



Strasbourg, 25 May 2011

CDL-UDT(2011)012
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**UNIDEM
CAMPUS SEMINAR**

INFORMATION, (SOCIAL) MEDIA AND THE CIVIL SERVICE

**Council of the Regione Friuli Venezia Giulia
Sala De Rinaldini
Piazza Oberdan 5
Trieste, Italy**

2 – 5 May 2011

by
Mr David GOLDBERG
(Advisory Board, Access Info Europe)

Transparency is to the 21st century what green was to the 20th

Outline :

Concepts and notions

Transparency ; access to information ; public administration ; media

Transparency in the European Space

Council of Europe and European Union instruments; 2 decisions of the European Court of Human Rights

Case studies

Scottish Information Commissioner's Round Table ; Recommendation of Scottish Public Services Ombudsman

Endnote

Snapshot of public administration – Cyprus ; ECJ: Transparency is about the public's right to know

INTRODUCTION - CONCEPTS and NOTIONS

Transparency; access to information

“Transparency” is one of the buzz words of the 21st century. One of the first acts of the then newly elected President Obama was to order a review and enhancement of transparency across the executive departments and agencies by the end of his first 120 days in office. But, what is “transparency”?

The White House Memorandum, *Transparency and Open Government*, states

Government should be transparent. Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset. My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use. Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public. Executive departments and agencies should also solicit public feedback to identify information of greatest use to the public.¹

Acces-Info Europe (AIE) offers another useful elucidation of the concept:

A government is transparent when the great majority of the information that it holds about its activities, policies and decisions is accessible for the general public. Therefore, transparency is the result of information being available. Thus, government transparency brings three main benefits to democratic societies:

- Transparency for participation: democracy means not only participating in elections but also participating in public debate and decision-making between elections. In order to defend human rights and civil liberties in a constructive and meaningful way, we need information.
- Transparency for accountability: in a democratic system, the general public is entitled to hold the government and public officials accountable for their actions and the decisions they made as the political representatives of the people.

¹ <http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/> accessed 26 April 2011

- Transparency for efficiency: reactive access to information has the benefit of encouraging public bodies to organise their information. Proactive disclosure of information encourages better information management and more effective communication between public bodies.

Comparative international research shows that transparency increases the trust of the people in public institutions and fosters the recognition of the daily work of their political representatives and public officials. Access to information therefore improves the democratic culture of a country.²

Sometimes, the notion of transparency is equated with “access to information”. But, it might be helpful to keep the two notions separate. AIE characterises the latter, thus:

In a democracy it is essential that people can access a wide range of information in order to participate in a real and effective way in the matters that affect them. The principle behind the right of access to information is that public bodies are – or should be – acting as “servants of the people”...Today, as a result of campaigns to promote the right of access to information, 84 countries have access to information laws. In addition, the right of access to information has been recognised as a **fundamental human right** by the highest international human rights courts. This right of access to information places two obligations on governments. First, the obligation to publish and disseminate to the public key information. Second, the obligation to receive from the public requests for information and to respond. In other words, access to information is a fundamental human right with two parts:

Proactive:the positive obligation of public bodies to provide, to publish, and to disseminate information about their main activities, including core classes of information such as budgets, policies, and plans. In this way the public can know what they are doing, can participate in public matters and keep public authorities accountable.

Reactive: the right of all persons to ask public officials for information about what they are doing and any documents they hold and the right to receive an answer with access granted either by viewing original documents or provision of copies. Due to legitimate exceptions...they may not always give you information but they always have to answer your request and you still have the right to appeal.³

Of course, other categories of laws, e.g., official secrets laws or those on administrative procedures can conflict with or even negate FOI laws. Recently, the draft law Kazakhstan law on administrative procedures was reviewed by the OSCE/ODIHR. It recommended that

Transparency and openness of administrative procedures are guaranteed by Article 14 of the draft Law. The right of individuals to “get familiar with enforced normative legal acts” mentioned in par 3 of Article 14 does not cover the positive obligations imposed on the State with regard to every person’s right to information. Rather than reiterate that people may familiarize themselves with such secondary laws, it is recommended to specify in Article 14 that administrative agencies are obliged to publish and inform the population about all applicable legislation. Such awareness-raising is paramount in ensuring the proper use and implementation of legislation.⁴

² <<http://www.accessinfocyprus.eu/en/what-is-transparency.html>> accessed 25 April 2011

