COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

HUMAN RIGHTS

PROCEEDINGS OF THE COLLOQUY OF THE COUNCIL OF EUROPE ON FREEDOM OF INFORMATION AND THE DUTY FOR THE PUBLIC AUTHORITIES TO MAKE AVAILABLE INFORMATION

organised by
the Committee of Experts on Human Rights
in collaboration with
the Faculty of Law of the University of Graz
Graz (Austria), 21 - 23 September 1976

STRASBOURG
1977

PREFACE

The Colloquy of the Council of Europe on freedom of information and the duty for the public authorities to make available information was held in Graz from 21-23 September 1976. It was organised by the Committee of Experts on Human Rights of the Council of Europe in collaboration with the Faculty of Law of the University of Graz.

The Colloquy elected Mr W PAHR, Director General of the Federal Chancellery of Austria Chairman and Mr J J CREMONA, Chief Justice of Malta Vice-Chairman.

The Colloquy made a comparative study of the laws and practices of the member States of the Council of Europe concerning access by members of the public to information entrusted to the States or held by public authorities on the basis of three reports presented by Messrs. B WENNERGREN (Sweden), L ADAMOVICH (Austria) and L FOUGERE (France).

The Committee of Ministers of the Council of Europe has in the meantime instructed the Steering Committee for Human Rights to study the suggestions made at the Colloquy with a view to submitting to it concrete proposals in this matter.

This publication contains the official speeches made at the opening of the Colloquy, the reports, a summary of the discussions and the list of participants.

As for the discussions, it was thought preferable not to include a detailed account of them but to indicate certain general outlines resulting from the questions which had been considered at the Colloquy, namely:

- general problems relating to the right of access to information,
- limits to the right of access to information, with particular reference to questions concerning working documents and official secrecy,
- other matters discussed.

This publication also contains a summary of the conclusions drawn up by Mr W PAHR, President of the Colloquy.

TABLE OF CONTENTS

Prof. K. Hansen, Hamburg
34

AGENDA OF THE COLLOQUY

1. OPENING OF THE COLLOQUY.

2. SPEECHES BY:

   - The Head of the Directorate of Human Rights on behalf of the Secretary General of the Council of Europe,

   - The Rector of the University of Graz,

   - The Mayor of Graz,

   - The Representative of the Landeshauptmann,

   - The Representative of the Federal Government of Austria.

3. ELECTION OF THE PRESIDENT.

4. ELECTION OF THE VICE-PRESIDENT.

5. THE RIGHT TO KNOW - A SCANDINAVIAN APPROACH: Report presented by Mr B WENNERGREN, Justice of the Supreme Administrative Court of Sweden.

6. THE DUTY TO INFORM IN AUSTRIA AS A MEANS OF REALISING FREEDOM OF INFORMATION: Report presented by Mr L ADAMOVICH, Professor at the Law Faculty of the University of Graz.

7. FREEDOM OF INFORMATION AND COMMUNICATION TO PERSONS OF PUBLIC DOCUMENTS IN FRENCH THEORY AND PRACTICE - PRESENT SITUATION AND PLANS FOR REFORM: Report presented by Mr L FOUGERE, Conseiller d'Etat (France).

8. CONCLUSIONS OF THE COLLOQUY by the President of the Colloquy.

Speech by Mr Roland MULLER,
Head of the Directorate of Human Rights of the Council of Europe

---

I hereby open the Colloquy of the Council of Europe on freedom of information and the duty for the public authorities to make available information.

First and foremost, I should like to transmit to you the best wishes of the Secretary General of the Council of Europe for success in your work. The Secretary General sincerely regrets being unable, himself, to wish you success but his presence is required in Strasbourg at this moment because of the Parliamentary Assembly of the Council of Europe.

I should also like to thank our Austrian hosts for the warm welcome they have given us and for their kind hospitality. It would have been difficult to organise this Colloquy without the generous and efficacious assistance of the Faculty of Law of the University of Graz, whose members I wish therefore especially to thank.

Numerous notable guests have honoured us by their presence here today and I wish to thank them. I particularly wish to thank:

- Professor Dr Klingenberg, Rector of the University of Graz,
- Dr Matzka, Councillor, representing the Mayor of Graz,
- Dr Tropper, Landesamtpräsident, representing the Landeshauptmann of Styria,
- Dr Pahr, Director General of the Federal Chancellery, representing the Federal Government of Austria,

who have all so kindly accepted to speak at the opening of this Colloquy.

This Colloquy has been called upon to consider a problem of great importance for present-day society, and I am convinced that the result of the discussions will lead to the achievement of a new step forward in this area.

Europe - our Europe - is an open society which presupposes freedom of expression. It is thus hardly surprising that this freedom of expression - which includes the freedom to receive and impart information, necessary in any democratic system - was explicitly enshrined in the European Convention on Human Rights.

I feel I should stress once more that this freedom of expression also includes the right to seek information. It is due to the work of the Committee of Experts on Human Rights of the Council of Europe that the Committee of Ministers has consented to the inclusion of the right to seek information in the European Convention on Human Rights when a new complementary international instrument is drafted on this matter.

./.

Today you are called upon to consider whether further progress may be made in the field of the protection of human rights by laying down, in a form yet to be determined, the duty for public authorities to make available information relating to matters of public interest, subject, of course, to appropriate limitations.

The legislation and administrative practices of the member States of the Council of Europe are most varied on this matter, and for this reason the Committee of Ministers, on a proposal of the Committee of Experts on Human Rights of the Council of Europe, decided to organise this Colloquy with the idea of conducting a comparative study of existing laws.

Further progress towards instituting the duty for the public authorities to make available information is all the more important because the public is thirsting for information - with a thirst which, despite the development of the mass media, is only partly satisfied in our present day society.

The society in which we live is impersonal and the development of technology - necessary for the well-being of the population has become more and more pronounced. This development is such on economic, financial and other levels, that the public authorities have, in certain domains, been led to take on the responsibility of tasks which formerly were part of the private sector.

Thus the sectors of State intervention have undergone a significant evolution and, as a result, the State has been led, more and more, to interfere with the rights and interests of individuals - who, for several reasons and particularly because of lack of adequate information, find it difficult to defend those interests.

The construction of nuclear power stations, of factories producing toxic substances, or simply the construction of a motorway, are a few significant examples of the need for free access to "official" information.

The consequences of growing state intervention, however, is the increasingly technocratic nature of the administration today. Dug in behind the defence of official secrecy the administration is not always able to fulfil its duty to inform. Hence the claim for a more open, more transparent administration.

Further, this development in State intervention has necessarily multiplied the number and the variety of items of official information held by the authorities, as well as the number and variety officials holding such information.

Such information is, by reason of official secrecy, no longer available to individuals. This implies danger for the rights of individuals and perhaps for democracy itself.

Indeed everyindividual has the right to have his interests taken into consideration. And access to information leads, particularly in the press, to the development of real debate on matters of general interest. At the same time it constitutes a supplementary guarantee for citizens.

./.

If we say there can be no true democracy unless the elected representatives, the press, the citizen are informed of the reasons for decisions of Government policy, then the duty for the public authorities to make available information is clearly even more important at this time of advanced technology. It would not be an exaggeration to say that, according to present day conceptions, the duty to make available information is inseparable from the duties of government; to be well informed is to be well governed.

Our present preoccupation is not therefore a mere theoretical, academic problem, quite the contrary. And tribute should be paid to the member States of the Council of Europe for seizing the importance of this problem.

One of the most promising developments in the recent history of our society is the consensus in favour of attenuating the secrecy of public administration. This trend towards free information - which is one precondition for the vitality of any democracy - has moreover found support.

Indeed, freedom of information, and more precisely the access of the public to information concerning the State, is a topical issue in the majority of our countries. This question has also aroused the interest of numerous associations and non-governmental organisations. In addition, press campaigns have been launched in various countries.

This consensus is reflected at government level where there is the awareness of the fact that in the age of the "liberal state", one of the fundamental principles, with only rare exceptions is the openness of state activity.

The moment would seem to have come to translate this desire for greater disclosure of State activity, by completing in some respects the freedom of information with the duty for the public authorities to make available information under conditions which have yet to be determined.

It is clear that the implementation of such a duty on the public authorities is not free from difficulties; experience has revealed this in those countries in which such legislation has already been passed. Indeed the measures required for the meaningful implementation of such a rule are not purely legal in nature.

Firstly, contrary to the majority of legislative texts, which govern a particular area of the administration, the application of national legislation on the disclosure of official information concerns practically the entire administration. This would require a thorough and overall reform.

Further, a new frame of mind will be needed in this area since reform will lead to an increase in the work load of the administration and will call for understanding and devotion, both of which are indispensable for the effective implementation of such legislation.

The duty to disclose information clearly cannot be absolute. Information concerning State interests, on the one hand and concerning private interests on the other, cannot be disclosed without threatening these legitimate interests.

./.

In addition, other information contained in preparatory documents does not seem suitable for disclosure insofar as it merely represents a preliminary stage in the decision-making process.

Far from wishing to encroach upon the contents of the reports which will be presented to you by our three eminent rapporteurs, I was anxious to express these few thoughts just to underline all the important characteristics of the problem as far as the protection of individuals is concerned.

I also wish to stress that, whatever the difficulties inherent in the accomplishment of such a task, they are by no means insurmountable if, one considers first and foremost the political significance of the task to be accomplished.

The realisation of a more open, more transparent administration, would also be the achievement of further progress for human rights and for democracy.

By setting the example in this matter, as we have already done in elaborating the European Convention on Human Rights, we will also be contributing to the establishment of a freer, and in the long run, more peaceful world.

It is in this spirit that I wish you every success in your work in Graz.

Speech by Mr H.G KLINGENBERG
Rector of the University of Graz

It is a great pleasure for me, as Vice-Chancellor of Graz University, to bid you welcome here. We are particularly happy that, of all the towns envisaged, you chose to hold your Colloquy in Graz, for the University in which you are now is a cultural centre not only in Austria, but for the whole south-east of Europe, whose influence is felt as far as the Middle East. Indeed, our influence spread to those areas in the past and it is still present there today.

To speak of freedom of information and the obligation on the part of the public authorities to communicate information is tantamount to saying that we have a duty not only to help men to understand what is happening around them, but also to establish the foundations and conditions necessary for ensuring a kind of understanding that will transcend all frontiers. Understanding presupposes information, but that in itself is not enough : one needs to be able to understand the information communicated.

Today, we are living in an age in which the need for information is particularly great. The Chairman has just spoken about a thirst for information. As a doctor, I find this expression a very apt one, for we are concerned here with a real need. But it sometimes happens that a drink does not quench the thirst of the person absorbing it, simply because he does not know how it should be absorbed. The same applies to information: we must therefore teach men how to understand information and how to deal with it.

But though the authorities today are bound to provide information - and I think this is really the subject you will be discussing here - there are certain limits to be set, as you state in the preliminary reports for your Colloquy. Indeed, the authorities are assembling masses of information on each citizen. Throughout the whole of our lives we must fill up innumerable questionnaires and the particulars are computerised. The question which arises is who is to have access to that information and for what purposes. What are the limits that must not be exceeded if we are to protect the individual and the private life of each citizen? I mention this point because it seems to me, as a doctor, a particularly important one, for I believe that the integrity of private life must be preserved. When one goes to Britain one is struck by the fact that there are no notices saying "it is forbidden to do this or that"; what is written on notices is simply the word "private". I think that this is an attitude which might guide us when it comes to deciding where respect for the individual sets limits to freedom of information.

I hope your Colloquy will be a great success and that all the discussions which you will have here on the problems of information and the communication of information, in an atmosphere conforming to the traditions of our university, will be profitable.

Speech by Mr N MATZKA
Municipal councillor, representing the Mayor of Graz

It is a great honour for me to extend a warm welcome to you on behalf of Dr Götz, the Mayor of Graz, and on behalf of the entire municipal council.

When political officials have the honour to speak at the opening of an important conference like this, it is usual to express the wish that it will be a successful one. This may perhaps be a pure formality, but it is a custom which I should like to observe today; I wish this Colloquy every success.

Let me add, however, that it is a very sincere wish for I believe that the theme of the Colloquy is one of particular importance for our municipality. We realise how important these problems are in the daily life of the community, in towns like Graz.

It is stating the obvious to say that municipalities are local communities in which the most direct contact exists between the public authorities and the population. This is perfectly understandable, since it is precisely at municipal level that citizens are invariably obliged to come into contact with the Administration. And let me tell you this: we, the administrators of this town do our utmost to carry out a policy capable of satisfying the population's need for information - an ever-growing need - in an effort to conform, here in Graz, with the principle of freedom of information. We have sought to prove that it was perfectly possible to conduct an open, candid municipal policy.

The need for information and the requirement of a right to know are to be explained by numerous factors. I believe that it is a consequence of the democratisation process, a consequence of the increasing interest taken by citizens in local affairs - even if that interest is not provided for in the provisions of Section 8 of the General Administrative Code. It is perfectly natural that citizens should seek to assert their rights, even if those rights are not yet written into substantive law.

But our aim to make this administration more accessible requires a careful study of several conditions, one of which seems to me to be of cardinal importance: the political will to satisfy the citizens' need for information must be legitimised in our internal legal order.

Ladies and Gentlemen, you will certainly understand the need to change political officials from time to time but I believe that even politicians must never forget that Article 18 of the Austrian Federal Constitution forms the legal basis of Austrian administration.

Let me conclude with a few rather more personal comments.

./.

A jurist who becomes a political official sometimes encounters difficulties when he convenes an assembly (of citizens), leads the discussions and submits various administrative files in order to explain them in detail to the population. He is forced, in such cases, to forget certain, even rather important, paragraphs of the Austrian Administrative Code.

You will understand, therefore, why I am particularly pleased that this Colloquy is being held in Graz. I am convinced that it will enable us eventually to bridge the gulf that exists between what is and what should be. For my own part, I hope it will have the effect of making the administration more open.

At the same time I understand perfectly that it is not easy to strike a judicious balance between the public's need for information, on the one hand, and the protection of individual rights, on the other.

That is why once again, I wish your discussions every success.

Speech by Mr A TROPPER,
Landesamtpräsident (President of the Land Administrative Office),
Representing the Landeshauptmann (Governor of the Land) of Styria

---

The Governor of the Land of Styria, Dr Friedrich Niederl, has asked me to bid you welcome on his behalf and on behalf of the Land Government. I must also thank you, Mr Chairman, Ladies and Gentlemen, for choosing the town of Graz as your meeting place. For us, this is indicative of two things: firstly, that you recognise the activity of the Austrian Delegation to the Council of Europe and its efforts to help in shaping a European legal order; secondly, that you have confidence in the Austrian legal school, which is endeavouring, not only to follow certain trends, but also to orientate legal development so as to bring it more into line with the situation of contemporary society.

I am a practitioner and so my address will not be that of a scientific theorist. Not wishing to confine myself to the mere verbal recognition of freedom of information and the public authorities' obligation to inform, I have brought here a decree, issued by the Styrian Land Government, as evidence of the importance we attach to these matters. Allow me, Mr Chairman, to present you with the text of the decree. I should here like to stress in this respect that it seemed to us indispensable to guide our civil servants towards this concept of freedom of information.

