; datos sanitarios; contratos de emergencia.

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1. COVID CRISIS AND TRANSPARENCY

During the months of April and May 2020 and in the midst of the COVID-19 crisis, controversy erupted over the lack of transparency in government activity, due to a confluence of factors such as the leaking of questions at government press conferences and the paralysis or delay of mechanisms that allow access to public information.

In a context such as that of a health crisis within the framework of a state of alarm, unrestricted governmental and official information acquires greater importance due to increased citizen demand, and as a formula for exercising a minimum level of accountability over governmental activity.

The work of the media contributes to the exercise of that of control, which is complemented by the transparency mechanisms that exist from the Law on Transparency, Access to Public Information and Good Governance (Law 19/2013, of December 9), and the obligations other sectoral laws, from which citizens in general

benefit, and within them, journalists because they can turn to the tools that they enable for the development of their work.

Since the publication of the Transparency Law in 2013, there has been a transition from high expectations regarding the possibilities of transparency, to a general appreciation that there are many pending challenges (Sánchez de Diego and Sierra Rodríguez, 2020). The same has happened in the field of journalism, underpinning today a widespread perception of insufficiency of the regulatory framework (Díez Garrido and Campos Domínguez, 2018; Rubio Jiménez, 2017; La Rosa Barrolleta and Sandoval Martín, 2016).

This article aims to deepen the analysis of these inadequacies of the regulation of transparency in relation to journalism in the context of the health crisis originated by COVID-19, in the light of the events that occurred since the declaration of the state of alarm - in mid-March 2020 - until the beginning of June 2020, date from which some procedures were reestablished to allow access to public information.

In order to do so, this period is treated as a case study and its reconstruction is studied in depth through the use of different types of sources such as CIS data, statistics on requests for access to public information and public administration reports, in addition to bibliographic, regulatory and jurisprudential analysis.

2. TRANSPARENCY, JOURNALISM AND INFORMATION IN TIMES OF CRISIS

The approach to the reference literature for this article is developed around three interrelated themes: the notion and functions of transparency, its projection in relation to journalism, and the singularity of public information in the face of the health crisis.

2.1. The notion of transparency and its functions

Transparency can be understood as an ideal, a principle or described in the framework of our current regulation. For Sánchez de Diego (2016: 307) it is "a quality of the information system of public entities". On the other hand, Ramírez Alujas (2010: 24 and 25) approaches us to the description of a transparent government as one that "provides information about what it is doing, makes available its sources and databases, and publishes the action plans for which it can be held accountable to society. This fosters and promotes accountability to citizens and permanent social control, while at the same time reinforcing trust, social cohesion and institutional strengthening".

Through the regulation of the Transparency Law of 2013 (LTBG) it can also be understood as a principle of action of public administrations, whose main manifestations are the right of access and active publicity (Piñar Mañas, 2014: 5). The right of access allows citizens to request information held by public administrations, although it is subject to limits derived from specific matters: national security, defence, foreign relations, public security, etc. There is also a limit derived from the affectation to third

parties' rights and specifically to the protection of personal data. In addition, there are a number of grounds for refusal of requests, such as information in the process of being prepared or published, auxiliary or support information, or information that requires reworking, among others. The grounds for refusal and inadmissibility have been recurrently criticized because they allow abusive interpretations that end up reducing the right of access (Moretón Toquero, 2014). It is true that refusals of access on these grounds can be appealed before the Transparency Councils, and that these adopt a pro-transparency stance (Barredo Rodríguez, 2017; Mir Puigpelat, 2017), but in any case, this has the consequence of delaying the deadlines for obtaining any favorable resolution.

On the other hand, active publicity corresponds to the publication of information through government websites and portals in compliance with the obligations established by law. Specifically, it is a catalogue of information that must be published and which is categorized as institutional, organizational and planning information; of legal relevance (regulations, draft regulations and reports); and economic, budgetary and statistical information.

Thus, the regulation of transparency -although it contains express mandates and allows the exercise of the right of access- is much more limited than the concept of transparency in a broad sense, which is the one that corresponds to the social and journalistic vision of transparency.

In any case, all these provisions lead us to ask ourselves why we want transparency. The answer is that transparency is presumed to have several functions for the functioning of democracy. Villoria Mendieta (2014) summarizes many of its virtues as a necessary element for accountability, improving the efficiency of organizations and the economy, preventing corruption, shaping good governance, and even increasing the quality of democracy.

This instrumental role leads to consider that greater access to information allows citizens to exercise their rights more fully and to carry out a public scrutiny that results in a higher quality democracy, since otherwise, "with public powers without being subjected to effective accountability, both institutional and citizen, it is a matter of time before democratic quality languishes and citizen disaffection grows" (Hernández Ramos, 2018: 508).

