

Chapter 7

Freedom of Environmental Information¹

The evolution from official secrecy to free access to governmental information is a trans-national process with national variations.

Trans-national Trends

The trans-national process is characterised by two factors, one being stable and rather diachronic, and the other acting as the moving force of the transformation. The diachronic factor consists of an innate inclination of bureaucracies towards secrecy. This inclination is due to the professionalism of bureaucracies which is most often secure enough of itself not to feel the need to exchange views with the public, to the political role bureaucracies have come to play, a role which induces them to hide their strategies and knowledge in the bargaining game ("knowledge is power"), and to the function of bureaucracies of promoting economic growth which is normally exerted in a corporatist network where the partners keep each other's data secret vis à vis third parties.

The historical factor of the trans-national trend lies in the evolution of industrialised countries in general. Whereas official secrecy is closely related to absolutism and mercantilism it comes under pressure with the rise of parliamentarism and the market economy. Yet, in a first step publicness preserves a passive character. There is freedom for expression and the press from governmental interference but not active right of access to governmental information except the right to be heard in cases of intrusion into individual rights. Only more recently a number of circumstances have provoked debates and legislation on free active access:

¹This paper is an extract from Gerd Winter (ed) *Öffentlichkeit von Umweltinformationen*, Baden-Baden 1990.

- (i) Bureaucracies have become more interventionist. As the parliamentary legislation cannot preconceive the details and must leave ample margin for administrative action public acceptance for this must be created on a local and issue-related basis.
- (ii) Industry transcends the private sphere of commodity production and sales by destroying public goods. Thus, in a sense, becoming public, it provokes demands for legitimising itself.
- (iii) The notion of the public interest has lost its obviousness given the coming to power of more pluralist societal forces. At the same time governmental regulation is not more confined to situations of evident harm ("police power"), but ventures into the realm of unknown risks. What shall be considered a legitimate interest and even a fact (as *e.g.* a relevant risk) has more and more obviously become a matter of social construction, not of preconceived wisdom. If so, it is only logical that those who are affected participate in the decision-making process and, first of all, require to have access to the available information.

The wave towards openness has also swept onto the inter- and supranational level. The consumer and environmental protection movement has built up supranational networks. This force has combined with an economic pressure characteristic for EC politics, where the ecologically more progressive and therefore, as they believe, competitively disadvantaged member states push for equality of the interventionist legal frame of the economy. With this support the Council of the EC recently agreed upon a Directive which requires the Member States to introduce free access to environmental information (OJL 158/56, 23 June 1990). In contrast to this alerting of the national legal systems, there is somewhat more reticence as to extending free access to the Commission's own files. The Member States, in this respect acting as pressure groups for their national economies, are afraid of free data flow to international competitors. Therefore, particularly in their product related environmental law, they are anxious to retain data from delivery to the Commission and to other states, if adequate secrecy is not guaranteed. Nevertheless, the Commission recently announced its willingness to prepare open access regulation regarding its own files.

National Variations

Ideological traditions, *i.e.* common values and perceptions of a country often strongly affects its particular resistance against or propensity towards freedom of information. In the Federal Republic, *e.g.*, access to files is restricted to persons whose individual rights may be affected by an imminent administrative decision. The right to know is seen to be the first step towards legal protection as a means to legal protection of rights, not as a means to democratic public participation. Historically this can be explained by what is called the German "*Sonderweg*" (*i.e.* peculiar path) towards parliamentary democracy. Eighteenth century German absolutism was basically a benevolent one which did not provoke strong democratic opposition as it did in France. The German bourgeoisie, afraid of the political potential of the rising working classes, compromised with the nobility to establish a constitutional monarchy rather than a parliamentary republic. They wanted participation where they deemed their individual rights to personal freedom and property affected but let the monarch rather than the parliament decide about the other political areas.

