Communication from the Commission on public access to the institutions' documents (5 May 1993)

Caption: On 5 May 1993, the Commission of the European Communities submits a communication, addressed to the Council, the European Parliament and the Economic and Social Committee, on public access to the institutions' documents.

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Public access to the institutions' documents (Communication to the Council, the Parliament and the Economic and Social Committee)

Introduction

During the adoption of the Treaty on European Union at Maastricht on 15 December 1991, a declaration was made on improved public access to information. The text of the declaration is the following:

'the Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.'

The European Council at Birmingham subsequently declared that the Community must demonstrate to its citizens the benefits of the Community and the Maastricht Treaty and that the Council, Commission and Parliament must do more to make this clear. Moreover, in Birmingham the Commission was asked to complete by early 1993 its work on improving public access to the information available to the Community institutions.

The Edinburgh European Council continued the work for a more open and transparent Community. Specific measures were adopted to start the process of opening up the work of the Council. Before Edinburgh the Commission had already taken a package of measures to increase transparency.

This package included producing the annual work programme in October, to allow for wider debate including in national parliaments; wider consultation before making proposals, including the use of Green Papers; making Commission documents more rapidly available to the public in all Community languages; and attaching higher priority to the consolidation and codification of legal texts. The Commission has taken these initiatives whilst being aware that it has already a commendable history of an open door policy, especially in comparison with existing practices in national administrations. Traditionally it has been open to input from the public. This stems from the belief that such a process is fundamental for the development of sound and workable policies.

The Edinburgh European Council welcomed these measures taken by the Commission. At the same occasion the European Council reconfirmed its invitation made at Birmingham for the Commission to complete by early next year its work resulting from the declaration in the Maastricht Treaty on improving access to information.

Response

The Commission views this declaration as an important element of the Community's policy on transparency of the institutions. Improved access to information will be a means of bringing the public closer to the Community institutions and of stimulating a more informed and involved debate on Community policy matters. It will also be a means of increasing the public's confidence in the Community.

In order to implement the Maastricht declaration the Commission has undertaken a comparative survey on existing access to information policies in the Member States and in some third countries. The results of this survey are summarized in the Annex as requested in Maastricht.

The fact finding survey has shown the different experiences of improved access to information. Access to information consists of two main elements.

Firstly it encompasses a series of measures taken by the public authorities themselves aimed at informing the general public of their actions. In this respect the Commission has noted that from the time the Community was established both Community institutions and Member States have taken numerous initiatives in this

field to inform the public and to make them more aware of Community policies.

Secondly, access to information also consists of making information available upon request from a member of the public. Some countries have developed a relatively long tradition in this respect, which has evolved over the years. This policy is based on the principle that access is granted while at the same time protection is given to public and private interests, and the proper functioning of the public authority concerned is preserved.

The public is granted access to specific types of information in some countries, while in other cases these were combined with general access rules. Directive 90/313/EEC on access to environmental information is an example of a Community initiative on access to a specific area of information.

Further steps

Taking account of the comparative survey on the situation in different Member States and third countries there is a strong case for developing further the access to documents at Community level.

The Commission therefore is prepared to take further steps in order to establish a framework for granting general access to documents. This will entail some adjustments of the Commission's working practices but the Commission considers that general access is a particularly important instrument to bring the Community closer to its citizens.

The Commission feels that the principle of access to information held should be shared by the other institutions and Member States. It invites the other institutions to cooperate in the development of such an approach which should contain at least the fundamental principles and a minimum set of requirements. As a first step, this could take the form of an inter-institutional agreement. Special attention should be given to the specific role of each institution within the existing inter-institutional framework.

In order to contribute to this common approach, the Commission, for its part, suggests that work be based on the following principles which it intends to elaborate upon further:

— access to information is granted to documents, the precise definition of which will be established,

— access to such documents will be provided subsequent to a sufficiently precise request from the public,

— there shall be no obligation on the person making the request to justify the reasons for wanting the document,

— a reply to a request for information should be given as soon as possible.

A request for a document may be refused in order to safeguard:

— personal privacy,

— industrial and financial confidentiality,

— public security including international relations and monetary stability,

— information passed to the institutions in confidence.