2.2. Transparency and Journalism: Expectations and Reality

In the fulfillment of these functions of transparency, the role played by journalism as one of its beneficiaries cannot be ignored, and also because it plays a central role as a mediator between government activity and society, exercising a broad role in democratic control. Moreover, there are specific and additional advantages that transparency offers to the journalistic profession, from the most basic, such as facilitating greater availability of information, sources and data. It is a complement to the daily work of journalists because it opens the door to a higher quality and possibilities of contrasting information, making it possible to access data that "are official, complete and accurate" (Díez Garrido and Campos Domínguez, 2018: 54). It allows "revealing the incoherence of the political discourse (beyond the newspaper archive), from the analysis of reports on actions or legislative measures" (Magallón Rosa, 2013). It constitutes an alternative for obtaining information that cannot be obtained by other means or when it is of interest that it is "raw" or unprocessed information (Bertoni, 2011). It offers an opportunity to increase autonomy in the face of dependence on interested leaks or press releases (Manfredi Sánchez, 2014: 78 et seq.; Magallón Rosa, 2013). It is also frequent to point to transparency as a means of breaking journalistic routines allowing the creation of an own agenda from new stories (Manfredi Sánchez, 2014: 77) and as a starting point for the development of other possibilities of the profession through data journalism (Zafra Díaz, 2013).

However, from these initial expectations, it has been considered that its development through the Transparency Law is insufficient and prevents taking full advantage of its benefits (Díez Garrido and Campos Domínguez, 2018; Rubio Jiménez, 2017; La Rosa Barrolleta and Sandoval Martín, 2016). According to several studies based on surveys to journalists, most of those who knew the Transparency Law indicated that its measures were not enough for journalistic work (Díez Garrido and Campos Domínguez, 2017)²; and for two out of three, it was not a useful tool for daily work (Rubio Jiménez, 2017a: 37).

The study by Díez Garrido and Campos Domínguez (2017) showed that 82.7% of respondents thought that improvements were needed in the regulation of the right of access to information, and that the data on the transparency portal were not enough. In addition, this study asked about the functions of journalism when using transparency mechanisms, highlighting almost equally the dissemination of objective information and the monitoring of power.

In the study of Rubio Jiménez (2017a: 37 and 38) again referred in the surveys to the limitations of the Transparency Law and respondents highlighted as main causes the existence of exceptions to access to information, the lack of a sanctioning regime of the guarantee body -the Transparency Council- and response times.

² The percentages ranged from 56% who considered them insufficient, 24% who did not know the regulations, 10% who considered them sufficient and 10% who gave other answers.

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The study based on in-depth interviews by La Rosa Barrolleta and Sandoval Martín (2016) confirmed some of these shortcomings. In relation to the right of access, reference was made to the long response times and their repeated non-compliance; to the existence of limits imposed by data protection, leading to negative resolutions when requesting detailed information on public officials; or to the fact that administrative silence is negative (dismissive). In addition, regarding the transparency portal, it was indicated that its content does not provide substantially new information, but the information repeated elsewhere; while regarding the Council for Transparency and Good Governance (CTBG), the lack of a direct sanctioning regime for the system to work effectively was pointed out. In addition, it is stated that all these reasons have contributed to the fact that data journalism has not been able to develop more rapidly in Spain, remaining "in an incipient state despite the *boom* that took place throughout 2015" (La Rosa Barrolleta and Sandoval Martín, 2016: 1224).

The aforementioned weaknesses are, for the most part, a consequence of the configuration of the right of access as a right of legal configuration of an administrative nature, without the rank and special protection granted to fundamental rights.

As Sánchez de Diego (2010: 256) stated, the right of access is an integral part of the right to information contained in Article 20 of the Spanish Constitution, "because in order to inform and communicate it is necessary to access information", as contemplated in basic texts such as the Universal Declaration of Human Rights (art. 19) or the International Covenant on Civil and Political Rights (art. 19.2), which specify that freedom of expression and information contains the possibility of investigating or seeking information. However, this disconnection shown through the LTBG was of one of the main criticisms it received after its publication, because in this way "citizens and journalists cannot freely access the information guarded by the Government and administrations" (Manfredi Sánchez, 2014: 73).

