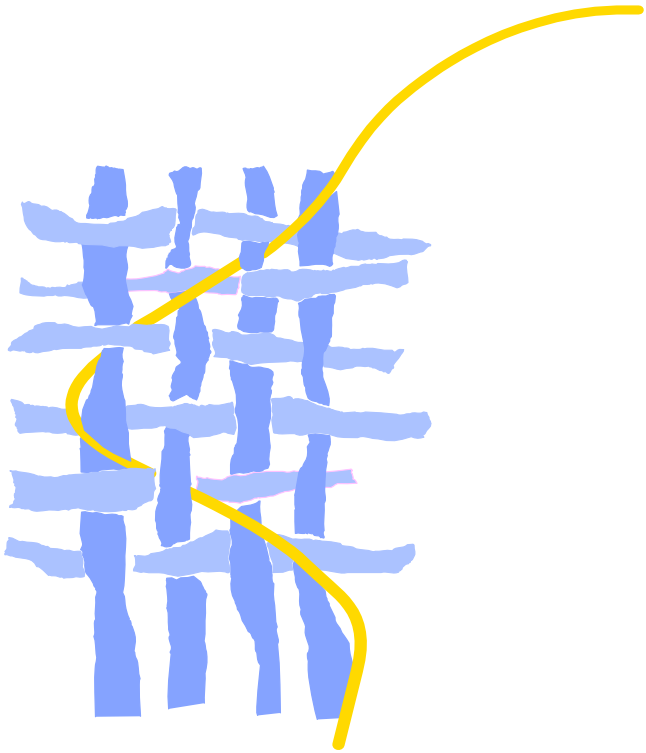
THE EUROPEAN OMBUDSMAN

PUBLIC ACCESS TO INFORMATION IN EU DATABASES



Strasbourg 2008

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SUMMARY

Background

An important part of the European Ombudsman's work is to deal with issues of public access to documents and information. Complaints to the Ombudsman have identified problems of public access to information contained in databases of the EU Administration.

To be informed of national laws and best practices on this subject, the Ombudsman consulted colleagues in the *Network of European Ombudsmen*. The Ombudsman in particular wanted to know whether national systems grant the public a right to request information held in the administration's databases, and how such a right is implemented in practice.

Legal and administrative context

- Information of interest to the public is increasingly kept in EU databases.
- Dispersed data in databases do not clearly fall within the scope of the EU's current legislation on the public's right of access to documents.
- Complaints before the European Ombudsman have illustrated the need for re-thinking the scope of EU legislation regarding access. The current reform of the relevant EU legislation offers a good opportunity for doing so.
- Ensuring the public's right of access to information in databases would be consistent with several factors, including:
    - technological development
    - national laws and practices;
    - existing relevant EU legislation;
    - existing practices of the EU administration
    - the expressed views of key institutional actors and civil society
- The key question now is how to make an extended access regime work in practice.

The Ombudsman's conclusions and suggestions

- To properly achieve its overall objectives, EU legislation regarding access should contain a right of public access to information in databases.
- The access legislation should contain rules that ensure the efficiency and workability of such a right.

This report examines these issues, and contains specific suggestions for the current reform of the EU legislation on access.

INTRODUCTION

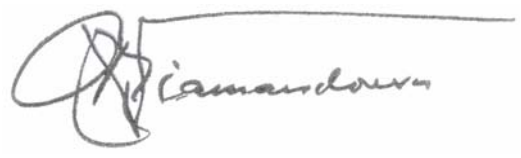
In the course of 2008, I conducted a survey on the public's right of access to information in databases held by public bodies. The survey was carried out within the framework of the *European Network of Ombudsmen*. Annex 1 to this report contains my consultation letter. Annex 2 contains a synthesis of the relevant information obtained from this survey.

The specific background to the survey was a complaint submitted by a Danish-German journalist in 2005, which concerned a request for access to national reports on EU farming aid. The information was contained in a very large database managed by the European Commission. The question, therefore, arose as to whether the request concerned access to *documents* or access to *information*. The key legislation on openness in the EU administration only gives a right of access to *documents*, which means that it does not give citizens a general legal right of access to *information* held by the EU administration.

The context of the case just referred to made it unnecessary for me to conclude whether the complainant's request was about 'documents' or 'information'. However, the case made one thing abundantly clear: If the content of electronic databases falls outside the scope of the EU's most important legislation concerning openness in the EU administration, the very purpose of that legislation can probably not be fulfilled.

In order to be informed of national laws and best practices, I undertook the above-mentioned survey. The information and insight resulting from it will not only be of inspiration to myself and, I hope, to my national colleagues, but may also be of interest to the EU legislator currently considering the adoption of a new EU regulation on public access to documents. The report contains analytical comments and findings throughout. Part 3 presents specific findings and suggestions relevant to the above-mentioned reform of the EU legislation on public access.

I would here like warmly to thank those of my national ombudsman colleagues or similar bodies, as well as specialised national bodies, who contributed information and analyses in the course of our survey. The extent and depth of the information they have provided me with not only constitutes ample testimony of the good collaboration resulting from the *European Network of Ombudsmen*, but also demonstrates that the issue raised in the survey is one of global concern in modern public administration.



P. Nikiforos DIAMANDOUROS, 10 December 2008

PART 1 - THE EU LEVEL

In 2005, the European Ombudsman received a complaint from a Danish-German journalist against the Commission. The journalist requested access to reports submitted by the national administrations to the Commission, which were relevant to the payment of agricultural aid. The access request was made under Regulation 1049/2001 on public access to documents held by the EU administration. The explanations provided by the Commission revealed the following:

The reports submitted to the Commission by the national administrations were transmitted electronically to a database. When the reports 'arrived' at the Commission's database, their content was instantly 'absorbed' by various parts of that database. Their content thereafter only existed in the form of dispersed data within the database. The Commission therefore argued that the complainant's request for access did not fall within the EU's access legislation because it did not concern a 'document'.

The EU legislation on access contains the following definition of the term 'document':

> "For the purpose of this Regulation:
>
> (a) 'document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility".[1]

This definition of 'document' clearly has the purpose of grasping the electronic reality of modern administration. However, the case mentioned above demonstrated its limitation. The definition of 'document' implies a 'content' contained in a 'medium'. Applying this to the Commission database referred to above would mean considering the database as a 'medium' and the information contained in it to be 'content'. But the Commission database did not, of course, merely contain the (dispersed) content of the electronically transmitted national reports. It also contained millions of other data related to the implementation of the Common Agricultural Policy.

For reasons of the specific context of that inquiry, the Ombudsman did not have to adopt a detailed conclusive finding on this matter in his decision. However, it was clear that the complainant's request concerned dispersed data in

[1] Article 3(a) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145, p. 43.

the database, and that the Commission would have had to put these data together in order to consider her access request under the EU's access legislation. Since, under this legislation, there is no general obligation of the institutions to *create* documents under this legislation, the Commission's argument that all the data could not be considered 'a document' within the above-cited definition was not without merit.