³ <<http://www.accessinfocyprus.eu/en/access-information-right-to-know.html>> accessed 25 April 2011

⁴ <<http://legislationline.org/>> accessed 26 April 2011

Public administration

Public administration is a concept which has had a settled history but now an increasingly shifting meaning as the structure and organisation of countries' administrations evolves in the contemporary world. A recent EIPA paper by Dr Christoph Demmke, 'Civil Services in the EU of 27 – Reform Outcomes and the Future of the Civil Service'⁵ concludes that

Today, the changing role of the state requires a changing conception of the public services and the civil servants. Despite the many changes that are taking place in many countries, the public perception is still that civil servants work in an environment that is clearly separated from the private sector. In some countries civil servants are seen as a protected group, set apart from the outside world. In reality, customer- and citizen-orientations have increased, and working conditions have been aligned to those in the private sector. Nowadays the differences between public and private employees in terms of their status, working time, pay, pensions, holidays, recruitment and competency requirements are smaller than they were previously. To state that the times of the traditional bureaucracy are over is tempting. In fact, it is highly unlikely that traditional bureaucracy is coming back. However, it cannot be excluded that specific principles and aspects may return to the agenda. For example, the current trend towards decentralisation and fragmentation has resulted in new discussions about the need for a new public service ethos, the need for common values, standardised HR practices and fairness issues.

Media

Change and evolution is also, it need hardly be said, affecting what it is that the media is. Media deemed to be within the scope of the field range from traditional print media to electronic media, e.g. broadcast television, including satellite TV, to blogs and social networking sites and platforms. Traditional media are complemented nowadays by new delivery channels for traditional content (iPlayer) and new forms of information delivery (blogs, wikis, social networking sites, user-generated content) used with sometimes significant effect.⁶ For example, in Armenia, several videos documenting abuse in Armenia have made their way on to YouTube, the video-sharing website, generating a wave of outrage both inside Armenia and among members of the diaspora. In a few cases, the burst of pressure generated by social networking has forced authorities to take action... Over the past year, In 2009, for example, a six-minute video showed two lions unleashed on a donkey in a cage, while a small crowd watched and cheered. Local newspapers wrote that the video was shot on the property of a leading member of Armenia's National Assembly, who is known for having a private zoo. He denied any association with the video. Regardless, the video generated discussion in Armenia about animal rights—not a regular topic of interest in the country... In September 2010, a video of two Armenian servicemen being physically abused by an army major was posted on YouTube. Several days—and thousands of hits—later, Armenia's Ministry of Defense confirmed^[3] that an investigation was underway... And while most videos have little more than entertainment value, a few expose important social issues. And they are not going unnoticed. Witnessing the discussion ensuing from these YouTube videos, activists and the public at large are realizing the power of social networking websites. And as the number of people in Armenia having access to cell phones with video cameras and high speed Internet access continues to increase, the struggle against injustices is expanding to cyberspace like

5 <<http://publications.eipa.eu/en/eipascope/>> accessed 26 April 2011

6 David Goldberg et.al., *The Media and Media Law*, 2009, Section 1.2.1

never before. The country, in general, can only benefit from the greater scrutiny of its people.⁷

In the present times, of course, pertinent to ask, Who is 'the press'? What about blogging and bloggers? One answer, which emphasises the *functional approach*, is the following:

Courts have long struggled with this seemingly easy question. While no doubt exists that "mainstream" media, such as broadcast stations, newspapers and magazines, enjoy the freedom of "the press," the line gets blurrier in cases involving underground newspapers, free-lance writers and pamphleteers. In general, however, courts have defined "the press" so as to include all publishers. The 2nd U.S. Circuit Court of Appeals, for example, has said that First Amendment protections extend to "every sort of publication which affords a vehicle of information and opinion." *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir.) (quoting *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)), cert. denied, 481 U.S. 1015 (1987).⁸

Michael Flaherty, an expert on the UN's ICCPR Committee and the Article 19 General Comment's Rapporteur, has recently stated

State parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network to exchange ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. State parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto⁹

In terms of the role of the media vis-a-vis making public administrations transparent, the European Court of Human Rights has been consistent in its characterisation of the "public watchdog" role of the press since its decision in *Sunday Times v United Kingdom* (See, *The Sunday Times v UK* (No. 1) (1979) 2 EHRR 245). For a recent *dictum*, see *Gutiérrez Suárez v Spain* App no 16023/07 (ECtHR, 1 June 2010), par 25

The press plays a notable role in a democratic society: although it is true that it must not go beyond certain limits...it is nevertheless incumbent on it to impart information and ideas on matters of public interest, respecting its duties and responsibilities...Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Otherwise, the press would not be able to exercise its vital role of "public watchdog"...

