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REPORT No. 320/21
PETITION 986-11
REPORT ON ADMISSIBILITY

CARLOS PÉREZ BARRIGA
ECUADOR

Approved electronically by the Commission on November 4, 2021.

Cite as: IACHR, Report No. 320/21. Petition 986-11 Admissibility. Carlos Pérez Barriga. Ecuador.
November 4, 2021.

I. INFORMATION ABOUT THE PETITION

Petitioner:	Pedro X. Valverde Rivera and Ignacio J. Álvarez M
Alleged victim:	Carlos Pérez Barriga
State denounced:	Ecuador
Rights invoked:	Articles 13 (freedom of thought and expression) and 25 (judicial protection) of the American Convention on Human Rights ¹ in relation to its articles 1.1 (obligation to respect rights) and 2 (domestic legal effects)

II. PROCEDURE BEFORE THE IACHR²

Reception of petition:	July 24, 2011
Additional information received during initial review	
Notification of the petition to the State:	April 25, 2017
State's first response:	August 21, 2017
Additional observations from the petitioner	June 8, 2018 and November 8, 2019
Additional observations from the State	January 11, 2019 and August 13, 2020

III. COMPETENCE

Competence Ratione personae:	Yes
Competence Ratione loci:	Yes
Competence Ratione temporis:	Yes
Competence Ratione materiae:	Yes, American Convention (ratification instrument deposited on December 28, 1977)

IV. ANALYSIS OF DUPLICATION OF PROCEDURES AND INTERNATIONAL RES JUDICATA, COLORABLE CLAIM, EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

Duplication of procedures and International res judicata:	No
Rights declared admissible	Articles 13 (freedom of thought and expression) and 25 (judicial protection) of the American Convention in relation to its articles 1.1 (obligation to respect rights) and 2 (domestic legal effects)
Exhaustion of domestic remedies or applicability of an exception to the rule:	Yes, January 31, 2011
Timeliness of the petition:	Yes, July 24, 2011

V. SUMMARY OF ALLEGED FACTS

1. Mr. Carlos Pérez Barriga turns to the IACHR arguing the international responsibility of the Ecuadorian State for the annulment of his right of access to information, insofar as he has not been able to obtain information on two advertising campaigns that would have been procured with public funds, despite having filed a request for information at the administrative level and a judicial action for access to information.

2. The petitioner explains that in June 2010 the government of Ecuador procured with public funds two advertising campaigns called "Manos" and "Basta Ya", which were broadcasted nationwide in the

¹ Hereinafter "the American Convention" or "the Convention".

² The observations presented by each party were duly transmitted to the opposing party.

country's main media. These campaigns, made up of 5 advertising spots, were broadcasted during the television broadcast of the soccer World Cup matches in 2010, and, according to the petitioner, they sought to stigmatize and question the legitimacy of the work of the independent media and promote the enactment of a communication law that would protect the citizens from these media. The brief indicates that, although these advertising campaigns were broadcasted anonymously, then-President Rafael Correa Delgado allegedly publicly reported on July 10, 2010 that the campaigns had been procured and broadcasted at the request of the Ecuadorian government. The petition states that at the end of commercial number 4, the SECOM (National Secretariat of Communication) is mentioned in "voice over"³.

3. The petitioner states that on August 5, 2010, Carlos Pérez Barriga presented a formal communication addressed to the then president of Ecuador, in which he requested specific information regarding said advertising campaigns, such as certified copies of the advertising contracts, their costs, and the officials involved, among others⁴. The petitioner explains that the request was addressed to the president, as the head of the Ministry of Communication, an institution that by Ecuadorian law is responsible for the procurement of advertising campaigns carried out by the government of Ecuador, and that it is administratively and financially attached to the Presidency of the Republic. In this regard, the petitioners point out that the Secretary General for Communication specified in the framework of previous requests for information that they should be addressed to the president. Said request for information was denied on August 12, 2010 by the National Legal Secretary of the Presidency of the Republic, indicating that the requested documents were not in the possession of the President of the Republic and that the request should be addressed to the corresponding entity, based on article 20 of the Organic Law of Transparency and Access to Public Information⁵.

4. Faced with the refusal at the administrative level, on October 19, 2010, Mr. Pérez Barriga filed a judicial action for access to public information against the President of the Republic, requesting that he be ordered to deliver the requested information and that the information be published on the website of the Presidency. By decision of December 13, 2010, the Ninth Civil Judge of Pichincha denied his claims, considering that the president did not have the requested information and that the plaintiff had not demonstrated that the defendant had said information. Once this decision was challenged, the Provincial Court of Justice of Pichincha, Second Chamber of Labor, Childhood and Adolescence, confirmed the judgment of first instance on January 25, 2011, indicating that the information was not requested from the official who was responsible for providing it. The petitioner indicates that said judgment was enforceable on January 31, 2011. On February 17, 2011, the petitioner filed an extraordinary action for constitutional protection before the Constitutional Court of Ecuador, which on March 21, 2011 decided not to admit the action, stating that the petitioner confused the object of the extraordinary protection action by claiming that the Court would act as one more instance within the access to information action, the rulings of which were contrary to their requests.

