

Making Access Rights Operative

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1 Introduction

Access to government-held information (“access”) is, to a large extent, about the right and opportunity to acquire knowledge concerning government actions and relations in order to evaluate and, potentially, take informed political or legal action. I define information as “government-held” if it is either produced or received by a government agency. In this article, access to government-held information is discussed both as a formal right and a question of citizens’ ability to exercise their rights. This article is based on the Norwegian experience, but I have refrained from discussing detailed, substantive legal questions. Instead, I have emphasised the significance of statutory structures and types of measures that are contained in “access legislation” in both Norway and many other countries. One of the important perspectives that I have attempted to establish is that statutory instruments – however much they may have been improved – are in themselves limited. Therefore we need to ask: how do we move forwards? How might we make access rights operative? My contribution to this discussion is, first and foremost, to propose perspectives, procedures and categorisations.

For a long time, access to government-held information has been recognised as an important element of democracy, proven, for example, by the adoption of freedom of information legislation.¹ Such rights are crucial to our ability to control and criticise government, and as a basis for proposing alternative policies. Furthermore, access rights are important in a society under the rule of law, as a measure of individuals’ ability to pursue their economic, social and ideological interests. Since government holds a central position in our societies, access rights not only effect our relations to government. Where government plays the role of intermediary and decision-maker, access rights may even affect our relations to private parties.

The access examples that I highlight are rational, in the sense that accessing information is assumed to occur for concrete and obvious reasons. This approach overlooks important aspects. For instance, access rights may be regarded as having a considerable educational quality, which may be of significance for the dissemination of relevant knowledge among citizens, and thus to the extent and character of their democratic participation. Moreover, access rights may have an impact on the opportunity for self-realisation. The granting or denial of access to information, and thus the development of knowledge, may influence which layer of society a person has access to, and, thereby, the type of social actor he or she is able to develop into.

This article voices a “democratic-political” rather than a “democratic-commercial” approach, meaning that emphasis is placed on access rights as a tool for political participation rather than as a means to do business in the information market place. One obvious consequence is that possible synergies between public administration and private information market place actors are not given special attention. On the other hand, it would be a misconception to assume that a “democratic-commercial” approach conflicts with a “democratic-political” viewpoint. On the contrary, access to government-held information by

¹ In Norway, “*offentlighetsloven*”, or Act Regarding Access to Government-held Information, was enacted in 1970.

business actors can be regarded as one of the prerequisites for effective access rights for citizens and their participation in the political and legal systems. It is unlikely that many governments will develop adequate tools for the effective scrutiny of government policy by citizens. Thus, private business initiatives can, and should, contribute positively to the development of applications that facilitate the effective exercise of access rights.

Are there grounds for believing that questions regarding access to government-held information are more important in 2004 than previously? I will highlight a number of elements that may indicate such a growing importance, though more linked to our phase in history than to a particular year. We live in a time of great political and administrative change, in particular with regard to changes in decision-making processes and reorganisation within and between government agencies. Internationalisation, European integration, modernisation and new public management are key concepts that describe elements in this development. Such changes are fundamental and challenge our democracies by their extensiveness, intensity and speed. As a consequence, the volume and complexity of accessible information is likely to become greater than ever before. At the same time, information and communication technology (ICT) may facilitate more effective processing of information, included processing to improve access. On the other hand, we remain, by and large, equipped with access legislation from a time when national and traditional government existed in a comparatively primitive technological context. This somewhat paradoxical situation calls for analysis and proposals for how to move forwards.

2 Documenting Government Conduct

The very existence of comprehensible information is an obvious prerequisite for effective access rights. Thus, before analysing these rights, I will briefly discuss the extent to which government administration generates information that citizens may have access to. Obviously, comprehensive rights are of limited value if there is little to access!

My starting point is a simple distinction between “transient” and documented information. By transient information I refer to information that leaves no traces, thus preventing others than those present from making a subsequent evaluation of the content. Examples of transient information include information derived from the spoken word and that contained in physical action. Provided that a recording device is used, such transient information can be documented, i.e. a representation of the information generated, making the data available for subsequent access. Access rights first and foremost relate to accessing documents,² but can also comprise access to transient information, such as meetings by decision-making bodies. The value of access to transient information is limited because it is conditional on personal presence and physical access. Thus, potential change in the balance between these two main categories of information is essential for the future of access rights.

² “Document” is widely defined, covering paper documents, images, video and sound recordings, drawings etc, see AGI section 3.