Having opted for this route in Spain -its non-recognition as a fundamental right-, a logical consequence is that the regulation configures the right in a secondary way and has less entity when weighing the collision with other rights or interests. The Spanish situation goes, therefore, against the grain of the texts and judgments of international courts, whose panorama has changed in recent decades, giving the right of access a fundamental *status* (Fernández Ramos, 2018: 233). Of these, it is noteworthy the criterion of the European Court of Human Rights (ECtHR) that considers the fundamental nature of the right of access when it is closely linked to freedom of expression, so that it has come to be configured with an instrumental character (Hernández Ramos, 2018) Thus in its judgment of 8 November 2016 -*Magyar case*-, it came to affirm this recognition when the requested information meets a *test* of four requirements: it is of public interest, it serves the public debate, it is available, and it is requested by a *public watchdog*, that is, by a qualified applicant such as journalists. According to this interpretation, the right of access would have a fundamental character when exercised by a *public watchdog* and not by any citizen, but in any case it would be a step forward compared to the current situation. Therefore, Spain, as a country that has signed the European Convention on Human Rights and other aforementioned

standards, should internalize this recognition by the constitutional obligation (art. 10.2 CE) to interpret fundamental rights according to international treaties and agreements signed by Spain (Cotino Hueso, 2017: 315).

2.3. Information in times of health crisis

This recognition would have had wide-ranging consequences in relation to the subject matter, since in a state of alarm fundamental rights cannot be suspended - although their exercise ³can be conditioned - and access to information would have been safeguarded in view of its importance in a crisis context.

It should be remembered that in these contexts the demand for information grows (Westlund and Ghersteti, 2015: 13), but that it becomes even more important because it fulfills a triple instrumental function (De la Sierra Morón, 2020: 34 and 41): it allows the control of government management, helps "the responsible adoption of individual decisions" of citizens, and contributes to other public administrations to act in accordance with the defined risks. In this line, the role it plays as an element that favors trust is highlighted, because without it "it will be very difficult to convince people to adopt the necessary behaviors in order to have that risk under control" (Costa Sánchez and López García, 2020: 5). But as there is a demand for information, institutional and official information is the primary source for the production of news, as it is the focus of attention and the main reference for consultation, apart from the fact that in the face of extraordinary events, the difficulties of private reporters increase (Ibáñez Peiró, 2020).

Therefore, in this framework, the communication capacity of governments to set the media agenda increases, so that the "media repercussion is directly related to the declarations of political leaders" (Martínez Solana, 2004: 145). The conditions that make political communication to be defined as the result of a pattern of constant interaction between politicians, communicators, journalists and citizens are thus altered (Canel Crespo, 2006: 27). In fact, in this context it reminds us -saving the distances- the situation to the equivalent of the post-war political communication described by Lasswell in 1948 in a context of governmental propaganda, linear and unidirectional communication, which from a position of superiority is directed to a passive mass on which it was possible to influence.

Furthermore, it cannot be ignored that governmental declarations are part of the *puzzle* of institutional communication, whose techniques have a persuasive intention to influence the recipients and achieve their adhesion (Canel Crespo, 2007). For this

³ The Spanish Constitution does not provide for the suspension of fundamental rights in a state of alarm, but it does establish conditions that are regulated in Organic Law 4/1981, of 1 June, on states of alarm, exception and siege. Among them are many of the limitations that have been produced by the intersection of the exceptional situation and health prevention measures, such as confinement or limitations on mobility. The confluence of both elements - state of alarm and prevention of contagion - has produced such limitations that part of the doctrine considers them to be excessive because they blur the essential content of some fundamental rights. See, for example, the text by Arnaldo Alcubilla (2020) on the exercise of the right of assembly in the state of alarm.

reason, it is no stranger to the use of possible resources such as the ceding of information, concealment, staging and persuasive communication.

Hence, transparency increases its importance, because it allows the availability of alternative sources of information and data that are not accompanied by the governmental vision, so that journalists are the ones who can build their own agenda and properly contrast governmental statements and information (Manfredi Sánchez, 2014; Magallón Rosa, 2013).

These approaches converge again in the idea that transparency and its use by journalism professionals are a counterweight to the communication tactics of governments, even more so in times such as exceptional states, in which there is a relaxation of the usual controls -or a greater difficulty for their ordinary development-, along with a greater concentration of power, on which, in addition, there is an increase in the predisposition of citizens to tolerate that the exercise of freedoms is affected (Amat *et al.*, 2020), with the risks of democratic involution that this entails⁴.

3. CASE ANALYSIS: INFORMATION AND TRANSPARENCY DURING THE STATE OF ALARM

Once exposed the main bibliography that offers a framework on transparency in times of crisis, it is necessary to introduce a description of the informative interest in the context of pandemic and the actions of governmental communication, to subsequently move on to the analysis of the causes for which the lack of transparency was blamed in relation to the right of access and active publicity.