The inquiry did not, however, merely illustrate an obvious problem in the EU's access legislation. It also brought to light an administrative practice adopted by the Commission in order to address this problem. A quotation from the Commission's reply to the complainant sums up this practice in clear terms:

> "In accordance with Article 2 of Regulation 1049/2001, the Regulation applies to all documents held by an institution, i.e., documents drawn up or received by it and in its possession, in all areas of activity of the European Union. However, the right of access under this Regulation does not imply an obligation to create a new document that contains the information requested, but applies to existing documents.
>
> A database as such is not a document. However, considering the importance of databases and the amount of information they hold, it would, for obvious reasons, be difficult to justify an exclusion from the right of access under Regulation 1049/2001 of all information contained in databases.
>
> Therefore, a practice has evolved according to which the result of a normal search in the database (...) is considered a document in the sense of Regulation 1049/2001. However, the Commission will not modify the existing search parameters of the database in order to be able to retrieve the information requested."

Thus, the Commission had already concluded that there should, somehow, be a right of public access to information contained in databases. In the concrete case referred to above, it also concluded, however, that the complainant's request could not be granted without a modification of the existing search parameters.

The Commission's commitment to solving the issue of public access to information in databases is fully visible in its proposal for a revised EU access legislation. In April 2008, the Commission submitted, to the European Parliament, a proposal for amendment of the legislation. One of the proposed changes to this legislation concerns precisely the definition of 'document' in relation to databases and similar storage systems. The relevant part of the Commission's proposal is as follows:

"data contained in electronic storage, processing and retrieval systems are documents if they can be extracted in the form of a printout or electronic-format copy using the available tools for the exploitation of the system".[2]

The European Ombudsman welcomes this proposal, which goes in the right direction of responding to the technological reality of modern public administration. The Ombudsman's analysis of this proposal, and relevant suggestions, are set out below in Part 3.

[2] Proposed change to Article 3 in 'Proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents' (presented by the Commission), Brussels, 30 April 2008, COM(2008) 229 final, 2008/0090 (COD).

PART 2 - NATIONAL SYSTEMS

Introductory remarks

A firmly established evolution towards access to *information* is clearly observable in most of the national replies. This is important for the present inquiry because data in electronic storage systems will usually be covered by such a right of access to information.

The evolution towards rights regarding access to information provides for access regimes that are *complementary* rather than alternative to the classical systems of access to documents. The picture that emerges is therefore not 'access to documents as against access to information', but rather a combination of 'old' systems which gradually came to embrace access to information rights, and more recent systems which - perhaps because they were adopted relatively late in the IT-age - have operated with access to information rights from the outset.

The national replies reveal an acute awareness of the need to strike a sound balance between access rights and administrative efficiency. For obvious reasons, rights of access to information potentially pose a greater challenge in this respect. Requests for access to information can by their very nature be much broader than access to 'documents', even when the term document is widely defined. The rules and mechanisms used to strike the right balance are examined below.

A final introductory remark is appropriate here: The right of public access to documents has already found its way into EU legislation applicable to the national level, in particular through the directive on the re-use of public sector information (PSI Directive) and the directive on public access to environmental information[3]. The national replies have only to a very limited extent included reflections on possible interactions of, and influences by, these EU directives and national laws and practices. In what follows, this issue is therefore not examined.

Access regimes focussed on 'access to information' from the outset

Some of the most developed regimes on access to information are found in the new democracies in Eastern Europe. This is unsurprising in light of several factors, most salient amongst which are: their historical and political context, the strong democratisation input notably from the EU and the Council of Europe immediately following transition from communist rule, and, as alluded to above,

[3] Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, OJ 2003 L 345, p. 90; and Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ 2003 L 41, p. 26.

the fact that their rapid and far-reaching administrative reforms implied a very considerable leap in the use of IT-technology.

Several of these newer democracies have even established a constitutional right of access to information[4], which is regulated in implementing legislation. Examples of relevant rules in these systems are given below:

> "*any knowledge and information, not falling under the definition of personal data, processed by an organ or person performing a state or local government function determined by law, regardless of the method or format in which it is recorded and its independent or collected character.*" (Hungary[5].)

> '*Everyone has the right of access to information held by the obligated persons.*' (Slovakia[6].)

> In the Czech Republic, the following definition is deemed, by the Czech Ombudsman, to apply to the content of databases:

> *'Information shall mean any content or its part in any form, recorded on any medium, in particular the content of a written record in a document, record saved in an electronic format or audio, visual or audiovisual record*.' [7]

> Such systems tend to cover all contents of electronic databases.

Older Member States also have access to information regimes, known as 'FOI' legislation (freedom of information). The UK has such freedom of information legislation[8], which provides for a right of access to information held by public authorities. 'Information' is defined as 'information recorded in any form'[9]. The content of databases falls within the legislation, which does not, it should be noted, expressly define the term 'database'; in one case the UK Information Tribunal found an entire database to be covered by the legislation. Ireland also operates with FOI legislation[10], which covers the content of electronic databases and similar electronic information storage media.

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4 Hungary, Lithuania, Estonia, Romania, the Slovak Republic.

5 Law LXIII of 1992 on the Protection of Personal Data and Disclosure of Information of Public Interest. This implements the constitutional right of access to public information, which was inserted in the 1989 Constitution.

6 Freedom of Information Act (No 211/2000 Coll.), Article 3(1); and cf. The Constitution of the Slovak Republic (Act No 460/1992 Coll.), which provides for the right to information and the obligation of public authorities to provide information (Art. 26(1, 4)).

7 Freedom of Information Act (No 106/1999 Coll.), Article 3(3).

8 The Freedom of Information Act 2000 (FOIA).

9 Section 84 of the FOIA.

10 Freedom of Information Acts of 1998 and 2003.

In practical terms, access to information regimes, old or new, tend to resemble access to documents regimes because the information is usually provided through print-outs or documents. They also operate with similar systems of exceptions for non-disclosure. The key differences, it appears, is that the public administration cannot refuse to handle requests for information on the ground that the access legislation concerns 'documents' only.

Access regimes focussed on 'access to documents' from the outset

Member States, such as Sweden and Finland, that have traditionally worked with access to documents regimes, have in recent years taken important steps to 'upgrade' their legislation for the purpose of adapting to new IT-contexts.

These examples are important because they show how access to documents legislation can be amended to embrace new technological developments. In other words, there is no reason to discuss 'access to documents' legislation as a model fundamentally different from, or incompatible with, 'access to information' legislation.

The specific solutions found in such systems range from parallel rights of access (to both documents and information) to novel notions of 'documents' that go beyond simply covering new content carrying electronic media.

In **Denmark**, the statutory right of access to documents, while covering electronic media carriers, simply does not include 'information'[11]. However, in addition to the written rules, Danish law contains a '*principle of extended openness*' (meroffentlighed). According to this principle, the Administration must consider making the information concerned available even when the above-mentioned statutory rules on public access do not apply. In concrete cases, the Danish Ombudsman has found that this principle required the Administration to search for the information that the individual concerned had asked for. In these cases, the information could be found by means of relatively simple searches through existing search mechanisms. In **Sweden**, a system of 'completed' and 'potential' documents was introduced in 2002[12]. The former kind covers a range of classical documents (including in IT-form). 'Potential' documents consist of collections of information that have been put together from the content of a database. They only come into existence in response to an access request. **Finland** has legislation on access to documents and other information held by public authorities[13]. According to the Law on openness of Government[14]

[11] Principally the Access to Public Administration Files Act of 1985.

[12] Freedom of the Press Act (following a 2002 reform), Chapter 2.