Should a request meet with a refusal, then the institution must reply in writing giving the reasons for the decision.

The Commission will use the time remaining before the European Council to be held at Copenhagen by the end of June to prepare a further outline of the general access to documents policy. It intends to submit this to

the other institutions in the context of a second communication on transparency which will focus on a general framework and specific actions to improve the Community's transparency.

Annex - Public access to information (Comparative survey)

1. Historical overview

Public administrations in many countries have in the past often tended to carry out their work within a framework of secrecy laws designed to protect major public interests (e.g. defence, foreign affairs, etc.). Security regulations were thus established to ensure that information not destined for public release remained protected.

Furthermore, legislation protecting the citizens themselves with regard to such issues as health and fiscal matters traditionally has been quite important.

A dual track rationale for restricting information on public administration can therefore be seen: to protect both public and private interests.

The traditional way in which a government administration informs the public of its decisions is through some form of official publication (journal, gazette, etc.). The public is also kept informed through the accountability of ministers to parliament, through the oversight of such external bodies as the court of auditors and law courts, through public access to plenary meetings of parliament and its various select committees and, finally, through a statutory right of petition.

Turning point

During the course of the 1960s there was a growing belief that such a relationship between government and those it governs should be supplemented with a more open approach. This belief arose from a desire for a stronger form of democracy, i.e., a more democratic form of government. It was felt that the public's business, in particular the way its affairs are administrated, should be conducted more publicly. Another driving force was the fact that whilst administrations were being entrusted with more and more tasks parliamentary control appeared to be less effective.

It was also assumed that a more open approach stimulates an informed debate on public policy issues and also opens up the possibility of improving control over the workings of the administration.

Policies adopted

A number of Member States and third countries therefore gradually adopted a series of measures designed to open up and improve public administration.

These national measures included mechanisms to increase the public participation in the administrative decision-making process. The measures vary from an obligation to pre-consult the public (through, for example, the issuing of Green and White Papers), the right to call for a public hearing and the granting of a right to the public to propose legislation which the relevant public authority would then be obliged to adopt or to consider.

The measures also included the reinforcement of provisions dealing with improved explanation and justification of decisions to the public; the improved publication of final decisions and increased opportunities for appeal against administrative decisions. In certain cases, new ways of appeal were created, such as the establishment of an ombudsman.

Finally, a number of countries also adopted the principle whereby information held by public authorities is generally open to the public unless such access has been explicitly exempted for a limited number of specified reasons.

2. Access to information: A comparative survey

2.1. General

Three trends can be identified which relate to the strengthening of access to information held by public authorities:

— access to consult administrative files was given to those members of the public who are a party in a lawsuit. The consultation of such files stems from the general right of defence. In several instances this form of access is granted regardless of whether or not the member of the public is involved in a judicial (appeal) procedure. This development led to the establishment of a number of specific access rules for each subject of information,

— access for the individual concerned to consult files containing personal data. These could be files held by the public sector concerning such things as appointments and nominations. It could also comprise access to files held by the private sector (insurance companies, for example). This has resulted in a number of specific access rules for each subject of information,

— general access to information held by public authorities (regardless of whether or not the individual/company concerned has a specific interest or is involved in a lawsuit). This has led to a number of general access to information laws.

The fact-finding, carried out indicates that, following the developments described above, however, the situation in individual countries varies. Only access to a specific kind of information was granted to the public in some countries while general access rules came into force in other countries. In a third group of countries both types of rules were established.

Active and passive information supply

The survey has shown that there are essentially two ways in which more access to information can be achieved. Firstly, there is the general (legal) obligation upon government departments actively to make all appropriate information (e.g. circulars, policy statements, departmental organigrams, etc.) available to the public at their own initiative.

Secondly, there is the more passive (legal) requirement for government departments to make information available upon request by a member of the public. This includes access to information which forms the basis of governmental decisions such as reports, studies, minutes, notes, circulars, instructions, opinions, forecasts, invoices, registers, indexes and other sorts of information which are held in written, computerized or audiovisual form.