5. In its additional information brief, the petitioner affirms that, although there is a web page of the institutional portal of the National Public Procurement Service (SERCOP), it is necessary to know the procedure number to be able to access it and obtain information⁶. In this sense, the petitioner states that it is not possible to identify the procedure number assigned to the procurement process of the advertising

³ "Voice-over" is understood as the voice that narrates and does not belong to any of the characters that appear on the scene or in the images.

⁴ Certified copies of the contracts signed with the company that produced the campaign material and with the advertising agencies that handled them, certified copies of the reports and official letters issued by public officials that served as support for the decision to sign the contracts, names of the officials involved in the implementation and execution of the campaigns, certified copies of the orders and / or advertising guidelines of the campaigns signed with the media, certified copy of the media plan designed for the campaigns, copy of communications between the presidency and other officials, advertising agencies, material producer and the media, and certified copy of the complete video of the citizen link of the President of the Republic broadcasted live in Ecuador on July 10, 2010 .

⁵ Article 20 of the Organic Law of Transparency and Access to Public Information is titled "Limits of Information Publicity" and establishes that: "The request for access to information does not imply the obligation of public administration entities and other entities indicated in article 1 of this Law, to create or produce information, with which they do not have or are not obligated to have at the time of placing the request. In this case, the institution or entity will communicate in writing that the denial of the request is due to the lack of data in its possession, regarding the requested information (...), the collection or compilation of information that is dispersed in the various departments or areas of the institution, is not considered to be production of information for the purpose of providing summaries, statistical figures, or indexes requested by the petitioner. "

⁶ The petitioner explains that the procedure number is a series that the procuring institution grants internally to identify the process, and that it is not a public data. It is the procuring institution that assigns the procedure number who can provide it to the citizen who requires access to the procurement documentation.

campaigns “Manos” and “Ya Basta”, since it was not provided by any state institution within the framework of the request of information both in administrative and judicial proceedings. Likewise, the petitioner indicates that access to the portal is not free since a username and password is required, reserved for natural or legal persons contracting with the State. The petitioner clarifies that the platform allows access to its files in general if data such as the publication date of the specifications or procurement entity are provided, information that is not available in this case. Therefore, the petitioner concludes that the State has not provided the necessary data to be able to access the procurement process through the portal, therefore it is not direct, public, and free access information.

6. The petitioner also points out that the information sent by the State refers to another procurement process (RECS-15-10-PUBLICIDA), different from the advertising campaigns “Manos” and “Ya Basta”, which also refers to commercials that were scheduled and broadcasted on the same dates, but they do not refer to the work of the media or journalistic activity. The petitioner affirms that it has precisely indicated which are the five advertising spots to which it refers, both internally and within the framework of this petition.

7. The petitioner alleges that the State violated Mr. Pérez Barriga's right to freedom of expression, from the perspective of the right of access to public information, arguing that the refusal to provide the requested information does not comply with inter-American standards on the matter, in particular with the principle of maximum disclosure. The petitioner indicates that the request for information met the legal requirements, as it was addressed to the head of the Secretariat of Communication, and maintains that the State had a positive obligation to supply the information that was requested and that no valid restriction existed in this case. The petitioner argues that it is implausible that the government did not have the information, given that the advertising procurement on which the request for information relates had been signed a few months before the request and that the president himself had publicly stated that the campaign was procured by the government. Likewise, based on the principles of good faith and maximum transparency, it states that in the event that it did not have the information, this is not a valid justification to restrict the right of access to information, since the State had the obligation to generate and collect it within a reasonable period of time, since it has a basic duty to collect, record, and disseminate information *ex officio*. On this point, the petitioner indicates that the State did not expose the steps taken to try to recover or reconstruct the information.

8. Likewise, the petitioner argues that the refusal to provide information corresponding to a public procurement generates a fertile field for corruption, understanding that the principle of maximum disclosure of information has as one of its main objectives to facilitate citizen control of management of the administration and that the right of access to information and the principle of transparency of state management are some of the main tools in the fight against corruption.

9. The petitioner maintains that the State violated Mr. Pérez Barriga's right to judicial protection given that, in a direction contrary to the inter-American frameworks for access to information, in the case under study the burden of proof was reversed-by requiring the alleged victim to demonstrate that the president had the information requested-, the president was not ordered to collect and deliver the information that was requested and the internal remedies were not effective nor did they allow to determine the existence of a violation of the right of access to information. In this regard, the petitioner indicates that the right of access to public information requires the existence of an effective and suitable resource to request the information, and that in their opinion none of the judgments complied with inter-American standards on the right of access to information.