We have endeavoured to define its scope and have succeeded in giving it a wide margin of application through a very broad interpretation of the provisions of the decree.

Practical experience has taught us that freedom of information finds its own limits when, in certain circumstances, the interests of local authorities or those of third parties are encroached upon or threatened. As far as such encroachment or threats are concerned, the legislator has not yet found a generally acceptable definition so that decisions have to be taken in each case in order to satisfy the need for information to the fullest possible extent.

I should like to give you this document in the hope that it may contribute to your discussions; believe me, this is a subject which concerns us deeply; contrary to the general belief, public officials do not cling to absolutist conceptions.

We are endeavouring to give concrete expression to our rights and duties in a democratic State and we are firmly convinced that we shall be able to achieve this in the future; and not only as regards our domestic law: we are also making an effort to incorporate international rules and standards into our internal legal system.

Mr Chairman, Ladies and Gentlemen, it is in this spirit that I once again bid you welcome to Graz; I hope that in this typically Styrian atmosphere your meeting will be a very pleasant and successful one.

Speech by Mr W PAHR,
Director General of the Federal Chancellery,
Representing the Federal Government of Austria

It is an honour for me to welcome you to Austria on behalf of the Federal Chancellor, who regrets that other engagements have prevented him from being here with you. In deciding to hold this Colloquy at Graz, the Council of Europe is, in a sense, carrying on a tradition, having already held several other colloquies and conferences on human rights in Austria. Some of these meetings were in Vienna; on one occasion you visited Salzburg, and now it is the turn of Graz.

We are confident that the results of your deliberations in this town will be as satisfactory as those of previous Council of Europe colloquies in Austria. Indeed, some of the ideas and suggestions put forward on former occasions have already become part of history. I am sure you will find the atmosphere of Graz particularly propitious for carrying out your work and for finding solutions to the problems you are to discuss. Graz is the capital of an Austrian province in which the democratic tradition is deep-rooted. The speeches of the Municipal Councillor and Mr Tropper have no doubt convinced you that the administration here has always been in close touch with the citizens and their preoccupations so it is only natural that the Styrian press should be read beyond the frontiers of the province. The Austrian Government is confident therefore that you meeting will be successful and expresses thereby its constant desire to take part in the Council of Europe's efforts to achieve European integration and to protect and develop European traditions; and it is well aware that on this occasion you intend to discuss a subject of capital importance for the future of democracies, of the democracy we cherish, the one defined by the Statute of the Council of Europe and the European Convention on Human Rights.

The particular aspect you are to discuss here is freedom of information. Nowadays that freedom must certainly be the most precious political right of every citizen, a right which every democratic society must itself respect and must see that others respect as well. Of course freedom of information no longer means freedom of the press alone; freedom of the press represents freedom of information at the level of an elitist democracy. This form of democracy is outdated; today's democracy does not merely permit the citizen to express his views from time to time when elections are held: it demands his permanent participation in every aspect of public life. Such democracy can only be possible where the citizen is informed; consequently, the most important aspect of the freedom of information which needs to be emphasised now is that which guarantees the citizen the right to receive the information he needs, namely the right of access to information, and the corresponding duty for the public authorities to make available information. Only a citizen who has access to information held by the public authorities can assume responsibility for the State, understand its problems and the obligations it imposes upon him in the interests of society as a whole - in other words, play an active part in democracy and further its course. In the past we have not been much concerned with this duty of the State's to provide information, although we have

./.

always been aware that an individual affected by measures adopted by the State must be able to know about those measures. In Austria, for example, no administrative procedure could conceivably be instituted if the parties were unable to consult the files relating to the case or without being heard. But this is not enough; the public character of administrative proceedings must be replaced by a wider publicity. These days, we must not forget that, even in totalitarian States judgements are pronounced in open court. It is generally held in our country that legislation should be both followed and actually supervised by the public. It should, moreover, be natural that the activities of the administration are public, provided the interests of individuals or the public at large are not prejudiced. The principle of publicity, and the principle of general publicity in particular, must, however, be adopted by the public as well and it is this very Colloquy which will produce the suggestions, ideas and criteria to be followed for that purpose.

In the course of your Colloquy you will hear three reports concerning three examples illustrating the different stages of development of the question and the reports will no doubt serve as the basis for your deliberations. The first report concerns the principle of administrative publicity as it is understood in Sweden, the first country to adopt the concept and develop it significantly. A second report will deal with the Austrian example, the example of a country which is a relative newcomer to the question; the principle of publicity has not yet been entirely assimilated in our country, for the Austrian citizen is still unfamiliar with this right. The principle has not had time to be fully developed here, but in Austria the citizen can receive information about the activities of the administration. Lastly, you will hear about the ideas being discussed in a State which is at present attempting to introduce the principle of publicity into its administration.

On the basis of these three examples you will no doubt be able to discuss every aspect of administrative publicity; I hope therefore, that your conclusions will be such that the Committee of Ministers can use them to formulate recommendations of use to those member countries of the Council of Europe which are seeking to solve this problem. To the extent that your meeting is successful, and I am sure it will be, you will be making an essential contribution to the furtherance and protection of democracy in Europe.

In this spirit, may I once again convey to you the good wishes of the Austrian Federal Government for a very successful meeting.

R E P O R T

presented by

Bertil WENNERGREN
Administrative Supreme Court Judge
(Sweden)

A RIGHT TO KNOW - THE SCANDINAVIAN APPROACH

The civil rights are dealt with in Chapter 2 of the Swedish Constitution under the heading *"Fundamental Freedoms and Rights"*. It is there provided that every citizen shall in relation to the community be guaranteed among other things the right to information, i.e. the right to obtain and receive information. With regard to this right a right to have access to official documents holds an exceptional position. The Constitution refers here to the Freedom of the Press Act where such a right has since long been regulated. Thus in Chapter 2 of that Act the following provision is to be found: *"To further free interchange of opinions and enlightenment of the public, every Swedish citizen shall have free access to official documents"*.

A veritable democratic break-through took place in Sweden in 1766. The concept of civil rights was acknowledged, the people's influence on the government was recognised, parliament's position was strengthened, a parliamentary ombudsman was introduced and an elaborate system of bureaucracy control was established. The freedom of the press was introduced too, with the free interchange of opinion as its main purpose. But it was also emphasised that a free information was needed as a means to disclose legal deficiencies and prevent abuse of power by officials. The freedom to print and publish was expected to contribute to abolishment of *"that pernicious curtain of secrecy behind which self-interest, bias, and unlawfulness could play its abominable game at the citizen's expense"*. With such a target in view, it was quite natural to include expressly in the freedom of the press a right to print and publish official documents in extenso. Further, without free access to the documents, such a right would be rather ineffective. It was therefore provided in the Freedom of the Press Act of 1766 that official documents should *"upon request immediately be made available to anyone, making such a request"*. It was added that *"to that end free access shall be maintained with regard to the copying of documents in loco or getting officially confirmed copies thereof"*. With a short interval of some decades, the positions taken in 1766 have been maintained with continuous adaptations to societal changes. The Freedom of the Press Act now in force was adopted in 1949.

./.

The underlying ideas of the principles of document publicity are, of course, not quite the same now as in 1766. The truly democratic thought that could be discerned already from the beginning has grown stronger, and the stress is more on information of the public and democratic participation than in past times. The original idea about document publicity as a method for checking on the bureaucracy and a guarantee for fair and just government is nevertheless still present. The system of document publicity is looked upon as something that fosters impartial government, but also as a device that promotes the citizen's freedom and a peaceful development in general of society. It is assumed that, when government takes place in the light of publicity, the officials will be more anxious to fulfil their duties, and the citizens in return more prepared to develop confidence in the officials. The mere existence of the rule of publicity clears the air. The Swedish Minister of Justice recently made the following statement that comprehensively reflects today's views on document publicity:

"The activity of the public bodies is something that regards all citizens. It is therefore inevitable in a democratic society that the authorities inform the citizens extensively about their work. This is however not the same thing as the rule of publicity in society. That rule means something more, namely that the public activity lies open to the citizens and the news-media in such a way that they can acquire information in different fields according to their own choice, independent of what information the authorities themselves choose to give. The principle of free insight into the public affairs manifests itself in different ways in the legal system. The oldest one is the public's right to attend court proceedings. Closely related is the right to attend the deliberations of the democratic assemblies. The principle of publicity appears also in the fact that civil servants to a great extent may communicate to outsiders what they have learnt about in the public service. Of particular importance is their right to communicate with the Press, the Radio and the Television. Primarily however, the principle of publicity of official documents. The rule of free access to the documents of the public bodies has been in force for more than 200 years. It has marked the public administration and influenced general attitudes and valuations in the society. Sweden has for a long time, besides Finland, been the only country to apply the rule of document publicity. Not until lately some other countries have followed the example. To be brief the principle of publicity serves three main ends. It is a guarantee for the rule of law, the administrative efficiency and the democratic efficiency. Public administration being performed correctly and judiciously is an interest of the first rank both for the society and for the citizens concerned. Document publicity here fulfils an important function of control. Thanks to it, faults that have occurred may be revealed and corrected. More important is perhaps that the consciousness of a public check-up incites the authorities to be careful and circumspect in their work. Another side to the matter is that baseless rumours and allegations of abuse of power not easily are believed by the public when it has access to the factual foundations of the decisions. Document publicity also provides for insight in planning, routines and financial matters and thereby serves as an incentive to efficiency, economy and avoidance of red tape methods. In a society where the political power is based upon a mandate from the people it is evidently necessary that the public may have such an insight in the public affairs that creates a bsis for discussion and decision about legislation or other measures that promote the development. The access to official documents provides objective information about the state of matters

./.

in the State and the communes. The importance of the principle of publicity for a living democracy reaches however longer than to throw a light on the state of things in the public administration. The official documents contain a large fund of facts in all kinds of matters. The access to this information is to a great extent fit for an enrichment of the general debate and broadens the basis for the position taking of the citizens and the organisations in different questions regarding the society. Thus the right to an access to official documents is an essential part of the citizens' right to obtain and receive information and thereby one of the conditions for the free democratic moulding of opinion. It is evidently unrealistic to expect that individuals will have a possibility, systematically or on the whole to any great extent, to inform themselves about the contents of official documents. Instead you have to acknowledge that the document publicity fulfils its general purpose primarily by being used by representatives of political parties, of other organisations and of the mass media. Of particular importance is the watch of official documents by the Press and the other news media and the communication of information from them to the public".

The first Scandinavian country to follow the Swedish example of document publicity was Finland. It happened in 1951 when an Act about the publicity of official documents was adopted. The Finnish legislation is in the main in accordance with the Swedish legislation. What already has been said about the latter and will be said about it later on is therefore with few exceptions true also with regard to the former. Denmark and Norway followed later on. Both the Danish legislature and the Norwegian legislature passed their Acts on Publicity in public administration in 1970. When the Danes stated the reasons for publicity they chose as a starting point that government is a function that regards all members of society and that the people should have as much knowledge as possible about what takes place within the government and ample opportunities to discuss and form opinions about matters of general interest. There was a connection between publicity and the freedom of speech, expression and opinion, freedom of assembly, etc. Publicity would contribute to create and maintain citizen interest in the government. It would also help the news media to inform the public adequately and not through gossip, rumours, etc. A system of publicity presupposed however a well-behaving Press. From the point of view of control publicity would make it possible not only for the party or some other directly concerned person but also for every citizen and any interest organisation or the news media to find out if an administrative decision is founded on facts, if similar matters are treated in the same way, and if favouritism or other arbitrariness or abuse of power occurs. By studying the documents, you could also ascertain if there is cause for complaints. The provision establishing the principle of publicity reads as follows: *"Everyone shall have the right to request that he may examine documents in matters which are or have been under consideration by the public administration"*. When the Norwegians stated their reasons for publicity they put the democratic values in the first rank. The better the public is informed, the more favourable are the opportunities for an influence from the public that is relevant and based on facts. The publicity should increase the interest of the public in governmental affairs, and enable the individual citizen and his organisations to take enlightened standpoints and exercise constructive criticism. Openness would favour a

./.

free interchange of opinions about administrative measures and promote participation. The opening provision of the Norwegian act reads: *"The documents of the public administration are public unless exceptions have been stated by law. Everyone may at an authority's office inform himself of the contents of a public doucment in a certain case"*. Although the starting point - that everyone shall have access to official documents - is the same for all the Scandinavian Acts, the regulations differ considerably in several respects. The most important ones will now be described.

According to the Danish Act a request for access to documents must specify the case to which the documents pertain and this is true also with regard to entries in journals, registers and other lists of documents. On this latter point the Danish Act differs from the other acts, according to which journals, registers and other lists of documents shall be open for inspection without any demand for specification. To start with, the same standpoint was projected in Norway as in Denmark but the Norwegian Parliament cancelled it, declaring that an agency's register is the key to its records and that it would not be satisfactory to establish the principle of publicity without giving the beneficiaries reasonable chances to use their right. It was also pointed out that to exempt the registers as such from publicity would render a continuous control of the public administration by the Press impossible. As the Danish Act, the Norwegian one presupposes that the one who makes a request for documents shall identify them. The Act thus uses the words *"documents in certain cases"*. As the registers are available, the effect of that condition is however considerably reduced. The Finnish and Swedish Acts do not presuppose any identification of a document as a prerequisite of access. In Finland and Sweden you can visit an agency and ask, for instance, for the documents in cases of a particular category or for today's incoming post. In this connection, it should also be mentioned that in Sweden a considerable number of authorities, among them the Ministries, use to exhibit, in particular Press-rooms, the in-coming mail - and sometimes also copies of out-going mail - for public inspection each day, usually from 10 a.m. to 3 p.m., after the registrar has sorted out documents excepted from publicity, but before the documents are distributed to the various divisions or sections for processing. Thus there is a big difference here between particularly the Danish and the Swedish system. The Danish Act does not, as the Swedish one does, give access to peruse the bulk of in-coming and out-going mail, nor does it entitle journalists or others to carry out *"fishing expeditions"* in the registers. An authority is furthermore not obliged under the Act to comply with a request to examine all cases of a particular kind, or all cases registered over a certain period of time. During the years that the Danish Act has been in force it has been utilised by the public and the news media only sparingly and the main reason for it seems to be the factors just mentioned. A reconsideration of them regarding a co-ordination with the Finnish, Norwegian and Swedish Acts will,however, take place in the parliamentary year of 1976/77.

The crucial point in a system of document publicity is, however, to find the most adequate and suitable way of putting the necessary limits to the access because the access can of course not be limitless. Two main categories of documents enter here into focus, namely working documents and documents needing protection because of legitimate interests of the State or the communities or of individuals.

./.