In Great Britain in principle not even those whose individual rights may be affected have a right of access to files, though important qualifications have to be made in that there is, in contrast to Germany, free public access to final administrative decisions and a number of registers. The overall reticence as to participation in, not after, the decision-making process is, at first sight, surprising, given John Locke's influential construction of the government as "trust" of society. This is indeed taken seriously in the British constitutional doctrine, yet it is not the public at large but parliament representing it to which the executive branch is made responsible. However, given the multitude of events the minister cannot know, and given the quasi-autonomy of many administrative bodies he has no power to control, ministerial responsibility has become a fiction. Nevertheless, the fiction serves as an argument against access not channelled through the parliament.

France provides an example, of how a country with a highly professionalised and centralised administration can turn off from official secrecy. The related Act on access to administrative documents of 1978 which was part of a bundle of participatory laws enacted in the late seventies was only a rather far cry from the student rebellion in the

sixties and, in a broader sense, of the French radical democratic traditions. More important was the Orleanist tradition of benign autocracy. In this frame the act appears as a gift from above, from the enlightened bureaucratic elite who searched for more legitimacy in a time of intensified technocratic intervention. It fits into this picture that the Act on the whole remained somewhat symbolic in practice and did not turn the administration into really open government.

In the United States absolutism is absent as an historical and symbolical phenomenon against or through which the sphere of public opinion would have had to work and establish itself. To be sure, bureaucracies also in the United States are inclined towards secrecy but mistrust in their capabilities and therefore the need for public participation is an undisputed societal value. Ministerial responsibility to parliament is no viable alternative because most of the regulatory agencies neither are dependent from a ministry nor derive their legitimacy from parliament. They have to search for public approval by their own, which explains their participatory rule-making and adjudicatory procedures and the acceptance of open access to their information.

A look at socialist configurations may complete the imagery of national variations. In the German Democratic Republic, before the recent post revolutionary steps towards new legislation, there was no right of access to administrative information. Neither was there a *legal* principle of official secrecy. According to the socialist conception there is identity between the state and the people. The state is constructed as the people's "commission". The people do not need to have individual rights of access because in a way it has collective access. And the state does not need to legally establish secrecy because, as it *is* the people, there is no secrecy. Of course, this identity vision contradicted the factual clash between the state and the citizens. This tension finally contributed to the November revolution of 1989. Poland was more realistic in this respect. Poland preserved some of its pre-war tradition of the rule of law and pluralist democracy. Much as West Germany it established a right of access to files for those who are aggrieved in their individual rights by administrative action. To this a socialist component was added to that so-called societal organizations, ranging from labour unions to environmental associations, were given a right of access and of participation in every administrative procedure. Only, as

these organizations were closely supervised by the state they could not develop much of oppositional power.

Empirical Observations

Before turning to the concrete legal forms of access I should like to present some empirical observations. There is, however, a caveat to be made. The impact of new legislation on practice cannot exactly be measured. Most probably a new law has some effect but there have to be many other factors in order to change society. In our case, making bureaucracies open-minded and inducing the public to actually take its participatory chance may depend more on the general information-culture than on the law. Therefore, much remains to be done once access laws have been passed. Still, laws are indispensable because they may preserve parts of an open culture in times where this declines, and it may strengthen the culture where it comes to grow.

Our data may be presented in the form of answers to arguments against the law or practice of freedom of information as follows:

(1) *"Free access leads to additional workload for public officials"*.

There are huge differences among different states and different agencies in this respect. For instance, the US Consumer Product Safety Commission handles about 13000 information requests a year for which 16 full-time posts have been created. On the other hand, a French department which supervises 1500 classified factories receives about three to four requests per year. This reflects differences in the general information cultures already mentioned. Besides, workload is nothing but a problem of personnel. A government which wants open administration must be prepared to bear the related costs.

(2) *"Free access is perverted to a means of business to gather information"*.

Whereas in the European "open systems" we researched, *i.e.* France, Sweden and the Netherlands, as well as in Canada, most requestors in the environmental and health fields are concerned persons and associations, access in the United States is indeed much more often used by business firms and even specialised FOI services companies, which make a business out of the conveyance of information. For instance,

from the 41500 requests the Food and Drug Administration received in 1987 80% were filed by regulated and other industries, 6% by the press, 4% by private persons and 1% by public interest groups. Yet, one can ask why competitors in a market economy whose very concept relies on free flow of information should be refused information about their fellow competitors, information, to be sure, which is not trade secrets. Many requestors want to check, if they are treated equally by the agency, and others want to know whose environmental performance is poor such that they can offer them treatment devices. These, I think, are perfectly legitimate goals.

