



The regulation of diffusion of public sector information via electronic means: Lessons from the Spanish regulation

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ABSTRACT

Transparency is one of the main challenges for public administrations in the information society to bring the public administrations closer to citizens and finally, to improve their democratic legitimacy. The article focuses on new tools to regulate the diffusion of public sector information and it also contributes some elements which will improve it. This analysis will be done, firstly by examining the various regulations approved in Spain on the diffusion of public sector information through electronic means. In particular, the scope of the Spanish e-Government Act will be analyzed in relation to the diffusion of public sector information through electronic means. Finally, some landmarks will be proposed which can serve to guide the formulation of new regulations on the use of electronic means for diffusing public sector information not only by Spanish public authorities but also by other authorities who intend to pass a regulation in this field to improve transparency.

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1. The contribution of electronic means towards extending transparency in the information society

Transparency is one of the main challenges for public administrations in the information society to bring the public administrations closer to citizens and finally, to improve their democratic legitimacy (Merloni, 2008, p. 12). In recent years, the functions and mechanisms used to channel transparency are being transformed by the widespread use of electronic means by both public administrations and society (Ackerman and Sandoval Ballesteros, 2006, p. 125; Cavaleri & Venturini, 2004, p. 11; Cerrillo i Martínez, 2005; Fung, Graham, & Weil, 2007, p. 25). These mechanisms are regulated by several tools that will be addressed in this article.

The role of transparency in the relations among public administrations and citizens has highly increased in the new public administration models which have arisen in the information society, characterized among other aspects by pluralism, complexity, and interdependence (Kooiman, 1993). These models are based on the collaboration between public administrations and citizens and on the configuration of networks in which public and private actors interact (Mayntz, 1998; Pierre, 2000). In this institutional framework, transparency becomes an essential principle in public decision making; the actors who participate in public policy networks will consider information as a resource which can be used to coordinate and improve their relationships. Transparency is a vital element of good governance; (Ackerman and Sandoval Ballesteros, 2006;

European Commission, 2001; Frost, 2003, p. 89; Mock, 1999). However, despite the positive effects of transparency in the relations of both public administrations and citizens, it must not be forgotten that objections have been raised regarding transparency and noting the limitations of this principle that have given sociological, economical, political, or legal arguments against the spread of transparency (Prat, 2006, p. 101).

Transparency is based on the public knowledge of public sector information. There have been many attempts to define transparency, in a broad sense, as a *glass house* (Rivero, 1989), that reveals what exists on the other side of public office doors (Cerrillo i Martínez, 1998). But in the end, transparency has an instrumental constitution (Carlóni, 2008, 351) as it makes public sector information available to allow democratic control of public administrations (Merloni, 2008, p. 12); (Carlóni, 2005, p. 600) and it not only implies that citizens can freely access public sector information but also that they are able to understand it and form their own view (Orofino, 2008, p. 211).

Although transparency can improve with the diffusion of public sector information through electronic means which have spread in the last decade, the use of electronic means has not necessarily a direct effect in transparency. As Margetts notes, if certain circumstances are not present, the use of electronic means can limit transparency. In particular, in order to enhance the impact of electronic means on increasing transparency, citizens must be digitally empowered, and the technological infrastructures must be able to deal with the needs which are generated (Margetts, 2006, p. 206; Zeno-Zencovich, 2006, p. 8). Transparency depends not only on the types of technology used or general access to technology, but also on the institutional, political, and organizational frameworks that

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support it. To improve transparency, an appropriate regulation of public sector information diffusion via electronic means is also necessary.

In particular, this article considers the regulation of mechanisms through which transparency can be increased. The aim of this article is to ascertain what rules should be passed to both improve the knowledge of public sector information by citizens and to increase transparency via electronic means. The research question we have set out to solve is: what kind of rule must be adopted to ensure the widest possible dissemination of public sector information through electronic means? The answer to this question will enable us to confirm our working hypothesis that there is a need for a specific regulation to ensure that people acknowledge public information by electronic means.

To carry out this study we have focused on the analysis of the Spanish legislation. However, we also offer a substantive review of international literature published in this area and an analysis of the legislation and the most relevant policies implemented by those countries that have passed relevant regulations in this field in recent years. Revision of Spanish legislation on public sector information diffusion will show us that it is not enough to guarantee public transparency via electronic means so it will be necessary to complement its content with new regulation.

2. Access and diffusion: two sides of the same coin regulated differently across the world

Transparency can be achieved by different mechanisms such as citizen access to public sector information or public sector information diffusion via different tools (public offices, telephone, Internet, etc.). Furthermore, the significant impact that the diffusion of public sector information, and in particular its re-use and commercialization, has on the market should not be forgotten. In this section, we will explain the rules governing access, diffusion, and re-use of public sector information that have gradually been adopted in several countries. In addition, we will briefly pay attention to new regulations on the use of electronic means in these activities.