Much of the traditional communication occurring within government organisations (as in most organisations) has been of the transient type. Although bureaucracies are famous for generating documents, a large proportion of communication consists of conversations (telephone, meetings, in corridors etc.). Although the exercise of government power is typically not associated with, for example, the informal exchange of views during lunch breaks, decisions may in fact be based on transient communication over a nice cup of tea. To the extent that citizens should have the opportunity to access information contained in such transient exchanges, at least three strategies may be adopted:

- Government may *document selected and significant elements* of transient information. For instance, requiring that decisions are documented in writing and grounds given, or that officials be obliged to note case-relevant contents of conversations with parties to the case.³
- Secondly, transient information may be *recorded* so that a representation of the real-life event is produced and made accessible to citizens. An example of this is images and/or sound from meetings.
- Thirdly, government may create *formal situations* where the spoken word is recognised as publicly accessible information – typically meetings of government bodies to which the public has access.

ICT may obviously be used to record transient information and thus ensure that more information is available for citizens. This can be the case with regard to meetings of political bodies to which the public have access. One clear advantage is that such recordings constitute a document that can be placed in context with other documents relating to the same case. Even in individual cases, telephone calls between officials in charge and between officials and parties to cases can be recorded. Such recordings may, for instance, be defined as case documents, filed and made available to the party by means of an internet-based routine.

Extensive use of email may be deemed to indicate that previously transient information is increasingly communicated in a manner that produces documented information. If so, such a development may be regarded as progress in increasing the accessibility of information. However, Norwegian law does not define email logs as registers to which everybody has guaranteed access, and not every email is automatically classed as a case document. Only those email messages that are defined by the official in question as government case documents are recorded in the correspondence list and made accessible in accordance with the Act Regarding Access to Government-held Information. Thus, the enormous volume of emails logged does not necessarily imply a notable increase in the number of publicly accessible documents. However, government agencies are at liberty to disclose any email message that is relevant to government activity, with the exception of emails covered by secrecy provisions. In reality therefore, access is not dependent on the rights of citizens

³ Cf. Public Administration Act (hereafter: PAA), section 11 d.

but on the accommodating attitude of government, a state of affairs that strongly limits the real value of such access.

The other side of the coin when discussing email and access rights is a possible reduction in the amount of accessible documentation. In the same way that email may replace telephone calls, email may also reduce the use of traditional posted letters. Both types of communication generate documents and are therefore, in principle, accessible. However, while correspondence using official letterhead is obliged to be filed, the filing of emails is dependent on a conscious evaluation of the information contained in the message. Thus, if email is chosen in favour of an official letter, it is less certain that the document will be regarded as a case document and to be filed in the correspondence list.

The period of time during which documents exist is, of course, of crucial importance to the right to access government-held information. In Norway, the Archives Act⁴ regulates which documents are handed over to the National Archive of Norway (Arkivverket). In addition, the obligation to keep case records etc. may follow from other special laws regulating narrower fields. On the other hand, legislation may lead to the deletion of documents or items of information contained in documents. This is particularly the case regarding personal data that is deleted once the purpose of its processing does not warrant further storage.⁵ However, such personal information may, in principle, be retained if the information is to be transferred to the national archive authorities.

I lack the basis upon which to decide whether or not ICT leads to changes in the balance between transient and documented information. Here, my main point is that technology can be employed to generate documents in situations where it has traditionally been awkward, even impossible, to produce documents which may subsequently become objects for access rights. In particular, formal situations, such as meetings where government powers are exercised, may in many instances be documented by automatic procedures. This is also the case for telephone conversations and the exchange of emails with parties to cases. The basis for access to information may be broader than before, but thus far there are no signs of such a development in Norway.

3 Fragmented Access Regulation

Access rights are rooted in our societies. I will not discuss how we should describe this “root”, but have instead chosen the simple approach of referring to the following three legal-political principles, which describe fundamental qualities of government:

- Freedom of information
- Rule of law
- Data protection

⁴ Act 1992-12-04-126.

⁵ Cf. PDA, section 28, first subsection.

I could have chosen a number of other principles and freedoms. “Free competition” would have been an alternative if economic aspects had been of special importance; and “equality” would have been a candidate had social rights been the topic of discussion. I have assumed that all such principles and/or their fulfilment may be said to contain or presuppose access to information. Thus, I could have described the significance of access rights much more extensively than that which follows from the three principles chosen here.