(3) *“Business will become more reticent in providing agencies with voluntary information”*

There is evidence from our interviews with agencies and firms as well as from more systematic research *e.g.* in Canada that in open systems business develops greater awareness and caution in order to protect sensitive information. More information is declared trade secret, and cases in Sweden and the Netherlands are reported where firms refused to give voluntary information if the agency did not agree not to disclose it even if it could not be deemed trade secret. Yet, although such change in attitude may have to be taken as cost of opening up two-tier relations to third parties, this cost could be lowered by broadening legal duties to inform the agencies and by carefully appraising secrecy claims.

(4) *“Business will be harmed by frequent disclosure of trade secrets”*

Although we asked all of our interview partners about this point, not a single case was mentioned where a firm was economically harmed by disclosure of information. Those who utter the critique tend to overlook that the agencies almost overanxiously either accede to the firms' initial secrecy claim or follow a prior notice procedure before they release potentially sensitive information.

(5) *“Access rights are covertly counteracted in practice”*

This argument is frequently made by environmental associations in France, Germany, Italy and Greece but less so in Sweden and the Netherlands. In the United States it is made with regard to some but not all agencies. Obstacles experienced by associations include high

standards by specifying the requested document, delayed responses by the agency, intolerable reading conditions, lack of copying facilities, broad interpretation of exceptions to disclosure, etc.

(6) *“Formalised free access will dry out informal sources of information”*

This argument sounds strange but it not too far-fetched. It is true that in the shadow of formal official secrecy informal channels of information do exist. To a growing extent third party networks reach into bureaucracies and effectuate “whistle-blowing” and “brown-bagging”. Also, trading substantive legal protection for voluntary information occurs. For instance, when the German chemical company Hoechst planned to build a factory for a new pesticide in Frankfurt, a neighbouring intervener withdrew his complaint, which would considerably have delayed the realisation of the project, in exchange for the firm’s promise to release process and product related information otherwise not accessible for him. The argument goes that formalisation of the informational interaction might, by channelling its wild flows, make the interaction, at the same time, more effective as far as non-sensible information is concerned and more restrictive as to more sensible information. I doubt that this expectation is correct. The US example shows that formalised free access and additional informal communication can go together. In any case, nobody who shares the argument would seriously oppose free access rights.

Framing Free Access Rights and Limitations

In the following I shall take the perspective of a law-maker who devises a new access law under the EC Directive and takes the different national laws and experiences into account.

The Directive was agreed upon by the EC Council on 28 March 1990, with the German minister voting ad referendum. It came into force on 23 June 1990. Its major thrust is to establish an access right independent of the showing of an interest. Access shall be given to environmental information. The Directive defines what this is, and states exceptions to the access right. It also requires that the right be legally protected. For the transformation into national law it should be noted that, as the Directive is based on Article 130 s of the EEC treaty,

Article 130 t allows the Member State to go further. For instance, the national legislator may want to open access to more information than what the Directive rather narrowly defines as environmental information. Also, the legislator has wide discretion – and may exert it more public or secret-minded – as to concretising the exceptions to the access right, as are the protection of trade secrets, privacy and governmental deliberations. It should be avoided that the doors which are to be opened by the basic right finally lead to emptied rooms.

Prerequisites of Access Rights

As mentioned above the right is to be framed in general terms as a general right open to everybody. No specific legal interest has to be shown. Foreign citizens are included, no matter if they belong to a state inside or outside the Community. This may lead to advantages for those who search for information not accessible in their own state in a more open foreign state. The US have been used as such a generous source but have apparently not suffered from nor complained about this situation. The EC-council seems to think along the same line.

