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Access Laws in a Flux

“... and I say, hey stop, where is that database, is it on the net, it isn't on the big net is it? Yes, it is on the net, he says, but I hate the net, because the net is water, in fact only Sibelius and death are more water than the net, because on the net everything flows, on the net the flow is free, freer than all other places taken together, it changes all the time, it is like an information flock of birds, it constantly changes direction, but not elegantly and at the same time, like a flock of birds, the image was miserable, forget it, but the direction changes, and you cannot step down into the same net twice, because it only exists for the moment and the next moment it will be something else, and I hate everything that is something else the next moment and I don't want to have anything to do with it...”

*Erlend Loe*¹

1 Naming and taming

The narrator in Erlend Loe's novel "Facts about Finland" hates water because he hates change. The reader is not surprised to find that he also hates the Internet, and data networks generally. Like water the data nets stand for change and change involves threats that take on the shapes of uncertainty, blurry categories, lost dividing lines, broken connections with the past, and so forth. Not only an individual but also a society, its legal system included, may have reasons to fear change.

Several years ago in Sweden, a legislative committee arranged a public hearing on the adaptation of access laws to modern information technology. The discussion soon made it clear that the traditional object of the constitutionally guaranteed access right had lost its previous stability. In fact, as some of the participating experts pointed out, information seekers had a right to request documents regardless of whether they existed as written or printed, ready-made objects in the archive of a public authority. A distinguished justice of the Supreme Administrative Court, also a renowned specialist on access rights law, found this to be a monstrosity. How on earth, he asked, can a public authority be required to hand out things that don't exist? How on earth can the law be construed and applied in such a way that a public authority doesn't even know itself what official documents it stores in its archives? If a "document" is no longer a "document", then something has gone terribly wrong.

The problem that surfaced at the hearing was not unknown. In the 1960s a law-making committee had paid attention to the new, electronic media and pointed at some of the basic difficulties that they were likely to give rise to in the future. Soon thereafter, in 1971, the

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¹ Erlend Loe, *Fakta om Finland* (Facts about Finland), Oslo: Cappelen 2001, p. 137. My translation from Norwegian does poor justice to Loe's extraordinary prose.

Supreme Administrative Court dealt with the question of whether magnetic tapes for computers should be seen as “documents” according to the basic regulation of access rights in Chapter 2 of the 1947 Freedom of the Press Act.² A county administration had refused to hand out such tapes on the ground that they were not to be seen as “documents” but rather as “tools” or “instruments” that could be used to produce “documents”. The Supreme Administrative Court, however, chose to regard the magnetic tapes as “documents”. The Court emphasised that a decision in the opposite direction would mean that increasingly large volumes of information would move beyond the reach of the access rights legislation. It would enable public authorities to steer away from openness by choosing non-document, electronic format for the storage of information. The Supreme Administrative Court found such a development unacceptable and, in consequence, construed the document concept broadly. By naming the new electronic media “documents”, the Court aimed to tame them, to place them securely into the traditional legal framework. However, the issue of the scope of the decision immediately came to the fore. Briefly, did the right of access include a right to obtain computer readable copies of the tapes or just paper printouts?

2 The challenges of ICT

The 1971 decision of the Supreme Administrative Court opened a gate, and the data files of public authorities were made accessible to the public. It did not take long for the lawmaker to confirm the action and revise certain relevant sections of the Freedom of the Press Act. Basically, ICT posed two kinds of challenges.

One challenge was the one noted by the Supreme Administrative Court, *viz.* that more and more information in public administration moves into the electronic environment of computers and data communication. Therefore, in order not to put the right of access in danger, it is necessary to let electronic media pass as “documents” and be treated in the same way as traditional media, i.e. eye-readable media such as paper documents, drawings, and photographs.

The other challenge concerns the new characteristics of the electronic environment. Not only is information registered and stored in new ways, it can also be processed and communicated in new ways. The question is: what does this mean for access rights? For example, automation enables new kinds of searches for information and if information is handed out in electronic format it may be used for purposes that differ considerably from what is possible with ordinary paper media.

The Swedish lawmaker has always been aware of the last mentioned, more far-reaching effects of information technology, and this awareness has found expression in three guiding principles:

- (a) The use of ICT in public administration should not be allowed to erode the right of access and reduce openness.
- (b) To the extent that ICT strengthens the right of access, such a development is to be welcomed.
- (c) The purpose of the right of access is to enable control of the activities of public authorities and to support the rule of law. However, it is also intended to make all kinds of

² RÅ 1971 ref. 15. See also RÅ 1965 ref. 25 and RÅ 1969 ref. 11.

public information resources available, resources that are of value for public debate and for the understanding of various matters in society.

The three principles may seem simple and rather uncontroversial in a democratic society, but in practice they involve complications and conflicts of interests.