[13] Law on the Openness of Government Activities (*Laki viranomaistoiminnan julkisuudesta*) no 621/1999. This law repealed the Law on the Publicity of Official Documents (no 83/1951).

activities, access to information contained in documents is not dependent on the form in which the information is held by public authorities. The assessment regarding the disclosure of information is made on the basis of the content of the information. Therefore, the right of access to information held in a database (or in another electronic form) is subject to the same principles as those which apply to information held in paper form. This means that the applicant has the right of access to information held in a database if (s)he has the right of access to the same information held in paper form. 'Document' is defined in the above-mentioned Finnish law as "a written or visual presentation; as well as a message relating to a given topic or subject-matter and consisting of signs which, by virtue of the use to which they are put, are meant to be taken as a whole, but are decipherable only by means of a computer, an audio or video recorder or some other technical device".[15]

Striking the balance between access rights and administrative efficiency

As briefly mentioned in the introductory remark, requests for information have a potentially far wider scope than requests for access to documents. It is therefore only natural that certain specific rules and mechanisms are applied to ensure reasonableness and proportionality in the implementation of this right. To a large extent, those rules and mechanisms are simply extensions of, or at least similar to, rules or mechanisms that have already existed for a long time in access to documents legislation. The pertinent question therefore is not whether there should be rules of reasonableness and proportionality (in either type of access regime), but the nature and extent of such rules. Examples of relevant rules are given in what follows.

- *Access through available search tools*

Some systems operate with the rule that the Administration is not obliged to provide 'information' that cannot be retrieved through technical means already available to the Administration (e.g., Sweden and Denmark). This means, in particular, that the Administration is generally not obliged to purchase new software or to reprogram existing systems for the purpose of responding to individual access requests. What this means in practice is usually left to the Administration and the reviewing bodies to interpret. Ireland provides an example of how the creation of a new *search code* in an existing search programme was, in a concrete case, deemed reasonable by the Irish Ombudsman. The Ombudsman considered that creating such a new search code would not cause a substantial and unreasonable interference with the Administration's work, and that it was

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[14] Law on the Openness of Government Activities applies not only to public authorities, but also to corporations, institutions, foundations and private individuals appointed for the performance of a public task when they exercise public authority.

[15] Law on the Openness of Government Activities, Article 5(1).

reasonable for the Administration to levy search and retrieval costs for the time spent in developing the code (for fee/charges, see below).

It is relevant to recall here that the Administration will normally be interested in having efficient search mechanisms for the information and data that it possesses, a factor that inevitably helps to reduce problems related to the technical accessibility of the information or data concerned.

- *Easy access*

A closely related rule is that the Administration must be able to retrieve the information or data concerned relatively easy. This is a somewhat vague rule requiring an ongoing effort on the part of the Administration and the reviewing bodies. One attempt to provide some definition, or simply guidance, is found in the Swedish legislation, which applies the concept of 'routine operations'. This means that 'potential' documents are not considered to be in the administration's possession unless the information (i.e., the 'potential' document) can be retrieved through such a 'routine' operation. The notion of 'routine' could, of course, give rise to the impression of a limitation closely linked with the administration's own habits and, in particular, interests. By way of comparison, the preparatory works for the Finnish legislation expressly state that access to such 'potential' documents exists independently of whether a similar search is used by the public authority in its activities[16]. This may be considered comparable to the Danish and Slovene regimes, which operates with a notion of searches/retrievals that are 'relatively simple'/take place through 'simple operations'.

- *Fees / Charges*

The charging of fees does not appear, generally, to be an issue of major importance in respect to access to 'documents'. This may be explained by the fact that 'documents', in the sense of formatted/completed contents contained on specific media, are - if the record keeping is adequate - fairly easy to retrieve and provide. Furthermore, when fees are charged, it is usually on the basis of relatively straight forward and understandable cost-implications, such as copying and posting. The question of fees in respect to the provision of information poses slightly different issues, and applicants may be more ready to question the reasonableness of the charging. The charges relate to the time spent in handling the request, and not simply to the paper or CD-ROM on which the information requested is provided. As a result, the calculation methods involved, may not always be understandable. In addition, the provision of information is done in response to the exercise by citizens of what is normally considered his/her fundamental right. The exercise of such rights, vis-à-vis the administration, is not always considered to obviously involve fees.

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[16] The Government Bill on the Law on openness of the Government Activities (HE no 90/1998 vp). The translation provided by the European Ombudsman's services.

There are indications, however, that the charging of fees is a relevant and useful response to large and/or complex information requests. Although the precise implementation of such fee systems cannot be described in this report without additional research, the following options and elements pointed out in the national replies may be noted. Specific time-related **fixed rates**: Ireland operates with a fixed hourly search rate (at the time of the Irish reply, this was 20.95 Irish Pounds, or roughly EUR 26); **cost threshold**: in Slovenia, if the costs of providing the information exceeds approximately EUR 84, the public organ may ask for an advance payment; fees **requiring re-programming**, i.e., as a means of enabling (and obliging) the Administration to go further in its information searches: in the Czech Republic, the Administration may be required to adapt a research tool of a database in order to retrieve the information, but the applicant will in that case be required to pay for the extra costs (a similar example was given by the Irish Ombudsman, cf. above under 'Access through available search tools').

- *Proactive rules*

Classical access to documents regimes usually provide for legal rules that oblige the Administration to take measures in order to facilitate access. The most obvious example is the creation of publicly available registers to enable potential applicants to know what documents the Administration has in its possession. This is for instance found in the EU's access legislation, which also contains a general duty "*to develop good administrative practices in order to facilitate the exercise of the right of access*" (Article 15).

However, as the Hungarian Information Commissioner reports, in most cases, public bodies, when creating large and complex databases, only take into consideration their own tasks. This can make it either impossible or very expensive to process access requests. The Information Commissioner points out that it could be useful to consult a relevant range of stakeholders in the design phase of such databases, including consultation of the Information Commissioner, experts, NGOs, and the media.

In Finland, the issue has been expressly addressed in the legislation. The law on openness of the Government activities[17] contains an *obligation for public authorities to promote access to information and good information management*.[18] This contains, among other things, a duty to plan and organise their document and information administration and the information management systems and computer systems they maintain in a manner allowing for the effortless realisation of access to documents. In Sweden, the 'Authority for

[17] Law on the Openness of Government Activities (*Laki viranomaistoiminnan julkisuudesta*) no 621/1999.

[18] Law on the Openness of Government Activities, Chapter 5, Articles 17-21.

Administrative Development' (Verket för Verwaltningsutveckling) constantly promotes, as part of its activities, the establishment and keeping of systems that allow for a quick and efficient implementation of the constitutional requirements to grant access.

As previously stated, the administration has a strong self-interest in working with databases through efficient search tools. This is a factor which helps to reduce access problems. Furthermore, it should be recalled that the creation and management of large databases is often very complex. The issue of the public's right to access information may simply receive a low priority - or even be forgotten - in that process.

There are, however, a number of quite obvious and recurring problems in access cases that can be taken into account in the construction phase of databases. These include the possibility of easily separating confidential information and/or personal data from other information (using, for instance, different entry fields); the possibility of converting data that are difficult or impossible to understand into understandable formats (including braille where possible); and, as suggested in the reply from the Hungarian Information Commissioner, in some cases even the possibility of allowing applicants themselves to access the database, subject, of course, to rules regarding confidentiality.