As far as the object of access is concerned it makes a difference if the selection of data is done by the agency or left to the requestor. Selection costs, on the one side, worktime, but is linked with the power of defining what may be released and what not. He who selects the relevant information also defines the lines between secrecy and openness. Almost no such power remains to the agency when the object of access is files, as it is the case in the US, Canada and Sweden. Then, a requestor not only gets information about the substance matter she wants to know but also about, how the matter is handled, if it was delayed, traded off, treated seriously, pushed through etc. This “operative” information is useful for legal action and effective participation. Most of it remains secret when the object of access is public registers, like, in Britain, or administrative documents, like in France because the operational information emerges from the whole of a file rather than from a single datum or document. The EC-Directive, by using the term “information about the environment”, leaves the power of selection basically also to the administration. If the requestor does not know that specific information exists the agency can always deny its existence. In this respect there is no difference between documents, registers or information as objects of access.

The scope of information the directive opens for access goes beyond environmental quality data and includes information about emissions and pollution abatement measures. However, the broad and most important areas of product related data, *i.e.* data about the composition, production and utilization of harmful products and substances is left out. It was contained in the modified proposal of the Commission of 19 March 1990 (COM (90) 91 final) but was subsequently dropped by the Council. Some product related Directives, it is true, contain so-called negative lists of data which must not be kept secret. For instance, the Directive on chemical substances provides this. But not all dangerous substances are treated in this way, and, even more importantly negative lists might be interpreted as not to dispense from the showing of an interest of access in those legal systems which in general require such condition for an access right. Here is a point where the Member States could go beyond the level of the Directive. They may even take the opportunity of having to reform their laws anyway and introduce freedom of information not only in the environmental field, but in administrative matters in general.

Limitations

(i) One limitation shall protect the decision-making process of the administrative agency. The Directive takes two measures in this respect. The first deals with the technical side of the process and provides room for undisturbed work. Thus, as *e.g.* in France and Sweden, not completed documents or data may be excluded from access. For instance, emission data may be retained, as long as they are raw and not yet compiled and analysed. This is acceptable, if access is given to all information after completion of the document. All national free access laws do so including the Dutch, French, Danish, Swedish and US-American, but remarkably, not the Directive.

The second measure concerns the substance of the decision-making. Some laws, *e.g.* the French and German protect documents which are written in direct preparation of the final decision. Others, like the Swedish, require that a specific damage must be shown should the information be disclosed. The Directive uses very elusive language in this respect. Access is denied when it affects the "confidentiality of the deliberations of the government" (which, according to a protocol declaration

includes the national, regional and communal levels). In addition, "internal communications" may be protected. Escape clauses could not have been better phrased, all the more it is once more not foreseen to make the preparatory information accessible after the decision was taken.

(ii) Trade secrets are the second most important limitation to the access right. Like most of the national laws the Directive does not define the term. Therefore the interpretation fights wielded on the national level will go on. The Directive missed the opportunity to decide some of the issues, of which the most outstanding are whether emission data become trade secrets when reversed engineering is possible, whether in balancing the firm's and the public's interest priority should be given to the latter, whether the agency shall determine by itself the need for secrecy or has to give prior notice to the secrecy holder, and whether secrecy protection presupposes a secrecy claim of the information provider.

It will help to structure the interpretation of the term trade secret when one distinguishes four elements which in one way or other are common to many legal systems. These constitute four filters information must pass through in order to qualify as protected secrets.

First, the information must directly relate to the technical process or business of the concerned person or firm. Hence, any environmental quality data must be accessible, because they primarily inform about the environment and not, or only indirectly, about the polluter. An exception may only apply when the very production of the data makes them an intellectual product and special or general national intellectual property laws forbid regulatory agencies to disclose them. Information about abatement or avoidance measures taken by the polluter, on the other hand, is clearly technical in kind. Doubts may arise as to emission data. One may say that emissions have left the assets of the polluter and, therefore, data about them do not concern the technical process of the polluter any more.

Secondly, the information can only be called secret if it is not known by more than a small number of persons. According to some laws, the information is also not secret if it could be produced by an average professional without greater difficulties. Otherwise, latent public information which could easily be brought into the open by the public itself would be privatised. This means, if one assumes that reverse engineer-

ing from emission data back to process data generally makes the emission data classifiable information this does not hold if the reverse engineering could be done by anybody up to an average professional.