TRANSPARENCY IN THE EUROPEAN SPACE

Council of Europe and European Union instruments

The Council of Europe has been at the vanguard of encouraging transparency of public administrations. Article 10, Principle of Transparency, of Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration¹⁰ states

7 Armenia: Social Networking and the Expanding Public Discourse <<http://www.eurasianet.org/node/62944>> accessed 28 April 2011

⁸ <<http://www.firstamendmentcenter.org/faq/frequently-asked-questions-press>> accessed 28 April 2011

⁹ See <<http://www.right2info.org/news/un-panel-revises-draft-comment-on-article-19>> accessed 28 April 2011

¹⁰ <<https://wcd.coe.int/wcd/ViewDoc.jsp?id=1155877&Site=CM>> accessed 26 April 2011. The principle is qualified: 3. They shall respect the rights of access to official documents according to the rules relating to personal data protection. 4. The principle of transparency does not prejudice secrets protected by law. See also, Model code of conduct for public officials; Appendix to Recommendation No. R (2000) 10, adopted by the Committee of Ministers at its 106th Session on 11 May 2000.

1. Public authorities shall act in accordance with the principle of transparency.
2. They shall ensure that private persons are informed, by appropriate means, of their actions and decisions which may include the publication of official documents.

The Council of Europe's Venice Commission is undertaking Stocktaking on the notions of "good governance" and "good administration".¹¹ One of the staples of those processes includes "transparency", partly as an independent value and partly as an instrumental one (see para 36):

Transparency means that decisions taken and their enforcement are done in a manner that follows rules and regulations. It also means that information is freely available and directly accessible to those who will be affected by such decisions and their enforcement. It also understandable forms and media...Accountability cannot be enforced without transparency...

The requirements of a right to good administration, however, stem from the fundamental principles of the rule of law, such as those of lawfulness, equality, impartiality, proportionality, legal certainty, taking action within a reasonable time limit, participation, respect for privacy and transparency (para 65)

In the European Union, the European Ombudsman has been instrumental in creating and promoting deontological codes for administration, principally the 'The European Code of Good Administrative Behaviour'.¹² Articles 22, 23 and 24 are the relevant Articles: Article 23, Requests for information, states

1. The official shall, when he has responsibility for the matter concerned, provide members of the public with the information that they request. When appropriate, the official shall give advice on how to initiate an administrative procedure within his field of competence. The official shall take care that the information communicated is clear and understandable.
2. If an oral request for information is too complicated or too comprehensive to be dealt with, the official shall advise the person concerned to formulate his demand in writing.
3. If, because of its confidentiality, an official may not disclose the information requested, he or she shall, in accordance with Article 18 of this Code, indicate to the person concerned the reasons why he cannot communicate the information.
4. Further to requests for information on matters for which he has no responsibility, the official shall direct the requester to the competent person and indicate his name and telephone number. Further to requests for information concerning another Community institution or body, the official shall direct the requester to that institution or body.

<[https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM\(2000\)PV1&Language=lanEnglish&Ver=final&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM(2000)PV1&Language=lanEnglish&Ver=final&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383)> accessed 26 April 2011

¹¹ CDL-AD(2011)009 <http://www.venice.coe.int/site/dynamics/N_Recent_ef.asp?L=E> accessed 28 April 2011; within the EU, see also the Charter of Fundamental Rights Art 41. Right to good administration <http://www.eucharter.org/home.php?page_id=49> accessed 26 April 2011

¹² <<http://www.ombudsman.europa.eu/resources/code.faces#hl4>> accessed 25 April 2011

5. Where appropriate, the official shall, depending on the subject of the request, direct the person seeking information to the service of the Institution responsible for providing information to the public.

Article 23 - Requests for public access to documents states

1. The official shall deal with requests for access to documents in accordance with the rules adopted by the Institution and in accordance with the general principles and limits laid down in Regulation (EC) No 1049/2001^[5].

2. If the official cannot comply with an oral request for access to documents, the citizen shall be advised to formulate it in writing.