Such proactive measures are reasonable in particular if the administration is allowed to charge fees: the better constructed the database is, the fewer fees will have to be charged to citizens asking for information. In addition, such proactive measures may even make it much easier, in the long run, to respond to information requests, than to respond to 'classical' document requests when the latter involve cumbersome blanking-out of confidential information.

PART 3 - CONCLUSIONS FOR EU REFORM

This part contains a constructive examination of the European Commission's relevant proposal to change the definition of 'document' in EU legislation concerning access.

As already noted in the Introduction, the relevant part of the Commission's proposal is the following:

> "data contained in electronic storage, processing and retrieval systems are documents if they can be extracted in the form of a printout or electronic-format copy using the available tools for the exploitation of the system"

This proposal contains a number of very positive aspects:

a. It refers to an unconditional term 'data', which appears to covers *all* data.
b. It contains a very broad *description* of the kind of systems covered, rather than, for instance, a specific technical term that could easily give rise to disputes in practice.
c. It includes extraction in electronic format, which in this context obviously implies very considerable possibilities for extraction.
d. Unlike the Commission's current practice, the proposal does not limit the extraction of data to those extractions that reflect the institutions' own 'routine operations'. It therefore creates a wide scope for meeting the specific needs of applicants.

The Ombudsman's constructive comments fall into two categories: first, specific and detailed aspects of the proposal; second, the proposal in the context of the other proposed amendments.

Specific and detailed aspects of the Commission's proposal

Legal provisions are subject to interpretation by both the administration and the reviewing bodies. Consequently, a degree of flexibility is often useful in relation to IT-issues. The following comments point to aspects of the Commission's proposal that may usefully be made more precise, without hampering flexibility.

e. The term 'data' could possibly give rise to very narrow interpretations, according to which 'data' does not necessarily equal 'information'. In order to remove any doubt, Article 3 should ideally refer to 'information'.

f. 'Available tools' could possibly give rise to disputes as to whether the 'tools' concerned are those already *in use* for the specific storage system concerned, or whether it could also imply 'available' in the sense of 'available' generally to the institution. Adding 'reasonably available' should be considered.

g. The formulation 'a printout or electronic-format copy' may give rise to disputes regarding the singular 'a'. Specifically, the unfortunate argument that could be foreseen is that (the need for) *multiple* print-outs/copies could, per se, be evidence of the (alleged) fact that there is no 'document' as such. Using 'one or more printouts or electronic-format copies' could reduce the scope of disputes regarding the provision's scope in relation to requests that can only be satisfied through several printouts.

h. The storage systems referred to in the proposal appear quite clearly to concern systems held or managed by the institutions. However, it is a reality of IT-developments that the institutions increasingly have access to, and use, information from databases that are held and managed by third parties, be these other institutions/bodies, Member States or private organisations. It would clearly be disproportionate to consider the data in those systems as being in the possession of the institutions merely through the fact that the institutions have access. However, it is a reality that much of the information obtained from such external electronic storage systems would in the past have been obtained in paper form, and hence indisputably have been received and held by the institutions. It is therefore particularly relevant to fix and lay down a rule for the extent to which such data obtained from external electronic storage systems are covered by the EU's legislation. One possibility is to consider such data that have been used, or is being used, by the institutions, to fall under the regulation. This would exclude, for instance, the full results of searches carried out in such external storage systems, but would include any results (data) *used* in the institution's work. A specific proposal is made further below.

The Commission's proposal in broader context

The Commission's proposed amendment to Article 3 is very significant, essentially creating a new 'generation' of documents at the EU level for the purpose of public access. It is therefore of paramount importance that the other relevant provisions of the legislation are adapted in relevant ways, to ensure the effectiveness and the workability of a right of access to data/information.

In the first place, it seems obvious that the provision proposed by the Commission will inevitably be subject to interpretations of **reasonableness** and **proportionality**. The only relevant provision in the current legislation (and largely left unchanged in the Commission's proposal) is Article 6(3) which lays down the possibility of finding a fair solution in the case of requests for "very long" documents or a "very large number" of documents. This provision, the usefulness of which is already not obvious in the present legislation, is clearly not sufficient for requests concerning the content of electronic storage systems. For instance, a request which is very *complex* and requires long searches is neither 'very long' nor involves a 'very large number', and would accordingly not be covered by the above-mentioned provision. Amendments to this provision would therefore be desirable (see proposals below).

The same comments apply to the related issue of **charging fees**. The present regulation, to which the Commission does not propose changes, provides that "*[t]he cost of producing and sending copies may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies. Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form or through the register shall be free of charge.*" (Article 10(1).) This provision, which already contains only a minimal degree of specificity in respect to the present access regime, is of most doubtful usefulness to the provision of data/information. A proposal is made below.

Pro-active rules should also be introduced, at a more specific level than the current general obligation to "*develop good administrative practices in order to facilitate the exercise of the right of access*" (Article 15 of the current regulation). The impact of this existing obligation does not appear to have been very significant. It does not seem reasonable, therefore, to expect that this general obligation will ensure a sufficiently pro-active approach on the issue of access to the content of databases. However, as noted in Part 2, a pro-active approach in this regard is of quite obvious importance, both for the applicants and for the Administration.

The European Ombudsman has already suggested the adoption of a general obligation on the institutions to take the needs of transparency into account in the design and operation of databases[19]. A pertinent proposal is made below.

[19] Response of the European Ombudsman, P. Nikiforos Diamandouros, to the Commission's green paper "Public Access to Documents held by institutions of the European Community: a review" (http://www.ombudsman.europa.eu/letters/en/20070711-1.htm).

The European Ombudsman's proposals

1. The European Ombudsman welcomes the Commission's proposal for a more detailed definition of the term 'document'. Its proposal, previously quoted, is as follows:

> "data contained in electronic storage, processing and retrieval systems are documents if they can be extracted in the form of a printout or electronic-format copy using the available tools for the exploitation of the system".

On the basis of the above-mentioned considerations and concerns (p. 17-19), the European Ombudsman considers that this proposal could benefit from the following reformulation:

> **" information contained in electronic storage, processing and retrieval systems (including external systems used for the institution's work) shall constitute a document or documents if it can be extracted in the form of one or more printouts or electronic-format copies using the reasonably available tools for the exploitation of the system."**

2. The Ombudsman encourages the EU legislators to adequately adapt the publics access regulation to this positive development initiated by the Commission, by introducing the following or similar changes:

> **" (...) in the case of printouts or electronic-format documents based on information contained in electronic storage, processing and retrieval systems, the real cost of searching for and retrieving the document or documents may also be charged to the applicant. No additional charge shall be made if the institution has already produced the document or documents concerned. The applicant shall be informed in advance of the amount and method of calculating any charge."**

> **"An institution that intends to create a new electronic storage system, or to change significantly an existing system, shall evaluate the likely impact on the right of access guaranteed by this Regulation and act so as to promote the objective of transparency."**

ANNEXES

A TEXT OF THE OMBUDSMAN'S CONSULTATION LETTER

Dear Colleague,

As a member of the *European Network of Ombudsmen*, I am contacting you and all our national colleagues in an attempt to obtain useful information on a most important issue of openness in public administration. My request concerns the question of rules on public access to documents and information, and their application to databases. The background to my request is the following.