Working documents differ from other kinds of agency documents in that they contain material and points of view which are immature, undigested, or merely tentative. All the Scandinavian Acts exclude working documents from the documents submitted to publicity. The authors of the Danish Act stressed that offficials need opportunities for deliberations and preparatory work that can take place freely and informally without the pressure of publicity. They added that opinions and evaluations may change during the progress of the case-handling, which makes publicity unwanted and inappropriate. Officials must not be forced to operate in a fishbowl. In Norway, much attention was paid to the disadvantages of premature disclosure. Although it was admitted that, from the point of view of participation, the public ought to be able to inform itself at an early stage, the risks of too much extra work and waste of time were evident if the public was let in at a preparatory stage, where the material might give an incomplete and often misleading idea of the matter. The Danish Act contains the most comprehensive regulation with regard to working documents. The Act exempts from publicity *"working materials for internal use, e.g. memoranda, drafts, outlines, proposals and plans"* as well as *"letters exchanged within the same authority"* and *"letters exchanged between a local government council and its departments, committees or other administrative branches, or internally between those branches"*. However, the exceptions for internal documents have in practice been interpreted to cover only what might be characterised as decision-making documents. Thus fact-finding documents are looked upon as submitted to the publicity. Furthermore, notes and memoranda that have been elaborated from the outset as internal working documents are no longer covered by the exception if forwarded to another administrative authority. By virtue of this restrictive interpretation, administrative authorities cannot evade the general rule of public access by exchanging *"internal working documents"* instead of utilising more formal means of communication. The Swedish Act uses another technical means of exempting working documents from the publicity. A document is submitted to the publicity solely on condition that it has been received or drawn up by an authority. And a document relating to a particular case or matter shall not be deemed to be drawn up until it has been dispatched or, if it is not dispatched, until the case or matter has been finally settled by the authority. Thus a working document is normally not to be deemed to be drawn up as long as the case is pending and the authority is not obliged to keep it after the case had been finally settled, if it is not a fact-finding document. Thus in all the Scandinavian countries the rule of publicity does not apply to working documents. There is no right to access to such documents. On the other hand the authorities are not forbidden to grant access. They may do so at their own discretion making due allowance for different needs of caution.

With regard to other official documents than working documents that need protection against publicity because of legitimate general or individual interests the Scandinavian acts apply two different methods in order to bring about such a protection. The Finnish and the Swedish Acts enumerate the types of official documents in question and prescribe that they are to be kept secret. The enumeration includes hundreds of items. Some of them have been made secret

./.

out of consideration for the State security or the State's relations with foreign powers or in order to protect the legitimate economic interests of the State or the communities. Others have been made secret because they relate to a private individual's personal or economic circumstances. Several other grounds for secrecy exist also. By having been classified as a secret document in the Act the document is not only excluded from the rule of publicity but also from any disclosure to the public. The authorities are legally bound not to give access to the document. The Danish and Norwegian Acts represent a different solution. Thus, they state that the right to access to official documents shall not include certain types of documents. The types have been defined in general wordings and there are no long lists of items as in the Finnish and Swedish Acts. Nor does the exclusion of a type of document from the rule of publicity mean that such documents are to be kept secret. An authority may give access to a document that is deemed to be excluded from publicity provided that the authority deems it safe to do so and no provision in a legislation on secrecy hinders it. The Danish and Norwegian system then is a much simpler one than the Finnish and the Swedish system. The simplicity is however won at the cost of security as no-one knows beforehand how the administrative discretion will be applied. A very restrictive practice will create more secrecy than really is necessary. The Finnish and the Swedish solution on the other hand ensures certainly that the secrecy is kept within strict limits but it adds much complicity and makes the system difficult for the authorities to apply and also for the legislature to keep up to date.

All the Scandinavian Acts use the word document to denote the object of publicity. But no Act defines the notion document. The Finnish Act, however, declares that what is said about documents shall apply also to maps, drawings, pictures, tapes, and similar objects. That is true also in the other countries In Sweden there has been much discussion about the legal position of recordings for electronic data processing. The question was solved by legislation. Thus there is now a particular provision prescribing that what is said about documents shall apply also to any recording for electronic data processing or other recording which can be read or listened to only by means of technical aids. Any such recording shall be made available in readable form or in such form that it can be listened to, provided that it is not an official *"document"* which is to be kept secret.

The right to have access to official documents is in all the Scandinavian countries a real, enforceable right. Judicial review is open for control of the legality of an authority's denial to give access at request to an official document, in Denmark and Norway by the ordinary courts and in Finland and Sweden by the administrative courts. All the acts prescribe also that access shall be given immediately or at least as soon as possible and that it shall be given by permitting the applicant to read or copy the document at the place where it is kept or by providing, at a stipulated fee, a copy of the document. As has been mentioned before the right to have access to official documents in Sweden even has the rank of a civil right, guaranteed by the Constitution. It should be observed that the Acts only deal with the right to have access to documents. They do not impose upon the authorities a general obligation to inform a citizen at his request about a matter which is or has been under consideration either orally or in writing. The authorities are, however,

./.

expected to serve the citizens in this respect as much as possible. There are also administrative regulations ensuring such a service. The Swedish regulations in question prescribe for instance that an authority shall at request give information, orally or in writing, when the information asked for is contained in files, journals, registers and other documents accessible to the public at large and provided that it can be done with regard to the due course of work.

To those who are used to working within a system protected against insight from the public and who look upon such a system as the natural and self-evident one, the Scandinavian openness with its availability of official documents and service of information may seem rather shocking. Perhaps not because they are afraid that the openness will jeopardise legitimate interests of secrecy at the detriment of the State, the communes or individuals. They are of course aware of the fact that the openness must be limited in favour of such interests. But they will fear that the openness will unduly disturb the exercise of the public functions and harass the functionaries. It goes without saying that a system of document publicity entails extra work for the authorities. The personnel must be trained in applying the rules, guidelines must be issued, routines elaborated etc. And the particular service to the public that shall be provided of course also causes extra work. When the idea of introducing document publicity was considered in Denmark and Norway there was a great scepticism against the idea just because of such apprehensions. After the publicity had been introduced and practical experience had been gained the scepticism however disappeared and the apprehensions were put to shame. As the Swedes which had been living with the openness for more than 200 years the Danes and the Norwegians found that openness is not dangerous for the public administration and does not cause any undue amount of extra work. As a matter of fact most agencies practically never or at least very rarely receive requests of access to their documents from members of the public or the news media and consequently are not troubled at all. Some agencies and institutions on the other hand are frequently requested to present their documents. Such is the case as to the ministries, some central agencies that handle questions of particular interest to the public, for instance environmental questions, the ombudsman and the provincial governments. Those institutions of course are caused a lot of work by the system of openness and sometimes have to make special arrangements in order to facilitate the matter as has been described before. But no agency has been heard to complain about intrusions in their case-handling by public discussions during the handling. What sometimes happens, however, is unfortunately that steps are taken to avoid the disclosure of information as a matter of convenience. The human factor plays its game here as everywhere else. Thus telephone calls and other oral media are used instead of written communication. Semi-official or private letters to officials are also tried as a means to circumvent the publicity of official documents. It may also happen that agencies try to get rid of hot-potato documents by destroying them, returning them to the sender, or stowing them away. Such attempts occur, however, very rarely and are exceptions that prove the rule of general acceptance and approval of publicity. There is absolutely no reason to allege that the public administration is impeded by the publicity. On the contrary, the general opinion is that the publicity promotes the public administration on the whole.

./.

It happens, of course, that private persons use their right to study official documents. They then mostly do it for particular, private reasons or of sheer curiosity. In practice it is, however, predominantly representatives of the news media who profit professionally by the document publicity. Thus, by and large, the publicity is a news media publicity. But among the customers should also be mentioned freelance opinion makers and politicians and the secretariats of the political parties and interest organisations and pressure groups.

o o o

References

Herlitz, Nils, Publicity of official documents in Sweden, Public Law 1958, p. 5

Petrén, Gustaf, Die Aktenöffentlichkeit in Schweden, Verwaltungsarchiv, 1958, p. 323

Holmgren, Kurt, La publicité des actes officiels en droit suédois, Revue du droit public 1968, p. 1019

Stanley V. Anderson, Public access to Government Files in Sweden, American Journal of Comparative Law, 419 et seq. (1973)

Wennergren, Bertil, Civic Information - Administrative Publicity, International Review of Administrative Sciences, 243 et seq. (1970)

Eilschou Holm, Niels, The Danish System of Open Files in Public Administration, Scandinavian Studies in Law 1975.

Information document

EXTRACT OF THE SWEDISH LAW ON PUBLICITY
(Chapter II
Public character of official documents)

Article 1

To further free interchange of opinions and enlightenment of the public, every Swedish national shall have free access to official documents in the manner specified below. This right shall be subject only to such restrictions as are demanded either out of consideration for the security of the Realm and its relations with foreign powers, or with regard to the activities for inspection, control or other supervision carried out by public authorities, or for the prevention and prosecution of crime, or in order to protect the legitimate economic interests of the State, communities, and individuals, or out of consideration for the maintenance of privacy, security of the person, decency and morality.

Those cases in which official documents, in accordance with the aforementioned principles, are to be kept secret, shall be clearly defined in a specific act of law.

Article 2

The term "official document" shall refer to any document kept by a State or municipal authority, whether it has been received or drawn up by such authority.

The provisions of the present Chapter relating to documents shall likewise apply to maps, drawings, and pictures. Any such provision regarding a document shall apply also to any recording for electronic data processing or other recording which can be read or listened to only by means of technical aids.

Any recording such as is referred to in the second paragraph of this Article shall be considered to be kept by an authority even in cases where it has been submitted to or drawn up by a person other than an authority, provided that the recording is available to an authority.

Article 3

For the purposes of this Chapter "State authority" means the ministries of State, the Office of the Defense Command, the Riksdag, the General Church Assembly, and their divisions, committees, delegations, commissioners, deputies and auditors, the courts and the administrative authorities and all other authorities and institutions, councils, commissions, and committees which constitute integral parts of the State administration.

For the purposes of this Chapter "municipal authority" means all assemblies and representative bodies as well as authorities, boards, corporations, agencies, councils, commissions, auditors, committees and delegations and their subordinate departments and institutions which constitute integral parts of local self-government.

./.

Article 4

A memorandum or other note prepared or drawn up by an authority solely to present a case or matter or to prepare it for decision shall not be deemed to be an official document in the hands of such authority unless, after the case or matter has been finally settled by the authority, the note has been taken in charge for the purpose of being kept.

Where a recording such as is referred to in the second paragraph of Article 2 has been made solely to present a case or matter to an authority or to prepare it for decision by an authority, the recording shall not be deemed to be an official document in the hands of such authority unless, after the case or matter has been finally settled by the authority, the recording has been taken in charge for the purpose of being kept. Nor shall such recording, until the question of such taking in charge has been decided, be considered official within any other authority, if it is kept there merely for the purpose of being technically processed or being stored.

Article 5

A document shall be deemed to have been received by an authority when it has been handed over to the authority or the official who has the duty to receive the document or who is otherwise to deal with the case or matter to which the document is related.

Diaries, journals, registers, and other similar lists shall be deemed to be drawn up when they have been made ready for entry or posting. Minutes and other similar records shall be deemed to be drawn up when they have been revised and approved by the authority or when they have otherwise been made ready. Other documents relating to a particular case or matter shall be deemed to be prepared when they have been dispatched or, if they are not dispatched, when the case or matter has been finally settled by the authority.

Article 6

Competitive entries, tenders, or other similar documents which, according to an announcement, must be delivered in sealed envelopes shall not be deemed to have been received before the time fixed for their opening.

A judgment or other decision of an authority which according to the relevant legislation must be pronounced or dispatched, and minutes and other similar records relating to such decisions, shall not be deemed to be prepared until the decision has been pronounced or dispatched.

Minutes kept by committees of the Riksdag or of the General Church Assembly, by the Riksdag Auditors, or by Royal Commissions, or by a local authority on matters dealt with by the authority solely for purposes of consideration or preparation shall not be deemed to be drawn up until the matter to which the minutes refer has been finally settled by the authority and, in the case of minutes of the Riksdag Auditors, until a report on the matter has been published.

./.

Article 7

The provisions of the present Chapter relating to official documents shall not apply to copies of such printed matter as is referred to in Article 7 of Chapter 4, nor to private letters, writings or recordings delivered to public archives or libraries or otherwise to an authority for the exclusive purpose of custody and care or for research and study purposes. The making available of such documents shall be governed by such rules as are specially enacted.

Article 8

Any official document which is not to be kept secret shall upon request, and free of charge, be made available, immediately or as soon as possible, to any person who desires to have access to the document for the purpose of reading or copying it at the place where it is kept. Any such recording as is referred to in the second paragraph of Article 2 shall be made available in readable form or in such form that it can be listened to.

A document which is to be kept secret only in part shall, notwithstanding this fact, be made available at the place where it is kept if this can be done in such a manner that the matter contained in the secret part is not revealed. If this cannot be done the person who wishes to examine the document shall, free of charge, obtain a copy thereof or, insofar as such recording as is referred to in the second paragraph of Article 2 is concerned, a transcript of the recording, provided that the secret part shall then be excluded from the copy or transcript.

There shall arise no obligation to make available a document at the place where it is kept if that would meet with considerable difficulties. Nor shall such obligation arise in respect of any such recording as is referred to in the second paragraph of Articel 2, if the contents of the recording are kept in readable form, within another authority and can be made available there without the person wishing to examine the recording being caused any considerable inconvenience.

Any person who wishes to examine an official document which is not to be kept secret or is to be kept secret only in part shall furthermore be entitled, at a stipulated fee, to obtain a copy of the document subject to the exclusion of such part thereof as is to be kept secret. An authority shall be under no obligation to make a recording for electronic data processing available in any manner other than making a transcript of the recording available. Nor shall an authority be under any obligation to produce copies of maps, drawings or pictures for delivery if that would meet with difficulties and the document can be made available at the place where it is kept.

Article 9

Any request to obtain an official document shall be made with the authority where the document is kept. As regards a recording such as is referred to in the second paragraph of Article 2 the request shall be made with the authority which has the disposal of the recording. The request shall be examined and determined by the authority with which it has been made.

./.

Where in accordance with rules of procedure or a special commission the custody and care of the document has been entrusted to a particular official he shall himself decide whether the document shall be made available, provided, however, that in so doing he must comply with the instructions issued by the relevant authority and that in doubtful cases he shall submit the question to the authority for decision, if this can be done without undue inconvenience. If the official refuses to make the document available, the question shall, at the request of the applicant, be submitted to the authority.

Provisions concerning the competence of a particular authority to examine and determine, in the place of such authority as is referred to in the first paragraph of this Article, questions regarding the making available of official documents are laid down in the second paragraph of Article 14.

Article 10

If an authority has rejected a request that an official document be made available, and if the applicant considers the decision contrary to law, he shall have the right to lodge an appeal against the decision in the manner hereinafter described; however, there shall be no right of appeal against any decision of the head of a ministry.

Article 11

Any such appeal as is referred to in Article 10 shall be lodged with the authority competent to entertain appeals against decisions or actions in that case or matter to which the relevant document relates, or, if there is no right of appeal in such case or matter, or if the document does not relate to a case or matter within the competence of the relevant authority, with the authority which in general is competent to entertain appeals against decisions or actions of the first-mentioned authority. The foregoing provision shall likewise apply with respect to the manner in which an appeal shall be lodged. Appeals shall be lodged with the Supreme Administrative Court in place of the Government.

