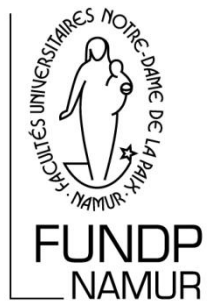




CENTRE DE RECHERCHE INFORMATION, DROIT ET SOCIÉTÉ



The Balance between Access to Public Information and Privacy

Cécile de Terwangne

Professor at the Faculty of Law, Research Director at
CRIDS - University of Namur, Belgium

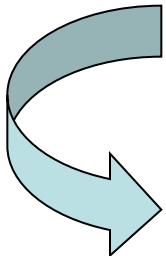
III Privacy Seminar, 1-2 October 2012, Sao Paolo Brazil

Right to Access to Public Information

Aim of the right of access

The exercise of a right to access to official documents:

- allows the public to know
- allows the public to participate
- allows the public to control



fosters the integrity, efficiency and accountability of public authorities

Constitutional Right (Sweden 1766)

Freedom of Information Acts (USA)

Council of Europe Convention on Access to Official Documents 18 June 2009

Link with freedom of expression (ECtHR, *Társaság a Szabadságjogokért v. Hungary* case, 14 April 2009; *Kenedi case*, 26 May 2009)

Council of Europe Convention on Access to Official Documents



CENTRE DE RECHERCHE INFORMATION, DROIT ET SOCIÉTÉ

“All official documents are in principle public and can be withheld subject only to the protection of other rights and legitimate interests.”

- Publicity is the principle / secret is the exception
- restrictions to protect public or private interests
- obligation to justify refusals
- review procedure

Council of Europe Convention on Access to Official Documents

crids

CENTRE DE RECHERCHE INFORMATION, DROIT ET SOCIÉTÉ

Article 2

Right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities

- right of access for everyone
- without any justification
- on request

Council of Europe Convention on Access to Official Documents



CENTRE DE RECHERCHE INFORMATION, DROIT ET SOCIÉTÉ

Article 10 – Documents made public at the initiative of the public authorities

At its own initiative and where appropriate, a public authority shall take the necessary measures to make public official documents which it holds in the interest of promoting the transparency and efficiency of public administration and to encourage informed participation by the public in matters of general interest.



Passive transparency

*« Public business is
the public's business »*



Active transparency

Classically, access to public information =
right to inspect the original document or
right to receive a copy

Today, access to public information =
right to receive an electronic copy
right to access —————> duty to communicate

Article 3 – Possible limitations to access to official documents

Each Party may limit the right of access to official documents.

Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

- a national security, defence and international relations;
- b public safety;
- c the prevention, investigation and prosecution of criminal activities; [...]
- f privacy and other legitimate private interests;
- g commercial and other economic interests; [...]

Article 3.

- 2 Access to information contained in an official document may be refused **if its disclosure would or would be likely to harm** any of the interests mentioned in paragraph 1, **unless there is an overriding public interest in disclosure.**
- 3 The Parties shall consider setting time limits beyond which the limitations mentioned in paragraph 1 would no longer apply.

No right to access if it harms **privacy** and if there is no overriding interest in disclosure

Right to Privacy and to Protection of Personal Data

2 notions :

→ Right to intimacy, to confidentiality

→ Right to self-determination

In the IT context, right to informational self-determination

Privacy: article 8 ECHR

Article 8, 1 ECHR : « Everyone has the right to respect for his private and family life »



ECtHR:

Classical approach (intimate sphere) +

S. and Marper case, 4 December 2008 : «The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention.»

Council of Europe Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data

28 January 1981 → modernization process

- The privacy exception to the right to access to public sector information means:
- no access where there would be a breach of confidentiality/intimacy (but with a balancing test)
 - no access where that would mean a breach of informational self-determination (data protection)

When does data protection apply?

- ⦿ When Personal data are processed =
any information related to a natural person
 - not necessarily confidential data
 - even professional data
 - commercial data
 - published data
- ⦿ When data is processed by automatic means or
is part of a filing system
- ⦿ When personal data sets or
isolated personal data

- Examples possibly concerned by public sector transparency:
 - Letters, mails
 - Meeting minutes
 - Personnel evaluation reports
 - Data on citizens hold by tax, social security or justice departments
 - Internal or public registers
 - Case law databases
 - Socio-economic data
 - Land register, maps

Data protection principles having an impact on public transparency:

- ⦿ Purpose principle
- ⦿ Proportionality principle

Purpose principle

Personal data must be stored for specified and legitimate purposes and **not used in a way incompatible** with those purposes

(compatible = enters into the reasonable expectations of the data subject
= provided by legal provision)

Further processing of data for historical, statistical or scientific purposes is admitted if additional guarantees

Communication of personal data for a **legitimate purpose** (balancing test):

interest in disclosure overrides the data subject's interests

Consent of data subject is an easy way to prove the balance but is not mandatory

Only **non excessive data** may be communicated (possibility of partial transparency)

