



RESOURCES
FOR THE FUTURE



THE REGIONAL ENVIRONMENTAL CENTER
for Central and Eastern Europe



Public Access to Environmental Information and Data

Practice Examples from the United States, the European Union, and Central and Eastern Europe

November 2001

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Introduction: How to Use This Document

This document is intended as a reference manual. It contains information about implementation in the United States and in Europe of systems that allow the public to access and obtain environmental information held by governments. This information will be useful as other countries implement similar systems, under their commitments made to the Aarhus Convention in 1998.* The Aarhus Convention sets standards for public access to environmental information, and public participation in environmental decision making, and for access to justice when the standards of the Convention have been abridged.

This document does not contain information about the Aarhus Convention itself. The experience and practices included in the document also do not necessarily correspond directly to the provisions of the Aarhus Convention. Nor does it advocate any particular solution or way of managing public access to environmental information. Rather, it leaves to the reader decisions about what solutions will work best in his or her own country. We hope that it proves useful.

- The document starts with a table of contents.
- The next sections contain information about the United States, about the European Union (EU) with emphasis on the Netherlands and Italy, and about the countries of Central and Eastern Europe.
- A glossary defines the terms used.
- An index cross-references all three substantive parts.
- Three annexes contain additional information and documents concerning EU and Dutch legal requirements.
- Finally, an appendix provides information about legal provisions and agency practice for “active” public disclosure of environmental information in the United States, and ties that information to issues that need to be addressed before public access mechanisms can be adopted in Central and Eastern Europe.

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Part One Practice Examples and Lessons: United States

I. Background and History¹

The importance of an informed citizenry, to best protect against an autocratic government, has philosophically been an important part of U.S. government history. This value was frequently referenced by the framers of the U.S. Constitution. James Madison, one of the framers, famously stated, “A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power which knowledge gives.” Thomas Jefferson, also influential in the creation of the Constitution, and the country’s third president, wrote, “Were it left to me to decide whether we should have a government without newspapers or newspapers without government, I should not hesitate a moment to prefer the latter.”

Nevertheless, prior to the enactment of the Freedom of Information Act in 1966, the legal infrastructure that allowed people in the United States to obtain information from records held by federal government agencies was not strong. Indeed, only since the latter half of the 20th century have Americans enjoyed any right to access government-held information, despite the importance that the founders of the republic placed upon this ability and its unmistakable relationship to democratic ideals.

It was not until the years immediately following World War II that serious debate began in the United States regarding a mechanism to allow the public access to information held by the government. The consideration of such a mechanism was prompted by interest among citizens and the press in information on nuclear weaponry. The arguments in favor of allowing greater access to military information were sometimes contested by the government officials who developed and maintained this technology. These officials felt “threatened by news accounts in journals and magazines that covered military readiness in the dawning era of atomic energy.”

In 1946, the U.S. Congress attempted to balance the desire for information with the importance of maintaining national security. They did this in a law called the Administrative Procedure Act (APA), which contained a public disclosure of information provision. According to the APA, information could be considered confidential if it related to “any function of the U.S. requiring secrecy in the public interest.” If information fell outside the scope of this classification but constituted a “matter of official record,” it could be provided only to “persons properly and directly concerned” with its content.

In many ways, the dubious value of the APA reflects a unique time in American history—a period fraught with concern over national security and the spread of communism. Indeed, this period saw the signing of an unprecedented executive order by President Harry Truman that “for the first time allowed non-military civilian agencies to classify information on the grounds of national security.” The purpose of this far-reaching order was to “safeguard national security [as] the specter of Communism loomed over Europe.”

The APA, with its imprecise definitions, was “generally recognized as falling far short of its disclosure goals,” and if anything was employed to justify the withholding of a great deal of information: “Government agencies typically exploited APA loopholes in order to restrict access to records, and the law came to be regarded as more of a with-

¹ The authors relied heavily in this section on the Martin E. Halstuck’s article, *Blurred Vision: How Supreme Court FOIA Opinions on Invasion of Privacy Have Missed the Target of Legislative Intent*, 4 *Communication Law and Policy* 111, 118 (Winter 1999). All quotations should be attributed to that article.

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holding statute than a disclosure statute.” In addition, there was no legal recourse if government officials inappropriately used the APA to deny requests for information.

The Freedom of Information Act

By 1966, it was recognized that the balance between information access and government secrecy had tipped too far in favor of nondisclosure. Despite lingering concerns over national security, Congress attempted to remedy the situation by enacting the Freedom of Information Act (FOIA). FOIA substantially increased the amount of information that was publicly accessible under the APA, granting the public a right to information “long shielded unnecessarily from public view.” Information held by federal government agencies that had been restricted to the public under the APA would henceforth be made available “for public inspection.”

Nevertheless, Congress was mindful that certain information involving national security, business confidentiality, and privacy interests might simply prove too harmful for public disclosure. Thus, FOIA contains nine exemptions, “specifically made exclusive and...plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed.” Congress also included in the act the right of individuals whose information requests are denied to appeal the decision to a U.S. district court.

II. Basic principles of the Freedom of Information Act (FOIA).

A. FOIA establishes rules for accessing information held by the U.S. government.

B. FOIA applies to records held by the executive branch of the U.S. federal government, including government agencies such as the Environmental Protection Agency (EPA).

C. FOIA does not apply to records held by:

1. state governments (information held by state governments may be available on the basis of state laws very similar to FOIA);
2. Congress;
3. the courts;
4. private industry; and
5. private citizens.

D. The bare language of FOIA has been elaborated by regulations and by decisions issued by U.S. federal courts (the courts that decide appeals from agency decisions to provide or withhold documents).²

E. The government’s obligation under FOIA is merely to provide existing information in response to a request, in whatever form that information is maintained by the government.

1. The government is not required to analyze information.
2. The government is not required to generate information or data that do not currently exist.

F. FOIA is used by the public to obtain documents that are not automatically available. By law, some kinds of information and data must already be available to the public (see Appendix). Examples of this “actively provided information” include:

1. public parts of rulemaking records, usually held in publicly accessible “dockets”;
2. effluent and emissions data; and

² In the common law court system, judges exercise very broad interpretative powers to mold the law; thus, decisions of courts concerning the application of specific laws become a “gloss” on the law and broadly applicable not only to the litigants but also to others similarly situated.

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3. Toxics Release Inventory (TRI).
 - a. The Superfund Reauthorization Amendments requires EPA to collect and make available to the public certain data regarding toxic releases from private industry. The data are collected annually from the companies.
 - b. TRI is a tool to allow companies and interested citizens to learn what kinds of toxics companies use and transport.
 - c. Information on TRI can be found on the Internet at http://www.epa.gov/enviro/html/tris/tris_overview.html.

G. Several types of environmental information are potentially subject to a FOIA request (although not necessarily available because they may be exempt; see Section IV):

1. information collected from private industry, including in the course of enforcement inspections;
2. background documents from rulemakings that are not part of the official docket;
3. confidential parts of rulemaking dockets;
4. parallel confidential dockets set up at the same time as the publicly accessible docket;
5. internal memos;
6. legal opinions from the EPA legal office (Office of the General Counsel);
7. predecisional memos that lead up to an EPA decision;
8. files generated in identifying contaminated sites for cleanup (Superfund sites) and potentially responsible parties;
9. comments and reviews by EPA's Science Advisory Board;
10. documents related to EPA's research and development function; and
11. information related to successful and unsuccessful bids for EPA contracts (e.g., when a losing bidder wants information about who won, and why).

H. Those who may request information under FOIA include:

1. U.S. citizens;
2. non-U.S. citizens;
3. private industry;
4. associations, such as labor unions and trade associations;
5. educational institutions, including universities;
6. local, state, and foreign governments; and
7. other nongovernmental organizations (NGOs), including public interest environmental groups, and even foreign organizations, all of which may seek to mold regulatory policy at the early stages of a proceeding, when participation is most effective.

I. Information existing in the following forms may be requested:

1. written documents;
2. photographs;
3. audio recordings; and
4. computerized records or e-mail.

J. A request must reasonably describe the records being sought in language specific enough to permit a professional employee of the agency—someone familiar with the subject matter—to locate the record in a reasonable period of time. A request may be made in the following forms:

1. letter;

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2. fax; or
3. e-mail.

K. Nine categories of information are considered exempt from disclosure under FOIA, but government officials have discretion to provide documents even if they can legally withhold them (see Section IV for a list and Section V for an analysis of these exemptions).

1. The government bears the burden of demonstrating that its decision not to disclose the information was lawful and appropriate.
2. If the government determines that a request for information falls within the range of one of these exemptions, the decision may be appealed by the requester to a U.S. (federal) district court.
3. Willful disobedience by the government of FOIA provisions may result in severe penalties assessed against the government employees who violated the act.

L. Requests for records or materials held by the EPA are forwarded to the Freedom of Information Office of the region in which the requester lives.

1. Following receipt of the request, the requester is sent confirmation of the date the request arrived at the office, using a requester's identification number (RIN) to facilitate tracking.
2. EPA has 20 business days from this date in which to respond before the requester can claim that there has been no response from the agency and initiate appeal proceedings in district court (see Section IX for more details).

Box 1: Duties of requesters of information under FOIA

- A request must reasonably describe the records being sought in language specific enough to permit a professional employee of the agency who is familiar with the subject matter to locate the record in a reasonable period of time.
 - Because agencies organize and index records in different ways, one agency may consider a request reasonably descriptive while another agency may reject a similar request as too vague.
 - For example, the Federal Bureau of Investigation (FBI) has an index of names for its primary record system and is able to search for records about a specific person. Agencies that do not maintain a central name index may reject a similar request because the request does not describe records that can be identified.
- Requesters should make requests as specific as possible. If a particular document is required, it should be identified precisely, preferably by date and title. However, a request does not always have to be that specific. A requester who cannot identify a specific record should clearly explain her needs. A requester should make sure, however, that a request is broad enough to include all desired information.
 - For example, a requester wants a list of toxic waste sites near his home. A request for all records on toxic waste sites would cover many more documents than are needed. The fees for such a request might be very high, and the request might be rejected as too vague. A request for all toxic waste sites within three miles of a particular address is very specific. However, it is unlikely that EPA would have an existing record containing data organized in that fashion. As a result, the request might be denied because there is no existing record containing the information. The requester might therefore ask for a list of toxic waste sites in his city, county, or state. It is more likely that existing records might contain this information. The requester might also tell the agency that he wants to know about toxic waste sites near his home; this additional explanation may help the agency find a document that meets the need.

III. Balancing disclosure and confidentiality.

A. Policy considerations.

1. In drafting FOIA, Congress recognized the difficulty of balancing potentially conflicting interests and values. Members of Congress expressed their views on this issue:
 - a. “Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.”
 - b. “It is necessary to protect certain equally important rights of privacy with respect to certain information in Government files.”
 - c. “It is also necessary for the very operation of our government to allow it to keep confidential certain material.”
2. Those who furnish certain kinds of information need to be protected.
 - a. The public has a right to know certain information concerning private industry, but industry also has a right to a certain degree of privacy. If the release of certain information will severely damage a company or reduce the likelihood that industry will provide information to the government, that information should not be released.
 - b. The release of certain information may invade personal privacy and, in the case of ongoing enforcement actions, damage the reputations of persons or companies before they have a chance to establish their innocence.
 - c. The release of information related to certain aspects of a company’s products or financial status may destroy commercially valuable trade secrets or give competitors an unjustifiable advantage.
3. The ability of government agencies to enforce laws also needs to be protected.
 - a. The indiscriminate release of information could allow the subjects of environmental enforcement actions to hide or destroy evidence, or discourage potential witnesses from cooperating with investigators.

B. FOIA provides several tools to balance interests.

1. The act mandates a presumption in favor of disclosure.

Box 2: Duties of government to respond to requests for information

- U.S. rule: Under FOIA, a federal agency is required only to provide existing records or documents to comply with a request. An agency is not obliged to create a new record, collect information it does not have, or do research or analyze data for a requester.
- Aarhus Convention rule: The requester may specify the form in which she wants the information. The public authority may provide the information in a different form only for justified reasons. Although the general principle is the same as in the United States (that the public authority provides only information it already holds), the authority may in fact create a new record by processing the information into the form requested.
- Netherlands rule: The requested information is provided through
 1. giving a copy or giving the literal contents in any other form;
 2. allowing the requester to take notes on the contents;
 3. providing an extract or summary; or
 4. providing information from these documents.

The form chosen depends on the preference of the requester and the expediency of procedure. In general, the authority provides the information in the form requested unless this request is unreasonable, too laborious, or too costly.

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2. The exemptions from disclosure protect information in nine categories.
3. The act includes two other protections:
 - a. The subject of any information disclosure is informed that the information will be provided and may ask a court to block the government's disclosure of information through a so-called reverse FOIA lawsuit.
 - b. In a reverse FOIA suit, the court considers whether an agency's decision to release information was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

IV. Exemptions to the Freedom of Information Act.³

A. Exemptions are legal reasons for denying a request for information. There are nine exemptions to FOIA's information disclosure provisions.

1. The intent of the exemptions is to protect information from disclosure only when disclosure would "have an effect considered excessively harmful to the producers of the information and a damaging chilling effect on the freedom of information itself."
2. The nine exemptions are as follows:
 - Exemption 1:* Matters of national defense or foreign policy.
 - Exemption 2:* Internal agency rules.
 - Exemption 3:* Information exempted by other statutes.
 - Exemption 4:* Confidential business information.
 - Exemption 5:* Privileged inter- or intra-agency memoranda.
 - Exemption 6:* Personal privacy.
 - Exemption 7:* Records or information compiled for law enforcement purposes.
 - Exemption 8:* Records of financial institutions.
 - Exemption 9:* Geological or geophysical information and data concerning wells.

B. Exemption 1: Matters regarding national defense or foreign policy.

1. Certain information regarding national defense or foreign policy is exempt. Information must be deemed "classified" according to the "procedural and substantive criteria" as defined in the latest relevant executive order issued by the President (or a past President).
2. To discourage the government from invoking national security to avoid providing documents, the law limits the circumstances in which an EPA document may be classified or reclassified after a request for the document has been received. No EPA document may be classified or reclassified unless the classification is (1) clearly consistent with the executive order and (2) specifically authorized by the EPA administrator.

C. Exemption 2: Internal agency rules.

1. This exemption covers records held by a federal agency "related solely to its internal personnel rules and practices."
2. The purpose of this exemption is to avoid administrative burden.
3. The exemption includes internal matters of a relatively trivial nature for which there is no substantial and legitimate public interest in disclosure. These include
 - a. an internal matter that would effectively help someone outside the government evade a statute or an agency regulation;
 - b. documents governing staff use of parking facilities;

³The source of information for this section is *The Freedom of Information Act Guide*, Department of Justice, May 2000.

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- c. statements of policy on sick leave; and
 - d. file numbers, routing stamps, and other administrative markings.
3. EPA has made a decision in its discretion not to withhold records of a trivial nature, even though such records may fall under Exemption 2.

D. Exemption 3: Information exempted by other statutes.

1. This exemption covers federal agency records classified as confidential under other federal laws passed by Congress.
2. The other law must clearly state what information can be withheld from the public or have “particular criteria for withholding” information.

E. Exemption 4: Confidential business information.

1. Withholding confidential business information (CBI) is justified for several reasons.
 - a. It safeguards submitters of business information from unnecessary harm and competitive disadvantage.
 - b. It protects the government’s ability to collect business information and thus discharge its regulatory duties.
 - c. It assures the submitters of information that their interests are recognized by the government.
 - d. It gives submitters of information incentive to voluntarily offer information sought by the government.
 - e. It also gives the government some assurance that information submitted to it by business will be reliable.
2. Exemption 4 applies to federal government agency records that include information relating to
 - a. trade secrets; and
 - b. information that is commercial or financial, obtained from a person, and is privileged or confidential.
 - i. Information generated by the federal government is not considered to have been obtained from a person and is therefore not subject to this exemption.
3. “Commercial or financial” information is defined by FOIA:
 - a. The phrase is given its “ordinary meaning.”
 - b. The term “commercial” includes anything pertaining or relating to or dealing with commerce.
 - c. Commercial information can include material submitted by a nonprofit entity.
 - d. Courts have rejected arguments attempting to confine the term to materials that reveal basic commercial operations. Instead, records are commercial if the submitter has a “commercial interest” in them.
4. Exemption 4 thus applies not only to economic data generated by companies, but also to personal financial information, including
 - a. business sales statistics;
 - b. research data (e.g., technical designs);
 - c. customer and supplier lists;
 - d. profit and loss data;
 - e. overhead and operating costs; and
 - f. information on financial condition.
 - g. Still, in all cases the “commercial interest” standard is applied.
5. A “trade secret” for the purposes of exemption 4 is
 - a. a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities, and that can be said to be the end product of either innovation or substantial effort.
 - b. There must exist a direct relationship between the trade secret and the use of that secret for business purposes.

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6. A “person” for the purpose of exemption 4 is different from the definition of a person for purposes of making a request under FOIA and includes
 - a. companies;
 - b. banks;
 - c. state governments;
 - d. agencies or foreign governments; and
 - e. Native American tribes or nations.
7. Two tests are applied to determine whether financial or commercial information that must be submitted to the government meets the definition of confidential information (and thus can be withheld from dissemination). Disclosure must either
 - a. impair the government’s ability to obtain necessary information in the future; or
 - b. cause substantial competitive harm to the person or business from whom the information was obtained.
8. Information that has been voluntarily submitted to the government, however, receives greater protection from disclosure under FOIA.
 - a. The government wants to avoid discouraging people from voluntarily submitting information.
 - b. Voluntarily submitted information is therefore categorically protected, unless it would normally be disclosed anyway to the public by the submitter.
 - c. The U.S. Department of Justice has issued government-wide policy guidance on whether a submission is voluntary. The test asks three questions:
 - i. Was the information submission a condition of participation in a program in which the private entity has chosen to participate? For example, was the submission really voluntary if it was submitted as part of an effort to obtain a government contract or to apply for a grant or a loan?
 - ii. Would the information have been provided by law at a later date, despite an earlier volunteering of the information?
 - iii. Was submission of information a condition of doing business with the government?
9. Exemption 4 is particularly relevant to records held by EPA.
 - a. Many EPA statutes give it the authority to require companies to provide information.
 - b. The test of substantial competitive harm is commonly applied to information in EPA’s possession.

F. Exemption 5: Privileged inter- or intra-agency memoranda.

1. Intra-agency memoranda or letters are exempt if these materials are “predecisional and deliberative.”
2. This exemption promotes candid discussion within government agencies.
 - a. Predecisional and deliberative materials are those written prior to an agency’s final decision and usually contain recommendations or express opinions on that decision.
 - b. The information normally contained in these documents involves such internal debates as the pros and cons of the agency’s adoption of one viewpoint or another.
3. This exemption does not include documents reflecting an agency’s final decision or memoranda explaining a final decision. Such documents cannot be considered part of the deliberative process: They are part of the law itself and must be disclosed.
 - a. Example: A memorandum of the general counsel of a federal agency explaining why he did not commence an unfair labor practice hearing is not protected.
 - b. But a general counsel’s memorandum explaining why he *will* commence a proceeding is protected because its release could reveal his litigation strategy.

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4. If documents requested under FOIA contain both predecisional and deliberative material and factual information, predecisional material can be removed and the rest of the documents can be presented to the requester.

G. Exemption 6: Personal privacy.

1. This exemption covers all information about individuals in personnel, medical, and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
2. This includes any information about a particular individual that is identifiable to that individual.
 - a. For example, it would violate personal privacy to release information concerning a federal employee's medical records or patterns of sick and vacation leave.

H. Exemption 7: Information compiled for law enforcement purposes.

1. This category is known as the "enforcement exemption."
2. It applies to records or information compiled for law enforcement purposes, when the release could cause such harms as revealing the identity of a confidential source or endangering an individual's physical safety. This includes records of investigations where disclosure could reasonably be expected to interfere with enforcement proceedings.
3. The Supreme Court has held that witness statements gathered during unfair labor practice investigations can be withheld because disclosure would permit employers or unions to coerce potential witnesses into changing their testimony, or not testifying at all.

I. Exemption 8: Records of financial institutions.

1. This exemption, which covers "reports prepared for agencies responsible for the regulation or supervision of financial institutions," is rarely encountered by EPA, and therefore no detailed explanation is provided.