In 2005, I received a complaint against the European Commission which, amongst other things, raised the issue of whether a large database and/or dispersed information in it could be considered to constitute a 'document' within the broad definition of that term provided in Regulation 1049/2001 regarding public access to Parliament, Council and Commission documents[20]. In my decision in that case, published on 10 December 2007 (copy enclosed), I concluded that the Commission's position as regards the application of Regulation 1049/2001 to databases in general was not satisfactory. Taking into account, inter alia, the fact that the foregoing issue is discussed in the course of the planned reform of Regulation 1049/2001[21], I also noted in that decision that I would actively consider consulting the national ombudsmen's offices in the European Network of Ombudsmen, in order to try to find out what answers have been given to this new kind of problem brought up by technological developments and to be made aware of the "best practices" followed at the national level, with an eye to guaranteeing an adequate level of public access to information stored in databases.

Consulting the European Network of Ombudsmen was a possibility that I had also shortly beforehand referred to in a speech to the European Parliament's Committee on Civil Liberties, Justice and Home Affairs. In that speech, I noted, amongst other things, the following:

> *Given the vast amount of information contained in public databases, it cannot be considered acceptable that the content of databases is simply not covered by the Community legislation implementing the fundamental right of public access to documents.*
>
> *Unless the Community legislator decides to adopt legislation giving a right of access not only to documents but also to information more generally - and this may not necessarily be advisable - the revised Regulation 1049/2001 ought to contain specific and clear rules in respect of the content of databases.*
>
> *Given that there are technical as well as legal problems in this area, I proposed in my response to the Commission's Green Paper the introduction of a general*

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[20] Official Journal 2001 L 145, p. 43.

[21] See http://ec.europa.eu/transparency/revision/index_en.htm

obligation to take the needs of transparency into account whenever the Administration designs new databases.

However, a satisfactory solution is also needed for the very many existing databases.

Upon further reflection, I have concluded that consulting the national members of our network is indeed relevant, and that doing so is likely to give all parties concerned valuable insight into how the above matter could best be dealt with. I would, thus, be most grateful if you could provide me with information on the following issues, as they pertain to your country:

1. Any existing legislation, administrative practices, jurisprudence or ombudsman 'case-law' or academic works that specifically address the issue of citizens' access to "documents" or information contained in databases maintained by the public Administration.

2. Any ongoing initiatives or procedures concerning this issue, such as draft legislation, or cases pending before the courts or the ombudsman.

3. Information on any rules or administrative practices, under which public Administration, acting in a proactive way, has to take properly into account the principle of transparency in its activities when establishing and/or formulating its databases and, in particular, the research tools and working methods allowing the retrieval of data contained therein.

Needless to say, if you have any relevant information on rules or practices in countries other than your own, I would be most grateful to receive this also. I am very well aware that not all national ombudsmen or similar bodies are necessarily dealing with this matter. If, however, you find that you would be able to contribute useful information, I would be most grateful to receive it. Furthermore, if you think that it would be appropriate to pass my request on to a specialised body in your country, you are most welcome to do so.

B SYNTHESIS OF NATIONAL REPLIES

The information requested of the national ombudsmen:

1. Existing rules
Any existing legislation, administrative practices, jurisprudence or ombudsman 'case-law' or academic works that specifically address the issue of citizens' access to 'documents' or information contained in databases maintained by the public Administration.

2. Proactive rules
Information on any rules or administrative practices, under which public Administration, acting in a proactive way, has to take properly into account the principle of transparency in its activities when establishing and/or formulating its databases and, in particular, the research tools and working methods allowing the retrieval of data contained therein.

3. Outgoing initiatives or procedures
Any ongoing initiatives or procedures concerning this issue, such as draft legislation, or cases pending before the courts or the ombudsman.

QUESTION 1 - EXISTING RULES?[22]

The Czech Republic has several relevant instruments[23]. According to Article 3(3) of the Czech Freedom of Information Act, "Information shall mean any content or its part in any form, recorded on any medium, in particular the content of a written record in a document, record saved in an electronic format or audio, visual or audiovisual record." According to Article 3(4) of the Freedom of Information Act, "[a] computer program shall not represent information for the purpose of this Act."

As regards the subject matter of the European Ombudsman's consultation, the Czech Public Defender of Rights states that he has not yet come across the questions put to him by the European Ombudsman. Nor is he aware of any published court decision concerning this issue. However, he considers that, under Czech law, nothing prevents the Freedom of Information Act from being fully applied to information contained in databases. This means that, unless there are relevant grounds for rejecting access, the information should be provided.

[22] All the summaries of the replies are set out in the usual EU protocol order.

[23] - Charter of Fundamental Rights and Freedoms (Act No 2/1993 Coll.), which provides for the right to search and spread information (Art. 17(4));
- Freedom of Information Act (No 106/1999 Coll.);
- Act on the Right to Environmental Information (No 123/1998 Coll.).

As regards the issue of adapting the search tool of a database in order to retrieve the information, the Defender states that, under Czech law, the applicant for access to information is obliged to pay the increased cost related to the retrieval of the information. This means that the applicant would have to pay the cost of the reprogramming the search tool.

Finally, the Defender draw attention to the views published by a civil society organisation 'Open Society'[24], which, in its 'Handbook for Citizens on the Free Access to Information and the Transparency of Public Administration', addresses issues concerning the right of the public administration to charge fees for granting access to a complete database by providing the complete content of the database on a CD. The Open Society concludes in this handbook that the Freedom of Information Act fully covers the provision of information contained in databases. In one concrete case, the entire database was provided with no need to search specific information from it.

Denmark has legislation[25] providing that the right of public access applies to 'documents', a term which is interpreted broadly, and includes all electronic media, pictures, x-rays and so forth. The term 'document' does not include databases as such, i.e., databases are not considered 'electronic media' in the above sense. Moreover, the administration has no duty, under the legislation, to create/establish new documents, for instance, by putting together data contained in a database. In relation to databases, this means that dispersed data in a database are not covered by the legislation. On the other hand, printouts from a database, and formatted documents kept in the database are 'documents' and thus covered by the public access rules.

In addition to the written rules, Danish law contains a 'principle of extended openness' (meroffentlighed). According to this principle, the administration must consider making the information concerned available even when the above-mentioned statutory rules on public access do not apply. In concrete cases, the Danish Ombudsman has found that this principle required the administration to search the information that the individual concerned had asked for. In these cases, the information could be found through relatively simple searches using existing search mechanisms.

Estonia has a relevant provision in Article 44 of its Constitution, which provides that "everyone has the right to freely obtain information disseminated for public use". The relevant implementing legislation is the Public Information Act (in force as from 2001), which provides that public information is "information which is recorded and documented in any manner and on any medium, and which is obtained or created upon performance of public duties provided by law or legislation issued on the basis thereof" (Article 3(1)). Additionally, the Archives Act contains the following definition of the term 'document': "a document is information recorded on any medium which is created or received in the course of the activities of an agency or person, and the content, form and structure of which is sufficient to provide evidence of facts or activities" (Article 4(1)). The Public Information Act specifically provides that databases shall be public - data processed in the database must be publicly available, except when access to them is

24 In Czech: *Otevřená společnost, o.p.s.* (www.otevrete.cz; www.otevrenaspolecnost.cz)

25 Principally the Access to Public Administration Files Act of 1985.

restricted by law or legislation passed on the basis thereof (Article 43(1)). In practice, applicants are not given access to the databases as such, but are given a printout of the data requested.