Thirdly, the concerned person or firm may be required to claim secrecy when submitting information to the agency. Some legal systems do so, *e.g.* the US-American, whereas others, such as the Dutch and the German, assume or are practiced to assume the submitter's claim to secrecy.

Fourthly, according to many legal systems the interest in secrecy must, on a case by case basis, be weighed against the interests in disclosure. Some legal systems, like Canada, give "the public interest as it relates to public health, public safety or protection of the environment" a certain priority. Others require that if the interest in secrecy shall prevail it must be shown that the person concerned would suffer loss should the information be disclosed.

(iii) The last limitation to the access right I want to mention is protection of privacy. Information about an event or phenomenon may at the same time contain information about a private person, be it that this person was part of the event or phenomenon, be it only that she is the source of the information, *e.g.* author of an expertise, subscriber of a third party intervention, applicant for a license etc. This person may be interested to have her authorship or involvement in the substance of the information concealed whereas she may be disinterested as to whether the substance, stripped of the personal allusion, is disclosed.

In order to decide under what circumstances privacy shall be protected two questions must be answered. The first concerns the legal technique: should the conflict of interest between protection and disclosure be regulated by the free access law or the privacy protection law? The former solution is more frequent. It is indeed more appropriate in our context because the specific regulation as to environmental information can be devised.

The second question relates to the criteria of how the conflict should be solved substantially. Some legal systems, *e.g.* France and West Germany, define a narrow sphere of the private life, beyond which privacy is not protected. Others use a broad definition of person-related information but limit its protection by setting up negative lists of accessible information. A third group refers to a balancing of interests test which is, however, an unsatisfactory solution, because then parliament

avoids setting priorities. Also, respect for the sphere of the public may whither away in the humdrum of in principle equalised interests.

Conclusion

Access to environmental information, if constituted as everybody's right, is part of and strengthens the public sphere. Public democratic debate is the necessary chaos which constantly destroys the (private and governmental) orders arising out of itself thus preventing societal sclerosis and resistance to learning.

The public sphere is permanently subject to attacks and erosion from the side of the ordering powers. In developing states the development apparatus has believed to know better than the public and to be able to avoid the chaos of uneducated debate, but has often departed from societal needs and virtually "corrupted". The same is true with socialist states where the bureaucracies have believed to implement a historic mission identifying themselves with an abstract labour class whose needs they thought to know best by themselves. Also in capitalist states the public sphere is in constant danger. Although there is a structural place for it, *i.e.* the sphere of transcendence of the individual interests for their own long term benefit, and although capitalism has succeeded in establishing the public sphere against feudal and absolutist *arcana imperii*, its own forces, combined with the technological potential of information society, poses new threats. "Information", *i.e.* the "forming" of alter ego through communication (rather than *e.g.* through force, money etc), was, to an extent unknown before it became a means of production, a commodity and a marketing device in the economic system. The political/administrative system, on the other hand, has learned to use information as a method of power more sophisticated than the traditional method of sanctioned law. These new emergences combine in an attempt to privatise the public sphere. There is a multitude of legal tools, which are used to support this process, ranging from the privatisation of telecommunication to the commercial capture of science by joint ventures and to making patent law reach out down to genetic information. The related legal tool in the area of access to governmental information is a broad definition of trade secrets and protection of governmental deliberations. The battle

over an everybody's right of access was won for the sake of the public sphere, but the victory may turn out to be one of the Pyrrhus kind when it comes to framing the exceptions to the right. Privacy protection plays a peculiar role in this context. It contributes, it is true, to reducing the public sphere. This is perfectly legitimate and indeed a means of preventing the mentioned privatisation from not only seizing the public, but also the personal sphere. But because it privatises information as well, though for different reasons, it is prone to be misused by the more powerful economic and governmental actors to serve as a disguise of otherwise not protectable trade and governmental secrets. In this respect, also privacy protection must be critically assessed if the European battle over a public environment shall not finally be lost.

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