Article 24 - Keeping of adequate records states

The Institution's departments shall keep adequate of their incoming and outgoing mail, of the documents they receive, and of the measures they take.

During 2011, the Code is being supplemented by the development of a new deontological Code 'on ethical principles for civil servants'. At present, this is the subject of a Public consultation on the draft statement of public service principles for EU civil servants (comments are welcome until 15th May 2011). The next step is that the European Network of Ombudsmen will discuss the subject at their next meeting in Copenhagen in October 2011.¹³

Amongst the principles forming part of the corpus of ethical principles is 'Transparency':

Civil servants should be willing to explain their activities and to give reasons for their actions. They should welcome public scrutiny of their conduct, including their compliance with public service principles.

More generally, as far back as 1981, the Committee of Ministers adopted a Recommendation ON THE ACCESS TO INFORMATION HELD BY PUBLIC AUTHORITIES (itself building on the Parliamentary Assembly Recommendation 854 on access by the public to government records and freedom of information).¹⁴ The twofold rationale was stated to be

Considering the importance for the public in a democratic society of adequate information on public issues; Considering that access to information by the public is likely to strengthen confidence of the public in the administration;

Of course, 'In the implementation of these principles regard shall duly be had to the requirements of good and efficient administration.' But, nonetheless, 'Where such requirements make it necessary to modify or exclude one or more of these principles, either in particular cases or in specific areas of public administration, '...every endeavour should nevertheless be made to achieve the highest possible degree of access to information.'

Principle 1, 'Everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities...' opens the door to the media to use the right in the exercise of its core function of informing the public.

13 The Report contains a useful resource: International codes and other material relating to ethical standards for civil servants <<http://www.ombudsman.europa.eu/en/resources/otherdocument.faces/en/10115/html.bookmark#hl7>> accessed 26 April 2011

14 RECOMMENDATION No. R (81) 19 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES

(Adopted by the Committee of Ministers on 25 November 1981 at the 340th meeting of the Ministers' Deputies)

The Recommendation was beefed-up in 2002 and by 2009, it had become transformed into the world's first multilateral Convention on Access to Official Documents.¹⁵ At the time of writing, although twelve states have signed it, only Norway and Hungary has ratified the treaty, so it is some way off from coming into force. It was also criticized by civil society on a number of grounds

The world's first treaty on access to information is unimpressive. It provides weaker guarantees for this right than many of Europe's laws. For example, the treaty applies only to a narrow range of public bodies, does not impose maximum time-limits for responding to requests, and fails to establish that those requesting information have a right to appeal to an independent body or court... Other problems with the text of the treaty include a restrictive definition of the documents it covers and the failure to place limits on the reservations that states may make to the convention's provisions.¹⁶

The European Court of Human Rights

A noteworthy development, which may or may not be a trend?,¹⁷ is the recent affirmation, in two European Court of Human Rights decisions, regarding access to information.¹⁸

Access to Information Judgment (1)

In 2004, a member of the Hungarian Parliament filed a complaint with the country's Constitutional Court over Hungary's national drug laws. The Hungarian Civil Liberties Union—a rights group active in the field of drug policy—applied to that court to receive a copy of the complaint. Both the Constitutional Court and Hungary's regular courts denied the request on privacy grounds. The Hungarian Civil Liberties Union took the case to the European Court of Human Rights alleging that the denial interfered with its right to access state-held information necessary to fulfill its role as a public watchdog.

Last week, the European Court issued its judgment in the case of [Társaság a Szabadságjogokért \(the Hungarian Civil Liberties Union\) v. Hungary](#). In the case the Court did not recognise a *general* right to access to information, but did indicate that in some situations the state is bound not to hamper the free flow of information which is readily available and which is solicited by social watchdogs, such as the press or even some NGOs (such as in this case). Importantly, in para. 37, the Court pointed out that it "considers that it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights, alleging that their opinions on public matters are related to their person and

15 Council of Europe Convention on Access to Official Documents Tromsø, 18.VI.2009 <<http://conventions.coe.int/Treaty/EN/Treaties/Html/205.htm>> accessed 25 April 2011; Explanatory Memorandum <<http://conventions.coe.int/Treaty/EN/Reports/Html/205.htm>> accessed 25 April 2011