Typically, each of the three selected principles assures the protection of certain rights or particular status for citizens. In Norway (as in many other countries), legislation has been enacted to establish minimum standards governing the legal position of citizens. In the Norwegian context, the following laws are the main guarantors for the three principles:

- Freedom of Information – Act Regarding Access to Government-held Information (of 1970), mentioned before⁶
- Rule of law – the Public Administrative Act (of 1967), hereafter PAA⁷
- Data protection – the Personal Data Act (of 2000), hereafter PDA⁸

In this section, I will discuss the major regulatory designs within which legislators have granted people rights to access government-held information. Contemporary Norwegian information access legislation is, to a large extent, organised with the aim of supporting citizens in particular situations and/or helping them pursue specific goals.

Principle	Freedom of information	Rule of Law	Data Protection
Status	As “citizen”	As “party” to a case	As “data subject”

Table 1

Each piece of legislation corresponds to at least one of the three principles referred to above. Access rights provided, for instance, by the PAA, are based on the assumption that citizens may wish to access their case dossiers in order to pursue their legal interests in cases to which they are party. Similarly, the AGI is based on the assumption that people may wish to fulfil their role as members of

⁶ Act 1970-06-19-69, sometimes also translated as “the Freedom of Information Act”.

⁷ Act 1967-02-10.

⁸ Act 2000-04-14-31.

a democratic society by monitoring, or even trying to influence, government. Their motivation may not only be their role as citizens, but also a desire to act to their own personal advantage. Access rights pursuant to the PDA are seen as a way of safeguarding an individuals' rights regarding data protection. Such protection not only regulates access to our own registered personal information. General access rights pursuant to the PDA permit any citizen to seek information regarding the extent and nature of the processing of personal data in society. Moreover, the rights enshrined in the PDA supplement those enshrined in the PAA, because case-relevant personal data may exist outside the case dossiers.

Together, the three laws referred to above give access rights to a large proportion of the population. The AGI and the PDA give access rights to everybody, i.e., in principal, limited only by individuals' curiosity and willingness to take action. The access rights enshrined in the PAA and the individual's rights enshrined in the PDA presuppose that people have a certain formal status. However, the situation of being registered or a party to a case is one that applies to many people. Thus, together, these three sets of access rights are very comprehensive. In addition, access may be requested on the basis of special regulations, i.e. within fields of government where the legislators were of the opinion that special needs existed, either to expand or restrict the access provided by general rights.⁹

Each of the acts mentioned above define a limited set of access rights that have been regarded as sufficient to satisfy the needs of the various assumed purposes and situations. Each access right has, to a large extent, been developed with little direct co-ordination with existing rights, implying that each right exists as an "island" of good intentions. Is it both feasible and desirable to establish a "mainland" of access rights, i.e. a co-ordinated body of access provisions that cover access requirements for a variety of situations and purposes?

The question above may not have one simple answer as it contains several problems and opportunities. Simply merging existing general access legislation into one "Information Access Act" is possible, but would obviously leave great gaps in the other laws where access provisions to be moved into a new act. This is particularly the case with the provisions concerning access rights in the PAA and PDA. Access rights in these laws constitute integral elements of other important guarantees for citizens. Access provisions must therefore be placed close to the provisions with which they interact. It is, for instance, crucial that access rights are placed in the context of the provisions defining information quality standards. A rearrangement resulting in the grouping together of various access provisions under the same statutory roof would weaken the laws they originated from. The benefits that might be gained by collecting access right provisions in one novel piece of legislation may, in other words, be lost because such a regulatory design would not satisfy the need for a fruitful legal context.

A second possibility is to insert a standard body of access provisions into every major act where questions of transparency and freedom of information are regarded as important issues. However, the complexity and volume that would

⁹ Special access rights exist, for example within the health and police sectors.

be created by such a strategy makes such a “multiplication strategy” highly problematic.

In our statutory tradition, acts should contain legal norms and contribute to answering normative substantive questions. Thus, simply informing citizens by means of Parliamentary acts, i.e. repeating and/or clarifying norms which form part of other legislation, rarely occurs.¹⁰ In one period following the Second World War, many acts were enacted as “framework legislation”, implying that most of the concrete legal norms were delegated and formulated in regulations adopted by the government or a ministry. One way to regard framework legislation is to consider it as norms that i) define limits to the delegated statutory power, and ii) confirm the existence of one or more regulations issued pursuant to the act.