J. Exemption 9: Geological or geophysical information and data concerning wells.

1. Certain "geological and geophysical information and data, including maps, concerning wells" are exempt under FOIA.
2. This exemption was probably enacted as a result of lobbying by private industry seeking to protect information regarding environmentally sensitive projects.

V. Determining confidentiality.

A. The federal government obtains sensitive information and data in its capacity as a regulator and enforcer. Some of this confidential business information relates to the environment:

1. information about new chemicals or pesticides being developed by companies;
2. health and safety studies;
3. information obtained by EPA inspectors during enforcement inspections; and
4. risk management plans (RMPs), used to analyze off-site consequences) for factory emissions and on-site chemicals.

B. The government considers whether data or information should be protected from public disclosure only in certain circumstances.

1. EPA usually lacks resources to look at confidentiality status without the prod of a FOIA request.
2. Possible triggering events:
 - a. EPA receives a FOIA request from a member of the public.

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- b. EPA initiates a review of documents because it expects public concern or a request.
- c. EPA initiates a review because it needs the information to write or revise a regulatory requirement or carry out an administrative or legal proceeding (e.g., for an environmental enforcement case).⁴ EPA may initiate such a review because enforcement actions and rulemaking are done in a transparent way, so any data or information EPA uses should be available for public review, if legally possible.
3. After being contacted by EPA, companies can either substantiate⁵ or waive their claims for confidentiality. To substantiate a claim of confidentiality,
 - a. the company may provide information explaining why the documents are sensitive; or
 - b. the company may answer questions presented by EPA..
4. If EPA decides that the information is not confidential, it notifies the company by certified mail (a special postal service that verifies delivery).
 - a. The company has ten working days from receipt of the notice to go to court to challenge EPA's final determination through a reverse FOIA suit (see Section III B).⁶
 - b. If no challenge is filed within ten working days, the information is released.

C. An example of the EPA process for judging claims of confidentiality:

1. Under the Toxic Substances Control Act (TSCA), EPA examines and reviews new chemicals that companies want to sell. Typically, companies believe that information about new chemicals, particularly the formulas and ingredients, is extremely sensitive.
 - a. Previously, EPA required companies to substantiate the confidentiality claim when the information was submitted to the EPA. Companies complained about the heavy burden, for these reasons:
 - i. About 70,000 chemicals were involved, and companies had to prepare enormous amounts of paperwork.
 - ii. The documents were not necessarily being utilized by EPA.
 - iii. The documents might not be subject to FOIA claims or otherwise need to have CBI decisions made about them.
 - b. EPA has revised its procedures so that substantiation is selective, and usually triggered by FOIA requests.

VI. Protecting confidential information.

A. EPA has special rules for handling confidential business information. The rules have evolved as EPA has gained understanding about the problems of handling CBI. The agency has expanded the types of information that are handled in confidence.

⁴ This legal provision has been criticized by one U.S. District Court. The judge accepted the argument that EPA's unfettered right to release the information might cause damage and violate due process guarantees. The court ordered that rather than release the information wholesale, EPA instead review and make a specific finding for each contested document. Complying with this court order has proven to be time- and resource-intensive.

⁵ A company may assert confidentiality by citing one of the FOIA exemptions, as articulated in federal regulations (40 CFR 2.301g) and specific provisions in relevant environmental statutes (e.g., Toxics Substances Control Act; the Federal Insecticide, Fungicide and Rodenticide Act; the Resource Conservation and Recovery Act; Clean Air Act; etc.)

⁶ Technically, the case is brought under the Administrative Procedure Act (APA) on the basis that the government's action in withholding information was "arbitrary and capricious."

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B. EPA is currently reexamining its CBI rules and writing guidance for its employees to better define which kinds of information fit into each category of information that is exempt from disclosure. The goal is to have uniform procedures throughout the agency.

C. Data storage and record retention:

1. Unless documents are specifically identified as CBI at the time of submission, they are stored in normal EPA files until a request is made or there is a proceeding.
2. Once information or data are determined to be confidential, the information becomes subject to a security system.
3. EPA does not have a centralized security system, and security systems vary from office to office. The Air Office, for example, may have a different system from the Water Office.

D. Methods for assuring security:

1. Documents may be separately stored.
2. Documents subject to security arrangements may be held in locked areas, put on private networks (as opposed to local area networks), and made not transportable (i.e., through e-mail).
3. Information may be placed on floppy disk (which is then locked up) rather than stored on a hard drive.
4. Some agency workers who deal with this type of information have two computers to segregate the information, one for public and one for private information.
5. Information is tracked to restrict access.
6. Annual training is required for individuals who handle this type of information.
7. An annual determination is made about the right to access the information (annual licensing), and the test is “need-to-know”—that is, does the employee require access to the sensitive information to do her job?
 - a. Only about 8% of all EPA employees and contractors have access to secure or sensitive documents, and only if their job requirements make it necessary.

E. EPA continues to explore technologies that can increase security.

1. The most stringent EPA security system is applied to confidential business information supplied under the Toxic Substances Control Act, the result of a court order. Elements of this security system include
 - a. security staff;
 - b. information not accessible on the hard drive of a computer;
 - c. nontransferable information;
 - d. a very thorough tracking system; and
 - e. retraining and annual certification of people with access to the information.
2. EPA is considering new security arrangements, consisting primarily of standardizing procedures throughout the agency. The difficulty is whether and how to establish agency-wide procedures because of the many different kinds of information collected and because of differences among agency programs.
 - a. The new Office of Environmental Information (OEI) has convened an EPA-wide working group to obtain an overview of EPA security procedures.
 - b. A central tracking system would help prevent the misplacement of information and assist in finding lost data.
 - c. Different levels of security may need to be established depending on the type of the information and the needs of program offices.
 - d. EPA has considered writing a “sunset clause” for CBI; this would set a time limit. Before the time limit, information claimed as CBI would be presumed to be CBI, subject to substantiation; after the time limit, the presumption would be in favor of release of the information, but the presumption could be challenged.

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- e. EPA is considering a pilot program in which persons would have to reassert their claims to confidentiality for specific subcategories of information provided under TSCA. The pilot program would include a “last chance” letter saying that the data will be released unless they make a final claim for confidentiality.
- f. Old documents that are no longer being used are required by federal law to be removed from agency offices and held in a centralized, protected storage area.
3. Special rules apply to e-mail communications that may contain confidential business information.
 - a. Electronic mail messages must be kept for 90 days.
 - b. EPA recycles and reuses electronic storage tapes after 90 days (because they are expensive to index and store), so the records are effectively lost forever.
 - c. For FOIA requests made within the 90-day period, EPA employees must search their own computers.
 - d. For requests made after 90 days, there is no obligation to search; the relevant tapes no longer exist.
 - e. E-mails placed in the public docket can be released at any time.
 - f. A federal court ordered EPA to follow a different procedure for handling e-mail communications related to a lawsuit involving an attempt to regulate “secondhand” smoke.
 - i. EPA must save e-mails specific to tobacco smoke and indoor air pollution.
 - ii. Any relevant information in e-mail format must be sent to a central file server, and requests for this information that are received more than 90 days after the e-mail was created must be honored.
 - iii. Complying with this court decision is costing EPA hundreds of thousands of dollars.

VII. Fees.

A. FOIA requires all agencies (including EPA) to publish fee schedules for providing information to the public. Government-wide consistency is assured by guidance from the Office of Management and Budget.

B. EPA uses the following process to implement the requirement.

1. EPA records the direct expenses it incurs for time spent searching for information, reviewing the information to determine whether it is confidential, and copying the information.
2. Each request is categorized as coming from one of the following categories:
 - a. commercial;
 - b. educational or nonprofit scientific institution;
 - c. media; or
 - d. other (private citizens, public interest research groups, etc.).
3. A requester may be asked to show proof of his or her affiliation for the strict purpose of establishing which billing category is appropriate.
4. Fees for information services vary for each of the above categories. For example:
 - a. Category “a” requesters (commercial) are charged for search and review time plus duplication costs.
 - b. Category “d” requesters (private citizens and public interest research groups) receive the first 100 pages plus two hours of search time for free.
5. EPA has established terms of payment.
 - a. Usually the requester pays any fee following receipt of the information.
 - b. If the total fee exceeds \$250, EPA requires the requester to pay before the information is provided.

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- c. EPA has not billed for amounts of \$25 or less because the costs of billing were thought to be more than the actual return. If a proposal to revise the billing policy is approved, EPA will not bill for amounts of \$14 or less.
6. The fees do not cover the costs.
 - a. All money received goes to the U.S. Treasury, not to the agency.
 - b. EPA may not charge more than \$10 per half-hour of search time; this amount does not begin to cover the actual costs of most professional employees who search for documents.
7. A proposed regulation would increase the amount charged for search and review time.
 - a. Search time would be divided into quarter-hour increments, rather than half-hour, for a maximum of \$10.25 per quarter-hour.
 - b. Different levels of employees would charge differently. For example, clerical staff would charge less for their time than would professional staff.

C. The estimated cost to EPA of administering FOIA is approximately \$4 million per year. The actual cost is likely higher because staff time to process requests was not unaccounted for in the past; this cost is now being tracked.

VIII. Meeting the deadlines.

A. FOIA allows federal government agencies 20 days to respond to a request for CBI, plus an extension of up to 10 additional days (previous law allowed a total of only 10 days).

B. Within this time period, EPA must

1. search for the relevant documents;
2. seek substantiation from the business that provided the data; and
3. determine whether information should be considered confidential.

C. Even with the possibility of a 10-day extension, 20 days is often insufficient.

1. EPA staff are overextended and have other pressing tasks.
2. Because large amounts of information are now on the Internet, most current requests are for obscure documents that require extensive searches or for sensitive material that must be approved for release.
3. The deadline is often missed because of uncertainty about whether information should be released.

D. Practical solutions:

1. EPA often provides an interim response, and then releases information in increments as it becomes available and is reviewed.
2. For some particularly sensitive requests, EPA meets with the requesters to provide and discuss the information.

E. Nevertheless, complex cases typically take a year.

1. A requester of information has the right to appeal to a district court under FOIA if no response is received after 20 days (see Section IX for more details).

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Box 4: Tips for speeding the time for processing requests

- Encourage people to include their telephone numbers with their requests. Some questions about the scope of a request can be resolved quickly when an agency employee and the requester talk. This is an efficient way to resolve questions that arise during the processing of information requests.
- Encourage requesters to make their requests as precise as possible. The requester benefits because the request can be processed faster and cheaper. The agency benefits because it can do a better job of responding to the request. The agency will also be able to use its resources to respond to more requests. Information access works best when both the requester and the agency act cooperatively.

IX. Oversight and appeals.

A. EPA, like other U.S. government agencies, is subject to several levels of scrutiny and oversight, to make sure that agency employees are following the rules. EPA therefore reviews its own behavior and activities related to requests from the public for information.

1. Procedures reflect EPA's on-going learning experience of implementing FOIA.
2. EPA's FOIA office tracks requests for several purposes:
 - a. management;
 - b. billing; and
 - c. assuring timeliness of response.⁷
3. Tracking is handled as follows:
 - a. Each request is given a sequential "request identification number," or RIN.
 - b. EPA's FOIA office records each request and provides guidance on how it is to be handled.
4. EPA has a process to find documents and decide whether they should be released.
 - a. The custodian of the information requested must search for the documents and respond to the request.
 - i. The custodian is the particular EPA employee with appropriate expertise who works in the office responsible for collecting the data in question.
 - b. The custodian determines whether the documents requested should be provided or fall within one of FOIA's exemptions.
 - c. Difficult decisions can be referred to EPA's legal office or handled in consultation with the EPA legal office.
 - i. EPA regulations require that the final legal determination be made by the legal office.
 - d. During the decision process, the information is treated as though it is confidential.
5. Two provisions protect the public from agency abuses.
 - a. The agency must say specifically why information is being withheld by citing the applicable exemption.
 - b. The agency's response must include instructions for appealing the nondisclosure decision.

B. If the request is refused, the requester can first make an administrative appeal (appeal and review within EPA).

1. The requester can appeal EPA's initial decision not to release the information by asking for a legal review or determination by EPA's legal office.
2. EPA's legal office acts on behalf of the agency to make the decision.⁸

⁷ Failure to respond or failure to respond in a timely manner can lead to a lawsuit.

⁸ In some agencies, the head of the agency makes the final decision. If an agency is headed by a panel (rather than a single official), it must maintain and make available for public inspection a record of the final votes of each member in every agency proceeding involving a FOIA decision.

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3. If the legal office determines that the information is not legally confidential, it can be released.
4. If the legal office determines that the information is confidential and refuses to release it, FOIA gives the requester a right to appeal to a U.S. district court.

C. A court review is the second step in the appeals process.

1. The judicial appeal is heard by a U.S. district court in one of several possible districts:
 - a. where the requester resides;
 - b. in the requester's primary place of business;
 - c. where the agency or the requested records are located; or
 - d. the federal district court for the District of Columbia (Washington, D.C.).
2. The court is required to give *de novo* review.
 - a. This means that the court does not rely on the record created by the government but makes an independent review of the documents in question.
 - b. If the government claims that the information sought is extremely sensitive, the court may review the materials containing the information *in camera* (in private) so that the alleged confidentiality is not breached.
 - c. The government bears the burden of demonstrating that it made the proper decision in refusing to provide the document. The government can demonstrate this by presenting a sworn statement (affidavit) that explains the government's decision.
 - i. If the government cannot demonstrate to the court's satisfaction that the documents should be protected from distribution, the court will order that the requested documents be released.
 - ii. If the court finds that portions of the documents requested are legitimately confidential and within the scope of one of the nine exemptions, the confidential material will be removed, if possible, and the remainder of the document will be released.
3. The requester may be reimbursed for attorney's fees or litigation costs in some cases.
 - a. The requester must have been successful in overturning the government's decision to withhold information.
 - b. The court may charge the United States reasonable attorney's fees and other litigation costs incurred by the requester.
4. Sometimes a court may assess penalties against government personnel responsible for not providing documents.
 - a. The court must make two findings to assess penalties:
 - i. The government's decision not to disclose certain information was unlawful under FOIA.
 - ii. The circumstances surrounding the decision to withhold suggest that government personnel acted arbitrarily or capriciously.
 - b. A "special counsel" is then appointed to initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for withholding documents.
 - c. The special counsel investigates and considers the evidence submitted, submits his findings and recommendations to the administrative authority of the agency, and sends copies of the findings and recommendations to the officer or employee or her representative.
 - d. The administrative authority in the agency then takes corrective action.

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Box 3: Procedures when requests go to the wrong public authority

- U.S. rule: A FOIA request must be addressed to a specific agency. There is no central U.S. government records office that services FOIA requests. If a requester does not know beforehand which agency has the desired records, the requester can consult a government directory, such as the United States Government Manual. This manual has a complete list of all federal agencies, a description of agency functions, and the address of each agency. A requester who is uncertain about which agency has the records that are needed can make FOIA requests to more than one agency. If a request is incorrectly addressed, the agency may simply notify the requester that it does not have the desired information.
- Aarhus Convention rule: If a public authority does not have the relevant information, it must promptly inform the requester and either transfer the request to the appropriate agency or inform the requester which authority may have the requested information.
- Netherlands rule: If the request for information is filed with the wrong authority, this authority will refer the requester to the authority that has the information or, in case of a written request, automatically forward the request and notify the requester.

X. Educational efforts.

A. Concern that the public might misinterpret technical information and overreact has pushed EPA to make its information more understandable. EPA does not add explanations to information provided under FOIA, but the agency is making other efforts to prevent misunderstandings:

1. Education is provided through the regional offices, which sometimes host town meetings.
2. EPA public affairs divisions have become more active.

B. These efforts to increase comprehension of information help prevent complaints and decrease the volume of information requests.

XI. Conflicts between FOIA and other laws.

A. Certain laws appear to conflict with the disclosure provisions of FOIA. Example: the Trade Secrets Act.

1. This act makes it illegal for an employee in the scope of official duties to divulge (without legal authority) certain sensitive information relating to manufacturing activities.
2. Types of information include
 - a. operations, style of work, or apparatus of any manufacturer or producer;
 - b. amount or source of income, profits, losses, or expenditures disclosed in income tax returns; and
 - c. certain trade secrets or processes.

B. The U.S. Supreme Court has ruled that if an information request under FOIA would violate another law, a court may order that the information not be disclosed.

C. A series of court cases defined a balance between the Trade Secrets Act and FOIA.

1. "If commercial and financial data as defined by the Trade Secrets Act does not fall within one of the FOIA exemptions, on balance it ought to be disclosed in the interest of informing the public of the bases for governmental action."
2. Thus, if one of the FOIA exemptions applies, the Trade Secrets Act will bar a discretionary release.

XII. Lessons from EPA's experience.

A. EPA's management of information requests has evolved over 30 years. EPA in early 1970s was the target of many criticisms.

1. The agency had poor record systems, and EPA personnel relied principally on memory to respond to requests.
2. Responses were informal: "We've searched everywhere and haven't found what you're looking for and we'll get back to you if we find something."
3. Requests were not honored unless explicitly called a FOIA request by the requester. (Today most requests for information are assumed to be made under FOIA.)
4. Absence of EPA rules for defining a request, determining fees, and tracking information was used as an excuse not to provide information.

B. Legal reforms and related institutional changes, prompted by public complaints, administrative appeals, and litigation, have resulted in the following improvements.

1. Amendments to the basic FOIA law have clarified the process.
2. Exemptions and fee schedules are defined.
3. Systems to track requests have been established, making oversight of agency personnel possible.
4. A required annual report to Congress provides information concerning the types and numbers of information requests.
5. Government agencies withholding information are required to provide details concerning denials of information requests and to name the individuals responsible for the denials.
6. A sample EPA report can be found at <http://www.epa.gov/foia/foiarpt99.htm#6BA>

C. Reforms specific to EPA include the following:

1. FOIA responsibilities are handled by EPA's Office of the Administrator (formerly, EPA's Public Affairs Office acted as the focal point for requests).
2. Newer EPA programs (TSCA,⁹ RCRA,¹⁰ Superfund¹¹) took advantage of lessons learned from older programs (Air and Water) and immediately established filing systems, dockets, etc., rather than waiting until FOIA requests were received.

D. Agencies are responding to changes brought by the information age.

1. FOIA was modified and updated in the 1996 Electronic Freedom of Information Act amendments ("E-FOIA").¹²
2. These amendments "embrace the revolution in electronic data collection and communication" and seek to foster public trust in government.
3. Federal records created as of November 1, 1996, must be placed on-line and accessible to the public without cost.
4. EPA was required to formulate a list of records "previously released under FOIA" and publish them on-line by the end of 1999.

⁹Toxic Substances Control Act.

¹⁰Resource Conservation and Recovery Act.

¹¹Comprehensive Environmental Response, Compensation, and Liability Act.

¹²http://www.usdoj.gov/oip/foia_updates/Vol_XVII_4/page2.htm

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5. As a result, a great deal of information regarding EPA policies, practices, and decisions is now available on-line, via the Internet or “another electronic form,” and there is no need to procure it through the FOIA information request procedure.¹³
6. The EPA website hosts a number of vast databases, in a relatively user-friendly format.
7. A requester can ask for a specific format for the response (e.g., PDF, EXCEL).

E. Other changes have been made as well.

1. EPA is no longer required to report to Congress the specific names of persons denying information requests.
2. Prospectively, documents that are not subject to a legitimate FOIA exemption must be placed in both electronic and conventional reading rooms (i.e., on the website and on paper) if requests for those documents are frequent.
 - a. The Department of Justice has interpreted “frequent” to mean three requests in a year.
 - b. In other words, the government must make some documents available without waiting for additional specific requests.
3. EPA created a centralized office to manage information, the Office of Environmental Information (OEI), and assigned it several tasks.
 - a. examining CBI regulations and recommending changes to simplify the process;
 - b. addressing continuing tension between the right to know and the need to protect information that meets the standards of the FOIA exemptions (and the requirements in specific statutes);
 - c. examining ways to increase (and in some instances introduce) standardization of information collection among the various offices of EPA, consistent with the individual missions and needs of those offices; and
 - d. meeting with stakeholders to develop standardized approaches.
 - i. In meetings with people who submit information to the agency, EPA learns about their preferences and concerns before decisions are made.
 - ii. In meetings with EPA personnel, the agency learns about the independent needs and concerns of program offices.

F. Results of reform efforts.

1. FOIA requests are now less likely to be litigated and tied up in court proceedings than in the past.
2. Public understanding of FOIA has grown; EPA receives better-written, more targeted FOIA requests.
3. EPA better understands what is being requested; it is harder for EPA to avoid requests by invoking procedural problems.
4. Because of E-FOIA, decisions about many documents are made without waiting for requests, and documents that are nonconfidential are placed on the EPA website.