¹⁶ <http://www.access-info.org/documents/documents/08_12_03_Press_Release_re_CoE_-_Second_Rate_Convention_adopted.pdf> accessed 26 April 2011. See also the UNECE UNECE CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS done at Aarhus, Denmark, on 25 June 1998 <http://www.access-info.org/documents/Access_Docs/Thinking/Principles/Aarhus_convention.pdf> accessed 25 April 2011

¹⁷ An important development is the draft text of the revised General Comment to ICCPR Article 19, see <<http://www.right2info.org/news/un-panel-revises-draft-comment-on-article-19>> accessed 28 April 2011

¹⁸ The source for the summaries is the excellent ECHR blog <<http://echrblog.blogspot.com/>> accessed 26 April 2011

therefore constitute private data which cannot be disclosed without consent."

The [Justice Initiative](#) of the Open Society Institute, one of the third party interveners in the case, added:

The court noted the important role played by the media and other independent monitors in creating "forums for public debate" and emphasized that any interference with the ability of such groups to obtain information of public interest must be able to withstand the "most careful scrutiny." The court emphasized that governments have an obligation "not to impede the flow of information" on matters of public concern.¹⁹

Access to Information judgement (2)

In its recent judgment *Kenedi v. Hungary* (Appl. no. 31475/05), the Court has given more clarifications on access to information. The applicant in the case was a historian doing research on the State Security Service. For several years he tried to get access to relevant information from the Ministry of the Interior, but to no avail. After continued refusals, he obtained domestic court orders to enforce access. The Ministry, however, continued to obstruct, for example by requiring that Kenedi would sign a declaration of confidentiality. Kenedi refused, also because the Court order had not mentioned confidentiality as a requirement. When he was later given access to part of the information concerned, he was not allowed to publish it. At the moment of the proceedings in Strasbourg Kenedi still did not have access to all documentation.

The Court found violations of a number of ECHR provisions. Article 6 ECHR (fair trial) was violated because of the total length of the proceedings and enforcement - over ten years. Article 10 was also violated in the Court's view. It reiterated that (para. 43) "access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression." In this case, the interference with the applicant's right had not been prescribed by law. The Court held (para. 45):

The obstinate reluctance of the respondent State's authorities to comply with the execution orders was in defiance of domestic law and tantamount to arbitrariness. The essentially obstructive character of this behaviour is also manifest in that it led to the finding of a violation of Article 6 § 1 of the Convention (see paragraph 39 above) from the perspective of the length of the proceedings. For the Court, such a misuse of the power vested in the authorities cannot be characterised as a measure "prescribed by law".

Although again the Court does not formulate a general right to access to documents, what it does clarify is that once access on the national level is ordered (in this case by a court), such access should be effective and be given within a reasonable time. In this case, the authorities had been so obstructive, that the European Court did not shy away from calling their behavior arbitrary.

Case studies²⁰

Scotland - roundtable

The Scottish Information Commissioner (SIC) recently hosted a roundtable event where

¹⁹ The Justice Initiative's amicus brief is at <http://www.soros.org/initiatives/justice/litigation/hungary/hungary_20080901.pdf> accessed 28 April 2011

²⁰ The UK Cabinet Office has set up the [Public Sector Transparency Board](#) to help embed the transparency agenda across government as a core part of all governmental business. It has also committed to establishing a legal right to data <<http://www.cabinetoffice.gov.uk/content/transparency-overview>> accessed 28 April 2011

professionals from the media, local government, trade unions and the legal sector discussed how the Freedom of Information (Scotland) Act 2002 had worked since it was implemented in January 2005 and how it impacts different perspectives.²¹ Amongst the key points were:

* A survey of FoI officers across Scotland found that over two thirds reported a rise in requests over the past year. The survey also found that 48 per cent felt that their organisation had become more inclined towards disclosure, with only 2 per cent reporting that they had become less inclined to release information in response to requests.

* The law has become a staple research tool for many of the media and the relationship between the press and the over 10000 public authorities covered by the Act is often a controversial one.

*the biggest change FoI has created is that the first port of call for journalists is a written FoI request and there is no contact with the press office; there are cases where a normal press enquiry is re-defined as an FOI request.

*Authorities are not too good at speaking to the journalists and asking them how they can narrow their request and find out exactly what they are looking for. The reason why that is difficult is there is this general presumption of secrecy. It doesn't sit well with their *raison d'etre*.