10. Lastly, the petitioner requests that it be declared that Article 20 of the Organic Law of Transparency and Access to Public Information of Ecuador is incompatible with the right of access to information enshrined in the American Convention, by stating that Ecuadorian bodies do not have the obligation to create or produce the information that they do not have or are not required to have at the time the request is placed, as this grants greater discretion to public entities to limit the right of access to information, outside the legitimate objectives contained in Article 13.2 of the Convention. Therefore, the petitioner requests that, pursuant to Article 2 of the ACHR, it be declared that Ecuador must adopt the necessary provisions to make said law compatible with the ACHR.

11. For its part, the State indicates that the petition must be declared inadmissible since the proposals and allegations it contains lack legal support, do not contain further details and do not tend to characterize violations of the rights contemplated in the ACHR. It affirms that the State of Ecuador guarantees

the right to freedom of expression and the right of access to public information. In particular, it explains that, according to the Organic Law of the National Public Procurement System, the relevant information on contractual procedures promoted by public sector entities must be published compulsorily through the Official Public Procurement System of Ecuador, which is administered by the National Public Procurement Service (SERCOP), with each contracting entity having the obligation to transmit said documentation. Likewise, it indicates that each contracting entity is custodian of the documentation related to its own contracting procedures, so if additional information is required, the person must send the request to the corresponding entity.

12. Therefore, the State affirms that it has not breached its obligation to provide information and that it has not denied the petitioner access to the information of a contractual process, given that the petitioner, like anyone else, has always had direct, public, and free access to the information required through the SERCOP institutional portal, in which the procedure number must be entered to obtain the files. Likewise, it sends the documentation referring to the contractual procedure "RECS-15-10-PUBLICIDA" of May 27, 2010, whose objective was the "hiring of an advertising agency that provides production and advertising services for two TV commercials, to take advantage of the football situation at the start of the 2010 World Cup in South Africa", indicating that such information is available on the public procurement portal and can be freely downloaded by anyone.

13. In relation to the right to judicial protection, the State argues that the petition is based on the dissatisfaction of the petitioning party with the administrative and judicial decisions, without any evidence to prove the alleged violation of this right. It affirms that there is no evidence that the administrative entity that denied the request for access to the information did so in an unfounded manner, since the reasons and the rules on which it was based for not providing the information were clearly established. It also states that it is not proven that the judicial authorities acted willfully to violate the rights of the petitioner by declaring inadmissible the constitutional action for access to public information, since the resolutions were legally founded and did not deny the plaintiff's substantial right, but rather they ordered him to present the action for access to public information in an appropriate manner.

14. The State alleges that there has been no exhaustion of domestic remedies since there was a breach of one of the procedural requirements when filing the constitutional action for access to public information: passive legitimation. It explains that, according to the public procurement portal, the entity sued by the petitioner was not responsible for the contracting process of the advertising campaigns to which it refers, so it was not responsible for providing the information in this regard. In this sense, it explains that SECOM has been registered in the institutional public procurement portal since August 2013 and enabled on September 3 of that year, so it could not have operated as a contracting entity for the contracting procedure for advertising campaigns in the year 2010, as stated by the petitioning party. Although the information is public and could be consulted without any type of restriction on the SERCOP institutional web portal, it maintains that Mr. Pérez Barriga could have directly requested the information from the corresponding institution, and in the event of an unfounded refusal, he could have filed an action access to public information but did not take any of these actions.

15. The State also maintains that there was no exhaustion of domestic remedies regarding the alleged incompatibility of Article 20 of the Organic Law on Transparency and Access to Public Information with the American Convention. On this point, it indicates that the petitioner should have promoted internally a public action of unconstitutionality of the legal norm, in order for the Constitutional Court of Ecuador to carry out a control of the constitutionality and conventionality of the legal provision demanded. This, understanding that the unconstitutionality action was the ideal and effective remedy to be exhausted in order to resolve the legal claim on the incompatibility of the legal norm on access to information and the ACHR.

VI. EXHAUSTION OF DOMESTIC REMEDIES AND TIMELINESS OF THE PETITION

16. The petitioner argues that there has been an exhaustion of domestic remedies given that Mr. Carlos Pérez Barriga filed the available administrative and judicial remedies, in accordance with the provisions of the Organic Law on Transparency and Access to Public Information. The petitioner maintains that these remedies were directed against the then president of the Republic, in his capacity as head of the Secretariat of Communication, the institution responsible for procuring the advertising campaigns carried out by the

government of Ecuador. The petitioner points out that the decision of the Provincial Court of Pichincha confirming the judgment of first instance was enforceable on January 31, 2011, and that on February 17, 2011 an extraordinary constitutional protection action was filed before the Constitutional Court of Ecuador, which on March 21, 2011 decided not to admit the action. The petitioner affirms that the petition was presented within a period of six months since the judgment that exhausted ordinary domestic remedies was finalized on January 31, 2011.