For the balancing test, one has to take account of

- public or private nature of the data;
- link with a question of general interest;

- sensitive data: Personal data revealing racial origin, political opinions or religious or other beliefs, personal data concerning health or sexual life, personal data relating to criminal convictions
- data that can harm the data subject



For passive and active transparency

! Impact of culture

Example of transparency of public servants' salary

Example : transparency of farm subsidies (Belgian official site)

crids

CENTRE DE RECHERCHE INFORMATION, DROIT ET SOCIÉTÉ

EN NL FR DE



Belgian Paying Agencies
Belgische Betaalorganen
Organismes Payeurs Belges
Belgische Zahlstellen

accueil

données

liens/contact

aide

Publication des informations relatives aux bénéficiaires de fonds en provenance du FEAGA et du FEADER – R(CE) n° 259/2008 modifié par R(UE) n° 410/2011

Quel est le but de ce site?

Quels sont les différents types de montants?

Tous les paiements sont-ils publiés?

Combien de temps, les données restent-elles disponibles?

Quand les informations sont-elles publiées?

Quelles sont les règles en matière de respect de la vie privée?

Quels sont les types de bénéficiaires?

Quels noms utilise-t-on?

Abréviations utilisées sur ce site

Le règlement (CE) n° 259/2008 stipule que les données suivantes concernant les bénéficiaires d'aides agricoles doivent être rendues publiques: le nom du bénéficiaire, son domicile et les montants qu'il a touchés du Fonds européen agricole de garantie (FEAGA) et du Fonds européen agricole pour le développement rural (FEADER) durant les deux dernières années budgétaires dôturées (une année budgétaire correspond à une période allant du 16 octobre de l'année 'n-1' au 15 octobre de l'année 'n', par exemple: l'année budgétaire 2009 va du 16/10/2008 jusqu'au 15/10/2009).

Les montants publiés sur ce site correspondent aux diverses aides de soutien du marché agricole dans le cadre de la PAC. Cependant, suite à l'arrêt de la Cour de Justice de l'Union européenne rendu le 09/11/2010, la Belgique a pris la décision de ne plus publier que les données relatives aux personnes morales seules. Et ce, en attendant la publication d'un nouveau règlement en la matière. En effet, la Cour de Justice de l'Union européenne considère que le principe de transparence en matière d'utilisation des fonds publics doit être maintenu mais que des dispositions doivent être prises pour le respect de la vie privée des personnes physiques.

Example : transparency of farm subsidies (Belgian official site)



CENTRE DE RECHERCHE INFORMATION, DROIT ET SOCIÉTÉ

European Regulation No. 259/2008 states that the following information regarding the beneficiaries of agricultural aids must be made public:

- the beneficiary's name and address
- the amounts received under the European Agricultural Funds during the last two years

As a result of the November 9th, 2010 decision taken by the Court of Justice of the European Union and awaiting new regulations on this topic, Belgium has decided not to publish any information on natural persons. The Court of Justice of the European considers that transparency in the way community funds are used must be maintained but that measures should be taken to protect the private life of natural persons.

Example : transparency of farm subsidies (www.farmsubsidy.org)

CLARENNE STEPHANE ----

CLARENNE STEPHANE is a recipient of farm subsidies in Falmignoul, Belgium.

Since 2002 CLARENNE STEPHANE has received **€242,673** in payments from the European Union .

Details of payments

Year	Scheme	Total
2009	Direct payments under European Agricultural Guarantee Fund	€101,174
2009	European Agricultural Fund for Rural Development	€18,161
2009	Other payments under European Agricultural Guarantee Fund	€7,382
2008	Direct payments under European Agricultural Guarantee Fund	€99,327
2008	European Agricultural Fund for Rural Development	€8,685
2007	European Agricultural Fund for Rural Development	€7,945
Total:		€242,673



Address

Falmignoul
5500

[View other recipients in Dinant](#)
[View other recipients in Namur](#)
[View other recipients in Wallonie](#)

[Download this recipient as a CSV file, for Excel](#)

Example : transparency of farm subsidies (www.farmsubsidy.org)

crids

CENTRE DE RECHERCHE INFORMATION, DROIT ET SOCIÉTÉ

« We need **your help** to find out more about this recipient. Is it a multi-national company or a small farm? What does it produce? Is it a subsidiary of a larger company? How large is it? Is it owned by anyone noteworthy? »

Example : transparency of geographic data in Belgium



Zooming possibility on the official site of the Walloon Region

crids

CENTRE DE RECHERCHE INFORMATION, DROIT ET SOCIÉTÉ



Zooming possibility on the official site of the Walloon Region

crids

CENTRE DE RECHERCHE INFORMATION, DROIT ET SOCIÉTÉ



Transparency of geographic data via Google

crids

CENTRE DE RECHERCHE INFORMATION, DROIT ET SOCIÉTÉ







2 rights to access to one's own personal data:

- Access through the FOI Acts
- Access through the data protection laws

→ 2 ways left to the data subject's choice

I thank you for your attention

Cécile de Terwangne