*the FoI law has been responsible for a change in culture – people will now actually give information that in the past they would have found a way to defend against it. It is not perfect, but it has made a huge change in the way public authorities deal with information. Press Offices would actually rather prefer that people contacted them in the first instance; an FoI request it is, in some ways, a blunt instrument; it's in writing and the perception is it would be better to phone up the press office and put the inquiry in a context.

* It comes down to the level of precision which is sought: Transport Scotland was asked how many snowploughs they have now and how many they used to have? The authority said the question would have to be submitted as an FoI request, and that the requester would need to specify the exact type of snowplough because they are not all the same. That has never been resolved and there has not been any answer. But, the public administration claimed that it is about an issue of *precision*: If the requester had contacted the authority and said, how many snowploughs does the council have, the press office would have given a rough figure over the phone, but for an FOI request, they would have done the precise headcount and breakdown of how many are permanent and so on. So, "If you want rough and ready then a quick call to the press office, but if you want the detail then FoI."

*there seemed to be a consensus that FoI has produced many positives, but there is concern, especially from the media, that some authorities don't comply fully with it. SIC Kevin Dunion said²²

Of all the issues I deal with as commissioner, the relationship between public authorities and the media is often the most fraught. What does concern me is the trenchant views that are expressed quite unguardedly on both sides. From a public authority point of view, I often hear that journalists are simply on fishing expeditions. I have been told some journalists have a quiet Friday afternoon so they sit and file 20 requests in the hope something will come up, they make unfocused, round-robin requests to every public authority and are not mindful of the impact it has on the authority. From the

²¹ See 'Freedom of information: Examining the success of Scotland's freedom of information laws' <http://www.holyrood.com/index.php?option=com_holyrood&func=article&artid=4877&edition=253&brick=30> accessed 28 April 2011

²² The Scottish Information Commissioner's office received 242 appeals from the media between 2005 and 2010, which is about 10 per cent of the overall number of appeals. By contrast to the volume of requests, the media are 'a relatively modest part' of the workload. See the SIC Annual Report 2010, <<http://www.itspublicknowledge.info/inyourhands/about-applicants.html>> accessed 28 April 2011

media's point of view, what I hear is that normal press enquiries become full-blown Fol requests so the normal relationship between a press officer and a journalist is put into the funnel of Fol and everything goes with the legal requirement of that

*The Commissioner said that news organisations should “name and shame” authorities that fail to meet the demands set out in Fol law as there had been instances where the delay in disclosing information to journalists has been “out of all proportion”. It should be noted that the SIC can undertake “Practice Assessments” and issue a Practice Recommendation where required.²³

*There is sometimes deliberate misinterpretation of a request, e.g., a journalist asked a public authority for all the minutes and board papers and appendices and the request came back, ‘thank you very much, can you please clarify what you mean by board minutes and appendices’ and this is a standard response given to almost anyone applying for information.

*The biggest concern is about a failure to respond to requests, responding on the last day permitted by the law.

*One journalistic perspective is that the existence of the law has shifted the balance of power in favour of the media significantly. ‘We have a right to get information, which previously we didn’t have. That means every time you ask a public agency something, whether it’s an Fol request or an ordinary request, they know that you can always follow up a general enquiry with Fol. I think it means we have more power and we get more information, although it is not perfect.’

*are the media are treated differently to the public or other organisations? There is a “fear factor” from the public-sector side of the fence. There is an element to which the organisation goes into a bit of a spasm and finds out an Fol request is coming from a journalist. One journalist reported that he had put in an Fol to the MoD for a specific document. Someone else, who is not a journalist, put in a request for the same document two weeks after the journalist and got it two weeks before the journalist. That could be because the MoD has lots of different departments who don’t talk to each other, or it could be because they didn’t want to give it to the journalist.

*Local administrations reported that they do not recognise the scenario of actually targeting someone because they are putting in an Fol request. Some media did report a difference between the ways the media and others were treated by Fol officers. Some added that organisations will ask journalists to make a request on their behalf because of a culture of fear over making requests, e.g., a small community group reliant on funding from a public agency maybe worried about something if it asks a question, as it automatically makes the relationship with that agency more uncomfortable. There are instances of emails from one council official to another mentioning who had made an Fol request and who their employer was.

*How frequent are ‘fishing expeditions’ - where journalists file vague Fol requests in the hope that something comes from it? One piece of advice is, there is no point in “playing games” with the Fol officer; one should ask whatever you want to know. Fishing expeditions are usually easy to deal with because most will be more than the cost limit anyway.