¹³ Private industry is beginning to argue that the increase in electronic information is threatening to companies’ well-being because it facilitates the distribution of erroneous data, bad data, or outdated methodologies—for example, when industry rankings are based on bad data or outdated methodologies. The driving issue is the speed with which the information gets out, the widened distribution as a result of electronic dissemination (formerly, someone had to go to EPA or ask under FOIA; now information is accessible globally), and the potential impacts on markets. Industry says that this data distribution has impacts stronger and swifter than direct regulation; indeed, it argues that government sometimes consciously uses information disclosure to affect behavior but that decisions to release information are not reviewable by courts, leaving industry vulnerable. Industry wants judicial review or the right to bring defamation suits for false and/or misleading information. There is some evidence that these arguments are the product of creative lawyering, but they are starting to gather attention. The counterarguments are that (1) there are less costly ways than litigation to assure that information is valid and fair; and (2) agencies do not knowingly distribute false and misleading data and information because they have an interest in maintaining their credibility and are accountable to Congress, the Office of Management and Budget (an office that works directly for the President), and the inspectors general.

5. EPA has developed a good record of being responsive to requests.¹⁴

G. There remains a need for coordination and management within the agency. EPA faces many practical problems in its administration of FOIA.

1. EPA is a geographically dispersed government agency, with headquarters plus ten regional offices plus labs and other offices around the country. Each EPA office can receive separate FOIA requests from the public. The challenges that come up include the following:
 - a. Achieving consistent responses and effective coordination.
 - i. The ten EPA regional offices and EPA headquarters often receive requests for the same information.
 - ii. Sometimes offices respond inconsistently: One EPA office or region may release documents that others withhold.
 - b. Avoiding legal problems, such as court challenges.
 - c. Helping regions manage scarce resources for responding to FOIA requests through standardized procedures and forms.
 - d. Avoiding the improper release of information.
 - i. Example: Under U.S. law, a release of information to a state, city, or local government has the same effect as a release to the general public.
 - ii. Thus, if a regional office releases otherwise-exempt, confidential information to the states, it cannot legally refuse that information to the next requester, which might be a company or an NGO.
2. Experience has revealed some special problems that were not expected.
 - a. Example: EPA learned that companies that lost bids for EPA contracts would often seek information about the successful bid.
 - b. EPA had to establish procedures to protect contractors' invoices, rates, and employee names. Procedures are based on
 - i. federal requirements (the federal acquisition regulations);
 - ii. growing understanding within the government about what kinds of information should be protected and what should be made available; and
 - iii. court decisions in specific cases.
3. EPA needs to provide practical support and assistance to some submitters of information.
 - a. Most confidential data and information are obtained from large companies.
 - b. A demand from EPA for substantiation is more easily carried out by large companies, which have more resources.
 - c. Large companies have a greater understanding of the process and more resources to pursue a claim of confidentiality.
 - d. However, smaller companies tend to be involved in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund) program, and have duties under that program to provide information and data.
 - e. EPA provides informal assistance to smaller companies (although no particular formal procedures have been developed to help them):
 - i. helping small companies through the process; and
 - ii. giving small companies more benefit of the doubt.

¹⁴For interesting discussion regarding information provision on websites, see the article at <http://www.freedomforum.org/press/1998/6/9efoia.asp>. EPA is described as having a "good track record" compared with some other U.S. federal agencies.

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H. EPA has several tools for managing past and potential problems:

1. guidance and training for regional FOIA officers;
2. training sessions for regional staff;
3. oversight of the regions by specialists in headquarters;
4. monthly telephone conference calls to discuss current issues and problems;
5. annual conferences (including FOIA lawyers); and
6. a manual, made available to all EPA employees who might have questions about FOIA processes. The manual
 - a. answers questions;
 - b. provides standardized letters and forms to facilitate responses; and
 - c. lists key people who will answer questions.

I. To expedite FOIA decisions, EPA uses the legal mechanism of "class determinations."

1. Class determinations establish generic categories of information that must automatically be considered confidential or be disclosed.
2. Examples of class determination categories that have been created to date include
 - a. contract information;
 - b. résumés and curricula vitae; and
 - c. the cost of services.
3. Classes can be created as needed. Initially, many classes were developed; few have been added in recent years.
4. Government employees and agencies are legally obligated to obey the class determination.
5. If a document falls into one of the classes, those who might object to its disclosure can challenge the release only in court (through judicial review); they cannot pursue internal administrative review within EPA.
 - a. This procedure removes a company's usual opportunity to dispute a finding that information should be released to the public.
 - b. However, EPA notifies the company before the information is disclosed.
6. Although classes tend to be narrowly defined, industry is generally uncomfortable with class determinations and prefers that determinations be made on an individual or case-by-case basis, so that companies can make specific arguments against disclosure.

Internet Sources for Further Information on U.S. FOIA

U.S. government guides to Freedom of Information Act

- Department of Justice (DOJ): <http://www.usdoj.gov/04foia/referenceguidemay99.htm#where>
- Environmental Protection Agency (EPA): <http://www.epa.gov/foia/broc.htm#a>
- Federal Bureau of Investigation (FBI): <http://foia.fbi.gov/>
- Other federal government FOIA websites: http://www.usdoj.gov/04foia/other_age.htm
- Guide published by the US Congress: http://www.epic.org/open_gov/citizens_guide_97.html

Guides provided by nongovernmental bodies

- American Civil Liberties Union (ACLU): <http://www.aclu.org/library/foia.html#request> **
- Electronic Privacy Information Center: http://www.epic.org/open_gov/rights.html
- Right to Know Network: <http://rtknet.org/>

**This is an NGO that advocates and litigates to support the individual rights and liberties guaranteed by the Constitution and laws of the United States.

Part Two The EU Directive and Its Implementation in the Netherlands

I. Introduction

The regimes for access to environmental information in the 15 member states of the European Union are all based on the European Community's 1990 Directive on the Freedom of Access to Information on the Environment. EU member states are required to implement this directive in their national legislation. Some member states have implemented this directive in legislation specific to environmental information; others have added the directive to existing laws covering general access to government information or used this directive to create general legislation. This paper first summarizes the directive. It then describes the access to environmental information system in one of the EU member states, the Netherlands, and also looks at implementation in Italy.

II. The EU Directive on Access to Environmental Information.

A. *Background.*

The main EU legal instrument on access to environmental information is the Directive on the Freedom of Access to Information on the Environment, adopted in June 1990.¹⁵ The directive had to be implemented in the domestic legislation of the member states by 31 December 1992.

B. *Basic principles.*

The objective of Directive 90/313/EEC is to ensure freedom of access to environmental information held by public authorities, as well as the dissemination of this information in a comparable, harmonized manner throughout the EU. It sets the basic terms and conditions under which information on the environment should be made available.

The directive defines "information relating to the environment" in a very broad manner, covering "any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites and on activities or measures adversely affecting, or likely to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes." The European Court of Justice has indicated that the term "information relating to the environment" needs to be interpreted broadly to include any "act capable of adversely affecting or protecting the state of one of the sectors of the environment covered by the directive." For example, the court held that "measures" included a statement of views given by a countryside protection authority in development consent proceedings if that statement could influence the outcome of those proceedings as regards interests pertaining to the protection of the environment.¹⁶

The directive defines "public authorities" in a similarly broad manner, as "any public administration at national, regional or local level with responsibilities, and possessing information, relating to the environment." The directive also covers information held by "bodies with public responsibilities for the environment and under the control of public authorities."

¹⁵ Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, in Annex I of this paper.

¹⁶ ECJ Judgment of 17 June 1998 (W. Mecklenburg v. Kreis Pinneberg), paras. 21 and 22.

Box 5: Exemptions to the free access to information on the basis of Article 3(2) of the EU directive

Member states may refuse a request for such information if it affects

- the confidentiality of the proceedings of public authorities, international relations, and national defense;
- public security;
- matters that are or have been sub judice or under inquiry (including disciplinary inquiries), or are the subject of preliminary investigation proceedings;
- commercial and industrial confidentiality, including intellectual property;
- the confidentiality of personal data or files;
- materials supplied by a third party without that party being under a legal obligation to do so; or
- materials whose disclosure might result in damage to the environment.

Excluded from the scope of the directive is information held by “bodies acting in a judicial or legislative capacity.” The European Court of Justice has interpreted this exclusion narrowly, limiting it to situations in which the relevant body is performing its judicial functions. The same narrow interpretation is likely to be applied to a legislative body.

The directive prohibits public authorities from requiring proof of interest; rather, the requested information needs to be provided without the requester’s having to prove an interest. Member states need to make their own practical arrangements for providing the information.

Public authorities need to respond to a request for information “as soon as possible and at the latest within two months.” Refusals to provide information must be justified.

C. Fees.

The directive allows member states to charge for the information provided but requires that such fees may not exceed a “reasonable cost.” The European Court of Justice found that “any interpretation of what is a ‘reasonable cost’ ... which may have the result that persons are dissuaded from seeking to obtain information or which may restrict their right of access to information must be rejected.” This means that “it does not authorise Member States to pass on to those seeking information the entire amount of the costs, in particular indirect ones, actually incurred for the State budget in conducting an information search.” Thus the costs should not be disproportionate to the information actually supplied, and if no information is supplied, no charge may be made for the administration’s costs incurred by the search.¹⁷

D. Grounds for refusing access.

The directive contains a list of exceptions to the freedom of access to environmental information. The directive states that in their national legislation implementing the directive, member states *may* refuse access to information on the environment if it affects the issues listed in its Article 3(2). Member states thus need not apply all the exemptions listed in the directive. In practice, however, most member states have implemented all exemptions in their national legislation.

The European Court of Justice has interpreted these exceptions in a very limited manner. It finds that the directive starts from the assumption that access to information should be provided, since that is the goal of the directive.

¹⁷ ECJ Judgment of 9 September 1999, Case C-217/97 (Commission v. Germany).

Access can be denied only in specific and clearly defined cases. No reason for denying access can be interpreted to extend beyond what is necessary to protect the interests it is intended to uphold.¹⁸

The court has so far addressed the scope of only one of the grounds for refusal: matters *sub judice* or under inquiry or the subject of preliminary investigation proceedings. The court held that the term “preliminary investigation proceedings” in the directive needs to be strictly construed and does not include administrative procedures that are preparatory to an administrative measure. According to the court, this exception is admissible only if it immediately precedes a contentious or quasi-contentious procedure and is justified by the need to obtain proof or to investigate a matter prior to the opening of the actual procedure.¹⁹

If for any of the above reasons information cannot be provided, the directive requires that partial information be supplied if the protected information can be extracted.

The directive furthermore allows a request for information to be refused if it involves the disclosure of unfinished documents (documents still in draft stage), incomplete data, or internal communications, as well as when it is a manifestly unreasonable request or has been formulated in “too general a manner.”

E. Appeals.

The directive provides for an appeal if the person requesting the information “considers that his request for information has been unreasonably refused or ignored” or has been “inadequately answered.” Judicial or administrative review of the decision is to be provided in accordance with the legal system of the member state.

III. The review of the Access to Environmental Information Directive.

A. Commission report on implementation of the directive.

The European Commission has recently issued a comprehensive report on implementation of the directive in the member states.²⁰ In this report the commission summarizes the experience of the 15 EU member states in terms of complaints from individuals concerning application of the directive, recommendations from the Stichting Natuur en Milieu (SNM) based on the conclusions of the IMPEL Workshop held in January 1998,²¹ and reports from the member states themselves. The very comprehensive comments made by SNM provide good guidance on the practical experience with implementation of the directive and are included in Annex III (below). The commission report also identifies improvements to be made to the EU directive, necessary for compliance with the Aarhus Convention.

The commission identified a number of problem areas in the application of the directive, including the need to

1. clarify the definition of “information” and the authorities required to disclose it;
2. improve the practical arrangements for ensuring that information is effectively made available (including creating registries on the availability of information, allowing requests for data in a specific form, designating specific contact officials or services, improving Internet access to information, requiring authorities to help and advise those requesting information, and issuing circulars on practical arrangements);

¹⁸ Mecklenburg v. Kreis Pinneberg, op cit, paras. 25 and 26.

¹⁹ Ibid. para. 30.

²⁰ Commission report of 29 June 2000 on the experience gained in the application of Council Directive 90/313/EEC of 7 June 1990, on freedom of access to information on the environment, COM(2000) 400, http://europa.eu.int/eur-lex/en/com/rpt/2000/com2000_0400en01.pdf.

²¹ Access to Environmental Information: The Review and Further Development of Directive 90/313/EEC, held in Utrecht, the Netherlands, 26 January 1998. The workshop report can be obtained from the Stichting Natuur en Milieu, Donkerstraat 17, NL-3511KB Utrecht, the Netherlands.

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3. draft the exemptions more narrowly;
4. clarify the duty to “respond” to include the duty to actually provide the information;
5. shorten the time for responding to requests;
6. clarify the duty to give reasons for a refusal;
7. allow for a speedy and inexpensive review of decisions to refuse access;
8. provide adequate information about fees if charges are made; and
9. improve the active supply of information.

B. Proposal for a new directive.

The shortcomings identified by the European Commission in its report on the implementation of the 1990 directive, together with the need to adapt the current directive to the Aarhus Convention and to follow new technological developments, prompted the commission to propose a new directive on public access to environmental information. This new proposal was published together with the report on implementation of the 1990 directive on 29 June 2000.²²

The development of the proposal will need to be carefully followed as it may have a significant impact on the way that EU member states shape their mechanisms for access to environmental information. Although the discussions on the proposal are still in a very early stage, the main changes are as follows:

1. Whereas the current directive only ensured freedom of access to environmental information, the new commission proposal establishes a *right* of access to environmental information, in line with the Aarhus Convention.
2. The definition of “environmental information” in the proposal is broader and more detailed. The proposed amendments include “measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect” the environment. The definition of “public authorities” is broader and includes, besides government or other public administrative entities at national, regional, and local levels, “any legal or natural person having public responsibilities or functions, or providing public services, relating directly or indirectly to the environment.”
3. Requesters not only would not need to “prove” an interest but would not need even to “state” an interest.
4. The time limit for responding to information requests would be reduced from “as soon as possible and, at the latest, within two months” to “as soon as possible and, at the latest, within one month.”
5. Public authorities would be obliged to make environmental information available in the form or format requested by the requester, unless the information is already publicly available in another form or format, or when it is reasonable for the public authority to make it available in another form or format.
6. Whereas the current directive allows public authorities to refuse access to environmental information if disclosure simply “affects” one of the listed legitimate interests, the proposed amendments allow the information to be withheld only if disclosure would “adversely affect” a legitimate interest. The amended proposal also requires that “in each case, the public interest served by the disclosure shall be weighed against the interest served by the refusal. Access to information will be granted if the public interest outweighs the latter interest.”
7. The proposal limits the list of available exemptions. Importantly, it states that member states may not refuse a request that relates to information on emissions, discharges, or other releases into the environment that are subject to provisions of European Community legislation.
9. The proposal obliges public authorities to publicize and make available to requesters a schedule of fees. It further requires them to publicize and make available information on the circumstances in which a fee may be levied or waived.

²² Commission proposal from 29 June 2000 for a directive on public access to environmental information, COM(2000)402 final, http://europa.eu.int/comm/environment/docum/00402_en.htm.

On 6 June 2001 the European Commission presented its amendments to the June 2000 proposal for a new directive, based on the comments received and amendments proposed by various institutions.²³ The directive has now gone into its second reading with the European Parliament, but it is unlikely that it will be adopted before the end of 2001.

IV. Information on water pollution in specific Community legislation.

A. Integrated Pollution Prevention and Control and the European Pollutant Emissions Registry.

The major European Community tool for the control of single-source emissions is the Integrated Pollution Prevention and Control (IPPC) Directive, which was adopted in 1996.²⁴ The directive, which establishes an integrated permitting system for large industrial installations, took effect for new installations on 30 October 1999. The directive will cover existing installations beginning 30 October 2007.

The IPPC directive contains a number of important provisions on public access to information. It requires that all permits provided under the directive be made available to the public and that the results of the monitoring of releases required under the permit also be made available to the public, although the exemptions in Article 3(2) and in Article 3(2) of Directive 90/313/EEC apply. The IPPC directive furthermore establishes a number of important requirements concerning public participation in the permitting procedure.

The directive also creates an important new tool to encourage the European Community to actively provide information on the environment to the public. The directive requires the commission to publish every three years an inventory of the principal emissions and sources in the European Community, the European Pollutant Emissions Registry (EPER).

The EPER decision was adopted on 17 July 2000.²⁵ According to this decision, member states must report to the commission any releases to air and water by individual facilities. Reporting under a prescribed format is obligatory for a list of pollutants, with specific thresholds for each pollutant. The first report under the EPER decision is due in June 2003 for emissions in 2001 (reporting on 2000 or 2002 instead is optional), and the second is due in June 2006, on emissions in 2004. From 2008 onward, the commission encourages annual reports, although this is not obligatory. The information is to be provided electronically by the member states to the commission. The commission, assisted by the European Environment Agency, will make the reported data publicly accessible via the Internet.

The EPER decision is used as a basis for the elaboration of the Pollutant Releases and Transfer Registry (PRTR), which is currently under negotiation in the framework of the Aarhus Convention.

Given the European Community's intention to ratify the Aarhus Convention, the European Commission has recently proposed a number of amendments to the IPPC directive. These amendments will bring the IPPC directive in line with the Aarhus Convention's requirements for broader access to information and access to justice.²⁶ The current proposals lay down a more elaborate procedure for involving the public in the permitting procedure and require authorities to make publicly available the final permit and the reasons and considerations on which the permitting decision is based. The proposed amendment also prescribes the possibility of appeal and contains a more elaborate

²³ Brussels, 06.06.2001, COM(2001)303 final, Amended Proposal for a Directive on Public Access to Environmental Information.

²⁴ Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control.

²⁵ Commission decision of 17 July 2000 on the implementation of the European Pollutant Emission Register (EPER) according to Article 15 of Council Directive 96/61/EC concerning Integrated Pollution Prevention and Control (IPPC), 2000/479/EC.

²⁶ Brussels, 18.01.2001, COM(2000) 839 final, proposal for a directive providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending Council Directives 85/337/EEC and 96/61/EC.

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procedure for public participation in projects with a transboundary impact. At the time of writing, the proposed amendment is still in the early stages.

B. The Water Framework Directive.

The European Community fundamentally reformed its water legislation with the adoption of the new Water Framework Directive in October 2000.²⁷ The directive introduces a wholly new approach, based on integrated management of so-called river basin districts. Each district comprises the “area of land from which all surface run-off flows through a sequence of streams, rivers and, possibly, lakes into the sea at a single river mouth, estuary or delta,” together with the associated groundwater and coastal waters. The main instrument in the directive is the requirement that member states draw up a management plan for each river basin district. These plans are to provide an integrated tool for managing the quality and quantity of the waters in the district, in line with specific requirements set forth in the framework directive and in other community legislation. The contents of a river basin management plan are set out in Annex VII of the directive and include:

1. a mapping of the characteristics of the river basin district, including the location and boundaries of its surface waters and groundwater, and the significant human pressures on these waters, including point and diffuse sources of pollution;
2. an identification and mapping of protected areas in the district;
3. a map of the monitoring networks and a presentation in map form of the results of the monitoring programs;
4. a summary of the controls adopted for point source discharges and other activities with an impact on the status of water and an identification of the cases where direct discharges to groundwater have been authorized;
5. measures taken to implement the obligations under the directive; and
6. the contact points and procedures for obtaining background documentation and information, and particularly the details of the control measures for the district.

The directive also contains specific provisions for monitoring the status of surface water, groundwater, and protected areas, which if implemented correctly will greatly increase the quantity of information on water quality in member states. The directive further requires that each river basin district adopt a program of measures aimed at achieving the quality and quantity objectives of the directive.

Although all information collected by national authorities under the new Water Framework Directive is covered by Directive 90/313/EEC, the directive explicitly stresses the importance of public participation and the availability of information on the river basin management plans. Article 14 of the directive requires that the competent authorities make available:

1. a timetable and work program for developing each plan, including a statement of the consultation measures to be taken, at least three years before the beginning of the period to which the plan refers;
2. an interim overview of the significant water management issues in the river basin, at least two years before the beginning of the period to which the plan refers; and
3. draft copies of the river basin management plan, at least one year before the beginning of the period to which the plan refers.