In Estonia, specific types of problems are frequently encountered in connection with access to information in databases: (1) officials find it difficult to make information available to the public in the databases in a way that guarantees privacy and data protection; (2) there have been problems with regard to the choice of the appropriate legal basis and procedures. In addition to the Public Information Act, two other laws are relevant to this matter: (a) the Response to Memoranda Act Request for Explanations Act and (b) the Personal Data Protection Act. The Public Information Act provides that if answering a request for information presumes/implies the analysis or synthesis of recorded information or the collection and recording of additional information, the administration must proceed on the basis of the Response to Memoranda Act Request for Explanations Act, and in this case the time allowed for responding to the access request is longer (one month, extendable by a month). As for the other act mentioned above, officials very often do not realise that they have to deal with access requests on the basis of the Data Protection Act.

With regard to the policies in this field, Estonia maintains a constantly developing and very ambitious approach to information technology in the public sector. Information policy principles were laid down in 1998, updated and developed in 2004-2006, and replaced by an 'Information Society Strategy 2013'.

Ireland has legislation[26] which uses the term 'record'. A 'record' is information held by, or under the control of, the public body in any medium or at any location. Therefore, the content of electronic databases and similar electronic information storage media are within the scope of the legislation. It has not yet been clarified (in legislation or case-law) whether public bodies are legally obliged to manipulate existing search methods in order to be able to respond to individual access requests. However, a practice has evolved whereby public bodies will consider creating novel search methods, but then charge the requestor for the time spent in designing and implementing the search queries. (The current search and retrieval search rate is currently 20.95 Irish Pounds per hour, or roughly EUR 26.) The Irish Ombudsman found in one case that the public body concerned should generate a new search code in order to retrieve and provide the information requested. His finding was in particular based on the consideration that the public body had accepted that to do so would not cause a substantial and unreasonable interference with its work, and that it was reasonable for the body to levy search and retrieval costs for the time spent in developing the code.

Spain has implemented the EU Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information (OJ 2003 L 345, p. 90). The implementing legislation contains a broad definition of 'document': "any information whatever its medium" (the Spanish version of the Directive uses "any content" rather than any "information"). The Spanish legislation came into force in

[26] Freedom of Information Acts of 1998 and 2003.

January 2008. As a result, there is no information on already defined relevant practices or case-law.

France has legislation[27] which provides that an 'administrative document' is any content whatever its medium. The document, however, must be finalised. It appears that the relevant reviewing bodies consider that the content of databases is covered by the legislation provided that the retrieval of the data can be done through existing search mechanisms.

Italy has legislation[28] in which 'document' includes any kind of medium. Databases are not considered a 'medium' as such. But databases are considered to contain documents. A request for access to the content of databases must have as its object an existing coherent set of information in order to constitute a valid request for a 'document'. This does not limit the access to existing formatted 'files' (PDF documents or similar) contained in the database, but, on the other hand, access requests requiring a complex collating of dispersed data does not fall under the legislation.

Lithuania's Constitution provides that individuals must not be hindered from seeking, obtaining and disseminating information or ideas (Art. 25(2) of the Lithuanian Constitution). The specific right of individuals to obtain information from the administration is regulated by the Law on the Right of Access to Information from the State and Local Authority Bodies[29]. The Lithuanian Ombudsman does not appear to have dealt with cases specifically on the issue of access to information/documents in public databases, but has provided a statement made by the Lithuanian *Information Society Development Committee* in response to the European Ombudsman's present consultation. This Committee states that "the human right of obtaining information from State and Council institutions" is guaranteed by the above-mentioned law**.** The Committee confirms that the right of access thus applies to the content of electronic storage systems, while adding that requests for information may be refused if they involve a disproportionate amount of work and time (Part 4 of Article 18 of the above-mentioned Law). The Committee cautions against using the term 'database' in respect to the right of access to information, referring to the fact that this term is frequently defined in different ways. The Committee also draws attention to the Lithuanian Law on State Registers[30], which provides that "public data gathered by a register can be supplied to persons using register data for the purpose of providing information services to third parties in the form of a database extract, including all data stored in the database or part of it, according to the wishes of the register data recipient. However, this extract must conform with the contract on the supply of register data, which should cover the extract format, content and payment procedures for the data supplied."

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27 Loi n° 78-753 du 17 juillet 1978.

28 L. 7 agosto 1990 n. 241, and D.P.R. 28. dicembre 2000 n. 445.

29 Official Journal, 2000, No 10-236; 2005, No139-5008; the law implements Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information.

30 Official Journal, 1996, No 86-2043; 2004, No124-4488.

Hungary has legislation[31] providing for access to 'public information'. This means "any knowledge and information, not falling under the definition of personal data, processed by an organ or person performing a state or local government function determined by law, regardless of the method or format in which it is recorded and its independent or collected character." This includes both documents and data. The Hungarian legislation therefore does not pose problems regarding the issue of whether the content of databases falls within the public's access right or not.

The Netherlands has a Law on Transparency of Administration ("Wet openbaarheid van bestuur", better known as "Wob"), which defines the term 'document' as "a written piece or other material that contains data" and which is in the possession of an administrative authority. The term 'document' is however interpreted in a broad sense. The Council of State, in a judgement of 12 October 2005 (ref. 200409392/1), ruled that a computer file which contains data can also be considered as a document. Therefore the term 'document' not only covers written pieces, but also computer discs with electronic data, electronic files and computer programmes.

Romania's 1991 Constitution provides the right to information. Article 31 of the Constitution reads as follows:

> "1) A person's right of access to any information of public interest shall not be restricted.
>
> (2) The public authorities, according to their competence, shall be bound to provide correct information to the citizens in public affairs and matters of personal interest.
>
> (3) The right to information shall not be prejudicial to the measures of protection of young people or national security.
>
> (4) Public and private media shall be bound to provide correct information to the public opinion.
>
> (5) Public radio and television services shall be autonomous. They must guarantee any important social and political group the exercise of the right to broadcasting time. The organization of these services and the parliamentary control over their activity shall be regulated by an organic law."

The law concerning free access to information of public interest[32] implements this constitutional provision. It provides for access to "information of public interest": "Information of public interest means any information related to or resulting from the activities of a public authority or organization, regardless of the frame, form or way of expression of the information". According to the same legislation, the term "document"

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[31] Law LXIII of 1992 on the Protection of Personal Data and Disclosure of Information of Public Interest. This implements the constitutional right of access to public information, which was inserted in the 1989 Constitution.

[32] Law No. 544 of 12 October 2001 regarding the free access to information of public interest**.**

encompasses any informational content or part of such content, regardless of the method or format in which it is recorded (paper, electronically, audio, video, or audiovisual). The legislation does not grant access to "personal information" (any information about an identified or identifiable physical person). According to the Romanian Ombudsman, this provision intends to protect the right to personal and family privacy, which is also stipulated in the Constitution. If the request for information implies reproduction of the documents held by the public authority or organization, the petitioner shall bear the cost of the reproduction, in compliance with the law. In this respect, the Romanian Ombudsman explained that this provision is currently under debate in Parliament and could be modified as follows: "the costs borne by the petitioner (person who requested the access to information) will not exceed the costs incurred by the public authority to produce copies of the documents requested".