²³ Improvements may follow an on-site practice assessment at a Council, undertaken by the Commissioner's staff. Practice assessments help the Commissioner identify where an authority is failing to comply with FOI laws, and then work with the authority to agree an action plan to improve its practice and achieve compliance. See, e.g., Scottish Borders Council turns FOI compliance around <http://www.itspublicknowledge.info/home/News/20101207.asp>; The Commissioner's Enforcement Strategy is available at <<http://www.itspublicknowledge.info/ScottishPublicAuthorities/ComplianceEnforcement.asp>> accessed 28 April 2011

*Scottish Public Services Ombudsman*²⁴

The Scottish Public Services Ombudsman (SPSO) handles complaints about public services in Scotland including councils, the National Health Service, housing associations, the Scottish Government and its agencies and departments, universities and colleges and most Scottish public authorities. It looks into complaints where a member of the public claims to have suffered injustice or hardship as a result of maladministration or service failure.

A recent case concerned a complainant that the Council (local administration) had failed to consult the public, both before and after a decision was taken to close a public facility or centre, in accordance with the Council's practice and statutory procedures. Whilst the SPSO did not find that there had been a formal breach of any rules, the SPSO did issue a recommendation which speaks to the requirement to be more transparent:

I recommend that, in the interests of good practice, the Council ensure that their strategy to communicate and engage with the community incorporates clear directives in relation to consistency in communication and engagement where it is proposed to close a Council facility or centre (para 70).

Endnote*Snapshot of public administration - Cyprus*

It is probably a truism to state that all or most public administrations are struggling with both reconfiguration and trying to meet new stringent demands of values, principles and laws promoting transparency and/or freedom of information. Simultaneously, a newly-sensitised professional media is waking up to using those new norms as part of its toolkit, as well as competing with a plethora of newly-minted social media. A useful "toolkit" has recently been published, *A GUIDE FOR JOURNALISTS ON HOW TO ACCESS GOVERNMENT INFORMATION*.²⁵ It was launched by the OSCE media freedom representative on World Press Freedom Day, 2010, who said

Promoting a culture of access to information on an international level is an effective method to increase government transparency, while raising awareness and promoting investigative journalism. I will ensure that access to information remains high on the intergovernmental agenda and keep reminding the governments of the OSCE participating States of its importance.²⁶

A recently completed survey of the transparency performance of public authorities on the Island of Cyprus (both North and South) typifies the extent and nature of the situation. Entitled 'access to information is the exception and silence the rule in Cyprus', the survey found that with a level of 75% of administrative silence in response to information requests, public bodies across the island are violating the public's fundamental right to know:

The largest ever monitoring of access to information in Cyprus found systematic breaches, in particular the non-responsiveness of public bodies resulting in 72% administrative silences in the Republic of Cyprus and 78% administrative silences in the

²⁴ Case 200803019: South Ayrshire Council <http://www.spsso.org.uk/webfm_send/2511> accessed 28 April 2011; see generally, Scottish Public Services Ombudsman <<http://www.spsso.org.uk/>> accessed 28 April 2011

²⁵ <http://www.legalleaks.info/images/stories/general/Legal_Leaks_Access_Toolkit_11_August_2010.pdf> accessed 28 April 2011>

²⁶ <<http://www.osce.org/fom/69227>> accessed 28 April 2011

northern part of Cyprus. Of the 393 requests submitted to 20 public bodies, only 8% of resulted in full provision of information: 7% in the Republic of Cyprus and 9% in the northern part of Cyprus.²⁷

Such a state of affairs will only be partially resolved by adopting laws and Codes. Most change will probably stem from a change in culture and attitudes; test litigation; civil society agitation; and media publicity and professional use of existing instruments.

The Main findings and recommendations are:

ONE

Finding: The right of access to information is guaranteed in constitutional provisions on freedom of expression but the legal framework is seriously flawed, with no law on access to information in the south and a law that falls below Council of Europe standards in the north.

Recommendation: Bring the legal framework into line with the Council of Europe Convention on Access to Official Documents, including by adopting an access to information law in the south and/or reforming all relevant legislation in the north/south.

TWO

Finding: Systematic violations of the fundamental right of access to information island-wide with 75% administrative silence in response to requests for information.