If no authority is competent under the foregoing provisions, an appeal shall be lodged, if it is against a decision of a local authority, with the county government, if it is against a decision of an authority subordinate to a county government, a diocese, an administrative board, or any other authority subordinate to the Government, with the superior authority, and in any other case with the Supreme Administrative Court. However, as regards decisions of an authority which is subordinate to the Riksdag or is under its supervision, the rules laid down by the Riksdag shall apply.

Article 12

With respect to appeals against such decisons of an authority by which an appeal has been rejected the provisions of Article 11 shall apply *mutatis mutandis;* there shall be no right of appeal against any decisions by which an appeal has been upheld.

./.

Article 13

If a person wishes to appeal against the decision of an authority, he shall have the right to be informed of the procedure to be followed.

A case or matter regarding the making available of official documents shall always be dealt with promptly. Transcripts of decisions shall be supplied to the appellant free of charge. The bringing or hearing of an appeal action shall not be subject to any special conditions, such as payment of an appeal fee or official authorisation.

Article 14

If an authority is in possession of an official document that is to be kept secret, and if the authority considers special measures necessary to prevent the document from being unduly made available, it may place a note on such document to the effect that it is secret. The said note shall refer to the provision of law on the basis of which the document is to be kept secret and shall show the date on which the note was made and the authority which caused it to be made.

With respect to special kinds of documents the secrecy of which is of eminent importance for the security of the Realm, the Government may order that a particular authority shall consider and decide questions of making such documents available. If such order has been issued, any document which is the subject thereof shall, in addition to the particulars specified in the preceding paragraph, carry an indication of the authority which is thus competent to consider and decide questions of making the document available. Any request made with another authority obtain a document carrying such indication shall, at the applicant's request, forthwith be referred to the competent authority.

Except as provided in the present Article no document shall bear a note to the effect that it is secret.

R E P O R T

presented by

Ludwig ADAMOVICH
Professor at the Law Faculty of the University of Graz
(Austria)

THE OBLIGATION OF AUSTRIAN GOVERNMENT DEPARTMENTS TO PROVIDE INFORMATION IN RESPONSE TO ENQUIRIES BY CITIZENS AS A MEANS TOWARDS PROMOTING FREEDOM OF INFORMATION

I am particularly pleased and honoured to be permitted as a representative of the host country to address you on the topic of the Colloquium. In fact, if I may say so in all modesty, Austria is in a position to present a new development in this field. Although it may not be all that new in the international perspective it is certainly a novelty in the context of Austrian law.

Austria is justified, I think, in claiming that by creating new statutory institutions and enacting new legal rules she has more than once exerted a seminal influence on developments in other countries. Let me only mention in this context the institution of the Constitutional Court with its powers to make pronouncements effective beyond the purview of the individual case on the legality of laws and ordinances (1) and also the enactment in 1925 of the Administrative Procedure Acts (2).

But, on the other hand, Austria is always prepared to learn from the experiences of other countries. The signing of the European Convention on Human Rights by itself necessitated many readjustments in legal thinking. But as I shall show presently, Austria has gone much further by introducing a statutory provision which, while not expressly demanded by the European Convention on Human Rights, is indispensable for the meaningful application of one of the major principles underlying the Convention. For the first time in Austrian legal history, the Federal Ministries Act 1973 (3) provides that Federal Ministries have a general obligation to answer enquiries from citizens. The Act moreover charges the various Federal Ministers with taking appropriate steps to ensure that the subordinate services working each Ministry also furnish information on demand. The essential novelty is that it is not only the parties to the matter under consideration that have to be given relevant information: this has long been established practice. Rather, the obligation is a general one, and the provision of information is not conditional on proof of a subjective legal interest in the matter.

./.

(1) *Articles 139 and 140 of the Federal Constitution.*

(2) *Introductory Law to the Administrative Procedure Acts, General Administrative Procedures Act, Administrative Penalties Act, Administrative Execution Act. All four statutes were repromulgated in 1950.*

(3) *Federal Act of 11 June 1973, BGBl. No. 389, concerning the Number, Responsibilities and Organisation of the Federal Ministries (Federal Ministries Act 1973).*

As an account of the motivations underlying this new provision, the following passage cannot be bettered. It is from the Federal Chancellor's reply, dated 23 July 1975, to a question raised in Parliament:

> *"By introducing the obligation for the Federal authorities to provide information, Austria has joined the very small group of liberal-democratic countries which give everyone the possibility, in principle, to obtain information on all activities going on in the sphere of administration. The reasoning behind the new provision was that it not only represents a very effective check on any administrative abuse, but that it also permits the citizen to make full use of the freedom of information safeguarded by the Constitution, a freedom which includes the freedom to actively seek information. Obviously, this freedom of information can only be translated into reality if it is complemented by a corresponding obligation incumbent on governmental authorities actually to provide such information. In a democratic political system, freedom of information is of eminent importance because only an informed citizen is able to exercise his democratic rights in a responsible and meaningful way".*

In order to realise the almost revolutionary effect of the new provision, we must recall to what a high degree Austrian administration is rooted in ancient traditions (not all of which, to be sure, are bad). On the other hand, the manner in which the new rule came into existence is not devoid of typical, characteristic features. The provision was not contained in the Government Bill(4). It was only inserted in the course of the committee deliberations. Yet the report of the competent committee to the plenum of the National Assembly (5) has not a word to say on this not entirely unimportant insertion; nor did the clause receive the attention it would have merited in the parliamentary debate proper. One almost gets the impression that not even Parliament had the courage to state openly how unaccustomed a burden was being imposed on public administration.

This is not the place for a sociological analysis of characteristic behaviour patterns of bureaucracies. What is certain is that even today the civil service bureacracy still shows traces of its historical origins as the support and vanguard of absolutism. Reason of state, the keeping of state secrets, and discretion towards outsiders form a closely interrelated set of behaviour patterns. No doubt, a certain measure of secrecy will continue to be indispensable in the future to those responsible for implementing government policy. But the crucial point is where the limit is to be drawn. In a liberal democracy, secrecy should always be the exception, whereas it was the rule in the age of absolutism (and probably also in the age of constitutional monarchy). Besides new laws, however, this reorientation demands a new consciousness not only on the part of the civil service but also in the population at large, and one may well think that much remains yet to be done in both respects. The principle of publicity is inseparable from the principle of democracy. But for all too long the practical implementation of this principle has been left to a small group of individuals - the politicians and the people directing the various mass media. Now the individual citizen will have to remember his rights. This is a point to which I shall return later.

./.

---

(4) *No. 483 of Supplements to the Shorthand Record of the National Assembly, XIIIth Legislative Period.*

(5) *No. 863 of the Supplements to the Shorthand Record of the National Assembly, XIIIth Legislative Period.*

After these introductory remarks, it is time to discuss some of the details of the new situation and the problems it poses.

As I said before, the new provision is incorporated in the Federal Ministries Act of 1973. This Act has a long and thorny history which does not concern us here. Difficulties arose not so much at the parliamentary level as within the framework of government administration itself. But although a number of controversial points were brought up in the parliamentary discussions, the new provision on government's obligation to give information to citizens was not one of them. That it found its way into the Act was not due to a political initiative but to the initiative of an expert, not entirely unknown to those present, who has the necessary international experience.

Among other things, the Federal Ministries Act enumerates those general tasks which each Ministry has to fulfil within its particular sphere of activity. In this context, section 3, paragraph 5, of the Act enjoins each Ministry to provide information on request, except where this is precluded by an obligation to observe official secrecy.

Section 4 sums up the responsibilities of each Ministry with regard to the Federal administrative authorities, offices and other institutions under its jurisdiction. Its paragraph 3 calls upon each Federal Minister to take appropriate steps to ensure that these subordinate services provide information to the public on matters falling within their territorial and substantial competence, except where this is precluded by an obligation to observe official secrecy.

Even a superficial reading of these two clauses reveals a number of important problems.

In the first place, one is struck by the fact that the law stipulates an obligation to divulge information only to the extent that there is no obligation for official secrecy to be observed. This raises the question as to the scope and limits of official secrecy.

We further find that while the Ministries themselves are under a direct obligation to respond to inquiries, the subordinate services are only included in asmuch as the responsible Ministers are charged with ensuring that these services also provide information if so requested.

Finally, there is another very essential point. The Republic of Austria is a federal state. Hence there are agencies and officials of the Federal Government on the one hand and of the *Länder* on the other, and the Constitution contains an explicit division of responsibilities between the Federation and the Provinces. One important component of the federal principle is what we call *"indirect Federal administration"*. This means that normally - apart from the exceptions laid down by constitutional law - the Federation's administrative responsibilities at the *Land* level are exercised by the Landeshauptmann and the *Land* authorities under his jurisdiction. Now the Landeshauptmann heads the Provincial Government, the *Land's* highest executive power, which is elected by the Provincial Diet, i.e. the parliament of the *Land* concerned.

./.

Hence the Landeshauptmann is at the same time the head of the *Land*'s supreme executive and - functionally speaking - an agent of the Federal Government. In this latter capacity he is subordinate to the Federal Government and the various Federal Ministers. Yet, in structural terms, he remains a servant of the *Land*, having been elected by the Diet. Therefore he is not one of the *"subordinate Federal administrative authorities, offices and institutions"* referred to in section 4, paragraph 3, of the Federal Ministries Act, and neither are the provincial authorities under his jurisdiction, i.e. the Office of the Provincial Government and the District Administrations. Hence the whole area of indirect Federal administration does not come within the purview of section 4, paragraph 3, of the Act, nor does, of course, provincial administration as such. Lastly, the Act does not cover the local authorities which are also charged with certain devolved responsibilities under both Federal and Provincial administration.

We see, then, that the rule which contains the obligation to answer enquiries embraces only a comparatively narrow area of public administration. From the citizen's point of view, this is not a very happy state of affairs, since the impression is bound to arise that there is a certain amount of inequality built into the system, or even that an arbitrary boundary has been drawn. The latter, of course is not the case, since the restriction of the purview of the rule was dictated by the constitutional division of responsibilities which forbids the Federation to interfere with the organisation of *Land* and local authorities. Of course, there is nothing to prevent a Provincial legislature from passing a corresponding law governing the disclosure of information at the *Land* and local level, but it is entirely up to each legislative body whether it does or does not. In everyday life, it is precisely the *"indirect"* Federal and the local authorities with which the citizen has to transact most of his affairs. He will find it difficult to understand why he is entitled to information in one case while being turned back in another, depending on the type of authority approached.

This criticism may be countered, firstly, by arguing that the situation outlined is an inevitable consequence of the federal system, and secondly by reminding the critic that a goal often has to be approached step by step. Moreover, there are relatively many cases where authorities belonging to the *"direct"* Federal administrative system take the place of *"indirect"* Federal authorities by way of exception.

Nevertheless, a certain uneasiness remains, especially since there definitely is a way to overcome these difficulties. This could be done by placing the information rule on a constitutional footing, a solution which would be all the more logical since the principle of official secrecy as well as the principle of mutual assistance between Federal, Provincial and local authorities are also part and parcel of the Federal Constitution. A constitutional statute could be passed requiring both the Federation and the *Länder* to adopt legislation to provide for an obligation of their authorities to answer enquiries from the public - a solution which would certainly not violate the federal principle.

./.

However, Parliament has not espoused this solution, natural though it seems. Yet usually the Austrian Legislature is far from reluctant to modify constitutional law. Why, then, has it not seized this opportunity? Political motives have undoubtedly played an important part - more explicitly, the touchy antagonism prevailing between the majority party and the opposition. But as far as I can see, no one has even tried to create a constitutional basis of the kind just outlined, and this I feel is rather sad. However, this possibility has not been barred for the future. Perhaps the necessary consensus will be forthcoming at some future time. This would be very desirable, in order to ensure the uniformity of legal obligations not safeguarded by the present legal position.

Earlier, I referred to other problems encumbering the present legal regulation of the authorities' obligation to provide information. One of these obstacles is the constraint under which the obligation is placed by official secrecy. In fact, where there is official secrecy, there can be no obligation to disclose officially held information. In itself this is quite reasonable, since no government in the world can afford to forego official secrecy altogether. The difficulty lies in the need to draw an acceptable boundary between publicity and official secrecy. It is of course the country's legal order that must provide the demarcation line.

Under Article 20, paragraph 2, of the Austrian Federal Constitution, all functionaries entrusted with Federal, Provincial or local administrative duties are, save as otherwise provided by law, pledged to secrecy about all facts of which they have obtained knowledge exclusively from their official activity and whose concealment is enjoined by the interests of a territorial authority or those of any of the parties concerned (official secrecy). Official secrecy does not exist for functionaries appointed by a popular representative body if the latter expressly asks for such information.

Thus the existence of an obligation to observe official secrecy is contingent on certain prerequisites. Firstly, it concerns only facts about which a public servant has only learned in the course of his official work. Further, it must be imperative in the interests of a territorial authority or the parties to the matter to keep these facts secret. Finally, notwithstanding these prerequisites, the scope of official secrecy could be further restricted (though not widened) by Act of Parliament. No use was made of this latter power when the Federal Ministries Act was drafted even though official secrecy might have been narrowed in quite a number of respects precisely in connection with the obligation to respond to enquiries.

The real difficulty lies in the lack of precision of the concepts *"interest of a territorial authority"* and *"interest of the parties"*. I am almost tempted to say that there is no fact whatsoever which could not give rise to a claim that for some reason or other it must be kept secret in the interests of a territorial authority or a party to the matter. Of course such an interpretation would not be germane to the spirit of the Constitution. This brings us back to a point briefly alluded to earlier. If we want to interpret constitutional provisions in a meaningful way, we must always keep the overall context in mind. In a liberal democracy, a pledge to official secrecy *"in the interests of a territorial authority"* must be understood more restrictively than in a totalitarian or absolutist system. Things are

./.

somewhat different with regard to secrecy in the interests of a party to a matter (where the opposite of what I just said may be true).

The overall context of constitutional law to which I referred a moment ago also requires us to pay attention to Article 10 of the European Convention on Human Rights, which in Austria enjoys the status of a constitutional instrument. Its first paragraph makes it clear that the right to freedom of expression includes the freedom to receive and impart information or ideas without interference by public authorities and regardless of frontiers; this is what is called *"freedom of information"*. Of course, the second paragraph of the article provides for the possibility to restrict this freedom under the conditions expressly enumerated in it. But clearly these restrictions are intended to be exceptions. Now surely, the citizen's freedom to receive and impart information is very substantially reduced if it is impossible to even start looking for a certain category of information because governmental authorities will invoke their pledge to official secrecy. As I said before, not the least reason why an obligation to give information was written into the Federal Ministries Act was the intention to complement the *freedom* to seek information by an *obligation* incumbent on government bodies to impart information. It would be contrary to the spirit of this provision if we did not at the same time interpret *"official secrecy in the interests of a territorial authority"* extensively enough to leave as much scope as possible to the obligation to give information.