3.1. News interest and governmental communication

From the days prior to the declaration of the state of alarm, the consumption of news media by citizens increased ostensibly, not only due to the expectation of the events, but also due to the contextual situation in which citizens had been confined to their homes, with more favourable conditions for access to the consumption of information without the constraints of the ordinary rhythm of daily activity.

Taking as an indicator the television audience data offered by Barlovento Comunicación, from a more or less stable situation of television consumption in January and February 2020 of less than 4 h. per person per day -with lower data than in the same period of the previous year-, the situation changed to a situation of consumption of around 4.5 h. in March and 5 h. in April, with an increase of around one hour per day compared to the same data of the previous year, while in the months of May and June these increases began to moderate (Table 1).

⁴ According to the study by Amat, Falcó, Arenas and Muñoz (2020) on the attitude of citizens to the COVID crisis, the survey results show that citizens are more predisposed to assume the temporary concentration of governmental power even at the cost of restricting freedoms.

Table 1. *Evolution of television viewing time. January-May 2020*

Television	January 2020	February 2020	March 2020	April 2020	May 2020	June 2020
Daily time per person	3:57	3:44	4,44	5:02	4:20	3:45
Increase over previous year's month	-10 min.	-16 min.	+51* min.	+69 min.	+37 min.	+10 min.

Source: *Monthly analysis of TV audience behaviour. Barlovento Comunicación (www.barloventocomunicacion.es).*

In this context, the demand for information also increased, along the lines that occur in crisis situations (Westlund and Ghersteti, 2015: 13). Data from the CIS barometer of March ⁵ showed that 71.2% of citizens followed the information with a *lot or quite a lot of interest*, a figure much higher than the level of interest in events such as the election campaign for the general elections in November 2019⁶. In addition, 54.5% stated in this initial period of the crisis that they would like to have more information on prevention measures. In subsequent CIS barometers (April - June) there were no equivalent questions, except for the one on the sufficiency of government information, which in April showed that more than 60% demanded more information, in general (58.2%) or more truthful (2.4%).

Therefore, the demand for information throughout the months of March and April 2020 justified, even more, the importance of journalistic activity with respect to the production of news in sufficient number and quality, as well as the provision of all possible resources for the development of their work.

Throughout the period, daily press conferences were held, dossiers were prepared on the evolution of the disease -emanated by the Ministry of Health-, and constant information was offered through the web pages of the ministries⁷, among many other communication actions⁸. However, the common denominator of all of them was the unidirectionality of the messages and the preponderance of the official versions of the events.

Thus, the first milestone in the controversy over the lack of transparency was the complaints of journalists and the media about the press conferences with questions

⁵ The CIS barometer no. 3277 of March 2020 was carried out just before the declaration of the state of alarm between 1 and 13 March.

⁶ According to the December 2019 barometer (CIS study no. 3269), 35.6% of those surveyed followed the election campaign with a great deal or quite a lot of interest.

⁷ The information included in the governmental communication was posted on the websites of La Moncloa (<https://www.lamoncloa.gob.es/>) and the Ministry of the Presidency (<https://www.mpr.gob.es/>). However, the Ministry of Health was including daily information on the evolution of the pandemic, as well as contents in the General Access Point, the Transparency Portal and practically in all Ministries regarding their scope of action.

⁸ Ibáñez Peiró (2020) quantifies in 118 press conferences related to the Coronavirus between March 10 and April 30.

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chosen by the government. This situation dragged on during the first weeks of the state of alarm. First without the presence of journalists, who submitted their questions previously, being selected by the Secretary of State for Communication; and later, by videoconference with the intervention of journalists, but subject in the same way to the government's selection of the media that could ask them.

This way of proceeding has been criticized by some authors for the fact that the selection of questions implies a direct censorship mechanism (Espinosa Sánchez, 2020), apart from the fact that the first deferred system -which did not allow the reply or cross-examination- was difficult to justify in view of the possibilities offered by the new technologies. In any case, the effect of this system is that it offered "an image of the government's management that did not correspond to reality, avoiding the most thorny issues, so as not to question the government's actions" (Ibáñez Peiró, 2020: 313).

However, this situation led to the manifesto "freedom to ask" (01/04/2020)⁹, in a context in which criticism was increasing. These were based on doubts about the quality of the data provided by the government regarding the evolution of infections and the lack of contrast with the mortality figures offered by other sources of information (Costa Sánchez and López García, 2020: 6 and 7)¹⁰.