3 Documents, data, information

Some of the difficulties have to do with the shaping of the regulation of access rights in view of the new, electronic environment. After all, naming is not such an easy task. For one thing, there is a need for *neutrality* and *independence* in relation to technology. The discussion of such needs tends to be a bit confused. Basically, different types of media ought to be treated in the same way. And the legal regulation ought not to be tied to a particular state of the art so that it needs continuous revision as media and data processing methods change. The meaning of such a striving for neutrality and independence can differ from one area to another. For example, in order to make a regulation technology-neutral it may be necessary to go into details that are contrary to the interest of technology-independence. There is also a constant need for awareness of what may be called the practical impact of technological developments on a particular regulation. To illustrate, consider the difference between obtaining only a paper printout of a computer file and obtaining a computer-readable, digital version of the file. Or consider the difference between manual searching of paper index cards and automatic searching of a modern electronic, relational database. Viewed in this perspective, a regulation that is formally both technology-neutral and technology-independent may still be strongly affected by the technological setting. It has even been put in question whether legal regulation can ever aspire to be neutral and independent in relation to information technology.

The Swedish naming operation began with the decision of the Supreme Administrative Court to construe the concept “document” so broadly as to include electronic media in the form of magnetic tapes. Ensuing revisions of the access rights regulation in Chapter 2 of the Freedom of the Press Act have elaborated on this scheme. Thus, according to current law there are two categories of documents. One category is made up of traditional, visible media such as pieces of paper and x-ray photographs. The other category comprises “recordings” that one can read, listen to or comprehend in another way only by means of technical aids. The regulation does not spell this out, but one can group such “technical recordings” into two categories. One consists of *simple recordings* such as microfilm and the other of *complex recordings* where the technical tool plays a significant role with regard to retrieval, selection, arrangement, transformation, presentation, and so forth. Basically, computer recordings may be said to be complex recordings.

The complex nature of computer recordings has made it necessary to try to pin down more precisely what is a recording in the digital environment. Two borders have to be considered. One concerns the upper limit where an entity of information ceases to be *one* document and needs to be regarded as several. The other concerns the lower limit where one encounters the components that together make up a document. The two limits are not unknown in the context of traditional media but it is mainly in the digital environment that they become a practical concern. Thus, in the “paper” environment the dividing lines appear natural and self-evident – a letter is *one* document even when it consists of two pages and an appended drawing. In the

electronic environment, the physical clues lose their obviousness whereas the logical structure of the information becomes important. For example, a chain of comments on a specific topic or a sequence of hypertext links may or may not be considered to make up *one* document.

The definition according to Swedish law of a recording in the context of automated data processing is 'any meaningful compilation of data'. The requesting party decides what is meaningful and, since he or she is not compelled to disclose the purpose of the request, one may conclude that a digital recording may in fact equal 'any information stored in a digital format'. Obviously, such an all-embracing and amorphous object of access needs some further limitation. One possibility could be to refer to the storage medium as such, but today's storage media do not lend themselves to restrictive and clear definitions of what is a document (a handy "memory stick" may, for example, store many megabytes of data). Instead, limitations are to be found mainly in the notion of "keeping". Only recordings that are being kept by a public authority can be requested. The notion of keeping in its turn presupposes that the recording (the compilation of data) can be made available through *routine measures* and with the aid of technical equipment that is used by the public authority itself. It is not necessary, however, that the public authority itself should have any interest in producing the requested compilation of data, nor that it should ever have produced it before. In other words; according to Swedish constitutional law, the public has a right to request and obtain access not only to pre-existing documents kept by public authorities but also to what are called *potential documents*, i.e. documents that may be produced by compiling data. It has to be emphasised that the right to gain access to potential documents exists only with regard to recordings and not with regard to traditional, "non-technical" documents. One can say that, almost invisible in the text of the statute, there exist two categories of access rights, one for traditional media and one for digital media. Fixation and stability put their mark on the first kind, flexibility and flow on the second. There is a tension between the two, a tension that has to do with the fundamental question of what kind of access rights a democratic society needs.

4 Fixation and flow

The Swedish regulation of access rights came into being in 1766 in what may be called a steady-state world of information management. In this world, recording information and moving it around took time. This made it natural for the right of access to focus on information frozen in ledgers, letters, diaries, dossiers, protocols, and so forth. At about the same time (in the late 18th century), modern ideas of archives also began to be developed. Here too, frozen information was at the centre of attention, and the so-called principle of provenance was beginning to establish itself as the basis for the creation and structuring of archives. Briefly, the principle of provenance means that materials in archives should be kept and structured so that later they can be accessed and used with the fullest possible understanding of their original, functional context. Thus, archives ought to be organised so that they reflect the historical organisation and activities of the source. Archives, in sum, were looked upon as frozen information reflecting "how it actually was". The principle of provenance is still very much alive and puts its mark on today's archive theory.