In addition, the directive requires that upon request, background documents and information used to develop the draft management plan be made available. Member states must also hold a comment period of at least six months, during which the public can comment in writing on those documents, in order to allow active involvement and consultation.

²⁷ Directive 2000/86/EEC of 23 October 2000 establishing a framework for Community action in the field of water policy.

The directive was adopted on 23 October 2000 and took effect on 22 December 2000. Its main provisions will take a while to come into force. The monitoring programs, for instance, will not become operational until December 2006, and the river basin management plans, December 2009. The programs of measures need to be established in December 2009, but the measures themselves need to become operational only by December 2012, at the latest.

V. Access to environmental information in the Netherlands.

A. Background and history.

The need for the government to establish rules for transparency in the way it fulfills its tasks is laid down in Article 110 of the Dutch Constitution. Although the Constitution does not contain a right to information in itself, it does require the government to adopt further legislation.

Access to information held by government authorities in the Netherlands is regulated in two types of legislation. First, and most important, there is the *Web openbaarheid van bestuur* (Freedom of Access to Government Information Act, or WOB),²⁸ which was adopted in 1991. The 1991 WOB replaced the earlier 1978 WOB and the access to information regulation adopted under the 1978 WOB, consolidating their provisions in a single act, without changing much in the substance of the law. The 1991 WOB establishes basic provisions for access to all types of information held by government authorities.

Second, there are a number of specific provisions on access to government information in sectoral legislation (e.g., the laws addressing air, water, and hazardous substances). In the field of the environment the most important are the *Wet milieubeheer* (Environmental Management Act, or EMA) and the *Wet milieugevaarlijke stoffen* (Dangerous Substances Act). The access to information provisions in Chapter 19 of the Environmental Management Act apply mainly to information held by the government in the process of environmental permitting, whereas the provisions in the Dangerous Substances Act apply in the context of hazardous materials.

The new Dutch WOB was drafted and adopted in parallel with the Access to Environmental Information Directive by the European Community's Council of Ministers. The Dutch government notified the commission in August 1992 that it was of the opinion that existing legislation fully implemented Directive 90/313/EEC and that therefore no further legislation was required. In October 1992 the commission responded that some of the exemptions in the WOB were too wide and therefore not in conformity with Article 3 of the directive. In particular, the commission found that the exemptions in Section 10(2) subsections (b) and (g) were wider than the exemptions allowed in the directive. On 12 March 1998 paragraphs 3 and 4 were added to Section 10, restricting the applicability of Section 10(2) subsections (b) and (g) in the case of environmental information. The WOB now contains stricter exemptions specifically for environmental information.

More specific access-to-information rules have been elaborated for each specific ministry, based on a general model regulation adopted in 1992. The rules and practice of the Ministry of Housing, Land-Use Planning and the Environment (VROM) are discussed in more detail below (Section F).

The Dutch government believes that the WOB now fully implements the EC directive. In September 1999 the minister of Justice presented a draft proposal for the integration of the WOB into the General Administrative Law Act (*Algemene wet bestuursrecht-Awb*). This integration is not likely to bring substantive changes in the rules on access to environmental information.

²⁸ http://www.minbzsk.nl/pdf/eo/goed/public_access_government_info_10-91.pdf.

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B. Basic principles.

The WOB applies to all documents held by government authorities. Documents are “written pieces or other materials that contain information,” and government authorities include, *inter alia*, ministries, provinces, municipalities, and water boards, as well as other government authorities working under their authority.

Anyone, without stating an interest, can submit a request for information to a government authority, indicating the information or the specific document or other material she wishes to receive. Such a request will, in principle, be granted unless one of the exemptions applies. If the request for information is filed with the wrong authority, the requester is referred to the authority, which has the information, or the written request is automatically forwarded and the requester notified.

Replies to written requests for information are given in writing. Oral requests for information are replied to orally unless a written answer is requested.

The government authority must decide as soon as possible on the request for information, with a maximum deadline of two weeks. Another two weeks are allowed if the authority notifies the requester of the reasons for the delay before the end of the first two weeks. Dutch administrative courts have interpreted the obligation to decide “as soon as possible” to mean that the information needs to be provided as soon as it is available. Authorities thus cannot “sit” on the information till the end of the two-week deadline. Although the text of the WOB reads that only a decision on the request for information, rather than the information itself, is required within two weeks, in practice the decision and the actual provision of the information usually coincide. In some cases the requester is notified that the information will be provided, and the information follows, but in any case, the information must be provided within two weeks.

Extensions of the deadline for replying as well as denials of request for information need to be justified. Access to information can be denied only on the basis of a limited set of grounds (see Section D below).

The information from the relevant documents is provided through:

1. giving a copy or giving the literal contents in any other form;
2. allowing the requester to take note of the contents;
3. providing an extract or summary; or
4. providing information from these documents.

The form chosen depends on the preference of the requester and the expediency of procedure. In general, the authority tries to provide the information in the form requested unless this request is unreasonable, too laborious, or too costly.

C. Fees.

The amount charged for the information is laid down in a separate administrative order (*Besluit tarieven openbaarheid van bestuur*). Local and decentralized authorities can determine their own fees. In practice, often no

Box 6: Tariffs for providing information in the Netherlands

Fewer than 6 copies	Free
6 to 13 copies	€ 5.4
14 or more copies	€ 0.34 per copy
Summaries	€ 2.7 per page
Copies of other materials	Maximum at cost

Box 7: Exemptions to the free access to information in the Netherlands

The following is a translation of Section 10 of the 1991 WOB, as amended (see Annex II for the Dutch government's translation of the full text of the act).

Section 10:

1. Disclosure of information pursuant to this Act shall not take place insofar as:
 - a. this might endanger the unity of the Crown;
 - b. this might damage the security of the State;
 - c. the data concerned relate to companies and manufacturing processes and were furnished to the government in confidence by natural or legal persons.
2. Nor shall disclosure of information take place insofar as its importance does not outweigh one of the following:
 - a. relations between the Netherlands and other states or international organisations;
 - b. the economic and financial interests of the State, other bodies constituted under public law or the administrative authorities referred to in section 1a, subsection 1 (c and d) and subsection 2;
 - c. the investigation of criminal offences and the prosecution of offenders;
 - d. inspection, control, and oversight by administrative authorities;
 - e. respect for personal privacy;
 - f. the importance to the addressee of being the first to note the information;
 - g. the prevention of disproportionate advantage or disadvantage to the natural or legal persons concerned or to third parties.
3. Subsection 2, chapeau and at b, shall apply to the disclosure of environmental information concerning confidential procedures.
4. Subsection 2, chapeau and at g, shall not apply to the disclosure of environmental information. It is possible to refrain from disclosing such information pursuant to this Act if its publication would make damage to the environment more likely.

charge is made for unless the information is substantial. Dutch courts have held that nonpayment of any fee is not a reason for refusing access to the information.

D. Grounds for refusing access.

The WOB contains two categories of grounds for refusing access to information. The first category comprises a list of exemptions.

If any of the grounds under Section 10(1) are invoked, access to information is refused, no matter the importance of the information for the person requesting access. The interests under Section 10(2) always need to be weighed against the importance of providing the information.

The second category of exemptions relates to information from documents composed for internal consultation. Personal opinions on policy are, in principle, not disclosed but can be released if the particular person explicitly consents or if the opinions cannot be traced to any individual. Information concerning personal opinions on policy contained in the recommendations of a civil service or mixed advisory committee may be disclosed if the administrative authority directly concerned informed the committee members of its intention to do so before they commenced their activities.

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Dutch courts have in numerous cases, including cases relating to the environment, been called upon to interpret the exemptions of the WOB. In most cases the Dutch courts have confirmed that the objective of the WOB is to provide information, thus necessitating a restrictive interpretation of the exemptions. The exemption most commonly invoked is 1(c), "data concerned relate to companies and manufacturing processes and were furnished to the government in confidence by natural or legal persons." Recent decisions have limited the applicability of this exception to instances in which "from that information can be read or deduced knowledge concerning the technical management or production process or the market or circle of clients and suppliers."

Dutch administrative courts require an extensive justification of refusals to provide information. It is, for instance, insufficient to simply refer to one of the exemptions. Justifications are, however, restricted by secrecy requirements: Too-extensive motivations could reveal too much about the information that is withheld. When, for instance, parts of documents are omitted, the authority often explains the omission of each section or group of sections.

E. Appeals.

If the application for access to the information is rejected, the requester can raise an objection and request administrative review under the General Administrative Law Act (*Algemene Wet Bestuursrecht*, or AWB). The procedure requires a review of the decision by the government authority, generally within six weeks after the request for administrative review. The requester can appeal the decision resulting from the administrative review to an administrative court, including the possibility of asking for an interim injunction or interim relief. The appeal to the administrative court can also be appealed with the administrative appeals court.

Dutch courts have, in general, shown a favorable approach to allowing individuals access to information. Most court decisions confirm that access to information is the norm and that this access can be denied only in exceptional circumstances. This is particularly true for the commercial and industrial secrecy exemption, Section 10(1)c, which is the exemption most commonly invoked by government authorities to withhold information.

F. Access to information held by VROM.

All Dutch ministries have adopted regulations for the internal application of the WOB. Most of these regulations are based on a model regulation that was issued in 1992.²⁹ The regulation for the Ministry of Housing, Land-Use Planning and the Environment (VROM) was adopted in December 1992.³⁰

The regulation establishes procedures and responsibilities for providing information held by each ministry. It also contains a registry of all institutions, services, and companies operating under the responsibility of the ministry, including their names, addresses, and information offices, or information points.

The regulation makes the ministry's Public Information and External Relations Directorate its central information point. The secretary-general of the ministry (third in the ministry's hierarchy after the minister and the state secretary) is responsible for providing the information; the secretary-general appoints a civil servant to assist her in the execution of the WOB. In 1996 the ministry also set up a specific information point for information on environmental permits, called Infomil.

From the civil servants working within the ministry, the central information point collects all requests for information made outside regular contacts. This office has access to a large electronic database containing information on a broad range of issues, with an advanced search system. Using this database, as well as a large paper filing system,

²⁹ Modelregeling ter uitvoering van de Wet openbaarheid van bestuur, behorende bij het besluit van de Minister-president van 8 April 1992, nr. 92M001858, houdende vaststelling van de Aanwijzingen inzake openbaarheid van bestuur (Stcrt. 1992, 84).

³⁰ Regeling ter uitvoering van de Wet openbaarheid van bestuur van 7 December 1992, nr. MJZ03d92002 (Stcrt. 1992, 242).

the central information point provides the information requested. If the information is not available in the database, it forwards the request to the responsible civil servant.

The regulation requires that decisions on requests for information be put before the secretary-general of the ministry if:

1. in case of an oral request, the central information point believes that the information cannot be provided and the requester has requested a written decision;
2. the central information point knows or believes that the rules allow for a different interpretation about whether the information should be provided; or
3. the central information point knows or believes that the granting or refusal of the request can have important social or political consequences.

The secretary-general puts decisions on granting or refusing information that may have important political or social consequences before the minister.

The regulation also addresses information that falls either fully or partly under the responsibility of another minister. Decisions on providing such information can be taken only after consultation with the other minister. If it is determined that the other minister is more competent to decide on the information request, the request is forwarded to that minister, and the person requesting the information is notified.

VI. Access to environmental information in Italy.

A. *Background and history.*

Access to environmental information in Italy is regulated in a patchwork of various laws. The first provision concerning access to environmental information without restrictions was included in *Legge* 8 July 1986, no. 349, which governed the establishment of the Ministry of the Environment and new provisions on environmental damage. Article 14(3) of this *Legge* states that “every citizen has, in accordance with the existing legislation, the right of access to information on the state of the environment held by Public Administration and can obtain copies against the costs of reproduction and real office costs.” This provision was, however, generally considered ineffective, since a denial of access to information could not be appealed.

In 1990 two laws were adopted to establish a general right of access to information held by public authorities in Italy, broader than the field of the environment. The first is *Legge* 7 August 1990, no. 241, which contains new provisions regulating administrative proceedings and right of access to administrative documents. This *Legge* confers a general right of public access to administrative documents. It requires each public authority to adopt an internal regulation for access to administrative documents and information. The second addresses access to information held by local authorities, including municipal and provincial administration. Article 7 of *Legge* 8 June 1990, no. 142, on the System of Local Authorities, guarantees the right of citizens to have access to all administrative documents held by local authorities, except those expressly exempted by law or on the basis of a temporary and justifiable decision of the mayor or president of the province.

The implementation of Directive 90/313/EEC in Italy was finally completed with the adoption of *Decreto Legislativo* 24 February 1997, no. 39 (Decree 39/97). This decree is a literal translation of the original text of Directive 90/313/EEC and contains the basic provisions for access to environmental information held by public authorities.

In addition to Decree 39/97, there are also a number of specific provisions on access to information in sectoral legislation. These include, for instance, Article 9(6) of *Decreto Legislativo* no. 372/99 (implementation of Directive 96/61/CE), which provides that the results of emissions control must be available to the public. The *Decreto Leg-*

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islativo 25 February 2000, no. 174, on the implementation of Directive 98/8/CE on Biocidal Products, governs access to information related to the authorization for the sale and use of biocidal products.

B. Basic principles.

Decree 39/97 applies to all the “information relating to the environment” held by “public authorities.” Public authorities are, according to Article 2(b), “any Public Administration at national, regional or local level”—that is, regions, provinces, municipalities, mountain communities, and other bodies having public responsibilities or functions, or providing public services in relation to the environment (e.g., Regional Agencies for the Environment, or ARPA). The definition does not include bodies exercising judicial or legislative functions, such as Parliament, tribunals (including courts and administrative tribunals), and regional or provincial councils. “Information relating to the environment” is any information available “in written, visual, aural or database form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities (including those dangerous) or measures adversely affecting, or likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental programmes.”

Everyone has the right to submit a request for information to a public authority, indicating the information or the specific document or other material containing information he or she wishes to receive. The requester has to give evidence of identity, but for environmental information no explanation for the request is required.

The ways in which this right can be exercised are further elaborated in Articles 2 to 6 of Presidential Decree 352/92 of 27 June 1992. This decree distinguishes between two access procedures, informal (verbal request to the office that has the document and immediate consultation) and formal (written request). If the formal request for information is filed with the wrong authority, this authority is required to automatically forward the request to the authority that has the information and notify the requester.

Requests for information must be responded to within 30 days. If no response is given within this period, the public authority is deemed to have refused to provide the requested information. The public authorities have 30 days to respond.

The information from the relevant documents is provided through:

- allowing the requester to take notes on the contents;
- giving a copy or giving the literal contents in any other form (including a floppy disk or e-mail message); or
- providing information from these documents.

C. Fees.

There is no charge for simply viewing information. Copies or duplication of the material are subject to reproduction costs (normally € 0.10 per copy). Specific legislation may require charging for postage, research, and surveys. Local and decentralized authorities determine their own charges, which are revised periodically.

D. Grounds for refusing access.

The list of exemptions to free access to information laid down in Decree 39/97 is an exact copy of those provided for in Article 3(2) of Directive 90/313/EEC. The decree requires that any refusal, limitation, or delay of the provision of information must be in accordance with one of the exemptions and must be justified.

E. Appeals.

If access to the information is denied or if the public authority fails to respond to the request within 30 days, the requester may file an appeal. The procedure for the appeal is set out in Article 25(4)(5) of *Legge* no. 241/90. Within

30 days of a refusal, the requester may seek a judicial review by the Regional Administrative Tribunal (TAR). TAR decides within 30 days from the submission of the appeal. The decision of TAR may be appealed, again within 30 days, to the *Consiglio di Stato* (Council of State). The administrative judges may order the information released to the requester.

Beside the judicial control exercised by the administrative judges, a further protection of the right to access to administrative documents is provided by the establishment, under Article 27 of *Legge* no. 241/90, of the Commission for the Access to Administrative Documents, which controls the realization of the “right to know” in practice.

F. Access to environmental information in practice.

Most of the Italian administrative court decisions show that the person claiming a right of access to information on the state of the environment does not have to show a specific interest in the information required, and the access can be denied only in exceptional circumstances.³¹ Courts have further held that information related to administrative enforcement and the investigation of potential breaches of legislation is not included in the list of exemptions of the decree, and information on these activities must thus be provided if requested.³²

Within 60 days after Decree 39/97 took effect, public authorities were required to establish a bureau that would handle access to environmental information. Some local authorities have established an *Ufficio Relazioni con il Pubblico*, a public relations office that provides environmental and other information to the public.

Article 8 of Decree 39/97 requires the minister of the Environment to present an annual report to Parliament on the measures adopted for implementing the decree. In turn, the public authorities are required to forward to the minister, by the end of June of each year, data about access to environmental information as well as a detailed report on the measures adopted for implementing the decree. Special forms have been created to simplify data collection; they include the kinds of requests, the percentages of requests granted and refused, and reasons for any refusal. Such information is still incomplete, however, and mostly limited to statistical information on the number of requests. The most recent report from the minister to Parliament³³ in fact indicated a significant drop in the number of reports sent from the authorities to the minister (from 400 in 1998 to 150 in 2000).

In addition to governing access to information held by public authorities, Decree 39/97 also requires the active provision of environmental information by the Italian government. Article 7 says a “report on the state of the environment” must be published and widely circulated by the Ministry of the Environment every two years. The last report was published on 31 January 2001.³⁴

VII. Lessons learned in the European Union.

A number of lessons can be learned from the implementation of Directive 90/313/EEC and the development of national access to environmental information legislation in Europe.³⁵

³¹ See TAR Lombardia, sez. Brescia, 30 April 1999, no. 397, Riv.giur. ambiente (Environmental Law Review).

³² See *Consiglio di Stato*, 28 April 1999, no. 6, *Rivista Amm.*

³³ Relazione Al Parlamento Concernente la Libertà di Accesso alle Informazioni in Materia di Ambiente, redatta ai sensi dell' art. 8 del decreto legislativo n. 39 del 24 febbraio 1997 e della successive circolare del 22.7.1997 in attuazione della direttive 90/313/CEE, Gennaio 2001.

³⁴ The full text is available on the website of the minister of the Environment: <http://www.minambiente.it>.

³⁵ This section is based on the lessons learned and best practices discussed at the workshop Access to Environmental Information: The Review and Further Development of Directive 90/313/EEC, held in Utrecht, the Netherlands, 26 January 1998. The workshop report can be obtained from the Stichting Natuur en Milieu, Donkerstraat 17, NL-3511KB Utrecht, the Netherlands.

The EU Directive and its Implementation in the Netherlands

1. Providing a general right of access to information, rather than a more specific right of access to environmental information, is preferable. A more general right to access to information avoids difficulties with interpreting what constitutes environmental information and creates a generally more open and friendly administrative attitude toward the public.
2. Access to information should be a right. Exceptions to this right access should be interpreted narrowly and used only in exceptional circumstances. Their application should be balanced with the importance of the disclosure of the information.
3. Practical arrangements, including the establishment of specific information points, public information registers, and a greater use of Internet databases, greatly contribute to the accessibility and administrative feasibility of providing information. The cost of setting up these facilities is often more than compensated by the decreased work of answering specific requests.
4. The time limits for the provision of information should be short—weeks or days rather than months.
5. Information should be provided in the form it is requested in, if possible.
6. Fees for the provision of information should be reasonable and well known to the requester. If possible, information should be provided in the least expensive format (e.g., large reports should be given in electronic form rather than on paper).
7. Continuing awareness building and training of officials is crucial in building a good access to information system. Barriers, such as internal sanctions when officials provide “barred” information, should be removed.
8. The public should be informed about what information is available and the means for obtaining that information. A well-informed public greatly reduces the administrative burden of, for example, dealing with incorrectly addressed information requests or requests for information that is already publicly available.
9. Public authorities need to be proactive in collecting information on the environment and making it automatically available to the public. This is particularly true for data on the state of the environment and discharges and emissions from specific installations.
10. The appeals process should be inexpensive, and decisions on appeals need to be speedy. Costly and lengthy appeals reduce the usefulness of the access to information system to the public and do not contribute to the public’s impression of an open administration.

Literature for the EU and the Netherlands Section:

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- http://europa.eu.int/eur-lex/en/com/rpt/2000/com2000_0400en01.pdf
- Commission Proposal from 29 June 2000 for a Directive on public access to environmental information, COM(2000)402 final
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Part Three Practices of Information Provision in Central and Eastern European and Former Soviet Union

I. Executive Summary

In Central and Eastern Europe, the goal of providing citizens with government information on the environment encounters several unique issues and obstacles. Some of the countries of this region have been reviving dormant national legal systems—a heritage without any tradition of citizen access to information. In many ways, incorporating public access in these countries may be more difficult than in countries that are establishing entirely new systems of government.