One possibility regarding access regulations is to establish a “hub act”, meaning a law that i) defines common provisions regarding access rights (for instance supplementary rules and rules aimed at solving conflicts of interpretation), and ii) contains a meta level description of existing access regulations. Such a description of access regulation may, for instance, consist of rights enjoyed by everyone, and in addition contain an overview of other classes of rights within fields of special interest, for instance the business, health and police sectors. Hub legislation might even contain overviews of access rights pertaining to specific situations, for instance, the access rights that apply if a citizen has a disagreement with a government agency or if an individual buys or sells an estate or shares.

The preceding example concerning shares and estates may illustrate another important benefit were an access law hub to be adopted. Today, we are discussing the proportion of the indistinct zone between government and private sector that is to be covered by the Norwegian AGI.¹¹ On the other hand, we currently have scattered pieces of legislation that provide the right of direct access to information held in private businesses, and legislation that compels private actors to report information to government, where it may subsequently be accessed by anyone. A general access law containing provisions that were independent of the traditional division between private and public sectors would be an obvious gain to many.

The fact that many of the benefits that could be gained through hub legislation might just as well be gained from simple information initiatives is an obvious reason for rejecting the hub legislation option. There is certainly no reason to make things more difficult than necessary, and adopting a new law is just asking for inconvenience and inflexibility. If information related initiatives could have the same effect as hub legislation, then they are probably to be preferred.

The PDA introduced a general obligation for controllers to provide guidance regarding statutory access rights to data subjects.¹² This obligation applies

¹⁰ A fairly recent example is section 11 litra a of the PDA, where the reader is reminded of the various steps required to secure compliance with basic requirements for processing personal data, and without any additional effect.

¹¹ See NOU 2003: 30 Ny offentlighetslov (concerning amendments to the AGI).

¹² See section 6, subsection 2.

regardless of the nature of inquiry from the data subject, and thus represents an independent obligation to consider the *total* needs and opportunity connected to accessing information. Obviously, this is an ill-placed provision, as it goes far beyond the access rights defined in the PDA. A hub law, as suggested above, may obviously constitute a better systematic placing. Moreover, such an act could contain several provisions that would tie the other access laws together as a bundle of laws. In particular, such a novel piece of legislation could establish common procedures regarding various ways of distributing and obtaining information, see section 4 (below). For instance, a common set of provisions could be established regarding the publication of information and processing access requests from citizens. If I, for example, were interested in accessing information in a tax case, both the tax office and Public Registrar would be relevant addressees. Common procedural rules, laid down in hub legislation, could guarantee that a single access request would suffice to communicate with both addressees and ensure that all possible types of access rights were considered, i.e. regardless of the specific legal basis.

4 Categories of Access Rights

Which categories of access rights do the PAA, PDA, AGI and other legislation contain? What follows is an attempt to identify and present the various categories of such rights, based on an empirical study of Norwegian legislation. I have assumed that this legislation is better than average – at least in a formal sense – i.e. that Norwegian access legislation is rather “rich”, in the sense that it contains many aspects and elements of access legislation that are adequate when a general description is to be deduced. This is not to say that the legislative basis is in anyway complete, nor do I claim that my construction is complete and fully relevant in relation to any legal system. However, the point here is not the details, but illustrating how aspects and elements of access rights might be grouped within one framework. That said, within the universe of Norwegian access rights, I have made no other obvious simplifications than those described here.

Access on request by the citizen is one of the key enablers for the creation of information openness in the legislation referred to above. In addition, a variety of other laws support access rights by means of a large number of other techniques, which I will identify and describe here. The aim is to make the contents of the legislators' “toolbox” evident in cases where the objective is to establish access rights. I have chosen to divide the techniques into two groups, according to who is required to take action:

- a) the duty of government agencies to disseminate information, and
- b) the rights of individuals to obtain information.

a) The duty of government agencies to distribute information

In principle, *a duty to publish* represents the widest duty to provide access to information. However, this may be limited to publications with very small circulations, and thus have little tangible effect as a means of informing the general public. In Norway, the duty to publish has, first and foremost, been used in connection with statutory instruments, for instance by establishing a duty to publish every new act of Parliament and regulations pursuant to acts.¹³ In 2004, the law was amended, establishing a duty to publish particular statutory instruments and make them available, free of charge and generally available, in an electronic format (in practise on the Internet).¹⁴

A *duty to make information available* is similar to the duty to publish, but with fewer requirements for proactive effort by government to ensure easy access by citizens. Thus, while publication requires active effort to bring information to peoples' attention, making it available merely implies that government has prepared the ground for access by individuals.¹⁵ Today, both publication and making available often occur within the framework of the Internet. Explicit information on a homepage would typically be regarded as publishing, while a PDF-document deeply embedded in the structure of a website would probably be regarded as making information available. Nevertheless, in many instances there will be plenty of room for doubt as to where the boundary between these two categories should be drawn.