These reactions prompted the government to propose a new system of videoconferencing in early April. However, the indignation of journalism and the media spread again after the publication, in mid-April, of the CIS Barometer, which included among its questions the measurement of the degree of agreement with the possibility of banning the dissemination of information that was not aligned with official sources. The insertion of this question was interpreted as an invitation to state censorship and the government was accused of seeking a favourable response through a wording of the question far from neutrality¹¹.

Subsequently, other controversies arose when it was detected that the resolution of requests for public information had been paralyzed and that contract information was not

⁹ The manifesto was signed by hundreds of journalists of various editorial tendencies and criticized the system for selecting questions and demanded press conferences by video call. Among the passages in the manifesto were harsh criticisms of the government that can be summed up in the following paragraph: "The purpose of these lines is not to defend or condemn the government's handling of the coronavirus crisis, but to ensure that the media can carry out their function without gags and without added difficulties. These are just excuses to control the press. The fact that the questions are asked by a member of the government itself reveals a lack of transparency and an interest in controlling information. The result is a new form of censorship of the media and intolerable contempt for the very citizens who are being asked to make enormous efforts that most of them are fulfilling to the letter.

¹⁰ Another situation that was added in relation to the media was the approval of aid for the maintenance of essential sectors, which, by incorporating large media groups among them, was interpreted as an attempt by the government to use them strategically in order to promote the image of its actions (Espinosa Sánchez, 2020).

¹¹ Thus, for example, the newspaper *El Mundo* (15/04/2020) illustrated one of its news items with the following headline: "Tezanos manufactures a CIS to claim support for Pedro Sánchez and propose censorship of the media".

being published. Hence, a spiral of reaction began to emerge -somewhat belatedly- from organizations related to transparency and the right of access, releasing various manifestos and statements by the Coalition for Access, CIVIO, Transparency International, Access INFO, or the Association of Transparency Professionals (ACREDITRA), among others.

To all these situations were added new circumstances arising from the demands for information from journalists and organizations, noting that the composition of the members of the Committee of Experts advising the government or the de-escalation reports, information that was public according to the General Law on Public Health (Law 33/2011, of October 4), was not published, nor was it provided.

All this led to talk of lack of transparency and censorship, and the media incorporated news related to the transparency portal and freedom of information to the media agenda.

The government's main reaction to the first criticisms was to argue that it was providing more information than ever before, emphasising the constant institutional communication activity that was taking place. Apart from that, some rectifications were made, allowing questions by videoconference or publishing contract awards, but without reactivating the deadlines of the right of access (they were resumed on June 1, 2020) and without providing the names and reports of the committee of experts that advised it and that existed according to the government¹².

3.2. The problem of the right of access

As mentioned, it had begun to be detected in expert forums the consequences of the interruption of administrative deadlines of the Decree of the state of alarm in relation to the exercise of the right of access to public information. This suspension had as a consequence the indefinite extension of the time to respond to requests for transparency. The blog of the expert Miguel Ángel Blanes Climent (2020), and above all, his entry entitled *El derecho de acceso sobre el Coronavirus durante el estado de alarma* (March 31, 2020), had a wide repercussion in the ecosystem of transparency organizations, which was followed by other articles of wide impact such as the blog of the Fundación Hay Derecho (Ibáñez García, 2020).

Indeed, the publication of *Royal Decree No. 463/2020, of 14 March, declaring a state of alarm for the management of the health crisis situation caused by COVID-19*, suspended the administrative deadlines for the entire public sector. The exercise of the right of access follows procedures subject to administrative law and, therefore, its

¹² The de-escalation reports were published on the website of the Ministry of Health, once all the Autonomous Communities had moved towards deconfinement. However, the identity of the members of the Committee of Experts was not published, and at the time this article went to press (30/07/2020), the controversy erupted once again when it became known that in official communications from the Ministry of Health to the Ombudsman, it was denied that there had been a Committee of Experts.

suspension has an impact on the time available to public administrations to resolve requests.

According to the Transparency Act, requests for access to public information must be resolved within one month after they are received by the competent body (art. 20.1 LTBG). As the regulation is formulated, this deadline may be delayed in the period of time that elapses from the time the request is made until it is received by the competent body. Besides, it may be extended for another month if the information requested is voluminous or complex.

Therefore, the interruption of time limits generally affected the right of access. The original wording of the third additional provision (paragraph 4) of the Royal Decree declaring the state of alarm contained a provision that the suspension of time limits would not affect those procedures and resolutions "when they refer to situations closely linked to the facts justifying the state of alarm". That is to say, it would come to safeguard those procedures that respond to the accountability of the state of alarm, among which could be included the requests for public information. However, four days later, this section was modified¹³, becoming a possibility that could be "agreed with reasons", that is, imposing an additional requirement for the continuation of the deadlines -the motivation-, instead of the previous wording that imposed in a generalised manner its continuation if they were related to the justification of the state of alarm.