There are also differences in the ways that access is established: Some countries have voluntarily adopted government transparency (“sunshine”) laws, but others have had sunshine laws imposed on them—for example, by decree, as in Bosnia-Herzegovina.

Even where a right of access to information is established, there remain questions about the accuracy and quality of the information provided, especially because the experience of these nations had led citizens to distrust their governments. At the same time, countries of this region had no tradition of participatory democracy, and citizens accepted their governments’ policy of providing information only to individuals with particular technical expertise.

The Chernobyl catastrophe and related public demands for information began to change traditions and practices. The public demanded information, and officials became somewhat more open to providing environmental information. Interest in joining the European Union has also brought changes, and countries of the region are adopting new standards for public access to information. Some countries have embedded provisions in their constitutions, and others have passed laws with various legal force. All contain several grounds for refusing to provide information but offer very little guidance or clear procedures on how this is to be done.

II. Background.

Many observers expected freedom of information laws to be among the first priorities of the new governments of countries in transition after the 1989 changes. After all, a political culture of secrecy was at the heart of the oppressiveness of the former regimes, despite the presence of laws that ostensibly supported public participation (e.g., the 1980 Polish Environmental Policy and Development Act explicitly granted NGOs the right to file public interest lawsuits and to access information about companies).³⁶ Although pressure to open archives and secret police records increased, there was little public pressure to adopt general sunshine laws relating to all categories of information.

A major factor that slowed post-1989 development of laws and practices for government transparency was the preoccupation of many Central European and former Soviet countries with reviving their own national legal traditions. Adopting and integrating Western European or international practices and trends were of secondary interest.

Most countries of Central Europe and the former Soviet Union shared a bureaucratic legal tradition that did not include the notion of free access to information or the “ownership” of information by citizens. Consequently, there was little constituency for early efforts to promote broad access to information. The few exceptions were those countries that did not place a premium on reviving previously developed national legal traditions. These countries were more open to solutions that were not constructed on their respective national legal foundations.

³⁶ See H. Brown, et al., *Effective Environmental Regulation: Learning from Poland’s Experience* (Praeger 2000).

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International environmental conventions, however, encouraged some changes. Russia and other countries of the former Soviet Union (as well as Poland and the Czech and Slovak Republics) agreed to provisions such as the 1992 revisions of the Helsinki Convention,³⁷ which committed the signatories to make available to the public (in their own countries and abroad) a wide range of environmental information, including discharge permits; results of water and effluent monitoring; and information concerning compliance with water quality and permit requirements.

A. *The countries of the former Soviet Union.*

After 1989, the countries of the former Soviet Union made laws and procedures providing for access to information an integral part of the overhaul of the social order. The 1995 Russian Federation Federal Law on Information, Informatization and Information Protection is an example of a post-Soviet “horizontal” information law—that is, a law that ensures access to a broad range of government information. This law followed a 1994 presidential edict that called for a federal law on the right to information, stating,

The activity of state organs, organizations, and enterprises, public associations, and officials is carried out in conformity with the principles of information openness, which is expressed [*inter alia*] in citizens’ access to information of public interest or affecting citizens’ personal interests; in citizens’ being systematically informed of proposed or adopted decisions...³⁸

In 1992 Ukraine adopted a law on information access that established three main subject categories for information that was to be considered publicly accessible: society, the state, and the natural environment. Indeed, this was just one of several early post-Soviet laws in Ukraine that included the principle of public access to information; the 1992 Law on Citizens’ Associations is another.

However, it took some time for citizens to exercise their rights under these laws. There is no record of information requests made or fulfilled before 1995, when the Environmental Public Advocacy Center in Lviv succeeded in gaining access to epidemiological information related to a dispute over illegal use of pesticides. Since then, several groups have made successful use of information requests in Ukraine. It is now established practice in major cities for authorities to respond to information requests.

The emphasis on the right to access environmental information in the former Soviet countries grew out of unique circumstances, namely the public’s outrage at the tragic events that occurred at the Chernobyl nuclear power plant in 1986. The unexpected public reaction to the Chernobyl catastrophe forced Soviet officials for the first time to respond to public demands for information. Accordingly, officials determined that information on the environment in which people lived should be made available to the public. Soon, officials were doing everything they could to be responsive to this environmental crisis of epic proportions. The flood of damning information on the nuclear disaster fueled popular discontent and was a major factor in the mass movement for greater freedoms that led to the downfall of the Soviet Union.

B. *The countries of Central Europe.*

Although a number of Central European countries had information provision laws prior to 1989, they had little success or experience in implementing them. With their newfound independence, many of these countries wrote consti-

³⁷ The Convention on the Protection of the Marine Environment of the Baltic Sea Area was originally signed in March 1974 by the coastal states and entered into force in May 1980; it created the Baltic Marine Environment Protection Commission known as HELCOM. See Robert G. Darst, *Smokestack Diplomacy: Cooperation and Conflict in East-West Environmental Politics* (Cambridge, MA, and London: MIT Press, 2001), at p. 74. The current signatories that are also countries in transition include Czech and Slovak Republics, Estonia, Latvia, Lithuania, Poland, and the Russian Federation. The convention was acceded by the Baltic States in 1992–1994.

³⁸ Sobranie aktov Prezidenta i Pravitel’stva RF 1994, No. 2 item 74.

tutions that included freedom of information provisions, with specific provisions that allowed for public access to environmental information. These provisions reflected both the role that the environment played in political protest against the old regime³⁹ and a desire to emulate Western European practices as embodied in the European Union's Directive on Freedom of Access to Information on the Environment. Without implementing laws, however, the constitutional provisions usually lack force.

Although these guarantees were widely popular, some people questioned the logic of distinguishing between environmental information and other information and sought much wider access to information held by authorities. Considering the vital role that freedom to access information plays in a functioning participatory democracy, it was only a matter of time before the larger issue of general information access became prominent in the Central European countries as well.

In response to this wider demand for information, over the past few years several countries of Central Europe have adopted horizontal freedom of information laws that apply to all information held by the government. These countries include Lithuania, Latvia, the Czech Republic, and most recently Slovakia, whose law came into force 1 January 2001. In early 2001, an average of ten requests per day were being made to the central information request center established under the Slovakian law. A law on data protection that has many of the attributes of a freedom of information law was adopted in Hungary in the early 1990s. It was one of the first laws of this kind in the region. Albania has issued a decree on access to information. Some provisions of these laws are discussed below. Bosnia-Herzegovina has done this as well, although it may present a special case.⁴⁰ There, a FOIA-type law is being imposed on the country by the international community, but resistance to the law on the local level continues. The situation in Bosnia-Herzegovina is an example of how insufficient motivation can negate the value of broad information laws.⁴¹

Interestingly, the broader freedom of information act laws have drawn more public attention than the laws limited to environmental information. These broader laws have won widespread support from diverse international organizations. Indeed, the Law on Free Access to Information of Slovakia, which took effect 1 January 2001, has been widely covered in the press and described as "much anticipated." The promoters of this new law include the United Nations Development Program and international umbrella civil society organizations.

III. Practice examples.

Laws on access to environmental information and laws pertaining to information in general must be held to the same level of scrutiny: How effectively have they been implemented, and how much are they actually used by the public?

Because FOIA-type laws are still rather rare, and many have only recently been adopted, it is difficult to speak of developed best practices in the countries of Central Europe or the former Soviet Union. Efforts by the international community to assess these practices and internal assessment efforts are still in the very early stages. Environmental information laws have a longer history in the region, however, and some practices have developed.

³⁹ See, e.g., S. Stec, "Do Two Wrongs Make A Right? Adjudicating Sustainable Development in the Danube Dam Case," 29 *Golden Gate University Law Review* 317(3), Spring 1999, describing how environmental protest became a surrogate for political protest in the years running up to 1989.

⁴⁰ As Bosnia-Herzegovina has no effective central government and instead is administered through the United Nations; in practical terms the UN High Commissioner for BiH has the power to bring laws into force by decree if the entities do not act.

⁴¹ At the same time, there were debates in Western Europe, including the U.K., about the merits of instituting a general right to information.

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Poland is an example of a Central European country in the process of developing more sophisticated environmental information practices. An external assessment of these efforts illustrates both the progress and the continuing cultural and institutional challenges that must be overcome:

[D]uring the early 1990s the public access to information about individual firms has actually been curtailed [from the standards set by the 1980 law]. The central bureau of statistics, which collects firm-specific data, releases only the aggregate data for industrial sectors. On the other hand, the provisions for public participation in licensing new facilities and in the Environment Impact Assessment process indicate a potential for change. There is also a strong sentiment among some drafters of the amended Environmental Protection and Development Act (which, ironically, have debated since 1997 largely behind closed doors) to strengthen the public participation in policymaking and implementation and to enhance broad input into policy development. For example, the 1999 discussion draft of the act provides for the rights of individuals to demand administrative actions against polluters. It also mandates the ministry to hold a three-week open comment period before finalizing any major rulings. In an unprecedented move, in November 1998 the Ministry of Environment actively sought comments on the draft text of the proposed legislation among the industry groups, local and regional environmental authorities and environmental organizations, following it in March 1999 with a forum to discuss the responses. Several dozen organizations and individuals participated.⁴²

In practice, however, there are still serious obstacles to broad participation in policy making and implementation, especially by the general public. First, the law challenges both the Bureaucracy's deeply entrenched administrative resistance to external scrutiny and its [disdain] for the value of lay persons' contribution to data analysis and policy making. Second, the independent ecological organizations have no traditions of participative legal process and are too fragmented to mobilize their limited resources necessary for such participation. Third, all parties are strongly influenced by the prevailing cultural mores, which, in Poland, favor delegating problems to experts who solve them in closed meetings. Similarly, organizations within industrial sectors have been slow, [with some exceptions]...For the most part firms continue to be recipients of regulations rather than participants in their formulation. But this is changing.⁴³

The development of international environmental law and programs for sustainable development has encouraged the Central and Eastern European countries to develop systems supporting access to environmental information. For example, provisions of the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area commit parties (of which five are countries in transition) to make available to the public (in their own countries and abroad) a wide range of environmental information, including issuance and requirements of discharge permits; results of water and effluent monitoring; and the degree of compliance with water quality and permit requirements. This convention took effect 17 January 2000. Subsequently, the convention's governing body (HELCOM) began in 2001 to work with the parties to develop the Integrated Baltic Marine Environment Information System, which aims at offering a wide range of environmental information (texts, figures, graphs, maps) tailored to various target groups. Particular standards for provision of information were also established in the context of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo 1991). The impact of international law in the

⁴² The experience of one of the authors in the mid-1990s indicated that the Polish Environmental Inspectorate engaged in public outreach as it developed ideas for adoption of compliance schedules, leading toward legislative drafting. Ruth Greenspan Bell and Susan E. Bromm, "Lessons Learned in the Transfer of U.S.-Generated Environmental Compliance Tools: Compliance Schedules for Poland," XXVII *Environmental Law Reporter*, News & Analysis (June 1997)

⁴³ H. Brown et al., *Effective Environmental Regulation: Learning from Poland's Experience* (Praeger 2000).

area of information access is likely to increase substantially once the Aarhus Convention takes effect, probably at the end of 2001.

IV. Recent developments.

The countries of Central Europe that have good prospects for early entry into the European Union have attached priority to harmonizing their legislation with an extensive *acquis communautaire*, including environmental requirements. One part of this is the EU Directive on Freedom of Access to Information on the Environment.⁴⁴

The EU is revising its current approach to access to environmental information to account for three factors. The first is the signing of the Aarhus Convention, which requires the EU to bring its directive into compliance with the convention's requirements. The second is that a number of EU member states have adopted or are considering the adoption of horizontal laws on access to information. The United Kingdom is one prominent example. The third factor is the constant pressure for the European Commission itself to be subject to the same rules of public disclosure of information that apply to the member states. Adoption of rules for public disclosure of information held by the commission was one of the priorities of the Swedish EU presidency in the first half of 2001. A regulation granting rights of public access to commission and European institution documents was adopted in March 2001.⁴⁵ This history also illustrates the degree to which Central and Eastern European countries seeking to enter the European Union must take into account that the European standards are somewhat of a "moving target."

V. Information systems and flow.

Providing information to the public presents special challenges to the governments of Central European nations and the countries of the former Soviet Union. One of these is the ambivalent attitude toward government-held or government-generated data and information. On the one hand, citizens often express reluctance to accept at face value much of the information they receive from the government. In view of the history of government manipulation of information in this region, they are suspicious of what they receive and want to evaluate and assess the quality of the information they obtain. Ironically, at the same time, despite all the chaos, disruption, and corruption, public officials are traditionally considered to be responsibly exercising authority in the "public interest." This is the overriding administrative tradition, in contrast to the tradition in the United States and other countries where colonial or other oppression led to an inherent distrust of governmental authority.

The public authorities themselves can bring entrenched views about the appropriate uses for technical data and information. The bureaucracy has been characterized by deeply entrenched administrative resistance to external scrutiny and disdain for the value of laypersons' contribution to data analysis and policymaking. Brown et al. note "all parties are strongly influenced by the prevailing cultural mores, which, in Poland, favor delegating problems to experts who solve them in closed meetings."

Authorities are also often reluctant to disclose information that has not been "certified" as accurate.⁴⁶ When they release documents or information submitted by the public or other entities, they believe the public will view the information as coming from the government and therefore demand that the information be verified by the government before it is released to the public. These countries have a long tradition of gathering detailed information for

⁴⁴ Considering that the European Union has approached freedom of information from the perspective of specific subjects, notably environmental information, the process of EU accession has tended toward influencing accession countries to adopt legislation on access to *environmental* information, rather than instituting broader information access requirements. See EC Directive 90/313 on Access to Environmental Information.

⁴⁵ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council, and Commission documents.

⁴⁶ In some countries, such as Hungary, authenticated copies of data or information held by the government can be provided to courts and are presumed to be valid.

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administrative purposes; systems of cadastres and other types of registers were perfected over centuries. However, it is also deeply ingrained that such cadastres and registers are designed to be used only by individuals with appropriate technical expertise.

Those factors contribute to a general attitude among authorities that information should not be completely accessible to the public unless they maintain some vestige of control over its use and interpretation. This attitude is shared even by many potential users of information, who seek government guidance on the meaning and significance of the raw data: It is sometimes the citizens seeking information who demand that the authorities take responsibility for the reliability of any information that they might hold and make available, whatever its source.

Nevertheless, increasing numbers of citizens are apparently insisting on unfettered access to information, without filtering or certification for veracity. This may reflect a growing understanding that they need this information to participate fully in environmental decisionmaking, and the parallel understanding that full and timely disclosure outweighs any advantages of verification. Gradually, consumers of information will become more and more sophisticated in its use and interpretation.

The difficulties in implementing effective systems for providing public access to information are compounded by the lack of infrastructure to deal with information requests. Individually, many public authorities do not feel a obligation to respond to requests, even when it is their legal responsibility to do so. From an institutional and organizational point of view, there are rarely specific personnel or designated offices whose principal responsibility is dealing with this issue, so responding to requests is viewed as an extra responsibility for already-overwhelmed officials.

The new Slovakian Law on Free Access to Information addresses that problem by requiring all public authorities to respond to information requests and establishing a centralized public information center to manage requests. This stands in mild contrast with the Aarhus Convention, which encourages the establishment of focal points for environmental information requests within each agency that holds or manages such information. The Slovak approach may be attractive to countries that are trying to hold down the costs of providing information. It may also provide a model for effecting coordination between various regional agencies that collect and maintain environmental information.⁴⁷ It will take some time, however, to determine whether this centralized approach will work to address these concerns.

VI. Conflicts between disclosure and confidentiality.

The countries of Central Europe are in the process of moving toward pluralistic systems and the balancing of competing interests. This is a big change from the mindset of a unitary state, in which all economic activities and interests are coordinated through and by a strong central authority. Even after ten years, many individuals in these societies still do not actively pursue their rights and interests. Moreover, national institutions lack experience in applying norms of interpretation to resolve conflicts to achieve a “just,” or at least a democratically intended, result. Consequently, cases of active use of information rights are rare—a problem in itself as it leads to arbitrary decisions and opportunities for undue influence. A definitive practice has not developed, nor has the number of cases reached a critical level for society as a whole to undertake a systematic appraisal. Some are of the view that only after such a systematic appraisal examining the inconsistency of results will countries adopt rules and guidelines for the balancing of interests in particular cases.

In sum, a great deal of confusion is generated by the lack of guidance on how to effectively balance the competing interests of privacy and transparency in Central Europe. Although the constitutions of most Central European countries guarantee the right to access information, and occasionally the right to access environmental information

⁴⁷ When it opened in January 2001, the Public Information Center was handling about ten requests per day.

specifically, most of them also include exemptions to the types of information that must be provided. Whether provisions are found in the constitution or in legislative acts of various legal force, the situation is fairly similar in all the countries: There are several grounds for refusing provision of information and very little guidance or clear procedures on how this is to be done.

A. *Trade and commercial secrets.*

The handling of information involving commercial or trade secrets illustrates the problem of arbitrary decisionmaking in information disclosure determinations. For some people in countries in political and economic transition, the opening of markets and the restitution of private property are strong ideological issues. They contrast current attitudes toward private property with the policies of previous regimes and hostility toward the concept of private property. To these people, not only are commercial or trade secrets worthy of protection, but their protection becomes a matter of national values. When this ideology is coupled with the traditional reluctance to divulge information to the public, the result is a presumption that *any* information relating to a particular company is a protected commercial secret. In addition, it has been reported that public authorities are afraid of being sued by persons whose interests are affected.

One approach to handling this issue is found in the Russian information law, which restricts the discretion of officials by making it a violation to withhold certain kinds of environmental information. According to environmental advocates in the Russian Federation, this law is one of the more effective tools in promoting environmental protection domestically. Some argue that it played a role in the ultimate dismissal of criminal charges against Aleksandr Nikitin, the environmental activist who published information on the environmental and health dangers of the activities of the Russian nuclear submarine fleet.⁴⁸ Article 10 of the Russian law states that

It is prohibited to classify information on...emergency situations, environmental information, meteorological, demographic, sanitary-epidemiological, and other information necessary to provide for the safe functioning of settlements, industrial objects, general citizens and population safety.

On August 1, 2001, the Polish Parliament passed a new law on access to public information, PNB Law Supplement 2001, August 01. Unless classified as confidential on the basis of specific criteria, the public information defined in this legislation is available without any need to justify the request. All parties, irrespective of citizenship, have the right to review official documents and attend hearings of elected governmental bodies, including meetings of political representatives, commercial and professional self-government organs, and representatives of official public entities. Because of the state aid they receive, political parties and trade unions are under the same obligation to release public information. Included is information on judicial proceedings in which public bodies are a party, as well as financial data on institutions in which the state plays a leading role. There are three ways to obtain such information: from the Public Information Bulletin (on the Internet), by application by an interested party, and by attendance at public hearings. Access to the information must be timely, and any denial of information must be justified in writing with full disclosure of the authority upon which any such decision is made. Finally, the law grants the legal right to appeal any refusal.

A slightly earlier Polish law provides some indication of progress in dealing with the interrelationship between commercial secrets and public access to information in the region, but it still does not go far enough to provide clear guidance on the resolution of disputes. The law also has not yet been tested in practice. However, a few provisions are worth mentioning:

1. The law makes it clear that a person providing information must affirmatively claim commercial confidentiality in order for a public authority to exempt the information from public accessibility.

⁴⁸ From the perspective of U.S. practice, the Russian language seems overbroad and somewhat unrealistic.

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2. The claimant must demonstrate that disclosure of the information would adversely affect his or her competitive market position.
3. Reviewing these factors, the public authority *may*, but is not required to, exempt the information from disclosure. Thus, the law implies that the public authority has to apply discretion in determining whether the claimant has convincingly demonstrated potential adverse impact.
4. In accordance with the Aarhus Convention, the public authority may undertake a balancing test invoking the public interest in disclosure. However, the Polish law does not expressly provide any guidance or criteria in the exercise of discretion.