Things are less simple where secrecy in the interests of private parties is concerned. What is at stake here is not the reason of state but the protection of the legitimate interests of human beings. The European Convention itself, in its Article 8, declares that private and family life must be protected. It is an acknowledged maxim of interpretation in the sphere of fundamental rights that no fundamental right may be interpreted to the detriment of some other fundamental right. No doubt, conflicts which are difficult to resolve may arise here; we hear about systematic barriers or the interdependence of fundamental rights. What is certain in any case is that official secrecy observed to safeguard the interests of the parties must be conceived differently than official secrecy invoked in the interests of a territorial authority.

Such fundamental insights are relatively easy to gain; what is much more difficult is their application to the concrete individual case. Besides, demarcation with respect to official secrecy is not the only problem raised by the clause in the Ministries Act that introduces the obligation to provide information in response to enquiries.

Hence the Federal Government has had to give thought to the problem how to ensure, to the largest possible extent, the uniform application of this provision. The Commission appointed to see to the uniform implementation of the Federal Ministries Act has set up a special working party to clarify the questions arising in connection with the fulfilment of the obligation to impart information to the public. The working party has drawn up guidelines which have been approved by the Federal Government and recommended to the Federal Ministers for application in their departments. Among other things, these guidelines contain a list of matters excluded from the obligation for reasons of official secrecy. But they also deal with many other issues.

./.

Thus, for example, the working party had to clarify with respect to what matters the obligation to give information can be invoked. Further, the legal nature of the information itself had to be examined. What happens if the enquirer believes the information to be false or incomplete? Finally, in what form can a department refuse to provide the requested information?

We have to bear in mind that Austria has highly formalised rules on administrative procedure, including a very highly developed appeals system. Within administrative procedure, the concept of *Bescheid* (administrative decision) plays a key role. A *Bescheid* is a formal, individual administrative act which contains a normative ruling on some issue of administrative law - a ruling that is *"capable of becoming absolute"*. A *Bescheid* can be appealed through the hierarchy of administrative authorities, where such a hierarchy exists, and after this chain of appeals is exhausted, the *Bescheid* can be submitted to the Administrative Court, and where appropriate the Constitutional Court, for scrutiny. Where a *Bescheid* is issued by a Federal Ministry or a Provincial Government, there is logically no superordinate hierarchy, hence such decisions can be challenged directly before the two courts just mentioned. Hence it is obvious that it is of considerable importance to the enquirer whether or not his enquiry is answered in *Bescheid* form. I shall return to this question presently.

The primary question is what kind of information falls within the purview of a Department's obligation to answer enquiries. Given the many different activities going on in a Federal Ministry, this question is very much to the point. The guidelines mentioned earlier say that all matters with which a Federal Ministry is charged are subject to the obligation to provide information but only where the competent agency's decision-making process is terminated and has led to a tangible result. With respect to possible intentions of a Federal Ministry the obligation can only be invoked if such intentions exist in a form that clearly documents the completion of the decision-making process. In any case, *"information"* is understood to mean only the communication of the contents of the files in question, not an obligation to permit the enquirer to inspect the files himself.

The guidelines take the - no doubt correct - view that where the prerequisites are fulfilled, the enquirer has a *legal right* to obtain the requested information from a Federal Ministry. The situation is different with regard to enquiries addressed to subordinate Federal services operating under the jurisdiction of Federal Ministries. Although this is a logical consequence of the different wording of the relevant passages in the Act, the result is a highly unsatisfactory state of affairs. Nevertheless, there can be no doubt that the enquirer has a legal right with regard to a *Federal Ministry*. The inevitable consequence is that the rejection of a request for information can only take the form of a *Bescheid*. The information itself, on the other hand, should not be communicated as a *Bescheid* since it has no normative effect. By contrast, the refusal of information does have a normative character, since it amounts to an explicit statement that the legal prerequisites for giving the requested information are not fulfilled. Any such *Bescheid* issued by a Federal Ministry can be challenged within six weeks on the grounds of illegality by direct appeal to the Administrative Court.

./.

One such case is now pending before the Administrative Court. The applicant asked a Ministry to inform her about the substance of a legal opinion obtained by the Ministry, and about whose existence the applicant had learned from a mention in a decision of the Constitutional Court. The Ministry told the applicant informally (i.e. without issuing a *Bescheid*) that such legal opinions did not come under the Ministry's obligation to furnish information. The applicant challenged this communication before the Administrative Court. The latter now faces two legal questions which are by no means easy to solve. First, the Court has to determine whether the communication, although not issued in *Bescheid* form, should not be deemed a *Bescheid* on account of its substance. (Such cases frequently occur in the jurisprudence of the Administrative Court.) If the answer is in the negative, the application must be rejected, since appeals to the Administrative Court are admissible only with respect to a *Bescheid* (or, according to recent practice, with respect to cases where direct use has been made against a specific person of official powers to issue instructions and use force). On the other hand, if the answer is yes, the Administrative Court will have to examine the problem whether it is true that legal opinions obtained by a Ministry do not fall within the purview of the obligation to provide information, as the Ministry told the applicant.

Another interesting aspect may be noted in this context. The Austrian General Administrative Procedures Act (section 73) imposes what Austrian nomenclature calls an *"obligation to decide"* on administrative authorities. Under this clause, any administrative authority coming under the Act must issue its *Bescheid* decisions without unnecessary delay, and more specifically not later than six months after receiving the application or appeal. If the authority fails to do so, competence to decide in the matter, upon motion in writing by the party concerned, passes to the appropriate superior authority, provided the delay was exclusively the fault of the first-mentioned authority. Where a delay is caused by the highest administrative authority competent in the matter, the complaint may be lodged with the Administrative Court, and it is then called *"complaint on grounds of delay"*. To a complaint on grounds the proviso that the delay must have been entirely due to the authority's fault no longer applies, although the six-month time-limit remains valid.

Now, a complaint on grounds of delay can only be brought if the applicant has a legal right to receiving a *substantive decision* on the administrative matter in question. When the Administrative Court receives a complaint on grounds of delay, it must issue a substantive decision in place of the tardy authority.

But the furnishing of information under the terms of the Federal Ministries Act is not in itself a substantive decision in an administrative matter, although the refusal of information is. Hence, if a Federal Ministry neither gives nor refuses the requested information, but wraps itself in silence, a complaint on grounds of delay cannot be lodged. It is easy to see why - obviously the Administrative Court cannot be expected to supply the applicant with information held by a Federal Ministry.

The guidelines for their part take the stand that an *"obligation to decide"* within the meaning of section 73 of the General Administrative Procedures Act does exist with respect to a request for information. Since the *negative* decision on the enquiry is an administrative act (requiring a *Bescheid*) governed by the General Administrative Procedures Act, the guidelines argue, the authority must either provide the information or - within six months - issue a *Bescheid* to the effect that the information is being withheld for reasons of official secrecy. In terms of what it sets out to achieve, this interpretation is undoubtedly sound, but it does not solve the difficulty pointed out earlier: that the

./.

Administrative Court, if it has received a complaint on grounds of delay, is required by law to issue itself the *substantive decision* normally incumbent on the administrative authority concerned. But again, the provision of information is not a substantive decision. The only way out seems to be for the enquirer to demand from the Ministry concerned a declaratory *Bescheid* to the effect that the information he or she is requesting falls within the scope of the provisions of the Federal Ministries Act regarding the obligation to furnish information.

If this application is not granted within six months, the way is open for a complaint on grounds of delay. Of course, this is no substitute for the requested information itself; it is only a method of obtaining a legally binding declaration that the matter does fall within the purview of the information rule. Should a Federal Minister ignore such a declaration, he would undoubtedly be acting againt the law. He could be prosecuted both under the provisions concerning the *"liability of officials"* and, before the Constitutional Court, for breach of his constitutional responsibility as a member of the Federal Government (6).

This brings us to the question how a citizen can protect himself against false information given to him under the information rule. Here the guidelines say that this is a matter of *"official liability"* (or more precisely the liability of officials). By virtue of Article 32, paragraph 1, of the Federal Constitution, and as specified in detail in the Official Liability Act, the Federation and the *Länder "are liable for the injury which persons acting on their behalf in execution of the laws have by illegal behaviour inflicted wrongly onwhomsoever"*. As the Supreme Court has consistently held in its jurisprudence, the term *"in execution of the laws"* denotes only the law courts and what is referred to as *"sovereign administration" (Hoheitsverwaltung)* in Austrian legal terminology, i.e. those parts of administration where the powers of the State to command obedience and use force *("imperium")* are brought to bear. This does not mean, however, that these powers need actually have been used in a specific case; it is enough if *imperium*, so to speak, has formed the background of the situation. With respect to earlier provisions concerning an official's obligation to disclose information, past case law has confirmed that an official acting under these provisions will be subject to the Official Liability Act. It is safe to say that the same will hold for responses to enquiries under the terms of the Federal Ministries Act.

I have repeatedly mentioned the guidelines issued to help the Federal Ministries in handling the information rule. They were later complemented by a circular from the Federal Chancellery (7) which discussed a number of additional questions relevant to this issue.

The circular contains some additional clarifications on the extent to which authorities can be expected to provide information. Enquiries which would make it necessary to evaluate voluminous materials or prepare detailed papers should be treated as an abuse of the right to information, the circular says. The purpose of the information rule, the circular goes on to say, is to help the enquirer in a specific matter by placing the Ministry's knowledge at his disposal. But it is not the intention to save the enquirer the trouble of enforcing his rights or meeting his responsibilities.

./.

---

(6) *Article 142, paragraph 2, letter b, of the Federal Constitution.*

(7) *Circular of 9 October, 1975, No. 600.454/4-VI/2/75.*

Information on current laws and regulations relevant to the enquirer's problem is regarded as coming within the purview of the Federal Ministries Act, and so is a reference to where these laws and regulations may be found. On the other hand, the enquirer cannot expect to be sent *"publications"*, although the circular does not say explicitly what is to be understood by *"publications"*.

The interpretation of the information rule just outlined is not entirely free of inconsistencies.

A public servant's duty to respond to requests for information the circular goes on to say, has its limit where it is being abused. Where exactly this limit lies in the individual case, the circular says, has to be determined by each Ministry itself. The guideline for such decisions should be that an answer to an enquiry can only be expected where the work required to compile the information keeps within reasonable limits.

In the abstract, it is understandable that there may be some concern that the Federal Ministries could be over-burdened with an excessive amount of enquiries forcing them to neglect their principal duties. However, there has been no evidence so far that this danger exists in practice. On the contrary, it very rarely happens that information is requested with explicit reference to the Federal Ministries Act. Although the apprehensions just mentioned are certainly justified in a purely theoretical sense, it must nevertheless be pointed out that the circular from which I have been quoting contains certain misconceptions.

The Act itself does not permit the conclusion that the only purpose of the obligation to give information is to extend practical help to the enquirer in a *specific matter*. This would mean that a request for information may only be a means towards a specific purpose, and cannot be filed simply because the applicant is interested in the information concerned. This is an interpretation which is not supported by the wording of the Act.

The circular says that information on laws and regulations in force at a given moment is definitely a service covered by the information rule. But again this raises problems. The rule of law is based on the principle of publicity. The converse of this principle is that no one can plead ignorance of promulgated law. If the existence and bibliographical location of promulgated legal rules is said to be included in the administration's obligation to provide information, then this is an indirect admission that the principle of publicity is fictitious in character. Otherwise the authorities would have to insist that it is up to every citizen himself to get information on the existence of promulgated laws and regulations.

No doubt, principle and reality diverge in this respect, and the standpoint of the circular is likely to meet practical needs. But we must bear in mind that it is not enough, usually, to know that a legal rule exists. It is in applying it to a concrete case that the difficulties arise. But according to the philosophy underlying the circular, it would probably be regarded as an abuse of the right to information if someone asked for advice on the correct assessment of subtle legal questions. Yet this is precisely what the individual citizen is interested in. If legal rules are at all included in a government department's obligation to provide information, then it will certainly not be easy to exclude advice on legal *issues*.

./.

As a matter of fact, the whole concept of *"abuse of the obligation to give information"* used in the circular presupposes that the aims and limits of the obligation clearly emerge from the wording of the Act. As I have stressed repeatedly, this is not the case. The only limitation mentioned in the Act is official secrecy. Neither do the notes and other materials on the Act tell us more. This does not, of course, rule out the possibility of discovering such additional limits by way of objective teleological interpretation. But in this case it may well happen that the Administrative Court arrives at a different finding than the Federal Ministry concerned. Particularly contestable, to my mind, is the view that an applicant can only expect to get the information he wants if the workload required to answer his query remains within *"reasonable limits"*. A very pragmatic view, no doubt. But can it really be deduced from the Act?

We have discussed some of the difficulties with which Austria's new legal institution, *Auskunftspflicht*, the obligation to give information, is fraught. This is the right, nay the duty of any critical jurist. But this critical appraisal should not lead us to underestimate the value of the new proviso. To be sure, it represents only a first step, and further improvements are needed in quite a number of respect. But for all that, the information rule is a highly significant contribution towards a changed conception of the State and - in a sense - a new understanding of fundamental rights.

The citizen's fundamental rights and freedoms as understood by the classical liberal tradition are essentially defences erected against the State, and this they are likely to remain. But this role does not rule out additional aspects. We shall have to get used to a new reading of the fundamental rights and freedoms which interprets them as a charge laid upon Parliament to pass appropriate specific legislation.

Thus, in the international debate on whether abortion should be permitted up to a certain time limit, an issue that has played an important part has been the legal question to what extent the individual's fundamental right to life places an obligation on the legislature to forbid interference with human life by third parties. The constitutional courts of several member countries of the Council of Europe were seized with this question, and expressed sharply differing views on it.

A similar (though by no means identical) problem is posed in connection with the citizen's freedom of information as safeguarded by Article 10, paragraph 1 of the European Convention on Human Rights. The manner in which the Austrian Federal Ministries Act regulates the government's obligation to answer enquiries from the public represents a new style in the process of interaction between fundamental rights legislation and ordinary legislation. It is to be hoped that this new style will also be adopted in the sphere of other fundamental rights.

Moreover, it is to be hoped that the people of Austria will make still more use of their right of enquiry than they have done hitherto, since an institution of law can only render its full service to the community when it has taken firm roots in the legal consciousness of each individual.

R E P O R T

presented by

Mr Louis FOUGERE
Conseiller d'Etat (France)

FREEDOM OF INFORMATION AND COMMUNICATION TO PERSONS OF PUBLIC DOCUMENTS IN FRENCH THEORY AND PRACTICE - PRESENT SITUATION AND PLAN FOR REFORM

Foreword

a) This report deals solely with "de jure" and "de facto" possibilities of access by the public to information of any kind held by the executive (i.e. mainly the Administration). It does not deal either with the question of the dissemination to the public of information already released by the government or with communications of a general political nature (speeches, televised interviews, press conferences, etc.. by the Head of State or Government or Ministers).

b) Access to information mainly means access to "documents" (decisions, reports, correspondence, plans, statistics, tape-recordings, medical papers, films, etc..), but it will also be taken to mean access to information not necessarily incorporated in a document (e.g. reasons for a decision, proceedings not recorded or set down in writing).

o

o o

./.