The notion of frozen information can never be fully true and pure. To continue expanding the metaphor, there is water under the ice and flowing water does not freeze. Change seeps into the world of fixed media. To take a trivial example: a letter may refer to other information and to circumstances that no longer exist and are known. Thus, the interpretation of the text of the letter becomes uncertain and will have to be based on guesswork and reconstruction of its original meaning. What purpose did the sender of the

letter have in mind? How did its recipient understand the letter? Meaning is elusive. Meaning means many a thing.

Modern electronic media tend to emphasise the fluid nature of information. They lend themselves to processing that involves rapid changes, diverse uses, deconstruction and reconstruction, and so forth. In fact (and to take the metaphor one step further), digital media *vaporise information* and in that sense may be looked upon as information steam engines working at high pressure and at a high speed.

So, what are the consequences of the growing use of electronic media and the introduction of “technical recordings” and “potential documents”? The question has more than one answer. To begin with, the information units that may be the object of access rights have become fuzzy. The discussion above on the upper and lower limits of documents, and the remarks about the fading away of simple, physical delimitation criteria illustrate this. When a document may consist of “any meaningful compilation of data” and the keeping of the document is defined as the capability to make the data visible or audible through the use of “routine measures”, then the situation is certainly more fluid than in the traditional “paper world” where the existence and location of documents is simpler in nature. In the “paper world” there are no potential documents, there are only pre-existing documents, fixed in form and ready to be fetched from a shelf or a drawer.

Secondly, in the electronic world it is practical and easy to process fragments of information in the form of data snippets and to relate them to one another. The spreadsheet is a well-known example. In a spreadsheet, each so-called cell may contain either data or code, i.e. instructions that describe how certain data are to be processed. For example, cell A10 in the matrix may contain a number whereas cell B10 contains a procedure such that a certain percentage of the value stored in cell A10 is calculated. The spreadsheet concept may be looked upon as a general model of modern, electronic data processing, characterised by complex interdependencies among parts and an intricate mesh of static and dynamic elements. The old filing system based on paper index cards, microfilm or some other static carrier of data has all but disappeared. Today, access rights apply or may apply to dynamic information systems where information patterns rather than information units are of interest to the information seekers. Increasingly, the information systems function in real-time, and access therefore tends to be concerned with short-lived and momentary information as well as (and sometimes rather than) historical.

Thirdly, the organisational structure of public administration changes, due to increasingly widespread and intense use of ICT. The phenomenon is sometimes labelled convergence, i.e. the floating together of things and activities that used to be separate and different. There are many aspects to be noted. There is, for example, the convergence of different administrative activities, of different administrative organs, of public sector activities and private sector activities, and so forth. Activities become multi-contextual. Bureaucratic, rigid organisations give way to what Alvin Toffler in “Future Shock” (1971) labelled *ac-hocracy*. Generally speaking, administrative structures become more fluid, with ensuing difficulties for access rights. For one thing, their aims become uncertain. What are they for? Critical examination of the activities of public authorities or something more? And is the existing regulation capable of dealing with hot information steam of the kind produced by electronic information and communication technology?

5 Minimalism and maximalism

Minimalism here means a cautious attitude to openness and digital media, maximalism means seeking new solutions and a striving to strengthen the right of access. The minimalist tends to

advocate a narrow kind of access right aimed at controlling the doings of public authorities. The maximalist emphasises the value of openness in general. We can approach the issues from two directions. One has to do with efforts to modernise the terminology and structure of access rights regulation. The other has to do with a possible expansion of the right of access, i.e. a content-oriented reengineering of the regulation.

In 1997 a legislative committee, the Data Legislation Committee chaired by Supreme Court Justice Staffan Vängby, proposed a radical change of the basic concepts in the right of access regulation in Chapter 2 of the Freedom of the Press Act. The proposal (SOU 1997:39) strove to distinguish between two kinds of information, *viz* on the one hand fixed or static information, and on the other dynamic or changeable information. The proposal recognised that the medium as such does not necessarily decide the nature of the information that it carries. A traditional paper medium, an index card file, for example, may contain information that is intended to be changed. On the other hand, an electronic medium may contain fixed information, such as write-protected numerical data or the finalised minutes of a meeting stored in a text database.

The Data Legislation Committee took it for granted that electronic media are on their way to dominating the information processing of public authorities. One consequence of this development is that fragmentation of information will become more and more visible and common. In other words, the previously mentioned definition of technical recordings as “any meaningful compilation of data” ought to be made visible in the text of the statute and ought to serve as the basis for the regulation. This reasoning led the committee to propose that the object of access ought to be, not “official documents” but “official data”. The concept of a document was to remain in the statute as one kind of “storage space for data” and a document as a storage space was to be characterised by its fixed nature. In the words of the committee, a document had “a defined content”, *viz.* the content which was originally ascribed to it and which was not intended to be changed. Changeable “storage spaces” were called “databases”. Databases, typically, contain data that are continuously updated and that may be presented in different combinations and formats.