A *duty to produce information* implies an obligation to produce particular information material, but without the duty to actively distribute it. For instance, according to the Norwegian Environment Information Act, section 8, every relevant government agency is obliged to possess environmental information covering their areas of responsibility and function.¹⁶ The obligation to maintain file records and correspondence lists etc., should probably also be classified under this category.

A *duty to actively inform* represents a technique for the distribution of information where government has to do more than make information available. In addition, it is obliged to take active measures to reach out to members of the general public. In Norway, local governments, for instance, have a general duty to actively inform their citizens of their activities, and generally prepare the ground for general access to government-held information.¹⁷ In contrast to publication, actively informing is based on the premiss that there are specific addressees (individuals or groups).

A *duty to announce* differs from the duty to publish in the sense that an announcement contains only a reference to the existence of the information in

¹³ See Act 1969-06-19-53.

¹⁴ See "<http://www.odin.dep.no/jd/norsk/publ/hoeringsnotater/012041-080078/index-dok000-b-n-a.html>" The same amendment established the opportunity to publish various legal instruments voluntarily.

¹⁵ See Act 1999-01-15-2, Authorised Public Accountant Act (revisorloven), sections 3-5 and 3-7, last subsections.

¹⁶ Cf. Act 2003-05-09-31.

¹⁷ Cf. Act 1992-09-25-107, Local Government Act section 4 (kommuneloven).

question and where it may be obtained. This technique is used, for instance, to facilitate democratic debate regarding draft area development plans at county level.¹⁸

A *duty to notify citizens* is among the central provisions of both the PAA¹⁹ and PDA.²⁰ The obligation to notify is motivated by situations where it is necessary to gain the attention of specific individuals in order to make them consider their own interests.

A *duty to provide guidance* implies an obligation to make an active evaluation of the extent to which individuals need to be informed of their rights and duties etc. The pendant to this obligation is the right to request guidance, see below. According to the Norwegian PAA, section 11, subsection 2, assessment of the need for guidance is to be carried out on the initiative of the government agency. Moreover, and of particular interest in the context of this article is the provision in section 6, subsection 2 of the PDA, referred to above, which establishes a duty to provide guidance regarding statutory rights to access information.

A *duty to give grounds for decisions* is among the basic rights to receive information, and is a particularly important element of the Administrative Procedure Act.²¹ In some cases, individuals may have the right to request grounds beyond those that government agencies are obliged to give on their own initiative (see below).

b) Rights of individuals to obtain information

The *right to request access to meta information* concerns information that is often used to identify documents (see below). In other words, meta information can be regarded as the key to other and richer bodies of information. However, meta information may, in itself, be of interest because it reveals relations, points of contacts and various other structures. Thus, information in logbooks, case records, agendas etc. is often of great interest, irrespective of the underlying information. Meta information is usually identified in accordance with legal rules or other norms such as the National Archives Act and conventions regarding the contents of agendas.

The *right to request access to documents* is probably the most common way of creating openness within government and is a core element in freedom of information legislation. In Norway, the concept of “document” has developed from referring merely to a written piece of paper, to the all-embracing statutory definition: “a logically limited quantity of information stored on a medium which enables later reading, listening, presentation or transmission”.²² In order to specify which documents to access, a “specific case” must be identified,

¹⁸ Cf. Act 1985-06-14-77, Act Regarding Planning and Building, section 19-4 (plan og bygningsloven).

¹⁹ Section 16.

²⁰ Sections 19 – 21.

²¹ Cf. sections 24 and 25.

²² In Norwegian: “logisk avgrenset informasjonsmengde som er lagret på et medium for senere lesing, lytting, fremvisning eller overføring”, Cf. AGI, section 3.

combining “document”, “specific case” and the information of case records. A core of material, subject to information access, may be easily identifiable. However, accessible documents are not limited to those formally recorded as being part of a case, and an individual may have access to documents in a number of cases. Thus, a “specific case” is primarily the designation of a starting point and does not exclude any document that the individual may regard as relevant.