Focus

The comparative survey focused on rules dealing with access to information available upon request (passive information supply), as laid down in general access to information legislation. It does not deal with specific access laws to a particular kind of information nor with active information supply by public authorities. The first of these issues has been extensively examined in the framework of another study, at the request of the Commission (Publaw 1, 1991). In the light of this study, the Commission has made certain proposals in this area (see below).

2.2. Member States and third countries

Inside the Community, Denmark, France, Greece and the Netherlands have statutes establishing general

public rights of access to government information. In Belgium, draft proposals on establishing the right of access to information are currently under discussion at federal and regional level. As is also the case in many other countries, Portugal, Spain and the Netherlands have constitutional provisions regarding a general right of access to information without, however, Portugal and Spain having yet implemented specific legislation.

Outside the Community, statutes granting access to information in the United States, Canada, Norway and Sweden have been studied. In the case of the latter country, a right of access to information has been established for over two hundred years.

All of these statutes (see Annex II) have one thing in common: they provide the public with a right of access to information upon request (albeit with certain exemptions from compulsory disclosure in order to protect public and private interests).

Main features

Aim of the legislation

The introduction of specific legislation dealing with the public's right of access to information is considered to be a vital element in the proper functioning of a free society as it further extends democracy within the administrative process. The right of access to information is consequently viewed as a fundamental civil right. It deals with the relations between an administration and the citizens it serves (third generation of human rights). In this regard the Council of Europe adopted a recommendation on a right of access to information held by public authorities. It invited the Member States to introduce a systematic right of access to such information.

A number of other benefits are cited in support of the introduction of access to information legislation. These include providing a system of checks and balances with which to oversee and control the workings of public bodies: improving management and ensuring a better allocation of resources, encouraging citizens to participate willingly in the workings of government and stimulating an informed debate on, as well as interest in, public policy.

The subject of the information requested

The statutes examined in the survey grant, in principle, public access to any kind of information held by a public authority which is contained in existing documents. The term 'document' is defined broadly to include not only traditional formats such as written papers and photographs but also more modern information carriers (e.g. microfilms, computer discs, magnetic, video and audio tapes). It is also taken as a basic principle that a request for information will only be granted provided it does not necessitate the creation of information that does not exist (e.g. compiling and summarizing data from a number of separate sources).

In the case of automatic data processing, however, this principle is sometimes difficult to maintain. To take the case of Sweden as an example, the rule has been established that a certain selection or merging of data should be regarded as an existing document if the selection or merging can be produced by routine measures.

Which authorities are obliged to grant access?

The public authorities bound by the access to information legislation differ from one country to another depending on the form of government. Broadly speaking, in federal systems, federal authorities (including the independent regulatory agencies) are the object of access legislation. Moreover, often State (as opposed to federal) legislation exists which provides access to information held by State authorities. In Belgium, for example, initiatives are taken at both federal and regional levels' to provide access to information.

In other governmental systems it is often the case that all public authorities (including the agencies) are governed by legislation concerning access to information.

Some statutes also include specific provisions with regard to the right of access to information and opinions orb mating from independent advisory bodies i.e. bodies to advise one or more public authorities on a particular subject.

Who may make a request for information?

Most of the general access laws studied contain provisions whereby any person, regardless of his or her nationality, has the right to exercise access to information. In virtually all cases the individual making the request for information is under no obligation to give a reason for his or her request.

How is information made available to the public?

There are essentially four ways in which an individual can obtain the information: either by requesting a full copy, a summary, an extract or an opportunity to examine the document in person. In deciding which of these alternatives it should choose, the public authority concerned must bear in mind the preferences expressed by the individual making the request.

Exemptions from the right of access to information

The study has shown that grounds for exemption from access to information legislation vary considerably from country to country. In certain cases exemption is compulsory, it is sometimes optional and in other instances it can be either one or the other.

Regulations in all the countries examined contain exemptions. These can be divided into two main categories:

— exemptions with regard to the protection of general public interest. Information shall not be disclosed if it damages international relations, the security of the State, national security and defence matters, economic and financial interests, the investigation of criminal offences and the prosecution of offenders, inspection activities,

— exemptions with regard to the protection of personal privacy. In this respect, data specifically related to a person is not disclosed to third persons if this would cause disproportionate harm to the privacy of the person concerned.