The intersection between trade secret protection and access to environmental information is a typical instance where a lack of clarity can lead to disputes. The Polish law provides some guidance, but does not completely avoid potential conflicts. When defining information that is not publicly available, the law refers to information that is covered by a specific 1995 regulation on public statistics *or* regulations on confidential information. The law does not specify the regulations on confidential information, leaving some uncertainty as to what is exactly meant.

The Polish law additionally specifies matters that may *never* be exempted from public disclosure on the basis of commercial confidentiality. These matters can be summed up as information relating to the amount and type of emissions to air, water, and land, as well as emissions of noise or electromagnetic radiation, and information about the location of the sources of any of the above. But within the area of discretion noted above, where a public authority *may* exempt information from disclosure in a situation in which a submitter asserts a commercial interest meeting a particular standard, the law does not give guidance as to how conflicts between the exercise of discretion and the contents of another law on commercial confidentiality are to be resolved.

B. Government procurement and contracting information.

Only two countries in the region have some experience in this area. In Hungary the attitude toward disclosure varies significantly from municipality to municipality, as noted below. "Local officials usually take the position that contracts by public entities with private companies are not public records and therefore, citizens do not have the right to obtain such documents."⁴⁹ The common view, that private companies will not want to enter into contracts with governments if there is transparency, is an important factor in officials' attitudes.

However, some Hungarian municipalities do allow public access to their contracts for public services. This position has been strengthened by a 1998 opinion of the Hungarian information ombudsman that a concession contract of the Ministry of Transport for construction and operation of a highway was a public record. The ombudsman stated that the principle of publicity has priority over business secret protection since the use of public funds should be transparent.

The Slovakian Law on Free Access to Information is expected to be used to gain access to public tender results, to assure losing bidders that their bids were treated fairly.

In contrast to the conventional wisdom that access to information is primarily a tool for NGOs, the interest in bidding information demonstrates that commercial interests are a major driving factor for freedom of information. Meanwhile, authorities often refuse to disclose information provided by private enterprises, out of fear that its "publication" will anger the private enterprise and provoke retribution. It is clear that the balancing of commercial interests against the public interest is one of the most critical areas in which the countries in transition could gain from the experience of western Europe and North America.

⁴⁹ Baar 1999.

C. Information that cannot be claimed as confidential.

Constitutions of several countries in Central Europe clearly assert that information on the state of the environment cannot be considered confidential. The constitutional language, however, often does not explain what information falls under this category, and often there are no clarifying laws or regulations. Also, constitutional language is usually not self-implementing. In practice, most countries' agencies understand environmental information to include the ambient state of environmental media (air, water, land).

D. Exemptions.

Some of the categories of confidentiality that exist include:

1. national security;
2. state secret;
3. official secret;
4. economic interests;
5. foreign affairs;
6. personal confidentiality;
7. commercial confidentiality;
8. internal agency communications;
9. information that might jeopardize rights of a third person; and
10. information whose disclosure might cause damage to the environment.

Besides these content-based categories, legislation in some Central European countries also provides for several technical circumstances under which provision of information might be refused:

1. when the request is too general; or
2. when the public authority receiving the request does not possess the information.

In the latter case, though, the general rule is that the request be forwarded or referred to the appropriate department or agency.

In Central Europe, the issue of confidential information is typically dealt with in a general information law and in special sectoral acts that provide more detailed regulation on individual exemptions. For example, the Latvian Law on Information Openness refers to four specific grounds of confidentiality as well as to confidentiality provisions regulated by other laws. In Estonia, where exemptions are regulated by several relevant laws, the official who considers whether requests for information pertain to confidential information is obliged to consult with a specified authority that administers the special law creating the exemption, when application of the law requires interpretation.

1. State secret.

This category of exempted information is generally very broad. Although the definitions and the rules for handling this information might vary slightly from country to country, the types of the information that are covered tend to be fairly similar.

In most Central European countries, state security, national defense, official secret, foreign policy, defense, and related issues are regulated within one single act.⁵⁰ Usually, the act itself establishes procedures for handling information, but some countries have separate regulations or guidelines that provide these specifics. So, for example, a Lithuanian government resolution sets up rules for the handling and transfer of state secret information.

⁵⁰ E.g., Law of Czech Republic No. 102/1971 Coll., on protection of state secrets, Hungarian Act LXV of 1995 on State and Official Secrets, Law of Latvia on States Secret.

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Estonian law as an example. In Estonia, the Law on Public Information protects documents containing data on the units of the army and their location and armament in the interests of national defense. The special Law on State Secret defines state secret information as information owned, supervised or produced by or for the state and protected from disclosure in the interests of national security. The Estonian law names three major categories of state secret: confidential, secret, and top-secret information. The law provides exhaustive lists of documents that are considered to fall under each category. Moreover, the law sets out procedures for classifying documents. It requires that the would-be classifier not only make a mark on the document or object but also write a justification for its classification.⁵¹ Through this approach, the act assures that some environmental information related to national security issues will be made public—for example, decisions related to or inspections of environmental performance of military installations.⁵²

Special regulations also identify which employees are entitled to classify information.⁵³ Classification rights are normally granted to high-ranking officials in the executive branch and certain top-ranking military officials (e.g., senior executive, secretary of state, head of police forces, commander in chief, ministers). The Estonian regulation requires that higher rankings of secrecy be imposed only by higher-ranked officials. Information, therefore, can be classified as state secret only through two steps: The information must fall under the legal criteria for state secret; and it also has to be actually classified as such, with a written justification, by the official mandated classification power.

2. *Internal agency communication.*

There is no current information about this subject in Central Europe.

3. *Justice proceedings and the courts.*

Both general laws on information and procedural codes in most Central European countries allow for classification of information related to ongoing court, disciplinary or criminal proceedings. The right to withhold such information is given to the officials that possess the information in the scope of their official duties in the proceedings. The protected information usually concerns ongoing judicial proceedings before the judicial body has made a decision, or pretrial materials that have been submitted to the court.

4. *Commercial confidentiality.*

Whether it is called trade, business, or commercial secret, protection for commercial confidentiality exists in all the Central European countries. It is usually regulated by information laws, company laws, commerce law, or as in Hungary, the principles of civil law. Although these protections are not alike and each country takes a slightly different approach, there are certain common features in the countries where the regulations are more advanced:

- a. All companies must submit all information to governmental agencies as required by law, whether they consider this information confidential or not.
- b. At the time the information is submitted, the regulated party can claim parts of it as confidential. The authority then examines the company's justification and either classifies the information or rejects the request for classification.⁵⁴
- c. In several countries there is a presumption in favor of information openness. In these countries, a decision must be made on whether certain information should indeed be kept confidential, using a balancing test

⁵¹ Law on State Secrets of Estonia, 26 January 1999.

⁵² Discussion paper on confidential information, Danish Cooperation for Environment in Eastern Europe, Dancee ref. No 129-0134: Assistance to Estonia in the Implementation of the Access to Information Directive and the Aarhus Convention, p. 9.

⁵³ Government of the Republic of Estonia Order no.227-k of March 1998 on Granting Right to Classify Information as State Secret, Establishment of Standard Format Authorization of Right to Classify Information as State Secret, and Approval of List of Agencies with Right to Permit Access by Aliens to State Secrets.

⁵⁴ Law of Estonia on Competition, Art.32, Law of Poland on Access to Information on the Environment and Its Protection and Environmental Impact Assessment, Art. 7.4.

between the corporate interest in protecting the confidentiality of the information and the public interest in its disclosure.

- d. Even if information is claimed as confidential by a business entity, the authority can release it, either because there is not enough evidence of the need for keeping the information confidential or because the public interest in its disclosure prevails over commercial and business interests. The Hungarian data protection ombudsman, in a 1996 statement, indicated that trade secret exemption cannot be applied to business enterprises that breach the law.
- e. Certain categories of commercial information cannot be recognized as confidential. For example, the Polish Law on Information recognizes the right of the information provider to claim information as confidential because its release might endanger the market value, especially with respect to technical data or data that might weaken the market position of the information provider. However, the law lists four exemptions related to the type, composition, and location of the source of the emissions to air, waste water emissions, solid waste, and noise.⁵⁵
- f. A refusal to release information should be issued in writing, with an indication of how the decision can be appealed.

5. *Personal data.*

The laws of many nations in the region—Latvia, Poland, Czech Republic, Croatia, and Ukraine, among others—recognize the confidential character of personal information. This exemption protects the privacy rights of individuals and applies to information on private life, political views, health, medical records, and so forth. It applies only to information about natural persons who can be identified directly or indirectly by reference to some of the person's characteristics. Records, especially if they originate with medical institutions or statistics offices, are simply not made available. One can receive only aggregated data, never individual. In some cases personal records might be disclosed provided they do not identify the person by name or through any of the features that can be connected to a particular person.

6. *Information provided by a third party.*

In many countries, information may be withheld from the public domain if it has been given to the public authority by a person not under obligation to supply such information. This exemption applies in two kinds of cases: when the third party must grant specific consent to release the information; and when the third party has the right to specifically request classification of the information it supplied voluntarily (the latter approach is taken by the Polish law on Access to Environmental Information and Environmental Impact Assessments).

7. *Information whose disclosure might damage the environment.*

In certain cases, a release of information might endanger the environment. For example, information on breeding sites of a rare species might be considered to be detrimental to the protection of the species and therefore withheld. In such cases in countries like Latvia or Poland, a policy decision has been made that persons who might harm the protected species because they consider it a threat to livestock or a pest, or who might seek financial gain through poaching, trade in endangered species, or eliminating obstacles to development, should not be able to make use of freedom of information laws to achieve their aims. Such legislation does not prevent disclosure of information on a case-by-case basis; for example, by enlisting the support of nature protection NGOs in defending protected species from poaching.

E. *Separation of information.*

In some countries where special laws regulate access to information, a special requirement of “information separation” exists. This means that wherever possible, the confidential data should be separated from the nonconfidential data so that information that does not fall within legitimate exemptions can be provided.

⁵⁵ Law of Poland on Access to Information on the Environment and Its Protection and Environmental Impact Assessment, Art. 7.

VII. Review and appeals.

Legislation in all countries of the region addresses appeals of decisions not to provide requested information. Usually, the official issuing the refusal must follow the rules listed here:

- A. notification of the refusal of information should be given in written form;
- B. grounds for refusal should be stated; and
- C. the notification should contain information on how the decision can be appealed.

There are two usual ways to appeal the refusal of information:

- A. to a higher authority than the one that sent the refusal, within the same ministry or office; and/or
- B. to a court.

Thus in Latvia, for example, a refusal to provide information must be appealed first to the head of the institution or to the relevant superior institution and only after that to the court. However, if the appeal is concerned with a violation of legal deadlines or unjustified classification of information, it can be submitted directly to the court.⁵⁶

VIII. The role of the ombudsman in facilitating information access.

The office of the ombudsman is a way to police information access in countries undergoing economic and political transition. The ombudsman is generally an officer of the parliament who represents the public and protects citizens' rights. The institution of the ombudsman as a representative of the public has achieved prominence in Central and Eastern Europe during the period of political and economic changes, starting in the late 1980s. The Polish ombudsman was in place before the transition began in 1989. For most of the Central European countries, this institution is constitutionally required.

The ombudsman can investigate situations in which information rights have been breached and generally concludes his or her investigation with a report. The ombudsman's decisions are usually not legally binding but generally are respected by governmental authorities and followed. Thus, the ombudsman is an interesting substitute for the courts in the United States that have played such an important role in assuring that government follows the rules for information access.

Most Central European countries have a single general ombudsmen, but Hungary appointed three parliamentary commissioners: a general ombudsman, an ombudsman on protection of minorities, and a data protection ombudsman, who is concerned with all the rights related to data protection and provision of information, including environmental information.

IX. Scrutiny and oversight.

With the exception of the institution of the ombudsman, there is little to report on oversight procedures in Central and Eastern Europe and the former Soviet Union.

⁵⁶ Law of Latvia on Openness of Information, October 29, 1998; see Gita Ozolina, *Access to Official Information in Latvia in Workshop Materials, Access to Information*, COLPI, 2000.

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Administrative Procedure Act (APA): An act passed by the U.S. Congress in 1946 to serve four basic purposes: 1. to require agencies to keep the public currently informed of their organization, procedures, and rules (sec. 3); 2. to provide for public participation in the rulemaking process (sec. 4); 3. to prescribe uniform standards for the conduct of formal rulemaking (sec. 4 (b)) and adjudicatory proceedings (sec. 5), i.e., proceedings that by statute are required to be made on the record after opportunity for an agency hearing (secs. 7 and 8); and 4. to restate the law of judicial review (sec. 10). The APA applies, with certain exceptions, to every agency and authority of the U.S. government other than Congress, the courts, or the governments of the possessions, territories, or the District of Columbia. <http://www4.law.cornell.edu/uscode/5/ch5.html>

affidavit: In the United States, a sworn statement in writing, generally made under oath or affirmation before an authorized magistrate or officer, such as a notary public (the powers of a U.S. notary public are much less than those of a notary in the civil law system).

agency or federal government agencies: Common alternative term for EPA or for other U.S. government offices (i.e., EPA, or “the agency”); comparable to “ministry” in Europe. Includes the government offices that serve as part of the executive branch (headed by the President), such as the Department of State, Department of Defense, Department of Agriculture, etc. The other two branches of government in the U.S. system are the Congress (including the House of Representatives and the Senate) and the judicial branch (federal district courts, federal courts of appeals and the U.S. Supreme Court).

CBI: Confidential business information.

CFR: Code of Federal Regulations; the publication that publishes regulations enacted by the U.S. federal government. The citation formula for a regulation is the volume of the CFR followed by the section number of the specific regulation; for example, 40 CFR §2.301.

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, or Superfund): U.S. law that sets out rules for responsibility for and cleanup of accidents, spills, dumpsites, and liability.

contracting information: Information related to the process by which agencies and offices of the executive branch of the U.S. government select and manage contractors that perform tasks for the government.

court case law: The law on a certain subject matter, as determined by a court decision or series of court decisions.

court of appeals: The United States is divided into 13 federal judicial circuits, each of which has a court of appeals known as the United States Court of Appeals for the Circuit.

Department of Justice: The Department of Justice is the chief legal department of the U.S. government. It represents the government in legal matters and renders legal advice and opinions, upon request, to the President and to the heads of the executive departments. This legal advice and opinions are considered binding interpretations of laws for the executive branch, in the absence of conflicting court interpretations. The Department of Justice was established in June 1870 and is headed by the attorney general, who is a member of the President’s cabinet. The functions of the Department of Justice include representing the citizens of the United States in enforcing the law in the public interest; protection against criminals; ensuring healthy competition of business; safeguarding the consumer; enforcing drug, immigration, and naturalization laws; and protecting citizens through effective law enforcement. The department conducts all suits in the Supreme Court in which the United States is concerned.

district court: Each state of the United States comprises one or more federal judicial districts, and in each district there is a district court. The United States district courts are the trial courts with general federal jurisdiction over cases involving federal laws or offenses. Only one judge is usually required to hear and decide a case

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in a district court, but for some matters it is required that three judges be called together to constitute the court.

docket (also *rulemaking dockets* and *official dockets*): An official public record, register, or physical system of records. It contains information about proposed and final regulations, copies of public comments, and related information, including scientific or technical data. At EPA, dockets are created for rulemakings. For example, if EPA's Air Office is thinking about issuing a regulation, two systems for storing documents related to that rulemaking are created. One docket is open to interested parties; it contains all the documents that are available for public review. A second docket contains sensitive documents that the agency judges would not be subject to release under the standards of FOIA. This second docket is used only by relevant EPA employees. A FOIA request for documents in the confidential docket would require the agency to reassess whether the documents met the criteria for exemption from public distribution. EPA is considering how to make its public rulemaking dockets electronically available. The U.S. Department of Transportation is the farthest along in the U.S. government in terms of making rulemaking dockets electronically available (<http://dms.dot.gov/>).

E-FOIA: Amendments made by the U.S. Congress in 1996 to the basic U.S. Freedom of Information Act, to reflect the changes that electronic retrieval of information have made.

enforcement inspections: EPA inspections of facilities that hold environmental permits, to determine whether they are complying with the law. In the course of inspecting the interior of facilities, inspectors may examine plant processes that are considered to be competitive secrets, or learn about chemical formulas for products, the disclosure of which would damage a company's competitive position.

EPA contracts: Arrangements with private companies that carry out EPA's work. EPA conducts a great deal of its business through contractors that bid competitively for these jobs. For example, certain dockets and public reading rooms are maintained by contractors; much of EPA's electronic communications, such as its web page,

are managed by contractors; contractors often conduct research for EPA. When EPA receives and reviews competitive bids for these contracts, it obtains and holds sensitive information about potential contractors—how much they earn, their qualifications, and information related to their tactics for bidding for jobs.

EPA program office: An office in EPA that manages a specific media program. For example, the Air Office manages activities under the Clean Air Act; and the Toxics and Pesticides Office manages activities under the Toxic Substances Control Act (TSCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

executive order: An order issued by the President of the United States pursuant to his or her implied powers as commander in chief and related to the duty to take care that the laws be faithfully executed. The order is binding upon agencies and employees of the executive branch of the federal government. However, an executive order does not have the force of a law passed by Congress or a regulation enacted by a federal agency; thus, it has no direct binding effect on persons outside the executive branch of U.S. government (although it may affect those people in practical ways). Generally, individuals cannot sue to make a federal government agency comply with an executive order; rather, the discipline for compliance must come from within the executive branch. The Administrative Procedure Act of 1946 requires that executive orders be published in the Federal Register (except for certain orders concerning sensitive national security matters). Before that, they were not listed or systematically published. George Washington issued the first executive order. President Clinton signed approximately 300 executive orders during his eight-year presidency.⁵⁷

federal acquisition regulations: The rules that U.S. federal agencies must follow when they use contracts to purchase goods (examples range from paper for copying machines to contracts to design and build missiles) and services (for example, experts to create government websites or to test soil contamination).

Federal Advisory Committee Act (FACA) (5 U.S.C. App. C): A law of the U.S. Congress that limits the use of advisory committees by government agencies. In part,

⁵⁷ An interesting example demonstrating the degree of flexibility Presidents have in issuing executive orders is found in the *Washington Post*, December 29, 2000 ("Clinton Reverses 5-Year Ban on Lobbying by Appointees" by John Mintz): On one of his last days in office, President Clinton reversed an executive order he signed on his first day in office in 1993 that barred senior officials of the White House and other agencies from lobbying former colleagues for five years.

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the law restricts the number of committees that government agencies can convene. It also requires that the membership of the advisory committee be fairly balanced in terms of the points of view represented (i.e., the government cannot solicit only one side of the argument in a contentious issue) and restricts the functions to be performed by the advisory committee.

Federal Register: The official U.S. government record. The Federal Register publishes proposed and final rules; executive orders (except for certain orders that are sensitive because of national security reasons), etc. It is available in public libraries or by subscription. Today, much of this information is also found on the web.

filing systems: systematic, consistent systems for storing documents so that they are easily found and easily retrievable.

FOIA: Freedom of Information Act. A law passed by the U.S. Congress in 1966 that sets the rules for availability of information controlled by the U.S. government.

general counsel: the chief legal officer of a U.S. federal government agency, including EPA. The general counsel usually heads an office called Office of General Counsel.

headquarters: the EPA office in Washington, D.C. EPA also has ten regional offices (in Boston, New York City, Philadelphia, Atlanta, Chicago, Kansas City, Denver, Seattle, San Francisco, and Dallas).

horizontal information laws, horizontal access to information: Laws, such as the U.S. FOIA, that require information to be provided to the public on request regardless of the subject matter. These laws contrast with “environmental information laws,” such as the EC Directive 90/313/EEC, which grant access only to environmental information.

invoice: An itemized list sent as a bill or a receipt related to a sale or purchase. EPA uses an invoicing process for contractors to collect fees for their efforts (<http://www.epa.gov/oam/main/cinvoice.htm>).

law: Rules enacted by the U.S. Congress (the Senate and the House of Representatives) that define the

authority of federal agencies. Laws include FOIA, the Clean Air Act, the Clean Water Act, and the APA.

nonprofit entity: An entity that has been organized under the laws of the United States as a not-for-profit corporation, which entitles it to special tax treatment. Many U.S. nongovernmental organizations (NGOs) are organized as nonprofit (not-for-profit) corporations.