17. For its part, the State points out that the decision of the national judge that declared inadmissible the action for access to public information, and that was confirmed by the Provincial Court of Pichincha, was based on the failure of the plaintiff to comply with a procedural issue, passive legitimation, so the requirement of exhaustion of domestic remedies cannot be considered satisfied. It also indicates that the judge safeguarded Mr. Pérez Barriga's right to act in accordance with the law before the corresponding entity, and that this did not happen.

18. The Commission observes that the request for information on the two advertising campaigns was addressed to the then President of the Republic, who had publicly confirmed that the campaigns had been procured and broadcasted on behalf of the government of Ecuador. Likewise, the petitioner indicates that the Secretariat of Communication (SECOM), administratively and financially attached to the Presidency, is mentioned at the end of one of the advertising spots on which information is requested. According to Ecuadorian legislation, the request had to be filed with the head of the institution from which the information is requested, which in this case would be the president, as head of the Communication Secretariat. Although the Commission understands that the petitioner must exhaust domestic remedies in accordance with domestic procedural legislation, the Commission considers that, based on the foregoing, it is reasonable that the request had been filed with the President of the Republic.

19. In relation to the argument of the alleged incompatibility of Article 20 of the Organic Law of Transparency and Access to Public Information with the ACHR, the State indicates that Mr. Pérez Barriga did not exhaust domestic remedies since he did not file an unconstitutionality action, so that the Constitutional Court of Ecuador could carry out a control of the constitutionality and conventionality of the legal provision demanded. The State indicates that the unconstitutionality action was an effective and suitable remedy to achieve the end sought by Mr. Pérez Barriga. In this regard, the IACHR has considered that domestic remedies were exhausted even without the filing of the unconstitutionality action, understanding that they had been exhausted with respect to the central object of the petition⁷. In this case, the central basis of the petition consists of the violation of the right of access to information due to the impossibility of obtaining information on two advertising campaigns, and not the very existence of the applied law. Likewise, the Commission understands that the State had the opportunity to rule at the domestic level regarding this provision, since the denial at the administrative level was based on the challenged norm and that later at the judicial level said decision was analyzed and the actions were declared inadmissible, stating that the request had not been addressed to the corresponding entity.

20. Therefore, the Commission understands that domestic remedies are exhausted with the decision of the Provincial Court of Pichincha that confirms the judgment of first instance, which was finalized on January 31, 2011.

21. Regarding the deadline for submission, the Commission notes that the petition was submitted on July 24, 2011, complying with the requirement set forth in Article 46.1.b of the Convention.

VII. COLORABLE CLAIM

22. The Commission observes that the present petition includes allegations regarding the denial of access to information on two advertising campaigns that would have been procured with public funds, despite having filed a request for information at the administrative level and a judicial action for access to information, on the grounds that the requested entity did not have such information. Likewise, the incompatibility of Article 20 of the Organic Law of Transparency and Access to Public Information with the American Convention is raised, by stating that the Ecuadorian bodies do not have the obligation to create or produce the information that they do not have or are not required to have at the time of the request.

⁷ IACHR. Report No. 128/01. Petition 12.367. Admissibility. Mauricio Herrera Ulloa and Fernán Vargas Rohmoser. Costa Rica, December 3, 2001; Herrera Ulloa, Preliminary objections before the Court.

23. In view of these considerations and after examining the elements of fact and law presented by the parties, the Commission considers that the allegations of the petitioning party are not manifestly unfounded and require a substantive study since the alleged facts, if corroborated as true, could characterize violations of articles 13 (freedom of thought and expression) and 25 (judicial protection) of the American Convention in relation to its articles 1.1 (obligation to respect rights) and 2 (domestic legal effects).

VIII. DECISION

1. To declare this petition admissible in relation to articles 13 and 25 of the American Convention, in relation to its articles 1.1 and 2; and

2. To notify the parties of this decision; to continue with the analysis on the merits of the matter; and to publish this decision and include it in its Annual Report to the General Assembly of the Organization of American States.

Approved by the Inter-American Commission on Human Rights on the 4th day of the month of November, 2021. (Signed:) Julissa Mantilla Falcón, First Vice President; Flávia Piovesan, Second Vice President; Margarete May Macaulay, Esmeralda E. Arosemena Bernal de Troitiño, and Stuardo Ralón Orellana, Commissioners.