In some countries internal documents containing personal opinions on policy are also exempt from the legislation.

Time limits within which the public can expect to receive a reply

These range from 10 days to two months. In some cases the authorities simply commit themselves 'to reply as soon as possible'. Most acts provide an opportunity for the time limit to be extended in exceptional circumstances and for a varying number of working days.

Charges for making information available to the public

In the great majority of cases, copies of requested documents are provided at cost price. However, personnel costs are not included in the calculation of this figure.

Appeal procedures in the event of a request for information being refused

In all the cases studied there exists the possibility of an appeal to an independent body, such as an administrative court, a council of State, an ombudsman or an information commissioner.

2.3. Quantitative analysis

It has proved difficult to find material with which to quantify the use to which these regulations have been put. There do not appear to be any central registers for the filing of requests received. However, in some of the literature consulted, it is indicated that access to government information is used more by individuals or companies who have economic rather than purely civil interests.

Should a request for information be refused or not answered within a given time period under the French system, the individual making the request can turn to the Commission d'accès aux documents administratifs (CADA) for an 'avis'. There has been a steady increase in the number of 'avis' issued: from 470 in 1979/80 to 2 098 in 1989. The 10 000th 'avis' was given out in 1989.

In Canada, 48 493 people exercised their right to request government records during the period 1983 to 1991. In that same period, 31 % of all requested information was disclosed, 37 % was disclosed in part and 8 % was dealt with in an informal way. In total, 4 % was not disclosed while 20 % of the requests could not be processed. The most frequently used exemptions were third party information and personal information. The total cost of operations was 39,5 million dollars, being 817 dollars per request. The total fees collected were 586 961 being slightly more than 12 dollars per request. During the period 1990 to 1991 54 % of all requests made under the Access to Information Act came from the business sector and 28 % from individuals. In Australia, some 25 000 freedom of information requests were made in 1990/91.

2.4. Community institutions

Present situation

The EEC Treaty contains a number of rules relating to administrative transparency which are related to this subject. These include rules governing the non-disclosure of information of a kind covered by the duty of professional secrecy (Article 214 EEC); the non-disclosure by Member States of information which is considered to be contrary to its essential security interests (Article 223 EEC); the obligation to publish legal acts of the Community (Article 191 EEC); the obligation to state the reasons upon which such legal acts are based (Article 190 EEC); the establishment of rules under which the Commission is obliged to give interested parties the opportunity to express their views on, for example, cases falling under Community regulations on competition rules applying to undertakings (Articles 85/90 EEC) and the obligatory annual publication of a General Report on the activities of the European Communities (Article 18 of the Merger Treaty).

Many of the relevant provisions of the EEC Treaty have been implemented through detailed legislation in, for example, the Staff Regulations for officials of the European Communities; Council Regulation No 3 (Euratom) implementing Article 24 of the EEC Treaty establishing the European Atomic Energy Community [(1)]; Council Regulation of 1 February 1983 concerning the opening to the public of the historical archives of the Community and Euratom which foresees access to the archives after a period of 30 years [(2)]; Commission's decision of 7 July 1986 on classified [(3)] documents and the security measures applicable to such documents which, for example, implies that sensitive commercial information made available in the context of competition policy will obtain the appropriate security classification, and also contains rules on classification and declassification of documents and handling of information received from Member States; and the Council Regulation of 11 June 1990 on data subject to statistical confidentiality addressed to the Statistical Office of the European Communities [(4)]. This applies to the transmission to the Statistical Office of data which falls within the national statistical institutes' field of competence and is covered by statistical confidentiality. Moreover, a number of internal regulations have been established dealing with the internal functioning of each institution.

Over the years, relevant case-law has been established on this issue by the Court of Justice (see, for example, the February 1988 case of Zwartveld versus the Commission, as reported on 13 July 1990).

At Community level, no general legislation exists with specific regard to access of information although the Commission has established certain explicit rules which do allow for it in the field of competition policy (see 12th yearly report on competition, 1982, pp. 42 to 43). A company involved on a proceeding is allowed to have access to the file on a particular case. However, any such access is limited by the Commission's obligation to refrain from discussing business secrets to third companies and the need to preserve the confidential nature of the Commission's internal and/or working documents.