First off, to clarify, access, diffusion, and re-use have different but complementary aims. Access to information is intended for the public to know the results of administrative action. It is known as a retrospective mechanism—an *ex post* transparency tool—which allows a body to act and simply provide periodic information on its activity, generally when citizens request it. In this way, access to information is mainly a mechanism for controlling the activity of public authorities, improving public accountability (Mock, 1999, p. 1097) which helps to increase their democratic legitimacy. In contrast, the diffusion of information allows citizens to know in advance and in real time about the action of public administrations. It is *ex ante* or online transparency, which means that the public sector activity can be continuously diffused by public administrations and consequently known by citizens (Cerrillo i Martínez, 2005, p. 14; Heald, 2006, p. 32; Mattarella, 2005, p. 12 et seq; Merloni, 2005, p. 127 et seq; Kubicek, 2004, p. 279 et seq; Sucevic, 2008, p. 114). Finally, although re-use of public sector information can also contribute to increase public transparency, it means that individuals or legal entities can copy, publish, and disseminate public sector information for commercial and non-commercial purposes (Ponti, 2008).

Transparency is usually linked with the activity carried out by public authorities to provide information to citizens. However, nowadays, as Fung, Graham, and Weil (2007) point out, a new stage is emerging in transparency mechanisms in which information users are empowered to provide and share information. In short, the mechanisms used to access to public sector information will also be more interactive and customized. Thus, entrepreneurs—from the public, private, and social sectors—will compete to develop software to facilitate the diffusion of information. As they say “the third

generation of transparency policies will allow citizens to initiate transparency systems and make in-depth use of varied, textured information which is sensitive to their different needs” (Fung et al., 2007, pp. 154, 169). The spread of electronic media has contributed to it by facilitating new technologies and through the emergence of two groups of citizens — those who know about public sector information and those who process it and add other information to create new sets of information and services with added value, in other words, receivers and emitters of information diffused by public administrations through electronic means (Fages & Sangüesa, 2008; Mayo & Steinberg, 2007, p. 11). Furthermore, it cannot be left out that citizens usually access information on public subsidies which is diffused on the Internet by making a preliminary search using web search engines such as Google or Yahoo rather than the portals created on purpose by the public administrations themselves (Margetts & Escher, 2007). That is, the rise of these new technologies and applications has meant that transparency is no longer channeled exclusively from public administrations to citizens, instead, citizens themselves contribute to the spread of transparency by participating in the diffusion of public sector information they know about (Acar, Alonso, & Novak, 2009). All this has taken place in an environment where there are increasing calls for the free exchange of public sector information, known as *open data*.

Although there are different ways to improve transparency which can be increased by the use of electronic means, the distribution of public sector information can still be asymmetric among the public. As it has been stated, “an increase in available information does not necessarily lead to greater levels of freedom. Rather new asymmetries are created which forces consideration of whether there is any state responsibility for information procurement” (Schmidt-Assmann, 1998, p. 293). That is the reason why the asymmetric distribution of public sector information among citizens forces public administrations to adopt mechanisms to deal with these information asymmetries and to stimulate the diffusion and exchange of information. Specifically, these mechanisms can be based on technology, including new channels and mechanisms for diffusing information, or on public policies that improve public sector transparency. But they also require legislation to regulate the diffusion of public sector information to guarantee that all citizens can access the public sector information they need for different functions and purposes and, in the end, to provide a more democratic control over public administrations. This will be, in particular, the focus of this article.

From a legal point of view, the right to access public sector information has historically become one of the main expressions of the principle of transparency and the mechanism used to regulate the public sector information knowledge (Carloni, 2005, p. 579). Freedom of information laws began to spread throughout Europe and the United States of America in the 1960s but they were generally adopted by OECD member states during the 1980s and 1990s (Birkinshaw, 2006; OECD, 2001, p. 30; Tankersley, 1998). In 2005, sixty-six countries passed Freedom of Information laws (Ackerman and Sandoval Ballesteros, 2006, 86; Privacy International, 2006). Recently, supranational institutions have also decisively contributed to extending this mechanism. As an example, we point to Recommendation Rec 2 of the Committee of Ministers of the Member States of the Council of Europe (2002), which was created in order to provide better access to official documents (Hins & Voorhoof, 2007). Later, it became the Council of Europe Convention on Access to Official Documents (adopted by the Committee of Ministers on 27 November 2008). Another example is Regulation (EC) No 1049/2001 of the European Parliament and of the Council of May 30, 2001 regarding public access to European Parliament, Council and Commission documents (Guichot Reina, 2003, p. 409 et seq; Roberts, 2002).

Freedom of information has been considered as a fundamental right (Birkinshaw, 2006, 2005; Braibant, 1981, p. 703; Davis, 1999; Guichot Reina, 2003; Molnar, 2009, p. 571; Raimbault, 2002), as the

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