I.

THE "DE JURE" SITUATION

A - PRINCIPLE OF SECRECY, CIVIL SERVANTS OBLIGATION OF DISCRETION AND ABSENCE OF A RIGHT TO INFORMATION

The wide range of information that the executive may possess by virtue of its functions and prerogatives can be divided into two classes according to the legal system applicable:

1) *Secret information*, which is unavailable to private individuals and may not be made public by the authorities;

2) *Other information*, which is generally unavailable to private individuals but may be made public by the authorities on certain conditions if they see fit.

1) Secret information concerns both private individuals and the State.

The Administration is aware of private individuals' family situations through records of births, marriages and deaths, and their economic situations through tax registers; it is also conversant with their police records (if any) and sometimes their state of health (in the case of schoolchildren, civil servants, prisoners, persons covered by social insurance, etc..). All such information is secret to anyone other than those to which it applies. Civil servants in possession of it and members of the Government themselves may not divulge it without incurring the penalties prescribed in Article 378 of the Criminal Code, relating to professional secrecy.

State secrets are also protected by criminal texts, particularly national defence secrets (Articles 70 et seq. of the Criminal Code). Ministers fairly frequently invoke these texts to justify their refusal to answer questions by parliamentary committees or authorise civil servants in their departments to appear before such committees. For instance, when the Senate set up a committee in 1973 to monitor administrative departments carrying out telephone tapping, most of the ministers declined to appear before it in more or less the following terms, which were those used by one of them: "The areas of enquiry of the committee set up to monitor administrative departments carrying out telephone tapping are covered by national defence secrecy from which no-one may release me ... owing to the mandatory nature of these provisions, I am unable to comply with the committee's request to appear before it" (1).

./.

(1) Documents parlementaires - Sénat - Première session ordinaire de 1973-1974 - Rapport N° 30, p. 85.

2) Matters covered by secrecy form only a part of the State's activities and occupy only a small proportion of its officials. The majority of public matters do not usually raise any secrecy problems. The public could therefore, barring exceptions, be given access to the Administration's documents, be provided with an account of administrative boards' discussions or be informed of the reasons for decisions affecting them.

However, they have no such rights. There is no general obligation for the Administration to inform the public, nor any general right for the public to be informed. It is a clear principle, even though its expediency is increasingly challenged nowadays, that the Administration is not required to communicate or divulge its documents, reasons, comments or intentions. Members of the public who contest at law - as they sometimes do - the Administration's refusal to communicate a document or supply some information are told by the court, as it dismissed their cases, that they have no right to obtain such things in the absence of a text expressly providing for the communication thereof. Here is an example: some members of the public asked the "Conseil d'Etat" to annul a compulsory purchase on the ground that during the enquiry they had been denied access to the report of the investigative commissioner. "The communication of such a report, which is obligatory in other countries such as Great Britain, would no doubt be desirable - said Mr Braibant, the government's commissioner - but it is contrary to our Administration's traditions of secrecy and is not provided for in any text in France." In its ruling, the "Conseil d'Etat" rejected the application on the ground that "no statutory or administrative provision stipulates that the report of the investigating commissioner, which is transmitted to the prefect or the sub-prefect, must be communicated to the persons affected by the compulsory purchase procedure".

This principle is applied countless times every day: someone who has not been allowed to sit an administrative competitive examination, a foreigner whose application for naturalisation has been rejected, an association whose request for a grant has been turned down are not entitled to see the documents in their files or to be informed of the reasons for the unfavourable decision.

While the executive may, if it wishes, remain silent, civil servants, for their part, are obliged to do so. Any information or documents covered by professional or state secrecy may be issued or communicated by ministers, but civil servants, the executive's agents, do not have the same latitude and are bound by the rule of silence unless a minister frees them therefrom.

This rule is laid down in Article 10 of the general regulations governing civil servants (Ordinance of 4 February 1959):

> "... every civil servant is under an obligation of professional discretion in respect of anything concerning facts and information which come to his knowledge in the exercise or in connection with the exercise of his functions. Any diversion or communication of internal papers or documents to third parties, that is contrary to the regulations, is strictly forbidden. Apart from cases expressly provided for in the current regulations, a civil servant may not be freed from this obligation of discretion or exempted from the prohibition laid down in the preceding paragraph except with the authorisation of the minister to whom he is responsible."

./.

An identical provision appears in Article 487 of the Code of Municipal Administration:

> "... every official is under an obligation of professional discretion in respect of anything concerning facts and information which come to his knowledge in the exercise or in connection with the exercise of his functions. Any diversion or communication of internal papers or documents to third parties, that is contrary to the regulations, is strictly forbidden. Apart from cases expressly provided for in the current regulations an official may not be freed from this obligation of discretion or exempted from the prohibition laid down in the preceding paragraph except with the authorisation of the mayor."

These provisions merely express, in fact, a general principle that is applicable even in the absence of a text, for public servants not covered by them ("département" official for whom there are no general regulations, non-established or auxiliary state and municipal officials) are bound, in the same way as established state and municipal officials, by an obligation of professional discretion.

It is a very extensive obligation, for it may be invoked not only against the public but against members of political assemblies, whose position is not in theory any different from that of the public. While various texts, which will be referred to later, require the executive to communicate to parliament and its members numerous items of information which it does not have to communicate to private individuals, such an obligation exists only when a text provides accordingly; in the absence of such a text, the executive may reject any parliamentary requests, be they requests for the communication of documents or requests to have civil servants heard by parliamentary committees. For instance, a committee of enquiry set up by the Senate in 1964 to examine the organisation and functioning of the Public Office of Radio and Television Broadcasting expressed the wish to interview various civil servants, but several ministers responsible for the latter refused to allow them to appear before the committee (1).

It should be added that secrets of the "Administration" are to a large extent secrets of the "administrations" in the sense that officials may not communicate information in their possession to civil servants in other departments unless a text or the exigencies of the service so require.

In conclusion, it should be observed that the principle of secrecy is fundamental, rigorous and far-reaching.

./.

---

(1) In this case, unlike the telephone tapping case mentioned earlier, the ministers could not invoke national defence secrecy. Their refusal was based on the principle that in the absence of a text requiring information to be communicated to parliament, the latter has no right to receive such information, though it can, of course, withdraw its confidence from the governement on the ground of such a refusal.

B - EXCEPTIONS TO THE PRINCIPLE OF SECRECY; RIGHTS OF THE PUBLIC TO INFORMATION

There are many such exceptions. Most derive from written provisions; some have been deduced by the courts from general principles of the law concerning the fundamental rights of individuals. They are diverse in nature and are based on a wide variety of considerations. The main ones are analysed below.

1) First of all, needless to say, the Administration is required to inform members of the public of legal, administrative or individual decisions which create obligations for them or confer rights on them. Unless made public, such obligations could not be enforceable; as for such rights, their beneficiaries would be entitled to go to law to secure the application thereof or, failing that, obtain compensation.

2) Various texts make it incumbent on the Administration to specify the reasons for certain decisions.

As a rule, unless stipulated otherwise, the Administration is not required to include any reasons in its decisions or announce the reasons at the request of those concerned. There are however many statutory or administrative provisions which do oblige it to give reasons for its decisions: this is the case, for example, with decisions imposing a disciplinary sanction or those withdrawing an advantage or licence.

In recent years there have been various demands, notably from academic specialists in public law, that the obligation to give reasons be extended to include all administrative decisions. So far, however, these demands have had no effect, and there is unlikely to be any reform along these lines in the near future.

3) Informing of the public at regional, departmental and municipal level -

Administrative decentralisation implies that the public should be kept well informed of administrative developments. Meetings held by regional, departmental and municipal councils are open to the public. Any decisions taken at such meetings must also be made public by being either displayed on notice-boards or announced in official bulletins. Suffice it here to quote the texts concerning municipalities and a provision specific to departmental councils.

Articles 30, 32, 33 and 34 of the Code of Municipal Administration read as follows:

> Art. 30: "Meetings of municipal councils shall be held in public. However, at the request of three members or of the mayor, the municipal council shall decide, by sitting and standing, without debate, whether it shall meet in private."

./.

Art. 32: "A copy of the record of the meeting shall be displayed on the town-hall door within eight days."

Art. 33: "Decisions shall be entered in chronological order in a register ...".

Art. 34: "Minutes of the municipal council, budgets and accounts of the municipality and municipal orders may be inspected on the spot or copied in whole or in part by any resident or tax-payer. They may be published by anyone on his own responsability."

There are similar provisions for departmental and regional councils. Article 31 of the Departmental Act includes a provision relating to the press: "Departmental councils shall draw up official summary records of their meetings day by day; the records shall be made available to all newspapers in the department within 48 hours after the meetings concerned."

4) Access to archives -

Public documents of any kind - letters, reports, plans, photographs, tape-recordings, films, etc.. - are the property of the State (or of secondary public authorities, departments and municipalities), and officials in possession thereof may not communicate them or divulge them without permission from the higher authority (Minister in the case of the State, mayor or prefect in the case of a municipality or department).

However, when such documents reach a certain age there generally ceases to be any objection to their communication, and research workers and historians may find it very useful to consult them. On such considerations are the rules governing archives based. These rules may be summarised as follows:

1°) Administrations are, barring exceptions, required to hand over documents of a certain age to specialised archive departments;

2°) After 50 years anyone may, upon request, inspect documents stored in the archives.

This so-called 50 year rule is subject to various exceptions, some restrictive, some liberal. As for the liberal ones: various decrees have made the archives, or some of them, available for consultation up to a more recent date (at present, documents prior to 1 September 1939 are available). As for the restrictive exceptions: administrations may, by a specific decision, maintain secrecy beyond the 50 year period and make the communication of such documents subject to special authorisation; documents concerning individuals may not be released until 120 years after the interested person's date of birth; judicial documents remain confidential for 100 years (secrecy of deliberations).

./.

5) Compulsory publication of general administrative documents -

Various texts provide for the publication of documents, generally periodic ones, of widely differing natures and origins, which mostly contain reports for a given period on the activities of this or that department or the application of this or that branch of legislation. For instance: the annual report of the Audit Office, which gives an account of the auditing operations conducted by the office each year; the annual report on the functioning of the prison administration; and the report on the accounts of state industrial enterprises.

5) Compulsory communication of papers, documents and files relating to individual administrative decisions -

Several categories are involved:

a) As a rule, the Administration prepares its decisions as it sees fit, at whatever pace it wishes and without being required to inform the public of the procedure, let alone associate them therewith. In many cases, however, statutory or administrative provisions lay down a procedure for the preparation of decisions which imposes compulsory formalities on the Administration.

Many such procedures include a prior enquiry during which - this being its principal aim - persons affected by the decision envisaged are informed of the Administration's intentions and plans and invited to make observations.

To enable such persons to express their views advisedly, statutory or administrative provisions require that they should provided with such documents as will enable them to assess the merits of the operation concerned.

Enquiry procedures of this kind apply mainly to property schemes or similar operations, such as compulsory purchases in the public interest, the opening of agricultural, industrial or commercial establishments regarded as dangerous, noxious or unhealthy, the laying down of town-planning or land-use regulations and the issue of building permits.

Each of these subjects is covered by specific procedural rules, but various features are common to such enquiries: they are announced in advance; they must be carried out within a certain time; certain documents (exhaustively listed) must be made available to individuals for a certain time in a particular place; interested persons may make observations to an investigating commissioner, notably by entering them in a register available to the public. The main purpose of procedures of this kind is to enable interested parties to defend their rights as owners or residents against threats of compulsory purchase or impairment of everyday living conditions (pollution).

./.

b) Communication is also compulsory in cases where the Administration is to take a decision which will penalise members of the public or curtail their rights and options. A concern to guarantee "rights of defence" has resulted in the communication of certain papers and documents to those concerned being made obligatory. The most striking example is the obligation to communicate to civil servants documents in their files before any disciplinary sanction is imposed or any compulsory transfer effected. Similar measures are provided for in other texts in the many cases where an individual is in danger of having some advantage (concession, etc..) withdrawn from him. Even in the absence of texts, the courts take the view that respect for the rights of defence is a general principle of the law whereby the members of the public are entitled to be informed - and if necessary provided with the relevant documents - of any measures it is intended to subject them to.

c) In a related field, the courts take the view that members of the public are entitled to see any documents in the Administration's possession concerning their state of health. For instance, a civil servant whom the Administration wishes to suspend or retire for health reasons may demand any medical reports drawn up by the Administration's experts in order to show them to his own doctor. Similarly, the "Conseil d'Etat" recently ruled that a father whose son had contracted a pulmonary complaint as result of physical exercises at school could ask for and obtain the X-ray plates and comments made by the school medical officer. This is a particularly interesting decision as the regulations on school medecine do not expressly provide for the communication of medical documents to interested parties in such a matter. The trend emerging from these fairly recent decisions is of great significance as it is based on the fundamental idea that individuals possess a number of essential rights or prerogatives for the guarantee of which the Administration must, at their request or even "proprio motu", communicate to them various relevant documents it is able to obtain.

d) The communication of certain documents is also connected with the idea that the Administration often acts as a notary or bailiff who keeps a record of facts concerning the lives or interests of members of the public. The latter may need such documents or copies thereof in order to perform a variety of acts or formalities in everyday life, and it is therefore essential that they should be able to obtain them. This category includes records of births, marriages and deaths, copies of which may be obtained by those concerned at any time, police records of convictions (which employers often apply for when taking on new employees), extracts from the land register showing all properties with their boundaries and areas, and certificates of exemption from direct taxation. The communication of such documents is generally prescribed in a specific text, but it may be assumed that even in the absence of such a text the Administration is required to communicate any such documents in its possession.

./.

II.

THE "DE FACTO" SITUATION

If the Government and the Administration were to apply the above-mentioned legal principles and rules, the public's supply of information would be meagre indeed. Fortunately, the "de facto" situation is much better than the "de jure" one, for three reasons: the public can obtain information through two indirect channels - the parliamentary and judicial channels; in practice government departments issue information which they are not legally obliged to publish; civil servants themselves, with the tacit or explicit consent of ministers, apply the rule of professional discretion flexibly.

A - INDIRECT SUPPLY OF INFORMATION THROUGH THE PARLIAMENTARY AND JUDICIAL CHANNELS

1) The parliamentary channel -

As already mentioned, members of the political assemblies are not as a rule treated any better than ordinary citizens: the Government may refuse to inform parliamentarians in the absence of any text requiring it to do so. But to this principle there are exceptions in favour of parliamentarians which are far more numerous and important than those applicable to ordinary citizens. Many statutory texts make it compulsory for the government to provide parliamentarians with reports, documents and information on a large number of subjects.

This is the case, for example, in the budgetary and financial field, where the chief texts are an ordinance of 2 January 1959 embodying an organic law on the presentation of budgets and an ordinance of 30 December 1958 whose Articles 163 and 164 give a list of the documents which must be appended to budgets. It would take too long to reproduce this list here. Suffice it to say that the government must communicate documents showing the transactions carried out in the previous financial year by the state and a number of its agencies.