Thus, any request for data or information related to the COVID-19 crisis was paralyzed, although there was a possibility for the administration's discretion to agree on the continuation of deadlines. Moreover, the importance of this suspension was wide-ranging, because it was not limited to the scope of the State, since the rules of administrative procedure are applicable to the rest of the public sector, and therefore, it had a general scope to all public administrations in our country¹⁴.

Hence it was criticized because it meant a paralysis of the right of access and because, in addition, no justification was observed for these provisions because public employees continued to perform their work through teleworking and because its maintenance was not detrimental to the health situation. As indicated by De la Sierra Morón (2020), despite the fact that the LTBG establishes a series of limits to the right of access, "it does not seem that in this case they are applicable in view of the higher legal good of public health". In addition, the continuation of deadlines could have been exempted from any suspension, as was done with other matters such as tax and social

¹³ Royal Decree 465/2020, of 17 March, amending Royal Decree 463/2020, of 14 March, declaring a state of alarm for the management of the health crisis situation caused by COVID-19. BOE no. 73/2020, 18 March. Available at: <https://www.boe.es/boe/dias/2020/03/18/pdfs/BOE-A-2020-3828.pdf>

¹⁴ It is not the purpose of this article to describe the situation in the Autonomous Communities and the rest of the public administrations, but it is worth mentioning that the situation was asymmetrical among them. Thus, some Autonomous Communities decided to continue the resolution of access requests normally, while others resolved according to the subject matter, or left without continuing the processing until the resumption of the administrative deadlines.

security deadlines. However, the suspension was communicated to the CTBG without any comments (Note from the Directorate General of Public Governance of 17 April 2020).

The impact on the paralysis of the resolutions can be clearly observed from the data of the statistics of the Transparency Portal of the Government of Spain. Between the months of March to May 2020, the size of the *backlog* of access requests in processing grew ostensibly. In the ordinary conditions of February it stood at 893 pending requests, which practically doubled at the end of April reaching 1,612 requests, to increase again to 1,997 in May 2020 (TABLE 2). In addition, the cumulative data for requests up to February 2020 showed that those directed at health accounted for around 3.9% of the total, but this percentage grew among new requests made during the state of alarm to 6.6% in March, 17.6% in April and 18.6% in May, making it the main subject of access requests.

An additional observation is that the number of new requests was reduced in the context of the crisis (from 966 in February to 585 in April), so the scale of the lack of processing could have been much greater if the normal pace of requests for information had continued.

Table 2. *Status of requests for access to information during the state of alarm*

Access requests	March	April	May
New	727	585	618
% new applications to health	6,6	17,6	18,6
In the pipeline	1.080	1.612	1.997

Source: *Prepared by the authors based on the statistics report of the Transparency Portal of the Government of Spain.*

3.3. Active advertising: public contracts, expert committees and health information

Regarding the other main pillar of transparency -active publicity- it should be mentioned that the LTBG regulates the matters that must be compulsorily published by all entities within its scope of application. However, with regard to the COVID crisis, the main controversies arose in relation to the mandates of publication or public knowledge derived from other laws on procurement and public health.

Within the Public Procurement Observatory, ¹⁵attention was already being drawn to emergency contracts, which, due to their characteristics, dispensed with the usual

¹⁵ The Public Procurement Observatory is a forum for debate and analysis of experts and professionals on the subject, whose publications can be found at the following address: <http://www.obcp.es/>.

elements of publicity and, moreover, the awards were not being published immediately (Gamero Casado, 2020).

The origin of the situation is to be found days before the declaration of the state of alarm. Royal Decree Law 7/2020 of 12 March enabled contracting through the emergency procedure to meet the needs arising from COVID-19 (art. 16). This procedure provided for in the Public Sector Contracts Law (art. 120) is widely used in Spanish legislation and allows contracting without following any type of procedure, even enabling verbal contracting (García Melián, 2020).

The practical consequences regarding the advertising of contracts is that there are no prior announcements of tenders, although this does not prevent the publication of the formalisation of contracts, which must be carried out within 15 days in the profile of the contracting party and in the Official State Gazette for contracts of the General State Administration and related entities (art. 154 LCSP). In addition, public procurement is subject to an express obligation of active publicity according to the Transparency Law. Therefore, as there is no exception in the Contracts Act and the Transparency Act, they must comply with the advertising obligations, because otherwise the proper control of respect for the basic rules and principles of public procurement is prevented (Gamero Casado, 2020).