The merits of the proposal may be discussed. Ultimately, it did not meet with success, above all because the idea of substituting “official data” for the well-known “official documents” proved to be too radical (too much ahead of its time?). In addition, a number of details of the proposed regulation were unclear. A subsequent legislative committee, The Committee on Openness and Secrecy, chose a more cautious strategy, marked also by a certain reluctance to acknowledge the notion of “potential documents”. Its proposal (SOU 2001:3) reserved the concept “document” for fixed entities of information (“a certain information content in uncorrupted form”) regardless of whether the information is stored on traditional or electronic media. Leaving details aside, it may be noted that, according to the committee, the key issue concerned the significance of so-called “routine measures” as a prerequisite for the accessibility of electronic recordings (see above). According to the committee, fixed electronic documents (such as the finished text of a decision) must be made available upon request regardless of whether this requires *more* than routine measures on the part of the public authority, whereas compilations of data (i.e. potential documents) must be made available only to the extent that this presupposes *no more* than routine measures. It may also be noted that the committee shaped the right of access to compilations of data as a sort of a secondary right. Neither the committee’s proposal nor the Government Bill that implements it (2001/02:70) let the relevant provisions of the Freedom of the Press Act explicitly state that there are two kinds of electronic documents, the “fixed” ones and the “potential” ones. The Council on Legislation, which commented on the bill, considered this an unfortunate lack of clarity. The reason behind it is to be found perhaps in a persistent uncertainty, even uneasiness, with regard to potential documents and “fluid” access rights.

Thus, the latest revision of Chapter 2 of the Freedom of the Press Act continues to struggle bravely with the tension between fixation and flow. The struggle is bound to go on. It will involve continued work with basic concepts such as “potential documents” but also with basic policy issues regarding a possible strengthening of the right of access aimed at making full use of the potential of electronic media. A few remarks may suffice to sum up. They concern (a) the right to use information that has been obtained, (b) the situation of computer programmes, and (c) the development of information infrastructure.

Access rights do not only involve inspection of documents etc. Their value often depends on *how the information can be used*. Electronic media strengthen the interest in this aspect of access, for the simple reason that they lend themselves to much more extended and varied use than traditional media. For the minimalist this may seem more frightening than beneficial. For example, extended use rights tend to collide with the protection of the individual’s data privacy and with intellectual property rights. The maximalist welcomes extended use, supports the idea of giving access to computer-readable data, and is critical of different kinds of data ownership that may stand in the way of using data obtained from the public authorities. Both views are reasonable and they have to be balanced against one another.

Computer programs are at the core of the concept of fluid information. In Sweden the right of access does not include a full-fledged right to examine functionality. There are certain obligations to document computer systems and the Personal Data Act of 1998 regulates a right to learn about the logic behind certain automated decisions. Computer program descriptions (including flowcharts and written code) are accessible as documents according to Chapter 2 of the Freedom of the Press Act. But there is no right to obtain computer readable copies of computer programs. Above all, there is no right to require that a public authority execute a computer program with input data supplied by the applicant. From the maximalist point of view one may ask why not. The only way a program can be understood is by running it. Reading lists of source code or, even worse, object code doesn’t make anybody the wiser.

The information infrastructure can be designed with varying regard for openness interests. The electronic environment is sensitive in this respect. To elucidate, it is essential to design the information systems of public authorities so that they can support the kind of aims that access rights legislation seeks to achieve. As a simple example, consider a system that only permits retrieval of particular registered information items (e.g. decisions with a diary number). Or consider a system where data of different kinds and belonging to different categories are stored in such bad order that all requests require time-consuming fishing expeditions and lead to frequent refusals, due to difficulties of assessing whether documents are official or not. Consider, on the other hand, systems that have been designed with a view to actively supporting openness interests – even when this involves extra costs and system functions that are not in the direct interest of the public authorities themselves. Such systems may contain personalised, cross-agency information services, alert services (e.g. for non-government organisations), databases for particular purposes (e.g. educational databases and statistical databases), and so forth. It may be objected that such extended services go beyond access rights as they are traditionally understood and that access rights have to do with more narrow purposes mainly involving control of public authorities. This is the minimalist view. The maximalist view is that electronic media enables a new vision of access rights. Why stick to the minimalist ‘peep through the keyhole’ kind of access? The modern knowledge society can and ought to have far more ambitious goals. In short, one of its key obligations should be to develop a rich notion of universal information services based on the traditional concept of access to official documents. For knowledge to grow, information must flow.