Moreover, under Article 64 of the Ordinance of 30 December 1958 the general rapporteur on the budget and the rapporteurs on the budgets of individual ministries may obtain from the ministries all financial and administrative information that is necessary or relevant to the performance of their functions, with the exception of information on secret matters concerning national defence, foreign affairs and the State's internal or external security. Similar powers are conferred on members of parliament appointed to observe and assess the management of national enterprises and mixed-economy companies.

./.

Furthermore there are numerous statutory provisions, mostly embodied in the annual Finance Acts, which require the government to provide parliament with precise and detailed information on the activities and functioning of numerous public services or the application of certain branches of legislation (for instance, the government has to supply a list of private associations in receipt of public subsidies, a report on the application of the Act on the voluntary termination of pregnancy and an account of the management of the National Forestry Board).

Documents communicated to parliament in this way as well as information gathered by its rapporteurs are usually made available to the public via the "Journal Officiel", which contains a record of parliamentary debates and reproduces many parliamentary working papers and their appendices.

In addition, parliamentarians may - and indeed do, usually at the request of their constituents - put written questions to ministers on the most varied subjects. These questions, and the answers given to them, are also published in the "Journal Officiel".

2) The judicial channel -

One of the main principles of judicial procedure is that it is conducted on a contentious basis. Accordingly any person party to proceedings, whether civil, criminal or administrative, may, either directly or through his lawyer, consult any documents in the file of the case. Moreover, the judge conducting the procedure may order the parties to place in the file any documents he considers essential to a settlement of the dispute. Thanks to the combination of these two principles, an individual who is dissatisfied with an administrative decision or wishes to obtain redress for an injury sustained through the Administration's doing, may, by instituting judicial proceedings for the annulment of the decision or the payment of compensation, create for himself a right of access to any documents relating to the case.

A practical example may be given to show how this indirect supply of information occurs and what its value is. When a building permit is issued to the owner of a piece of land, it must be communicated to the public by being displayed on a notice-board. Any interested party may then, under a recent decree, apply to the authority which issued the permit to consult certain relevant documents: the text of the permit, the building plans, etc.. But the list of documents which may be communicated in this way is an exhaustive one and, in application of the general principle of administrative secrecy, interested parties have no access to other documents in the file. These, however, are often the most interesting ones (e.g. reports of the various administrative authorities consulted during the examination of the application for a building permit, correspondence between these various authorities), for it is they that enable the permit's legality to be assessed. Interested parties may nevertheless gain access to such documents by appealing to the administrative court against the issue of the permit. The case then becomes a judicial one and, thanks to the rules applicable, interested parties may obtain the documents which they were unable to do at the administrative level.

./.

B - PUBLICATION OF INFORMATION BY GOVERNMENT AUTHORITIES

The authorities provide the public with a fairly plentiful supply of information on numerous subjects even though they are not legally bound to do so. Such information takes various forms: ministerial statements, press releases, radio and television bulletins, generally concerning government activities and projects; publication, periodic or otherwise, of documents which primarily relate to the Administration's activities and are akin to progress reports, etc.. published in pursuance of a mandatory text.

In 1973 the Commission for the Co-ordination of Administrative Documentation (1) had a catalogue of periodic publications and collections of the French Administration, published by "Documentation Française", a department attached to the Government's secretariat. This 368-page, multi-entry publication lists, by ministry, 852 publications differing widely in importance and nature. The following random examples may be given: monthly statistics of seaports, progress report of the National Accounts Board, reports of boards of examiners responsible for appointing teachers, annual report on the activity of the National Savings Fund, general report of the prison administration, Vaucresson annales on approved schools, etc.. etc.. Not all these documents are distributed to the same extent. The circulation of some is restricted; others are intended for the general public. Some are in the nature of studies which makes them comparable to general periodicals.

C - FLEXIBLE APPLICATION BY CIVIL SERVANTS OF THE PRINCIPLE OF PROFESSIONAL DISCRETION

The obligation of discretion imposed on civil servants is not an obligation of secrecy, and naturally civil servants to degrees varying according to their rank, functions and also their temperament, do not consider themselves bound to remain constantly and completely silent: in practice they are not completely silent in either intra or inter-departmental relations or in their relations with the public, particularly with persons interested in the settlement of a matter which concerns them personally. The head of a central department will often receive journalists and give them interviews - though only, in the case of a delicate matter, after seeking his minister's consent; similarly, a head of section whom a member of the public goes to see in order to find out what stage his case has reached will provide the latter with such information and may even let him see all or part of the file.

This, it is true, is a field where the rules of professional behaviour are somewhat vague. The courts have seldom had an opportunity to define the exact scope of the duty of professional discretion, which in at least one case has been interpreted fairly strictly by the "Conseil d'Etat".

./.

---

(1) See below, p. 15.

This was a case where a trade-union official in an administrative department circulated among his colleagues a draft memorandum on working hours before it had been either signed or issued; a (mild) disciplinary sanction was imposed on the official, who appealed to the "Conseil d'Etat", but the latter considered the sanction legal and rejected his appeal. The apparent rigour of this decision does not seem consistent with what may be called current administrative practices. These are embued with a liberalism which varies from one department to another but which often introduces a felicitous flexibility into relations between an administration and the public.

D - EVALUATION OF PRESENT INFORMATION POSSIBILITIES

After this survey of the "de jure" and "de facto" situations, an attempt may be made to evaluate the information possibilities available to the public in France. These are considerable, in the sense that both in law and in fact a large mass of information and documents is available to the public. But they are still precarious, too limited in some fields and often difficult to use.

1) There is no general right to information. Secrecy and discretion are still the rule. If the Government and the Administration wished to be rigorous, the various sources of information would largely dry up.

2) Information possibilities connected with administrative decentralisation are in practice fairly limited. Municipal, departmental and regional matters have neither the volume nor the importance of those for which the state is still responsible. The supervision to which local authorities are subject, their financial dependence on the state, the increasingly technical nature of their activities which they cannot handle without the State's assistance - all this makes their autonomy somewhat illusory. Local councillors are often greatly dependent on central authorities, and the supply of information to the public is bound to suffer as a result.

3) Enquiry procedures which enable members of the public to obtain certain items of information often provide for only limited rights: time-limits are excessively short, the documents that may be communicated are few in number and often sketchy, etc..

4) Recourse to the judicial channel, which entails the institution of legal proceedings, is a slow and costly process.

5) The supply of information - both information which the Administration is statutorily required to provide and that which it provides of its own accord - is often considerable in the case of general studies and documents and material relative to past situations; it is much less considerable in the case of matters of a special nature still pending. This distinction is of fundamental importance. A member of the public may readily and cheaply obtain a thousand and one items of information on such things as the activities of the customs service in previous years, social security accounts, harbour and inland waterway traffic and the school population, but he will

./.

find it very difficult or even impossible to ascertain the exact route of a motorway that is to cross his locality, the stage reached by his application for naturalisation, the probable date of payment of a sum due to him, his chances of obtaining a grant, etc.. He can usually satisfy his curiosity as a citizen or a researcher; it is much more difficult for him to put his mind at rest as a person amenable to administrative action.

III.

NEW TRENDS

In France the problem of keeping the public informed is now a topical issue which is often referred to in political discussions, in press articles and at technical conferences. Many statements are made on the subject by the most eminent persons in the country. According to these discussions and statements there is apparently a broad consensus in favour of a significant extension to public information possibilities.

A - REASONS FOR THESE TRENDS

The reasons are numerous.

One is connected with the considerable and rapid social change that has occurred since the last war. The increase in national revenue and the proliferation of public works schemes of all kinds have caused a far greater upheaval in everyday living conditions in the last quarter of a century that in the 75 preceding years. Such schemes as the construction of roads and motorways, large housing estates, industrial buildings and nuclear power stations have been carried out by the Administration or with its help or permission, resulting in interference with or prejudice to private rights or interests. When the Administration is highly active the public does not take easily to the silent and aloof authoritarianism with which it usually likes to conduct its affairs.

Another reason lies in a certain "seizing-up" of the traditional machinery of political and administrative representation. For a long time parliamentarians and local and regional councillors were the natural intermediaries and spokesmen of the public. For a variety of reasons their role has diminished, and the public are very often no longer content to leave things to their elected representatives; they prefer to form associations and deal direct with whichever administrative department it is whose doors they want to break open and whose secrets they need to penetrate. Their success largely depends in such cases on what they know or do not know about the decisions, plans and intentions of the Government and the Administration; hence a general demand on their part for as much access as possible to information.

The authorities, for their part, are alive to this trend and feel the need to secure the public's participation in the tasks they have set themselves. Needless to say, however, true participation implies prior information, and not surprisingly it is on government instructions that the Administration has for several years been engaged in a policy of public information.

B - MANIFESTATIONS OF SUCH TRENDS

1) The official pronouncements of the highest authorities in the country have been followed by indubitable efforts on the part of many administrative departments to organise a better supply of information to the public about their activities and projects. In some ministries, officials or even sections have been specifically made responsible for this task. Periodicals, information bulletins and documents of all kinds are regularly published and sent to associations or even individuals. It must nevertheless be noted that although administrations are on the whole making an information effort in response to government instructions, they do not always do so willingly and the effects are only limited. Information services do issue publications, but they are mainly of a general kind, and most administrations are still reluctant to inform the public of "particular cases", which are nevertheless the ones which primarily interest them. An association concerned with town-planning problems will observe with some bitterness, but without surprise, that the ministry responsible submerges it with papers and documents every week but very often fails to answer its letters asking for specific information on a particular case or suggesting a reform.

2) Recent legislative amendments have led to an improvement in the main inquiry procedures, particularly the one conducted before a property scheme is declared an "operation of public utility". A decree of 14 May 1976 has introduced arrangements in the procedures that will enable the public to be better informed: extending of the length of the inquiry; notification of the public of the reasons for choosing the scheme in preference to other possible schemes; meetings between the investigating commissioner and members of the public; communication of the commissioner's report to members of the public at their request, etc..

C - FUTURE PROSPECTS

It is not impossible that further progress will be made.

Various groups (academic jurists, political parties, trade unions) are demanding a reversal of the present rule on information, so as to bring France into line with various other countries: the principle of secrecy tempered by exceptions would be replaced by that of free information except in a specific number of cases.

The way to this change was recently opened by the report which the Commission for the Co-ordination of Administrative Documentation delivered to the Prime Minister in November 1974. The commission had been set up on 13 July 1971 under the Prime Minister to study ways of improving the

./.

documentation work of public administrations in the interests of efficiency, see to the technical co-ordination of the various interested departments' publishing activities and ensure the most appropriate distribution of publications from public administrations.

The commission could have interpreted strictly its seemingly somewhat technical terms of reference. It did not do so, however: immediately after being created it set up from among its members a committee to study access to administrative documents, and in 1973 it submitted to the Prime Minister an important report which included the following concluding sentences:

> "These various considerations lead the commission to propose the institution of a genuine right to communication for members of the public. The right's fundamental principles should be laid down by the legislature, for only intervention by the latter could make the impact necessary for the reversal of the most deeply-rooted administrative habits. The promulgation of an act on the right to information would be in keeping with a process already initiated by many liberal countries."

Following this report, the Prime Minister appointed in late 1975 a working party chaired by a member of the "Conseil d'Etat" to prepare texts to give effect to the commission's proposals. In February 1976 the working party transmitted to the Prime Minister a bill and a draft decree.

More recently, with the government's consent, the Minister for the Environment set up a working party to draft a bill instituting a very broad public inquiry procedure that would enable the public to express their views - thanks in particular to appropriate prior information - on many, if not most, of the Administration's projects liable to affect them.

SUMMARY OF THE DISCUSSIONS ON THE QUESTIONS CONSIDERED AT THE COLLOQUY

A. General problems relating to the right of access to information

1. In considering the right of access to information, the experts participating referred first of all to the relevant legislation in the Scandinavian countries and in Austria.

They agreed that these examples could offer encouragement to sponsors of a reform of the right of access to information in other European countries.

2. It was noted that there were three main techniques on which developments in Europe are based in this field:

- by the possibility of freely consulting documents, as in the Scandinavian countries,
- by a duty to inform the public, as in Austria,
- by initiatives taken by governments themselves in the matter of disclosure.

Sweden has for a long time, besides Finland, been the only country to apply the rule of disclosure in respect of documents; only recently was its example followed by other countries. Although the starting point - that every citizen should have access to official documents - is the same for all the Scandinavian Acts, the regulations differ considerably in several respects. The experts noted, for example, that the Finnish and Swedish Acts did not presuppose any identification of a document as a prerequisite of access, whereas the Danish and Norwegian presuppose that the one who makes a request for documents shall identify them.

3. It was also noted that in Denmark the public was mainly interested in questions concerning family law, maintenance payments, visiting rights, while political parties and pressure groups regularly enquired into matters particularly those relating to town and country planning and environment protection.

4. The Austrian system differs from the Swedish model mainly in that there is no provision for the disclosure of documents as such. Indeed, whereas in Sweden an administrative authority will allow interested persons to consult files, in Austria an administrative authority will simply answer enquiries, but will not authorise consultation of files. In this country, the duty to inform relates not to documents but to matters. This complicates the task of officials, who have to decide which facts are confidential and which ones may be divulged.

./.

5. The experts considered the various ideas under discussion in France, where an attempt is also being made to introduce the principle of disclosure into public administration.

6. It emerged from the discussion that there was no longer any State in Europe which systematically refused to communicate information. Although there may still be difficulties regarding scope and methods, the actual principle of furnishing information is no longer disputed. It was, however, pointed out that the principle of disclosure in respect of documents could not be applied in the same way in all countries. Its application depended on such things as administrative structures, legal systems as well as cultural and psychological factors.

7. As to how far provisions relating to the duty to inform may be directly based on Article 10, paragraph 1, of the European Convention on Human Rights, and whether this Article does not in fact require member States of the Council of Europe to adopt general provisions to that effect, it was observed that while Article 10, paragraph 1, of the Convention was undoubtedly closely linked to the duty to inform, member States were, under this Article, only morally, and not legally, bound to introduce legislation in this area.

8. Several speakers pointed out that access to official documents provided objective information about the state of matters in the State and the Communes. The right of citizens to obtain and receive information could exist only in a democratic society. In such a society it was essential that authorities should inform citizens about their activities; democracy worked better when citizens were in possession of all the facts, subject to appropriate limitations. The right of access to information held by public authorities led to real public debate on matters of general interest and constituted not only an individual safeguard for citizens but also the prerequisite of true democracy.

Moreover, the disclosure of documents helped to create and maintain citizen interest in the administration of public affairs and enabled them to participate in the decision-making process. The right of access to information provided the mass media with reliable sources for informing the public. It also fulfilled an important function of control as it enabled the public to ascertain what measures had, or had not, been taken by the authorities and also to discover in what context an administrative body had taken a particular decision.

The disclosure of documents made it possible not only for the party or some other directly concerned person, but also for every citizen, interest organisation or the news media, to find out if an administrative decision was founded on facts, if similar matters were treated in the same way, and if favouritism or other arbitrariness or abuse of power had occurred.