Furthermore the content of Article 47 of the Treaty establishing the European Coal and Steel Community should be noted as it indicates that the Commission must not disclose information of the kind covered by the obligation of professional secrecy.

In 1990 the Council of Ministers adopted Directive 90/313/EEC to allow the possibility of access for any legal or natural person throughout the Community to information held by public authorities relating to the environment [(5)]. In certain specified cases this information may be refused. This Directive came into force on 1 January 1993.

The rules apply to environmental information held by the competent authorities of the Member States. It does not apply to environmental information held by the European institutions. However, the Commission indicated, in the explanatory memorandum accompanying the proposed Directive, that it would take initiatives with the object of applying the principle of access to information (with regard to the environment) to the Community bodies [(6)].

The Commission has recently proposed specific rules for personal data protection and the free circulation of data [(7)]. This proposal is aimed at facilitating the free movement of data in the Community while ensuring a high level of protection for the individual with regard to the processing of personal data. It includes provisions for an individual's right of access to his or her own personal data. It also lists exhaustively the exceptions with regard to personal data contained in public sector files in order to safeguard such interests as national security, defence, criminal proceedings, etc. The draft Directive was accompanied by a Commission declaration on the application of the data protection principles to personal data held by the Commission and other Community institutions. Work is under way to implement these principles.

Overview of general access laws

Introduction

By 'general access laws' this survey refers to such rules is provide a general access to administrative documents. This means access which is neither restricted to a particular area nor demanding a special involvement of the person seeking the information. There are other types of rules on access which are restricted to certain persons or may demand that a person state a legal or at least a legitimate interest. These rules deal for example with company registers, population registers, and credit risk information. Such access rules exist in most of the Member States.

The situation on general access both in the Community and in certain other countries is as follows:

Belgium

Several draft proposals granting general access to information are under discussion at different levels of government.

Denmark

Act No 572 of 19 December 1985 'on access to public administration files'.

France

Loi No 78-753 du 17 juillet 1978: Titre premier: ‘de la liberté d'accès aux documents administratifs’ and Loi No 79-587 du 11 juillet 1979 'relative à la motivation des actes administratifs et à l’amélioration des relations entre l'administration et le public'.

Germany

There is no general access to information law in Germany. The regulation closest to such a law is the Administrative Procedure Act. However, access to information exists in specific areas, mainly to public registers.

Greece

Law No 1599/1986, ‘on the relationship between State and citizen, the establishment of a new type of identification card and other provisions', Article 16.

Ireland

There exists no general access legislation, however, in specific areas access to information exists.

Italy

There is no general access to information law in Italy. The regulation closest to such a law is the Access to Administrative Documents Law of 7 August 1990 (No 241). Access is possible for those who have a legal interest.

Luxembourg

There is no general access to information law. Access to administrative documents is regulated in the context of non-contentious administrative procedure.

The Netherlands

Act of 31 October 1991, Stbl. 703 'on public access to government information'.

Portugal

Constitutional provision regarding a general right of access to information. Moreover, in specific areas access to information exists.

Spain

Constitutional provision regarding a general right of access to information. Moreover, in specific areas access to information exists.

United Kingdom

No legislation exists on a general right of access to information.

Canada

'Access to Information Act' of 1983.

Norway

Act No 69 of 19 June 1970 concerning public access to documents in the public administration as subsequently amended by Act No 47 of 11 June 1982 and Act No 86 of 17 December 1982.

Sweden

1976 Freedom of the Press Act, Chapter 2, 'on the public nature of official documents'.

United States of America

Freedom of Information Act of 1982 (5 USC Section 552), as part of the Public Information, Agency Rules, Opinions, Orders, Records and Proceedings (5 USC Section 551 to 559).

(1) OJ No 17, 6. 10. 1958, p. 406/58.
(2) OJ No L 43, 15. 2. 1983, p. 1.
(3) SEC(86) 1132 final.
(4) OJ No L 151, 15. 6. 1990, p. 1.
(5) OJ No L 158, 23. 6. 1990, p. 56.
(6) COM(88) 484 final.
(7) COM(92) 422 final.