The Romanian Ombudsman pointed out in his reply that "access to information of public interest implies access to any information or part of it, regardless of the method or format in which it is recorded (paper, electronically, audio, video, or audiovisual)". This interpretation has been confirmed by the Constitutional Court. According to the same legislation, the Romanian authorities should ensure that information of public interest becomes gradually available, through databases accessible to the public at a national level.

The *Agency for Governmental Strategies* also replied to the European Ombudsman's consultation letter. This Agency monitors the application of the legislation concerning free access to public information by the public authorities. The Agency stated that the Romanian Parliament adopted specific legislation[33] which concerned the recording of documents in electronic format. This legislation establishes the legal framework for the creation, conservation, consultation and utilisation of documents archived in electronic format or which would be archived in an electronic archive. Every person has the right to give electronic documents to be safeguarded in an electronic archive. The right of access to these documents is provided only with the agreement of the owner of the document.

Slovenia has legislation providing for access to information which is at the administration's disposal and contained in a medium so that it can be repeatedly accessed, and which is also "information of public character" falling within the administration's working area. Consequently, electronic databases and fall within the scope of that legislation. The competent body for dealing with complaints concerning refusal of access is the Slovenian Information Commissioner. The Slovenian law provides that, as regards the transformation/processing or extracts of information, a public authority may refuse access on the grounds of an onerous burden, if this would go beyond a simple operation. The public bodies are not required to collect, create or process new documents in order to satisfy a request for access. However, in the current practice of the Slovenian Information Commissioner, the threshold for electronic databases is more favourable for the applicants (for instance, a 10 minute search in a SQL database would be considered as reasonable). The Slovenian Ombudsman pointed out, in her letter, that, in principle, the amount/extent of information for which

[33] Law No. 135 of 22 May 2007 concerning the recording of documents in electronic format.

somebody can ask is not limited. However, if the costs of providing this information exceed approximately EUR 84, the public organ may ask for an advance payment.

Slovakia has legislation[34] providing for access to information. According to Article 3(1) of the Freedom of Information Act, "Everyone has the right of access to information held by the obligated persons."

The Slovak Public Defender of Rights points to a publication entitled 'Right to information: interpretation of the Freedom of Information Act, problems from the practice, courts' decisions'[35], according to which "information held by the obligated person" includes not only information which the obligated person has created in its activities, but also information which it had received. According to the same publication, the Freedom of Information Act does not impose an obligation, following an application for access, to create information that did not exist at the time of the application.

Further, according to the same publication, information retrieved automatically from a database (for example, through a retrieval order in Excel or other database), cannot be considered as information which is not held by the obligated person. A computer database consists of information organised according to various criteria, and, by putting the order, the information is only retrieved from it. Therefore, if a database contains in itself a criterion, then a request for an extract from the database on the basis of this criterion (for example, on the basis of an address of residence, a date, or a producer) does not constitute creation of new information.

The Defender concludes that the key aspect in assessing, whether or not a public administration body holds information, is whether granting access to the information requires a qualitative, substantive modification of that information.

The Defender further points to the Act on Information Systems of Public Administration[36] which, *inter alia*, regulates the provision of information from such information systems.

The Defender further states that he is not aware of any existing administrative practices, academic works or cases pending before courts or jurisprudence concerning specifically the issue raised by the European Ombudsman. Moreover, the Defender has not received any complaint concerning this issue so far.

Finland has legislation on access to documents and other information held by public authorities[37]. According to the Law on openness of the Government activities[38], access

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[34] - Constitution of the Slovak Republic (Act No 460/1992 Coll.), which provides for the right to information and the obligation of public authorities to provide information (Art. 26(1, 4));
- Freedom of Information Act (No 211/2000 Coll.);
- Act on the Environmental Information (No 123/1998 Coll.)
In original: '*Právo na informácie: Výklad k zákonu o slobodnom prístupe k informáciám, problémy z praxe, rozhodnutia súdov*' published in 2006 by the NGO '*Citizen and democracy*' (Občan a demokracia), Available at http://www.oad.sk/files/downloads/Pravo_na_informacie.pdf.

[36] Act No 275/2006 Coll.

[37] Law on the Openness of Government Activities (*Laki viranomaistoiminnan julkisuudesta*) no 621/1999. This law repealed the Law on the Publicity of Official Documents (no 83/1951).

to information contained in documents is not dependent on the form in which the information is held by public authorities. The assessment on the disclosure of information is made on the basis of the content of the information requested. Therefore, the right of access to information held in a database (or in another electronic form) is subject to the same principles as those which apply to information held in paper form. This means that the applicant has the right of access to information held in a database if (s)he has the right of access to the same information held in paper form.

'Document' is defined in the above-mentioned Finnish law as "a written or visual presentation; as well as a message relating to a given topic or subject-matter and consisting of signs which, by virtue of the use to which they are put, are meant to be taken as a whole, but are decipherable only by means of a computer, an audio or video recorder or some other technical device".[39] The Government Bill on the Law on openness of the Government activities contains the following justification for the above-mentioned wide definition of document with regard to databases: "Due to the character of information technology, the right of access to information maintained by automatic data processing is more versatile than the right of information in the case of traditional documents. Information technology makes possible the combination of diverse data, and therefore the right of information covers, indeed, also messages which are not combined nor printed by the public authority itself. These documents are called "potential" or "virtual" documents. If it is possible to make a free search into the data system of the public authority, then any message, which can be detected without new programming, is subject to the right of information contained in this [draft] law, independently of the fact whether a similar search is used by the public authority in its activities."[40]

Sweden has constitutional legislation on access to documents. The Freedom of the Press Act (following a 2002 reform) contains the following (emphasis added):

"Chapter 2. On the public nature of official documents

Art. 3. Document is understood to mean any written or pictorial matter or recording which may be read, listened to, or otherwise comprehended only using technical aids. A document is official if it is held by a public authority, and if it can be deemed under Article 6 or 7 to have been received or drawn up by such an authority.

A recording under paragraph one is deemed to be held by a public authority, if it is available to the authority using technical aids, which the authority itself employs, for communication in such form that it may be read, listened to, or otherwise comprehended. A compilation of information taken from material recorded for automatic data processing is however regarded as being held by the authority only if the authority can make it available using routine means.

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[38] Law on the Openness of Government Activities applies not only to public authorities, but also to corporations, institutions, foundations and private individuals appointed for the performance of a public task when they exercise public authority.

[39] Law on the Openness of Government Activities, Article 5(1).

[40] The Government Bill on the Law on openness of the Government Activities (HE no 90/1998 vp). The translation provided by the European Ombudsman's services.

A compilation of information taken from material recorded for automatic data processing is not however regarded as being held by the authority if the compilation contains personal information and the authority is not authorised in law, or under a statutory instrument, to make the compilation available. Personal information is understood to mean any information which can be referred back directly or indirectly to a private person."