9. Suggestions were made on ways of inciting public interest in the activities of administrative authorities, namely:

- keeping the public regularly informed about its rights,
- explaining legal systems clearly and intelligibly,
- simplifying legal terminology.

./.

In this respect, the experts noted that citizens did not always take the initiative in this field. It was said that in the Scandinavian countries people were often unaware of their right to be informed and, consequently availed themselves of it less than they might. It was mainly pressure groups, political parties and newspapers which really exercised the right, because they knew it existed. In Austria, the public and the media showed limited interest in the new legislation and did not, therefore, make sufficient use of their right to information.

10. Some experts stressed that conservatism on the part of administrative authorities was a general phenomenon. To overcome these psychological obstacles, it was better to introduce legislation on the subject gradually.

Several speakers, however, said that whilst it was possible that a true obligation to inform could be introduced only progressively, the principle of such an obligation should be adopted rapidly and unequivocally in countries where there was no right of access. There was no question of administrations taking initiatives of their own in the matter. It was necessary for officials to be able to base their action on specific instructions.

11. It was clear from the interventions made on the more general aspects of this question, that the problem of informing the public was a topical one in Europe. There seemed to be a broad consensus in favour of significantly extending the measn of access to information held by public authorities in those countries where there was no such right of access. There was a need, therefore, to introduce statutory provisions on the subject. Such provisions, although not expressly required by the European Convention on Human Rights, were indispensable for the meaningful application of one of the major principles of human rights, namely freedom of information. The Council of Europe might pave the way and encourage developments in this field.

B. Limits to the right of access to information

12. The experts agreed that some limits to access to documents were essential but that they should be kept to a certain minimum. The main reasons for not disclosing information might be: State security, relations with foreign powers or international organisations, the prevention and punishment of crime, the legitimate economic interests of the State, communities and individuals, and the protection of privacy.

13. With regard to official documents other than working documents that need protection against disclosure because of legitimate general or individual interests, the Scandinavian Acts apply two different methods in order to bring about such a protection. The Finnish and Swedish legislation enumerate the types of official documents in question and prescribe that they are to be kept secret. The enumeration includes hundreds of items. The Danish and Norwegian legislation state that the right of access to official documents shall not include certain types of documents. These types have been defined in general wordings and there are no long lists of items as in Finnish and Swedish legislation.

14. Two particular aspects of the problem of limits to the right of access were considered by the experts: official secrecy and working documents.

./.

(i) Official secrecy

15. The experts noted that in most European countries, officials were pledged to secrecy as regards facts and information which came to their knowledge in the performance of their duties or in connection therewith.

In some countries, such as Austria, the principle of official secrecy in respect of civil servants was an integral part of the Constitution.

16. The experts agreed that official secrecy was justifiable in order to protect certain legitimate interests. In such cases there could be no obligation to disclose information held by a civil servant in the context of his official duties. The difficulty lay in the need to draw an acceptable boundary between disclosure and official secrecy.

17. It was suggested that the obligation to observe official secrecy should be subject to a number of conditions. Firstly, it should apply only to facts which came to an official's knowledge in the context of his official duties. Further, official secrecy should only be observed when it is imperative in the interests of a public authority or of the parties to the case. Finally, notwithstanding these prerequisites, it should be possible to restrict, but not broaden, the scope of official secrecy by an act of Parliament.

18. The experts considered it desirable that precise statutory provisions should lay down what documents were covered by official secrecy. Accordingly, there could be no obligation to disclose information held by a civil servant in the context of his official duties. The principle of secrecy tempered by exceptions should be replaced by the principle of free information waivable in certain specified cases.

19. The experts also discussed the difficulties liable to arise, particularly under the Scandinavian system, when a matter involves, at the same time, facts which need to be kept secret and others whose divulgence presents no problem.

(ii) Working documents

20. Several experts thought that working documents, for internal use only, should be exempted from the rule of disclosure so that civil servants could engage in free and informal deliberations and preparatory work, without pressure from the public. A working document differed from other kinds of document in that it contained material and points of view which were immature, undigested or merely tentative. Opinions and estimates could change during the course of work on a given matter, and this made disclosure undesirable and inexpedient. An obligation to supply information should exist obly when the decision-making process of the body responsible has terminated.

21. Other experts pointed out that disclosure might be desirable at the beginning of an administrative procedure as a means of enabling the public or an interested party to make observations. In the case of the construction of nuclear power stations, for instance, the public should be informed as early as the planning stage. In this connection it was observed that the furnishing

./.

of comprehensive and diverse information also meant that anyone opposed to a project should be able to express his views. Pressure groups could make use of the media for this purpose.

22. The experts noted that in none of the Scandinavian countries did the rule of disclosure apply to working documents. However, administrations were not prohibited from granting access to such documents. They could do so at their own discretion, and making due allowance for different needs of caution. In Austria it was not possible to supply information on schemes at the planning stage with the exception, under special provisions, of regional development schemes etc. In that country there was an obligation to provide information only where the competent agency's decision-making process was terminated and led to a tangible result.

23. Some experts pointed to the risks of an excessive workload and of time being wasted if information was supplied to the public as early as the preparatory stage, when data were liable to give an incomplete and often inaccurate impression of a matter.

C. Other matters discussed

24. Some experts expressed the view that exhaustive information on specific legal problems of greatest concern to the public might, in the last resort, provoke a standstill in the administrative apparatus. The disclosure of documents might place an excessive burden on officials and impinge considerably on the performance of their duties. An enquiry should, therefore, be answered only when the work required to collect the relevant information remained within reasonable limits.

The experts noted that in Austria an answer to a query is given only when the work required to collect the relevant information remained within reasonable limits.

They also noted that fears that the openness of the administration would hamper the exercise of public duties and overburden officials had not proved justified in practice.

25. Several speakers thought that the right of access to documents should be a real, enforceable right. Indeed, once the principle of access to documents was introduced, judicial review for control of the legality of an authority's denial to give access should be provided for through the ordinary or administrative courts. Such actions might also be instituted in respect of the supply of inaccurate information.

26. One expert raised the question of the relationship between the duty to inform and the duty for ministers to inform parliaments as part of their ministerial responsibilities. In this respect it was observed that it would, in future, be desirable to study the system of parliamentary questions in member States of the Council of Europe and particularly to see whether it did not fulfil in part the obligation for the State to make available information.

./.

27. Some experts expressed the wish that, in federal States where the federal authorities were bound by statutory provisions on the subject, the same obligation be imposed on provincial authorities, since the rule of disclosure concerned all authorities and hence local authorities to the same extent as the central authorities.

28. The experts were informed that in the Netherlands a bill based on the Danish arrangements sought to introduce, as an information technique, a duty for administrative authorities to allow the public to consult documents or, as the case may be, request copies. They were also informed that in Canada the drafting of a bill on the duty for public authorities to make available information was already at an advanced stage.

CONCLUSIONS OF THE COLLOQUY

presented by

Mr W PAHR

Chairman of the Colloquy

---

1. The Chairman of the Colloquy, Mr Pahr, emphasised that the Colloquy's deliberations had borne upon the right to access to information for all citizens, and that, consequently, neither the rights of parties to a procedure nor the right of parliamentarians to information from the government (parliamentary questions) should be taken into consideration.

Where a judicial procedure was concerned, Article 6 of the European Convention on Human Rights regulated in detail the right of the parties to be informed and consult the file. The rights of parties to an administrative procedure was being discussed by a committee of experts set up by the European Committee on Legal Co-operation to consider questions concerning the protection of the individual in relation to the acts of administrative authorities. The system of parliamentary questions was undoubtedly a very interesting subject, and it would be desirable one day for the competent Council of Europe bodies to study it more closely.

2. The problem of the disclosure of administrative documents, which had been dealt with at the Colloquy, was closely related to Article 10 of the European Convention on Human Rights. It had been felt, however, that this Article entailed no obligation to introduce a system of general disclosure. The view had been expressed that, for an individual to be able fully to exercise his right to obtain information, it was desirable, expedient and indeed necessary that the State should supply as much information as possible. Disclosure of government activities as a whole was the hallmark of a democratic system. In the reports and during the discussions it had been repeatedly emphasised that disclosure was an essential condition, even an ingredient, of democracy.

3. The participants had considered that it was much more in the interest of the State than in the interest of the individual that administrative activities should be disclosed, since the obligation to supply information benefitted the former more than the latter. Public interest in the disclosure of administrative activities enabled such activities to be subjected to fuller supervision. An informed citizen was more aware of his democratic duties and better able to appreciate measures which the State was sometimes obliged to take in the public interest, even if they were prejudicial to individual interests.

4. The discussions had revealed three systems of disclosure:

a. the Scandinavian system: as a rule every citizen had free access to information;

b. the Austrian system: the authorities were required to provide a citizen with information at his request;

./.

c. the system existing in one form or another in almost all member States: government authorities themselves took the initiative of informing the public about current affairs.

During the debate it had been observed that, ideally, all 3 systems should co-exist in the same country. An individual should be able to apply to the authorities for the communication of information of interest to him. He should also be able to consult files in order to check the accuracy of such information. In addition, he should be informed by the State, without his having to take any action himself, about current affairs affecting the community as a whole.

5. The major problem nevertheless remained that of delimiting the scope of the principle of disclosure and the obligation of secrecy, which no State could waive, not only in the public interest, but also in the interest of individuals. Exceptions to the principle of disclosure were necessary in cases there would be a danger of infringing the right of individual privacy, or where reason of State demanded secrecy. The participants had considered that there were as a rule two ways of taking account of cases to which the obligation of disclosure did not apply:

a. drawing up a general clause;

b. enumerating the various domains to which the principle of disclosure did not apply.

Both arrangements had their advantages and disadvantages. A general clause had the virtue of being more flexible and enabled certain domains which needed to be kept secret to be excluded from an enumeration. On the other hand, it made the right to information dependent on the goodwill of an official. If exceptions to the principle of disclosure were governed by a general clause, officials had to exercise their powers of decision with a high sense of responsibility, which presupposed the provision of appropriate training.

6. The Colloquy had not been organised with the aim of producing spectacular conclusions or any immediate solutions to the problems involved. It importance had been to instigate the awareness of such problems and to see whether the principle of access of the public to information held by the public authorities raised difficulties in every country.

The reports and discussions had clearly shown that in no State where a duty of disclosure had been laid down by law, had the administration really suffered as a result. On the contrary: it had been regretted that the public made too little use of their right to information, often because they were ill-acquainted with their rights.

7. All the participants had expressed their conviction that disclosure should be the basic rule and official secrecy the exception. The principle of disclosure could not of course be applied in all countries in the same way. Its implementation depended not only on the legal system of each country, but also on the traditions of its population, officials and government, not to mention the mentality of each population. The discussions had nevertheless shown that the concept of disclosure was based on a number of general principles.

./.

8. The Committee of Ministers of the Council of Europe should be advised that the discussions had shown that access to information was a problem of European interest. As all the States represented in the Council of Europe were at present concerned with the problem, it should be suggested that the Committee of Ministers instruct the Committee of Experts on Human Rights to study the matter further with a view to advocating ways of facilitating or extending the disclosure of the activities of the administrations of the member States.

LIST OF PARTICIPANTS

AUSTRIA	Mr W PAHR *(Chairman)*	Directeur Général Chancellerie Fédérale VIENNE
	Mr L ADAMOVICH *(Rapporteur)*	Professor at the Law Faculty University of Graz GRAZ
BELGIUM	Mr J NISET	Conseiller Juridique Ministère de la Justice BRUXELLES
	Mr H RUQUOY	Inspecteur Général de la Fonction Publique, détaché aux Services de la Chancellerie du Premier Ministre BRUXELLES
CYPRUS	Mr A FRANGOS	Senior Legal Counsel of the Republic NICOSIA
	Mr T HADJIANASTASSIOU	Justice of the Supreme Court of Cyprus NICOSIA
DENMARK	Mr N EILSCHOU HOLM	Head of Division Ministry of Justice COPENHAGEN
	Mr P LORENZEN	Head of Section Ministry of Justice COPENHAGEN
FEDERAL REPUBLIC OF GERMANY	Mr GALLAS	Oberregierungsrat Ministère de l'Intérieur BONN-BAD GODESBERG
	Mme I MAIER	Ministerialrätin Ministère de la Justice BONN-BAD GODESBERG
	Mr H D BERENDT	Referatsleiter des Presse- und Informationsamtes der Bundesregierung BONN-BAD GODESBERG

./.

FRANCE	Mr GOUDET	Sous-Directeur de la Justice Criminelle au Ministère de la Justice PARIS
	Mr J MAILY	Chargé de Mission Ministère de l'Intérieur PARIS
	Mr L FOUGERE *(Rapporteur)*	Conseiller d'Etat PARIS
GREECE	.....	excused
ICELAND	Mr O STEFANSSON	Deputy Secretary General Ministry of Justice REYKJAVIK
	Mr P GUDMUNSSON	Judge City Court REYKJAVIK
IRELAND	Mr J McMAHON	Principal Department of the Public Service DUBLIN
ITALY	Mr G PALEOLOGO	Conseiller d'Etat Ministère des Affaires Etrangères ROME
	Mr C ZANGHI	Conseiller Juridique Contentieux Diplomatique Ministère des Affaires Etrangères ROME
LUXEMBOURG	Mr E MULLER	Premier Conseiller de Gouvernement Ministère de la Justice LUXEMBOURG
MALTA	Mr J J CREMONA *(Vice-President)*	Chief Justice SLIEMA

./.

NETHERLANDS	Mr D VAN DUYNE	Deputy Secretary General Ministry of General Affairs THE HAGUE
	Mr J T VAN STEGEREN	Legal Adviser Ministry of Home Affairs THE HAGUE
NORWAY	Miss I WILBERG	Senior Lecturer University of Oslo OSLO
SWEDEN	Mr V HELLNERS	Assistant Under Secretary of State Ministry of Foreign Affairs STOCKHOLM
	Mr B WENNERGREN *(Rapporteur)*	Justice of the Supreme Administrative Court of Sweden STOCKHOLM
SWITZERLAND	Mr W BUSER	Vice-Chancelier de la Confédération BERNE
	Mr B F JUNOD	Avocat, Division de la Justice, Département fédéral de justice et police BERNE
TURKEY	Mr L DURAN	Professeur à la Faculté de Droit de l'Université d'Istanbul ISTANBUL
UNITED KINGDOM	Mr W J BOHAN	Home Office LONDON
	Mr A W RUSSELL	Machinery of Government Division Civil Service Department LONDON
HOLY SEE	Rev. H REINISCH	Chancelier de l'Evécheé de Graz GRAZ
	Mr F CSOKLICH	Président des Journalistes Catholiques

./.

(SECRETARIAT)

Mr R MULLER	Chef de la Direction des Droits de l'Homme, Conseil de l'Europe.
Mr G GUARNERI	Administrateur Principal, Direction des Droits de l'Homme, Conseil de l'Europe.
Mlle J DINSDALE	Attachée à la Direction des Droits de l'Homme, Conseil de l'Europe.