Office of the Administrator: The head of EPA is called the administrator, and his or her office is a separate administrative unit in the EPA organizational structure.

potentially responsible parties: Individuals, companies, and others who might be responsible under CERCLA for the costs of cleaning up contamination.

predecisional (“deliberative”) materials: Documents, memoranda, etc., that are written to express points of view, opinions, and advice and to help shape decision-making while a U.S. federal government agency is contemplating a particular decision. For example, staff might create and present regulatory options for decisionmakers, with pros and cons. Predecisional information can be released once a decision is made public. It can, however, be withheld where a decision was never made.

private industry: A term used interchangeably with company, plant, private business, business.

Public Affairs Office: An office at EPA that manages interactions with the public.

public docket room: A publicly accessible room, located in or near the relevant government agency, that enables interested parties to hand-deliver filings and examine documents and papers. The most up-to-date docket rooms are equipped with computer workstations, permitting fast retrieval of information and enhanced search capabilities. Customer service staff are on-hand to answer inquiries regarding the computer equipment, docket, and coordination programs. Most U.S. government public docket rooms can be accessed without advance notice during normal government business hours. However, some agencies have put restrictions on certain kinds of access to public docket rooms. For example, the Department of Energy requires foreign nationals to get permission to obtain access.

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regulation: A rule enacted by a U.S. federal agency, such as EPA, as authorized by laws written by Congress. Regulations are written in a publicly interactive process called notice-and-comment rulemaking. The process of notice-and-comment rulemaking was established in the APA and further elaborated in decisions of the U.S. federal courts. Once enacted, regulations have the force and effect of laws, and violations can lead to civil and criminal penalties.

requester: In this document, a person, organization, or other entity that asks for information under FOIA.

research and development function: Environmental research sponsored and/or conducted by EPA.

Resource Conservation and Recovery Act: A U.S. law that governs disposal to land sites.

risk management plan (RMP): Information on certain extremely hazardous flammable and toxic substances that enables chemical accident prevention at facilities using such substances. RMPs were first created in reaction to the accident at the Bhopal, India, Union Carbide plant. The 1990 Clean Air Act amendments required US EPA to publish regulations and guidance. EPA had planned to make RMPs available on the Internet but was accused of making a “road map for terrorists” by releasing certain risk assessments with worst-case scenarios. The critics argued that such information, if electronically available, could easily be aggregated and used in harmful ways. Now EPA is reconsidering its security system. In response to a demand by the Congress, EPA wrote an August 2000 rule banning the electronic release of RMP information for one year. Information can be shared in paper format with “qualified researchers.” The term qualified researchers is as yet undefined.

Science Advisory Board (SAB): An office established in 1978 by the U.S. Congress to provide scientific advice to the EPA administrator or committees of the U.S. Congress and functions as a technical peer review panel with public input. As a federal advisory committee, it must comply with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. C) and related regulations. SAB is a staff office that reports directly to the administrator. Members of and consultants to the board constitute a distinguished body of scientists, engineers, and economists (drawn from academia, industry, and envi-

ronmental communities throughout the United States and, in some limited cases, other countries) who are recognized experts. Some statutes (e.g., Clean Air Act) require that certain proposed decisions be reviewed by subgroups of the SAB.

<http://www.epa.gov/sab/about.htm>.

substantiation: The process of demonstrating the validity of a claim that information should be protected because it contains confidential business information (CBI). Industry is usually asked to explain, for example, exactly why release of the information would cause competitive harm.

Superfund: See Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

Superfund site: Contaminated property that qualifies for cleanup under the U.S. Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

sunset clause: A specific time limit beyond which a law or regulation expires. In the case of confidential business information (CBI), EPA is considering a sunset clause for protection of data classified as CBI. After the expiration date, anyone who wanted to protect the information would have to demonstrate why confidentiality should be continued.

sunshine laws: Laws that require government to provide information to the public; to conduct its business in ways that allow the public to see, to the extent possible, the inner workings of the government; and to otherwise act in a transparent way.

Toxic Release Inventory (TRI). A reporting requirement established by U.S. law requiring private industry to provide data concerning toxic releases. Like the Risk Management Plan, TRI represents a regulatory response to the Bhopal accident (see RMP, above). The TRI system has led to a voluntary reduction program for emissions of 17 of the most toxic substances on the list. However, it should be noted that the U.S. TRI only includes some emission sources, and that therefore TRI underestimates U.S. emissions. In Europe, a similar requirement is called PRTR.

Toxic Substances Control Act (TSCA): A U.S. law that gives EPA authority to regulate chemicals. TSCA figures prominently in any discussion of how EPA man-

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ages confidential business information, in part because of its new chemical review requirements. Before a new chemical is placed on the market, it must undergo review by EPA. The manufacturer must provide information about the chemical. As a result, EPA often has

information of competitive significance to the company. Because of these responsibilities, the TSCA program has the most stringent set of information controls in EPA.

Annex I: Council Directive 90/313/EEC of 7 June 1990 on the Freedom of Access to Information on the Environment

(Also available at: http://europa.eu.int/eur-lex/en/lif/dat/1990/en_390L0313.html)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 130s thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Considering the principles and objectives defined by the action programmes of the European Communities on the environment of 1973 (4), 1977 (5) and 1983 (6), and more particularly the action programme of 1987 (7), which calls, in particular, for devising 'ways of improving public access to information held by environmental authorities';

Whereas the Council of the European Communities and the representatives of the Governments of the Member States, meeting within the Council, declared in their resolution of 19 October 1987 on the continuation and implementation of a European Community policy and action programme on the environment (1987 to 1992) (8) that it was important, in compliance with the respective responsibilities of the Community and the Member States, to concentrate Community action on certain priority areas, including better access to information on the environment;

Whereas the European Parliament stressed, in its opinion on the fourth action programme of the European Communities on the environment (9), that 'access to information for all must be made possible by a specific Community programme';

Whereas access to information on the environment held by public authorities will improve environmental protection;

Whereas the disparities between the laws in force in the Member States concerning access to information on the environment held by public authorities can create inequality within the Community as regards access to information and/or as regards conditions of competition;

Whereas it is necessary to guarantee to any natural or legal person throughout the Community free access to available information on the environment in written, visual, aural or data-base form held by public authorities, concerning the state of the environment, activities or measures adversely affecting, or likely so to affect the environment, and those designed to protect it;

Whereas, in certain specific and clearly defined cases, it may be justified to refuse a request for information relating to the environment;

Whereas a refusal by a public authority to forward the information requested must be justified;

Whereas it must be possible for the applicant to appeal against the public authority's decision;

Annex I

Whereas access to information relating to the environment held by bodies with public responsibilities for the environment and under the control of public authorities should also be ensured;

Whereas, as part of an overall strategy to disseminate information on the environment, general information should actively be provided to the public on the state of the environment;

Whereas the operation of this Directive should be subject to a review in the light of the experience gained,

HAS ADOPTED THIS DIRECTIVE:

Article 1

The object of this Directive is to ensure freedom of access to, and dissemination of, information on the environment held by public authorities and to set out the basic terms and conditions on which such information should be made available.

Article 2

For the purposes of this Directive:

(a) 'information relating to the environment' shall mean any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites, and on activities (including those which give rise to nuisances such as noise) or measures adversely affecting, or likely so to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes;

(b) 'public authorities' shall mean any public administration at national, regional or local level with responsibilities, and possessing information, relating to the environment with the exception of bodies acting in a judicial or legislative capacity.

Article 3

1. Save as provided in this Article, Member States shall ensure that public authorities are required to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest.

Member States shall define the practical arrangements under which such information is effectively made available.

2. Member States may provide for a request for such information to be refused where it affects:

—the confidentiality of the proceedings of public authorities, international relations and national defence,
—public security,

—matters which are, or have been, *sub judice*, or under enquiry (including disciplinary enquiries), or which are the subject of preliminary investigation proceedings,

—commercial and industrial confidentiality, including intellectual property,

—the confidentiality of personal data and/or files,

—material supplied by a third party without that party being under a legal obligation to do so,

—material, the disclosure of which would make it more likely that the environment to which such material related would be damaged.

Information held by public authorities shall be supplied in part where it is possible to separate out information on items concerning the interests referred to above.

3. A request for information may be refused where it would involve the supply of unfinished documents or data or internal communications, or where the request is manifestly unreasonable or formulated in too general a manner.

4. A public authority shall respond to a person requesting information as soon as possible and at the latest within two months. The reasons for a refusal to provide the information requested must be given.

Article 4

A person who considers that his request for information has been unreasonably refused or ignored, or has been inadequately answered by a public authority, may seek a judicial or administrative review of the decision in accordance with the relevant national legal system.

Article 5

Member States may make a charge for supplying the information, but such charge may not exceed a reasonable cost.

Article 6

Member States shall take the necessary steps to ensure that information relating to the environment held by bodies with public responsibilities for the environment and under the control of public authorities is made available on the same terms and conditions as those set out in Articles 3, 4 and 5 either via the competent public authority or directly by the body itself.

Article 7

Member States shall take the necessary steps to provide general information to the public on the state of environment by such means as the periodic publication of descriptive reports.

Article 8

Four years after the date referred to in Article 9 (1), the Member States shall report to the Commission on the experience gained in the light of which the Commission shall make a report to the European Parliament and the Council together with any proposal for revision which it may consider appropriate.

Article 9

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 1992 at the latest. They shall forthwith inform the Commission thereof.
2. Member States shall communicate to the Commission the main provisions of national law which they adopt in the field governed by this Directive.

Article 10

This Directive is addressed to the Member States.

Done at Luxembourg, 7 June 1990.

For the Council

The President

P. FLYNN

Footnotes:

- (1) OJ No C 335, 30. 12. 1988, p. 5.
- (2) OJ No C 120, 16. 5. 1989, p. 231.
- (3) OJ No C 139, 5. 6. 1989, p. 47.
- (4) OJ No C 112, 20. 12. 1973, p. 1.
- (5) OJ No C 139, 13. 6. 1977, p. 1.
- (6) OJ No C 46, 17. 2. 1983, p. 1.
- (7) OJ No C 70, 18. 3. 1987, p. 3.
- (8) OJ No C 289, 29. 10. 1987, p. 3.
- (9) OJ No C 156, 15. 6. 1987, p. 138.

Annex II: The Netherlands Act of 31 October 1991, Containing Regulations Governing Public Access to Government Information

We Beatrix, by the grace of God, Queen of the Netherlands, Princess of Orange-Nassau, etc.

Greetings to all who shall see or hear these presents! Be it known:

Whereas We have considered that, in view of Article 110 of the Constitution, it has proved desirable, in the interests of effective, democratic governance, to amend the rules concerning openness and public access to government information and to incorporate these rules in statute law wherever possible;

We, therefore, having heard the Council of State, and in consultation with the States General, have approved and decreed as We hereby approve and decree:

Chapter I. Definitions

Section 1

The definitions employed in this Act and the provisions deriving from it shall be as follows:

- a. document: a written document or other material containing data which is deposited with an administrative authority;
- b. administrative matter: a matter of relevance to the policies of an administrative authority, including the preparation and implementation of such policies;
- c. internal consultation: consultation concerning an administrative matter within an administrative authority or within a group of administrative authorities in the framework of their joint responsibility for an administrative matter;
- d. independent advisory committee: a committee appointed by the government to advise one or more administrative authorities, the members of which do not include any civil servants who advise the administrative authority to which they are responsible on the subjects put before the committee. A civil servant who is the secretary or an advisory member of such a committee shall not be regarded as a member for the purposes of this provision;
- e. civil service or mixed advisory committee: a committee responsible for advising one or more administrative authorities, which is composed partly or wholly of civil servants whose duties include advising the administrative authority to which they are responsible on the subjects put before the committee.
- f. personal opinion on policy: an opinion, proposal, recommendation or conclusion of one or more persons concerning an administrative matter and the arguments they advance in support thereof;
- g. environmental information: all information available in written, visual, auditive or digital form concerning the condition of water, air, soil, fauna, flora, agricultural land and nature reserves; concerning activities, including activities causing nuisance such as noise, and measures which have or probably will have an adverse affect on these; and concerning relevant protective activities and measures, including measures under administrative law and environmental protection programmes.

Section 1a

1. This Act shall apply to the following administrative authorities:
 - a. Our Ministers;
 - b. the administrative authorities of provinces, municipalities, water boards and regulatory industrial organisations;
 - c. administrative authorities whose activities are subject to the responsibility of the authorities referred to in subsection 1 (a and b);
 - d. such other administrative authorities as are not excluded by order in council.

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2. Notwithstanding subsection 1 (d), this Act shall apply only to such administrative authorities responsible for education and research in the policy field of the Ministry of Education, Culture and Science as have been designated by order in council.

Chapter II. Public Access

Section 2

An administrative authority shall, in the exercise of its functions, disclose information in accordance with the present Act, without prejudice to provisions laid down in other statutes.

Chapter III. Information on application

Section 3

1. Anyone may apply to an administrative authority or to an agency, service or company carrying out work for which it is accountable to an administrative authority for information contained in documents concerning an administrative matter.
2. The applicant shall specify the administrative matter or the document relevant to it about which he wishes information.
3. An application for information shall be granted with due regard for the provisions of sections 10 and 11.

Section 4

If the application concerns documents held by an administrative authority other than that to which the application has been submitted, the applicant shall, if necessary, be referred to that authority. If the application was made in writing, it shall be forwarded and the applicant shall be notified accordingly.

Section 5

1. The decision on an application for information shall be given verbally or in writing.
2. The applicant shall receive written notification of a refusal to disclose all or part of the information for which he applied in writing. If the application was made verbally, the applicant shall receive, on request, written notification of the refusal. This option shall be brought to the attention of the applicant.
3. The decision shall likewise be given in writing if the application for information concerns a third party and said third party has applied for this information. In such a case, the decision and the information relevant to the third party shall be sent to him.

Section 6

The administrative authority shall decide on the application for information at the earliest possible opportunity, and in any event no more than two weeks after the date of receipt of the application. The administrative authority may defer the decision for no more than a further two weeks. The applicant shall be notified in writing, with reasons, of the deferment before the first two-week period has elapsed.

Section 7

1. The administrative authority shall provide information concerning the documents which contain the information required by:
 - a. issuing a copy of the documents or conveying their exact substance in some other form,
 - b. permitting the applicant to take note of the contents of the documents,
 - c. supplying an extract from the documents or a summary of their contents, or
 - d. supplying information contained in the documents.
2. In choosing one of the methods listed in subsection 1 the administrative authority shall take into account the preference of the applicant and the importance of smooth, rapid procedure.

Annex II

Chapter IV. Information provided voluntarily

Section 8

1. The administrative authority directly concerned shall provide, of its own accord, information on its policy and the preparation and implementation thereof, whenever the provision of such information is in the interests of effective, democratic governance.
2. The administrative authority shall ensure that the information is supplied in a comprehensible form and in such a way as to reach the interested party and as many interested members of the public as possible at a time which will allow them to make their views known to the administrative authority in good time.

Section 9

1. The administrative authority directly concerned shall ensure that the policy recommendations which the authority receives from independent advisory committees, together with the requests for advice and proposals made to the advisory committees by the authority, shall be made public where necessary, possibly with explanatory notes.
2. The recommendations shall be made public no more than four weeks after they have been received by the administrative authority. Their publication shall be announced in the Netherlands Government Gazette or in some other periodical made generally available by the government. Notification shall be made in a similar manner of non-publication, either total or partial.
3. The documents referred to in subsection 1 may be made public by:
 - a. including them in a publication which is generally available,
 - b. publishing them separately and making them generally available, or
 - c. depositing them for public inspection, providing copies or making them available on loan.

Chapter V. Exceptions and restrictions

Section 10

1. Disclosure of information pursuant to this Act shall not take place insofar as:
 - a. this might endanger the unity of the Crown;
 - b. this might damage the security of the State;
 - c. the data concerned relate to companies and manufacturing processes and were furnished to the government in confidence by natural or legal persons.
2. Nor shall disclosure of information take place insofar as its importance does not outweigh one of the following:
 - a. relations between the Netherlands and other states or international organisations;
 - b. the economic and financial interests of the State, other bodies constituted under public law or the administrative authorities referred to in section 1a, subsection 1 (c and d) and subsection 2;
 - c. the investigation of criminal offences and the prosecution of offenders;
 - d. inspection, control and oversight by administrative authorities;
 - e. respect for personal privacy;
 - f. the importance to the addressee of being the first to note the information;
 - g. the prevention of disproportionate advantage or disadvantage to the natural or legal persons concerned or to third parties.
3. Subsection 2, chapeau and at b, shall apply to the disclosure of environmental information concerning confidential procedures.
4. Subsection 2, chapeau and at g, shall not apply to the disclosure of environmental information. It is possible to refrain from disclosing such information pursuant to this Act if its publication would make damage to the environment more likely.

Section 11

1. Where an application concerns information contained in documents drawn up for the purpose of internal consultation, no information shall be disclosed concerning personal opinions on policy contained therein.

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2. Information on personal opinions on policy may be disclosed, in the interests of effective, democratic governance, in a form which cannot be traced back to any individual. If those who expressed the opinions in question or who supported them agree, information may be disclosed in a form which may be traced back to individuals.
3. Information concerning the personal opinions on policy contained in the recommendations of a civil service or mixed advisory committee may be disclosed if the administrative authority directly concerned informed the committee members of its intention to do so before they commenced their activities.

Chapter VI. Other provisions

Section 12

Rules applicable to the central government may be laid down by or pursuant to an order in council concerning charges for copies of documents made and extracts from or abstracts of documents supplied in response to applications for information.

Section 13

Publication of recommendations by the Council of State or independent advisory committees which were issued before 1 May 1980 shall not be compulsory under the present Act.

Section 14

Further rules concerning the implementation of provisions laid down by or pursuant to the present Act may be laid down:

- a. for central government, by or pursuant to an order by Our Prime Minister in accordance with the views of the Cabinet;
- b. for provinces, municipalities, water boards and the other administrative authorities referred to in section 1a, subsection 1 (c and d) and subsection 2, by their executive bodies.

Section 15

[Lapsed.]

Section 16

The provisions of the previous Government Information (Public Access) Act (Bulletin of Acts and Decrees 1987, no. 581) shall continue to apply to appeals against decisions given pursuant to the said Act which had been lodged before the present Act entered into force.

Section 17

Our Prime Minister and Minister of General Affairs, and our Minister of the Interior shall, within five years of the entry into force of the present Act, report to the States General on its application.

Chapter VII. Amendments to certain Acts of Parliament

Section 18

[Contains amendments to other regulations.]

Section 19

The provisions of the previous Act shall continue to apply to advisory reports, recommendations and proposals issued by the Council of State before the present Act entered into force.

Section 20

[Contains amendments to other regulations.]

Annex II

Section 21

Restrictions on access imposed before the entry into force of the present Act shall continue to apply to applications pursuant to the 1962 Public Records Act (Bulletin of Acts and Decrees 1962, no. 313) for consultation or use of documents which had been deposited in a repository before the entry into force of the present Act.

Sections 22-24

[These articles contain amendments to other regulations.]

Chapter VIII. Concluding provisions

Section 25

The 1978 Government Information (Public Access) Act (Bulletin of Acts and Decrees 1978, no. 581) shall be repealed.

Section 26

This Act shall enter into force on a date to be determined by Royal Decree.

Section 27

This Act may be cited as the Government Information (Public Access) Act.

We order and command that this Act shall be published in the Bulletin of Acts and Decrees and that all ministerial departments, authorities, bodies and officials whom it may concern shall diligently implement it.

Done at The Hague, 31 October 1991

Beatrix

R. F. M. Lubbers
Prime Minister;
Minister of General Affairs

C. I. Dales
Minister of the Interior
Published the thirty-first of December 1991

E. M. H. Hirsch Ballin
Minister of Justice

Annex III: Recommendations for Review and Revision of Directive 90/313/EEC

Annex C from the Report from the Commission on the experience gained in the application of Council Directive 90/313/EEC of 7 June 1990, on freedom of access to information on the environment, COM(2000)400

The Report published by the Dutch organisation, Stichting Natuur en Milieu, based on the conclusions of the IMPEL Workshop of January and a variety of other sources made recommendations which can be summarised as follows.