Thus, it was detected that there was a lack of information on these contracts on the Transparency Portal and on the State Contracting Platform, which did not begin to be published until more than a month after the declaration of the state of alarm.

In any case, the controversy that arose over the lack of publicity of public contracts was not only due to the non-compliance with respect to contracts that were not published on time, but also because a form of requesting them, such as the right of access, had been left without effect. In addition, the use of this emergency procedure is more opaque and has fewer controls, moving away from the spirit and practice that should guide public procurement.

Finally, reference is made to other transparency obligations contained in the General Law on Public Health of 2011, such as the identity of the members of the Committee of Experts that advised the Government on Covid-19 and its reports, among which were the evaluations of the Autonomous Communities for de-escalation.

This information was unsuccessfully demanded by journalists and also by some Autonomous Communities. In this regard, the *fact-checking* company Maldita, denounced this situation to the CTBG, whose request responded showing one of the problems of the inadequacy of the Transparency Act. The Transparency Council came to indicate that the composition of these committees of experts not formalized, are not the type of bodies referred to in the LTBG, and therefore, the CTBG did not have powers to perform a control of active publicity required by other rules other than the Transparency Act.

On the other hand, the General Law of Public Health does not have a mechanism to demand the publication of the obligations it establishes. After almost a decade since its approval, there is no regulation of the law, nor a procedure to demand the dissemination of information, which translates into an obligation without any guarantees of compliance.

4. DISCUSSION AND CONCLUSIONS

The situation originated after the declaration of the state of alarm, combined with the paralysis of the economic activity, the confinement in homes and the position of the Government as a practically exclusive source of information, caused a wide concentration of power around the executive. For this reason, transparency reaffirms its importance to exercise public control and promote accountability, without considering transparency as a substitute for institutional communication, because the objective and protagonist of each one are different. While institutional communication ultimately seeks adherence (Canel Crespo, 2007) -in this case around the government-; transparency aims at scrutiny and access to the public, being the citizenship its main protagonist. It also differs in that transparency is neutral -it is information and data-, so it moves away from the connotations and frameworks of interpretation used in communication. Besides, communication is at the discretion of the issuer, while transparency focuses on facts and implies a right that should not be left to the will of the one who has the information.

Apart from this disquisition, it has been observed from the first moment how the mandatory regulation in our country does not guarantee transparency or accountability. On its own, the Transparency Law is insufficient, but not only that, but it also proves its fragility in the legal framework, which allows an emptying of its obligations before the interruption of administrative deadlines and that there is a lack of effectiveness before procedures or obligations contained in other rules.

One of the main reasons why the right of access is at the mercy of administrative rules is that it is not recognized as a fundamental right (Sánchez de Diego and Sierra Rodríguez, 2020; Cotino Hueso, 2017). This is one of the main challenges to be solved for it to be more effective, either through a new transparency law that entails this recognition, or from the work of judges and courts that end up building an interpretation of the right of access as a fundamental right.

Regardless of the debate as to whether or not a fundamental right of access is predictable for all citizens, at the very least, it should be so for the group of journalists, insofar as access to public information is necessary for an effective deployment of freedom of information and because they act as *public watchdogs* (Sánchez de Diego, 2010; Cotino Hueso, 2017). In any case, its recognition as a fundamental right could lead to a greater strength of the right of access in the interpretation of the scope of its limits, and could reduce the barrier that many of the limitations derived from the protection of personal data pose for the journalistic profession and that prevent access to information about public officials (La Rosa Barrolleta and Sandoval Martín, 2016).

While the moment of this recognition arrives, there are a series of legal changes in the transparency regulations that have been shown to be necessary in the context of the pandemic. The exercise of the right of access, as it is configured, is not useful for journalism due to the response times, being one of the main criticisms shown in the studies analysed (Díez Garrido and Campos Domínguez, 2017; Rubio Jiménez, 2017; La Rosa Barrolleta and Sandoval Martín, 2016). It is true that these requests can be made and, in the meantime, the investigations can be completed while awaiting a response (Magallón Rosa, 2013), but the thirty-day period in the face of situations of dizzying speed is excessive. Even if the deadline for responding to requests for access had not been paralyzed, as planned, it has become clear that the regulation of its exercise does not accommodate the needs of journalism.

Therefore, some proposals are rescued, such as the one made by Rubio Jiménez (2017b: 456 et seq.), who proposes a two-speed system, an ordinary one, which could correspond to the current thirty-day configuration; and an extraordinary one, which in a few days would force a resolution. However, this author does not believe that a privileged channel should be established for journalists, but that it should be an option for anyone, although the undoubted connection of the work of journalism with freedom of information should have some kind of additional guarantees.