Recommendation: The government should ensure that the public authorities respond to requests by providing comprehensive information within a reasonable time frame. To this effect they should adopt the necessary legal mechanisms and train all officials in the public's right to know.

THREE

Finding: Three quarters of people in Cyprus believe that they have a right of access to information according to the Opinion Survey conducted under this project. Only around one in three respondents agree that public authorities in Cyprus are open and trustworthy. Over half of respondents stated that, in practice, access to key documents is not possible.

Recommendation: In addition to ensuring that there are access to information laws which function in practice, the government has an obligation to inform the public of their right of access to information, including through public education campaigns on how to file requests, how to appeal refusals and silence, and where to find proactively published information.

FOUR

Finding: Many public bodies do not appear to have information officers nor to have provided full contact information on their websites or in other public materials.

Recommendation: Ensure that in each public body there is an official responsible for responding to the public's requests for information and for the proactive publication of key classes of information. Ensure that full contact information for this person is published.

FIVE

Finding: There is no Information Commissioner or similar body responsible for oversight of the right to information and for receiving complaints from members of the public. In the north the Access to Information Assessment Commission foreseen by the law has not been appointed.

Recommendation: Ensure that the future access to information law in the south establishes an Information Commissioner fully empowered to promote and protect the right of access to

²⁷ See <<http://www.access-info.org/en/cyprus/157-open-cyprus-project-research-and-results> accessed 28 April 2011>. The full Report is available at <<http://www.accessinfocyprus.eu/>> accessed 28 April 2011

information. Appoint the Access to Information Assessment Commission in the north and give it full powers to enforce the law.

SIX

Finding: The research found very poor levels of proactive publication on the websites of public authorities. Monitoring of 20 public bodies across the island found that in the south only 36% and in the north only 13% of core classes of information were available. Information is usually available in only one language.

Recommendation: Ensure full proactive publication of information about the structure, policies, functioning, and budget of each public body is available in multiple languages. The information should be presented in a way that is comprehensible to members of the general public, and should be published both on websites and using other media.

SEVEN

Finding: The websites of public bodies particularly lack financial information such as projected budgets and actual expenditure, details of public procurement processes being run by that public authority and updated information on contracts issued. This was confirmed in interviews with civil society organisations.

Recommendation: A particular effort should be made to ensure the publication of key financial information on the websites of each public authority. This information should be comprehensive and detailed. It is essential for the fight against corruption that public procurement, subsidy, and contracting processes are fully transparent.

EIGHT

Finding: There is a lack of information about public consultations which indicates that there is a very low level of involvement of members of the public in public decision making across the island. This was confirmed, in particular, in the interviews conducted with civil society representatives.

Recommendation: There is a need to open the doors of government to the public, including by establishing frequent public participation mechanisms throughout the policy making process. Information about the opportunities to engage in decision making should be widely publicised including via public body websites, ensuring that all necessary background information is made available.

ECJ: Transparency is about the public's right to know

Whilst most normative progress will likely come from decisions of the Council of Europe's Court of Human Rights, the EU's European Court of Justice's decisions are worth following too. Most recently, Access-Info Europe won a ruling against the Council of the EU (the legislative body representing the EU member states). According to [a ruling of 22 March](#)²⁸ the Council has no right to hold back documents showing the position of the member states in ongoing deliberations; or if it had, it failed to prove its case. Not only did the Council in Brussels refuse to disclose the member states positions, but the states themselves were very reluctant to reveal their own arguments. In a survey conducted by Access Info Europe, 16 out of 27 member states refused to provide any information on the transparency negotiations. Only five members (Denmark, Finland, Sweden, Lithuania and the Netherlands) gave a partial release on first request.

²⁸ *Access Info Europe v Council of the European Union*, case T-233/09. An analysis of the States responses, 'The Secret State of EU Transparency Reforms' is at <http://www.access-info.org/en/european-union/164-secret-state-eu-transparency> accessed 28 April 2011

In two significant *dicta*, The Court stated that:

By its nature, a proposal is designed to be discussed, whether it be anonymous or not, not to remain unchanged following that discussion if the identity of its author is known. Public opinion is perfectly capable of understanding that the author of a proposal is likely to amend its content subsequently.

it is in the nature of democratic debate that a proposal for amendment of a draft regulation ... can be subject to both positive and negative comments on the part of the public and media.

Finally, the Court enunciated what is probably the *leitmotif* for public administration in the 21st century:

If citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information.