A distinction is made between completed documents and potential documents. 'Completed' documents (i) have been subject to a final drafting; (ii) already exist; (iii) have a fixed content, which (iv) can be reproduced. The administration can retrieve such documents through equipment that it uses itself. The retrieval does not have to be a 'routine operation'. Retrieval of such 'completed' documents is essentially comparable to the retrieval of classical paper documents. 'Potential' documents consist of collections of information that have been put together from the content of a database. They only come into existence in response to an access request. The collections are made through technical means already available to the administration. These 'potential' documents are only considered to be held by the administration (and hence a public document) if the administration can produce them through 'routine'-means/operations. The purpose of this rule is that the administration should not spend an unreasonable amount of work or resources responding to requests for 'potential' documents that it does not itself use for its own activities. The interpretation of 'routine'-means/operations has been left to the case-law and practice. This provides for a degree of flexibility, which is useful in light of the usually fast development of IT-systems. What is very clear, however, is that the rewriting of computer programmes is not 'routine'.

The above rules are to a large extent a codification of case-law.

The 2002 legislation does not appear to have been interpreted in statements of the Swedish Parliamentary Ombudsmen.

The United Kingdom has legislation providing for access to information[41]. It provides for a right of access to information held by public authorities. 'Information' is defined as 'information recorded in any form'[42]. The UK Information Tribunal has confirmed that the Act concerns a right of access to 'information', and not (only) a right of access to 'documents'. The focus of the Act is on the content of the information as opposed to the form in which it is held. In practice, requesters tend to ask for access to more or less specific 'documents' rather than for 'information on'; and the public authorities tend to respond by providing documents containing the relevant information.

The Information Tribunal has found that the content of databases does fall within the Act (the Act contains no definition of a 'database'). By way of example, the related UK Environment Information Regulation also operates with a broad term of information 'in any material form'. This has been held by the Information Tribunal to cover an entire database containing information on cellular radio transmitters.

41 The Freedom of Information Act 2000 (FOIA).

42 Section 84 of the FOIA.

The work burden in retrieving information from databases has been subject to review by the UK Information Commissioner. In a recent case, the UK Home Office argued that in order to locate, retrieve and extract the information concerned, it would need to write and run a report. The Information Commissioner did not accept that the level of difficulty involved in performing these activities had a bearing on whether information is or is not held by a public authority. He decided that the information requested was held by the Home Office and that in failing to either provide it or provide alternative reasons under the Act for not doing so, it breached the Act.

QUESTION 2 - PROACTIVE RULES?

Introductory points:

(A) Some of the contributions made reference to the national laws on access to environmental information, which contain a duty to proactively organise environmental information in such a manner that it can be quickly and efficiently provided to the public, especially in electronic form. This duty essentially follows from the EU Directive 2003/4, which in Article 7(1) lays down that:

> "Member States shall take the necessary measures to ensure that public authorities organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology, where available. (...)".

This duty therefore applies to all Member States, and is not repeated in the following accounts.

(B) The present part concerns specific rules on proactive measures related to public access to documents and information. It does not go into detail on the basic duties of good record keeping.

Hungary does not appear to have any specific proactive rules. The Hungarian Information Commissioner makes, however, the following comments. In most cases, public bodies only take into consideration their own tasks when creating large and complex databases. This makes it either impossible or very expensive to process access requests. The Hungarian Information Commissioner has investigated the case of an access request concerning forestry data contained in a database. In this case, difficulties arose because the category of data requested could only be provided with considerable effort and at high costs. Because the public data controller in that case was not obliged to collect and process the data - even for extra fees - the person requesting access could not obtain the information in question. The Hungarian Information Commissioner considers that it might be useful to consult a range of relevant stakeholders in the design phase of large and complex public database (for instance external experts, market players, NGOs, media representatives and information commissioners). The Information Commissioner furthermore points out that it is difficult to identity the full range of uses of a database, and that thought should be given to the possibility of granting the requester direct access

to the database concerned (unless, of course, this would imply access to confidential information).

The Netherlands: Within the framework of the current Law on Transparency of Administration, it is very difficult to ascertain which administrative authority has to make available to the public which information and via which manner (on which moment and against what costs). However administrative authorities are subject to active transparency and are obliged to provide on the internet general information about their tasks, organisation and activities (recently accomplished or running projects), and about the most important documents and where they can be found. According to the report submitted in December 2000 to the Dutch Parliament (see below under question 3), the new draft Law could promote a proactive information distribution by foreseeing that the administrative authority, when it receives a request for passive access, should always verify whether there is reason to proceed to granting active access, especially in cases of voluminous information like information located in data bases or information systems.

Slovakia does not appear to have any specific proactive rules. However, in reply to this question, the Defender pointed to the National Conception of Informatisation of the Public Administration, which is a strategic document concerning the introduction of e-Government in Slovakia.[43]

Finland's law on openness of the Government activities[44] contains an obligation for public authorities to promote access to information and good information management.[45] This contains, among other things, duties for the authorities to (i) maintain an index of any matters submitted and taken up for consideration and any matters considered and decided, or otherwise ensure that their public documents can be easily located; (ii) draw up and make available specifications on their information management systems and the public information contained therein; (iii) plan and realise their document and information administration and the information management systems and computer systems they maintain in a manner allowing for the effortless realisation of access to the documents.

In Sweden, it is considered that the far-reaching constitutional requirement to grant access to documents constitutes a strong incentive for the establishment and maintenance of access-friendly record keeping, including the keeping of information in databases. In practice, the 'Authority for Administrative Development' (Verket för förvaltningsutveckling) promotes, among other things, the establishment and keeping of systems that allow for a quick and efficient implementation of the constitutional requirements to grant access.

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43 http://www.informatizacia.sk/strategicke-dokumenty-is/600s

44 Law on the Openness of Government Activities (*Laki viranomaistoiminnan julkisuudesta*) no 621/1999.

45 Law on the Openness of Government Activities, Chapter 5, Articles 17-21.

The United Kingdom did not report on any relevant proactive rules. It is noted, however, that the UK public authorities are required to produce and maintain a publication scheme which provides for proactive dissemination of information[46]. A publication scheme is the authority's commitment to routinely and proactively provide information to the public. All such schemes must be approved by the UK Information Commissioner. And they must regularly be reviewed. The Information Commissioner has furthermore launched a 'Development Maintenance Initiative' to encourage public authorities to improve and expand on existing publication schemes.

QUESTION 3 - ONGOING INITIATIVES OR PROCEDURES?

Denmark: A commission for the reform of Danish access legislation - and for which the Danish Parliamentary Ombudsman is the chairman - will submit its first report in the winter 2008/2009. At the time of writing the present report, its deliberations were still confidential.

The Netherlands: In early 2000, a report on the consequences of the application of information and communication technology (ICT) on the Law on Transparency of Administration (Wob) was submitted to the Dutch Parliament (the second Chamber), at the request of the Ministry of Interior Affairs. The report recommended abandoning the term 'document', in the Law, as this term was not considered adequate to cover modern electronic data collections, such as data bases and information systems. The recommendations have however not yet been acted upon by the government. In the draft new Law on Transparency of Administration, the definition of the term document is extended also to information which can in a simple way be automatically retrieved from a data container. It can be concluded that, for the moment, the term 'document' is subject to discussion, but that anyway it is interpreted in a broad sense.

[46] Section 19 of the UK Freedom of Information Act 2000.