Even so, an accelerated resolution of petitions does not ensure that they are not inadmissible or rejected. Therefore, it is necessary to reflect on and improve the regulation so that the interpretation of limits and grounds for inadmissibility is applied in a restrictive manner.

In addition, these changes should be accompanied by an accelerated complaint procedure before the Council for Transparency and Good Governance. It would be a contradiction that accelerated requests have a negative response or lack of response, and that the claims before the body guaranteeing the right, lead to a long delay of time. In relation to this approach, there is no point in having agile complaint procedures if the CTBG subsequently has no power to enforce compliance with its decisions. In this regard, it should accept direct sanctioning powers -a weakness detected by journalism (Rubio Jiménez, 2017a: 37 and 38; La Rosa Barrolleta and Sandoval Martín, 2016)-, but also strengthen its resolutions by granting them binding and enforceable force. In this way, before a favorable resolution to access, the resolution could be enough to demand the delivery of the information to any public official or authority. Nowadays, however, it does not have this value, nor does it ensure the delivery of the information, and in addition, a public entity can delay the delivery of the information by appealing the CTBG's resolutions before the contentious-administrative jurisdiction.

In relation to the case studied, we have seen that the informative mandate of the General Law on Public Health is devoid of any effectiveness if it does not include a mechanism to ensure compliance, and that the CTBG has no powers to act outside the obligations of the LTBG. Hence the need for coordination of the Transparency Act with the rest of the information obligations provided by other sectoral laws or special regimes (Fernández Ramos, 2018: 238). In this line, the Council for Transparency and Good

Governance should be enabled to act against any breach of disclosure and information obligations outside the scope of the LTBG.

In the specific case of emergency contracting, and without questioning the convenience of its regime in extraordinary situations, its regulation must be made compatible with the possibilities that today's new technologies allow for the publication of information. Once again, we find ourselves with a shortening of the deadlines as the main proposal, putting at the same level the agility that is allowed for contracting with its publication. Immediacy when publishing contracts could be the guideline to follow, without prejudice to the fact that information that requires elaboration tasks -such as justification reports- could be included at a later date.

On the other hand, it has been observed that throughout this crisis there has been a constant controversy about the quality of information regarding those affected and those admitted to the ICUs. The transparency of health data is a pending task that requires a reinforcement of the obligations of publicity. An alternative would have been the elaboration of own information from raw data, but as has already been warned about data journalism (La Rosa Barrolleta and Sandoval Martín, 2016), the provisions of the regulation in the LTBG and in the rest of the legislation do not contribute to its development. The practice during this crisis has been to offer health information through aggregated data in PDF documents, which in turn has uncovered the problems of applying different methodologies and with different periodicity in the Autonomous Communities, This in turn has highlighted the problems of applying different methodologies and different periodicity in the Autonomous Communities, which makes any expectation of access to raw data more distant due to the asymmetry of open data culture that exists in the autonomous communities (Curto Rodríguez, 2020) On the other hand, when the individual records of emergency contracts have been published, the possibilities of simple downloading in spreadsheet format through the Transparency Portal are limited. This leads to a manual filtering and extraction process that makes any own exploitation tedious, but that, in any case, reflects the lack of provisions for public procurement information to be easily exploitable by third parties (Beltrán Orenes and Martínez Pastor, 2016).

From all the circumstances described, it is clear that after some years since the implementation of the Law on Transparency and the deployment of the structures of transparency -in the State and in the Autonomous Communities-, these do not meet the expectations and functions that are supposed to transparency.

In crisis situations such as this one, in which in addition to the aforementioned concentration of power there is a relaxation of the usual controls, the importance of transparency is even greater given the risk of abuse of power and greater tolerance to the restriction of freedoms (Amat *et al.*, 2020). Therefore, it would not be illogical to expect the incorporation of transparency obligations and the creation of specific information portals before the declaration of any of the exceptional states that may occur due to health crises or equivalent. However, we would not be talking with the same intensity about this problem if there were a culture of transparency and accountability

rooted in our country, especially among people who occupy government positions, so that without the need for a law they would take an active attitude to offer all the information and not try to replace it with institutional communication.

Therefore, it must be reiterated that it is necessary to reissue the regulation of transparency, with a much broader scope, with a recognition of access to public information as a fundamental right, and with a transversal projection to avoid maintaining areas of opacity that escape the control of the guarantee bodies, which must be provided with greater strength. As a final idea of this article, all the insufficiencies that transparency shows towards journalistic work are synthesized in the lack of a privileged statute of access to public information that is adapted to their needs through an agile and complete access to the information that is in the hands of public institutions.

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