1. The Directive should expressly state that access to environmental information is a right, so that limitations on its exercise would have to be applied in a narrow and specific way.
2. Article 1 refers to information “held” by public authorities but, increasingly, information is held by other bodies subject to the control of a public authority. The Directive should specify that a public authority “holds” information if that information is available to it but physically in the possession of a private entity which is subject to the regulation of the public authority.
3. The Directive’s definition of “information relating to the environment” should be amended to make it clear that it covers information on health, radiation and nuclear energy as well as information (including financial or economic information) on activities or proposals which may affect the environment.
4. The Directive currently applies to public authorities with “responsibilities... relating to the environment”. The Directive should, however, apply to environmental information held by any public administration irrespective of whether they have responsibilities relating to the environment. Publication of indicative (but not exhaustive) lists of bodies covered by the Directive could be useful.
5. The Directive excludes bodies acting in a judicial or legislative capacity from the definition of public authorities. This exception has in some cases been interpreted to mean that a body which sometimes acts in a judicial or legislative capacity always falls outside the scope of the Directive. The Directive should therefore clarify that the exclusion of a body applies only on the occasions when such a body is acting in a judicial or legislative capacity.
6. Increasingly, functions traditionally performed by governmental authorities are being transferred to quasi-public or private bodies. Article 6 is intended to bring them within the scope of the Directive but is limited to those “under the control” of public authorities”. Therefore article 6 needs to be clarified and extended to cover bodies, controlled, directed, influenced or established in whole or in part by government to carry out a public service or a governmental function and the current requirement for such bodies to have “public responsibilities for the environment” should be deleted.
7. Article 3(1) of the Directive requires public authorities to make information “available” but is unclear about whether authorities are required to make it available for inspection or for copying. The Directive should provide for the person seeking the information to decide how he or she wishes to have the information made available.
8. Article 3(1) currently states that any person may make a request without his having to “prove” an interest. The Directive should make clear that a person may request information without having to offer any explanation to the public authority.
9. The Directive only requires Member States to define the practical arrangements for making information effectively available without providing further for what constitutes such arrangements. The Directive should address, at least, the following matters:
 - the designation of information units or officers for each relevant public authority
 - the keeping of registers of information held
 - the making of arrangements for forwarding information requests to the proper authorities

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- the establishment of inspection facilities at reasonable locations and open at reasonable hours
 - the publication of cost schedules
 - the organisation of training programmes for officials.
10. Article 3(2) provides for a long list of broadly formulated exceptions which are capable of undermining the Directive's stated object. They should be carefully limited to those strictly necessary to protect legitimate public and private interests. Exceptions should apply only if it can be demonstrated that disclosure of information would adversely affect the protected interest and that the harm which would result from the release of the information would exceed the benefit to the public interest in giving access to the information. Clear and specific reasons should be given for a refusal of access.
11. In addition to the provision recommended in paragraph (10):
- the reference to the "confidentiality of the proceedings of public authorities" should be narrowed to more specific kinds of "proceedings" and to "confidentiality" as established by law or comparable rules.
 - the too broad exception by reference to "matters which are, or have been, sub judice, or under enquiry (including disciplinary enquiries), or which are the subject of preliminary investigation proceedings" should be limited to matters currently sub judice and to what is necessary to prevent the release of information which would adversely affect the right of a fair trial or the course of justice. The protection for "preliminary investigation proceedings" should be clearly limited to investigations which would result in criminal charges.
 - the exception related to "commercial and industrial confidentiality" should be limited to sensitive commercial information (such as trade secrets) which has been designated as confidential by the company concerned and the disclosure of which would significantly harm its commercial interests and assist a competitor. A person claiming the protection of commercial confidentiality should have to justify the claim. The Directive should specify that data relating to releases into the environment (emissions, waste etc) cannot be confidential.
 - the exception concerned with "material supplied by a third party" can be difficult to apply in practice as it may be unclear whether information was supplied to meet a legal obligation or not. Moreover, much of the information which public authorities hold for the purpose of environmental protection is supplied voluntarily. The need for confidential treatment of information should be based on its contents and not on the manner in which a public authority obtained it and so there should be no general exception for voluntarily supplied information.
12. As respects Article 3(3):
- "unfinished documents" should not be capable of being withheld if they have been considered by a public authority in arriving at a decision
 - "unfinished data" should be deleted from the grounds for refusal as the notion that data can be withheld pending processing is difficult to defend.
 - the Directive should clarify when communications between different public authorities can be withheld as "internal communications".
 - the ground for refusal which refers to a request being "formulated in too general manner" should be reviewed. A request may need to be formulated in a general manner if the public authority does not keep lists or registers of information held which would help a person to make a more specific request.
13. Article 3(4) should be amended to provide that a response must be made as soon as possible and the information must be supplied at the latest within a specified time period. The current two months deadline should be drastically reduced as requests for information are often time-sensitive and data are increasingly stored in computerised form which can be accessed and transmitted quickly.
14. As respects Article 4, the Directive should expressly require that there should be the opportunity of an administrative review of the matters currently covered as well as of related matters (such as overcharging) while preserving the opportunity of ultimate recourse to judicial review of the administrative decision. This

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should help to mitigate the high costs or the long delays associated with review proceedings at present in cases where they are a component of the existing judicial system in the Member State concerned. Furthermore the Directive should provide that, in accordance with the relevant national legal system, the review process should be characterised by low cost and by swift, independent, binding and transparent decision-making.

15. As respects Article 5, the Directive should:
 - require the establishment and publication of a schedule of maximum costs;
 - make explicit that inspection is free of charge;
 - provide that there should be no charge for a set initial amount of search time; and
 - provide for the possibility of a reduction or waiver of charges for requests for non-commercial purposes.
16. The Directive should establish sanctions against public authorities which improperly withhold information.
17. Article 7 should be strengthened to respond to public interest in environmental information and also brought up-to-date in the light of developments in information technology.
18. Since all Member States have now transposed the Directive, a relatively short period such as 12 months should be allowed for transposing any amendments which may result from the Article 8 review. There should again be provision for evaluation and review with a clearer statement of the date by which Member States should submit their reports.

Appendix

Legal Provisions and Agency Practice for “Active” Public Disclosure of Environmental Information in the United States, and Related Issues to Address for Application in Central Europe

1. Generally Applicable Legal Requirements for Publication or Other Public Disclosure by Agencies of Documentation and Other Information: Administrative Procedure Act and Federal Register Act

- a. Agency rules and regulations, both substantive and procedural, and policy statements of general applicability must be published in the Federal Register on adoption, and published in codified form in the Code of Federal Regulation.

Agency rulemaking: Proposed rules and agency decisions adopting final rules, along with the rule adopted, must be published in the Federal Register. All agency documents relevant to a proposed rule and all public comments received by the agency on the rule must be generally available for public inspection and copying in dockets in agency public record rooms.

- a. Proposed and final agency adjudicatory decisions in particular matters, including the issuance, modification, or revocation of permits or licenses and administrative enforcement actions must be noticed in the Federal Register.

Adjudicatory decisionmaking procedures: Proposed decisions, relevant agency documents, comments and submissions by the public, and final decisions must be generally available for public inspection and copying in dockets in agency public record room. Copies of licenses and permits must also be generally available for public inspection and copying (in dockets in agency public record rooms. (Documents relating to agency actions for civil and criminal enforcement in court are made publicly available for inspection and copying in the relevant courts.)

Implications and requirements for implementation in Central and Eastern Europe:

- Existence of a Federal Register-like publication or a similar journal published either by the government or by a neutral source that can make available the information in question. The Federal Register is a document published daily by the U.S. federal government and widely distributed.
 - Existence of public docket rooms accessible by the public.
 - Establishment of legal provisions that require public notice for specified actions and documents.
 - Public availability of court records.
- b. Administrative staff manuals and staff instructions that affect members of the public must be made publicly available for inspection and copying.

2. Provisions in Specific Environmental Statutes Requiring Agencies to Make Documents and Information Generally Available to the Public for Inspection and Copying

Examples:

- a. Reports containing monitoring data on air pollution and water pollution discharges. The sources of such discharges are required by statute to file for permits. The information they submit to regulatory agencies must be generally available to the public.

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- b. Records and reports of inspections of facilities conducted by a regulatory agency must be generally available to the public.
- c. Environmental quality monitoring data collected by the government (e.g., on air quality in various locations, water quality in lakes and rivers), must be generally available to the public.
- d. Agency reports on trends in environmental quality indicators and summaries of monitoring data, reports on aggregate emissions and effluent data, reports on inspections and enforcement, reports on plans for achieving improved environmental quality, reductions in discharges, and better enforcement and compliance must all be published and made publicly available. As a matter of practice, agencies often aggregate such information in large databases, organized by facility, industry, year, and geographic location, and make such information publicly available on websites. Agencies also routinely make available informal guidance and policy documents.

Implications and requirements for implementation in Central and Eastern Europe:

- Adequate legal provisions requiring that specified data and information be made publicly available.
- Adequate systems—collection, sorting, and display and access mechanisms—for making the information available.
- Resources for aggregating data and putting it into accessible format.

3. General Requirements That Agencies Provide Specific, Identified Documents in Their Possession to a Specific Person Making a Request for Same

- a. Freedom of Information Act (FOIA).
- b. Agency regulations implementing FOIA.

Implications and requirements for implementation in Central and Eastern Europe:

- Please see the first section of the Practices manual

The Clean Water Act and Federal Requirements for Controlling Point and Nonpoint Source Water Pollution

(States may adopt more stringent water pollution controls than required by federal law.)

1. Point Source Water Pollution
 - a. Polluted effluent discharges from sources through a “discrete conveyance,” such as a pipe or trench, are subject to federal regulation under the Clean Water Act.
 - i. There are several hundred thousand such point sources.
 - ii. All point sources must have a National Pollution Discharge Elimination System (NPDES) permit, issued by EPA or the state pursuant to the Clean Water Act.
 - iii. EPA may delegate NPDES permitting authority to states where regulatory programs meet federal standards (about three-quarters of the 50 U.S. states have NPDES permitting authority; sources in other states get permits from EPA).
 - iv. Permits require point sources to
 1. comply with effluent limitations requirements (see below); and
 2. monitor, record and report discharges to a permitting authority.
2. Nonpoint Source Water Pollution
 - a. Discharges from other than point sources—e.g., runoff from forestry or agriculture—are also subject to federal regulation under the Clean Water Act.
 - b. State and local governments are responsible for controlling nonpoint source pollution.

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- i. There are millions of nonpoint sources.
3. Effluent Limitations for Point Sources (incorporated in NPDES Permits)
 - a. Federal technology-based limitations
 - i. For industrial categories and municipal sewer and waste treatment systems.
 - ii. EPA writes these standards.
 - b. Water quality–based limitations. Sources must comply with additional effluent limitations if necessary to meet water quality standards.
 - c. States may adopt more stringent limitations than required under the Clean Water Act.
4. Water Quality Standards
 - a. States classify waters and designate uses.
 - b. States adopt ambient water quality standards to secure designated uses consistent with EPA criteria.
 - c. EPA approves the water quality standards.
 - d. States monitor the quality of waters.
5. Total Maximum Daily Load Program
 - a. States review water quality data and make lists of “impaired waters”—portions of water bodies that do not meet water quality standards (40% of the waters in the United States).
 - b. States determine total maximum daily loads (TMDLs), the maximum amount of pollution that can be discharged into an impaired water and allow water quality standards for that pollutant to be met.
 - c. States prepare lists of impaired waters to be reviewed and approved by EPA.
 - d. States develop priorities and plans to reduce current effluent discharges to impaired waters to TMDLs to achieve water quality standards.
 - i. States determine the extent to which ambient discharges must be reduced in order to meet TMDLs and water quality standards.
 - ii. The reduction burden is allocated among various point and nonpoint sources (possible point source–nonpoint source effluent discharge trading).
 - iii. There is an unclear division of legal responsibility between EPA and the states.
6. Municipal sewer and waste treatment systems
 - a. Point source discharges, including storm sewers, are subject to Clean Water Act requirements for point sources.
 - b. Municipalities have received federal grants for construction of waste treatment plants.
 - c. Industrial facilities discharging to municipal sewer systems are subject to federal technology-based effluent limitations and requirements to pay municipalities for treatment costs.

The Generation, Recording, and Provision of Information to the Public at Each Stage of the Regulatory Process

1. NPDES Permits (National Pollutant Elimination Discharge System)
 - a. Several hundred thousand NPDES permits have been issued in the United States. Information contained in permits
 - i. facility information;
 - ii. single event violation information;

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- iii. pipe schedules;
 - iv. effluent limits;
 - v. effluent measurements and violations;
 - vi. permit events;
 - vii. evidentiary hearing events;
 - viii. pretreatment assessment summaries;
 - ix. compliance schedule violations; and
 - x. inspection information.
- b. Accessibility of information contained in permits”
 - i. All the information gathered through the NPDES permitting process is publicly available in the NPDES compliance system database on the EPA website.

Implications and requirements for implementation in Central and Eastern Europe:

- May require substantial revisions in permitting processes.
 - Institution of electronic or manual retrieval systems.
 - Institution of self-monitoring where it is not currently required and related inspection and enforcement procedures.
 - Increase in coverage of permitting system and assure that companies cannot operate without permits.
2. Monitoring, Recordkeeping, and Reporting Requirements for Point Sources
 - a. NPDES permits require point sources to monitor effluent discharges, usually on a daily basis.
 - b. Sources must keep records of monitoring results.
 - c. Sources must make monthly monitoring reports to the permitting agency (EPA or the state).
 - d. Monthly monitoring reports are publicly available in hard copy from the permitting agency.

Implications and requirements for implementation in Central and Eastern Europe:

- May require substantial revisions in permitting processes.
 - Institution of electronic or manual retrieval systems.
 - Institution of self-monitoring where it does not currently exist, and related inspection and enforcement procedures.
3. Technology-Based Effluent Guidelines
 - a. These “guidelines” are mandatory regulatory standards, adopted by EPA, that establish numerical limitations on the amount of various pollutants in effluent discharges, for about 500 industry categories and subcategories (e.g., petroleum refineries, tanneries, steel mills). About 500 guidelines have been issued by EPA. Point sources must comply with all applicable guidelines.
 - b. Information generated
 - i. national standards based upon technology for wastewater discharges to surface waters and publicly owned treatment plants;
 - ii. documentation generated by rulemaking proceedings for adoption of guidelines—agency, industry, NGO studies, data, analysis, comments;
 - iii. effluent guideline plans providing an overview of ongoing and future effluent guidelines, projects, and preliminary studies (published in the Federal Register biennially);
 - iv. preliminary studies on recent technical and economic information on different categories of discharge sources, which help EPA managers select new rulemaking projects;

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- v. information on the Federal Advisory Committee, which meets periodically to recommend improvements in the Effluent Guidelines Program ;
 - vi. questionnaires to industry to determine these guidelines; and
 - vii. public meetings records.
- c. Accessibility of information generated
 - i. The existing national standards are published in the Federal Register when adopted and codified in the CFR.
 - ii. The effluent guidelines plans are published biennially in the Federal Register.

Implications and requirements for implementation in Central and Eastern Europe:

- May require substantial revisions in the legal processes and in permitting processes.
 - Institution of electronic or manual retrieval systems.
 - Institution of self-monitoring where it does not currently exist and related inspection/enforcement procedures.
 - Creation of a Federal Register-like document.
 - Establishment of tradition of public meetings for permit issuance and rule or regulation writing.
4. Water Quality Standards
 - a. Information generated
 - i. EPA criteria for developing standards of water quality for use;
 - ii. state standards based upon those criteria; and
 - iii. EPA approval of the standards.
 - b. Accessibility of information generated
 - i. Each EPA office keeps a hard copy of the standards in its region.
 - ii. Information on the criteria and standards is accessible by telephone.
 - iii. The entire docket of criteria and standards will be posted on the EPA website.
 5. Government Monitoring of Water Bodies for Compliance with Water Quality Standards
 - a. Information generated
 - i. Many monitoring programs are conducted by the states, with EPA assistance.
 - ii. States receive pollution control and environmental management grants from EPA.
 - iii. EPA helps the states establish and maintain monitoring programs.
 - iv. EPA conducts limited monitoring of its own, as well, under the Environmental Monitoring and Assessment Program, which tracks the status and trends of statistically selected waters representing a variety of ecosystems.
 - v. Extensive chemical monitoring of waters is conducted by the U.S. Geological Survey (USGS).
 - b. Accessibility of information generated
 - i. The results of the state monitoring programs are reported to EPA.
 - ii. These results are available in EPA's STORET (storage and retrieval) database.
 - iii. Information from USGS monitoring is available on the USGS database, on its website.
 6. State and Local Nonpoint Source Pollution Management Programs
 - a. Information generated
 - i. lists of impaired waters that fail to meet water quality standards;

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- ii. state TMDLs for impaired waters; and
 - iii. plans for reducing current discharges to impaired waters to achieve water quality standards.
 - b. Accessibility of information generated
 - i. The EPA website allows the public to access a report by the Environmental Law Institute describing each state's nonpoint source pollution control programs.
 - ii. New York State's Department of Environmental Conservation (DEC) is creating a web page describing its nonpoint source pollution control programs.
 - iii. DEC provides a definition of TMDLs.
 - iv. DEC provides information on proposed TMDLs.
 - c. Program-specific opportunities for public participation
 - i. Public participation requirements for state nonpoint source pollution control programs are listed in the CFR.
 - ii. If a state does not submit an acceptable management program to the EPA administrator, according to the CFR a local public agency or organization may implement with technical assistance a nonpoint source pollution management program.
 - iii. The EPA website lists contact information for state nonpoint source pollution control program coordinators.
 - iv. The EPA website suggests methods by which the public can help monitor nonpoint source pollution in local areas and techniques for tracking, evaluating, and reporting on the implementation.
 - v. The New York DEC website requests public comment on proposed TMDLs.
7. State-Delegated NPDES Permit Programs
 - a. Information generated (using New York as an example)
 - i. information on each permit application.
 - b. Accessibility of information generated
 - i. The DEC database is available at DEC website.
 - c. Program-specific provisions for public access to environmental information and public participation in environmental decision making
 - i. Regulations in the CFR govern state compliance with applicable public participation requirements for access to information and public participation in environmental decision making.
 - d. Program-specific opportunities for public participation
 - i. CFR describes citizen responsibilities in relation to noncompliant state NPDES permit programs.
 - ii. The New York DEC provides opportunity provided for citizens to comment on specific permit applications.

Implications and requirements for implementation in Central Europe:

- May require substantial revisions in the legal processes and in permitting processes.
 - Institute electronic or manual retrieval systems.
 - Institute self-monitoring where it does not currently exist and related inspection and enforcement procedures.
 - Create a Federal Register-like document.
 - Establish tradition of public meetings for permit issuance and rule or regulation writing.
8. Interstate Environmental Protection Commissions
 - a. Information generated

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- i. Water quality monitoring information for water basins and bodies of water that cross the boundaries of more than one state.
- b. Accessibility of information generated (examples)
 - i. Delaware River Basin Commission website; and
 - ii. Chesapeake Bay Program website.

Citizen Suits

1. Citizen Suits
 - a. A requirement that is part of the Clean Water Act; elements include
 - i. standing;
 - ii. notice requirements;
 - iii. enforcement under a comparable law as a bar to citizen suits under the act;
 - iv. costs; and
 - v. remedies.
 - b. Accessibility of information
 - i. Information on citizen suits can be found in the EPA Water Enforcement Bulletin, available on the EPA website.

Other Programs Involving Public Access to Environmental Information and Public Participation in Environmental Decision Making

1. EPA Public Participation Initiatives under the Clean Water Act
 - a. The agency has drafted a strategy to enhance public awareness of nonpoint source pollution and expanded use of the Internet to provide environmental information the public.
 - b. The agency published *The EPA Lakewalk Manual: A Guidebook for Citizen Participation*, which allows individuals to submit water pollution data gathered during walks by lakes. The manual is easy to follow and provides clear, nontechnical instructions.
2. Nonstatute-Specific EPA Public Participation Initiatives
 - a. Consensus building in public participation programs.
 - i. Only when the opinion of every stakeholder is addressed will a decision be made.
 - b. The Community-Based Environmental Protection Program and the Green Communities Program.
 - i. Enable local communities to combat more effectively environmental problems by offering them guidance and technical assistance.
 - ii. Train EPA staff to work in a more efficient manner with communities.
 - c. The concept paper on environmental permitting
 - i. establishes public access to information as the “common denominator” of any new permitting system; and
 - ii. proposes less technical permitting models.

Implications and requirements for implementation in Central Europe:

- Establish tradition of public meetings for permit issuance and rule or regulation writing.
- Establish tradition of public outreach related to government decisionmaking.

Appendix

Remaining Obstacles to Public Access to Environmental Information and Public Participation in Environmental Decisionmaking

1. Obstacles to Encouraging Access and Participation
 - a. Barriers to information for business confidentiality and national security reasons.
 - b. Special interest groups and lobbying.
 - c. Technical language that dampens public interest in environmental information.

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