A document will always contain a variety of items of information, from specified and formalised types of information to that contained in factual prose, photographs, soundtracks etc. In other words, information may be expressed in ways that may make it difficult to determine in advance what should be regarded as one item of information. Nevertheless, exceptions from access to documents may often comprise specific items of information, for instance personal or private information.

The *right to request access to specific types of information* may sometimes supplement or facilitate the right of access to documents. According to the PDA, section 18, subsection 1, everybody has the right to access information that provides a general description of how personal data is processed. Moreover, the right to access specific types of information may also confer the right to access certain types of information contained in otherwise inaccessible documents.²³

The *right to receive guidance from a government agency* may either be of a general nature or linked to particular challenges, e.g. completing forms or acquiring knowledge of the contents of statutory or case law. This right is often universal, i.e., regardless of status, for example, as the party to a case.

The *right to request the grounds for decisions* supplements the obligation for government agencies to give grounds.²⁴ In Norway, such a right to obtain the grounds for decisions applies e.g. to specific fully automated decisions, in accordance with the PDA, section 22.

Finally, *the right of access to meetings of public decision-making bodies* implies the right to acquire transient information, for instance by attending meetings of central or local government bodies. In Norway, such rights exist within central and local government and within the court system. Rights to attend meetings at local government level may be accompanied by a duty to announce the event and to make the agenda publicly available.²⁵

In sum, this categorisation of access rights indicates a variety of ways to create openness. From the viewpoint of the legislators, it would probably be useful to develop a “toolbox” for the design of access policies and provisions. The aim should be to break the broad “access rights” down into smaller, well-defined elements that could be instrumental in the formulation of precise and well-founded access provisions.

²³ For instance, according to the PDA, data subjects have the right to access information concerning “security measures implemented in connection with the processing, insofar as such access does not prejudice security” (section 18, subsection 2, litra b).

²⁴ See, for example, section 13, subsections 4 & 5 of the Environment Information Act.

²⁵ Cf., for instance, the Local Government Act, section 32.

5 Putting Access Rights Together

In principle, access rights should first and foremost be improved through statutory amendments, to result in a co-ordinated and fully comprehensive body of provisions. Realistically, such an objective lies, at best, in the rather distant future. As an alternative, each government agency may develop its own internal policy, placing various elements of access rights together and correcting deficiencies in access legislation. In this section, I will attempt to illustrate how a simple *access procedure* model could contribute.

To transform the categories presented in the previous section into more than a list, it would be reasonable to place each element into what could be regarded as a typical (yet simplified) *information access procedure*. I have defined the possible phases of such a procedure in the table below and placed each category from the list in one of phases. That I have only chosen one phase for each category is not meant to preclude the possibility that categories may occur in several phases. Indeed, “guidance”, for instance, may be placed in several of the phases. However, I have presupposed that the placing of elements in the figure is simplified and typical, representing an adequate, albeit incomplete, representation of the information access procedure.

	Government		Individuals			
Action	Produce information	Distribute information	Survey information	Acquire information	Realize information	Act upon information
Decision-making	Documents	Publish	Access meta info	Access documents	Guidance	
Planning	Spoken word	Announce		single info.	Grounds	
Evaluation		Notify		meetings	Active info.	
		Answer				

→

Table 2

The first three phases represent the government’s responsibilities, i.e. where a government agency is the active party. “Action” represents occurrences of administrative and political action, such as decision-making, planning, evaluation of policies, exchange of information etc., i.e., processes that citizens may later find of interest and worthy of accessing information about. The second phase (“Produce information”) represents situations where government produces information relating to an “action”, either in a transient or documented form . The third and last phase in the government’s part of the process (“Distribute information”) is where the government takes steps to ensure that the information concerning the action in question is made known to a wide or narrow circle of individuals.

During the next three phases of the procedure, the active party is individuals wanting access to government-held information. Government agencies must act in response to requests. The first typical step is to establish an overview of possible information objects to access (“Survey information”).²⁶ Various types of meta information such as logbooks, case records and agendas may be used. Such information directly or indirectly discloses the information objects that are often the target of the whole information access process (“Acquire information”). Both meta and “target” information may be subject to scrutiny by citizens. However, I have assumed that case documents, items of information from filing systems, data bases etc., and occurrences and statements in meetings will, first and foremost, be regarded as target information, and thus the most important to acquire.

In the final phase of the procedure (“Understand information”), individuals deal with the challenge of interpreting and comprehending the information acquired. In doing so, individuals may need various types of general or individually oriented supplementary information or guidance, specific or general grounds for individual or general decisions etc.

Irrespective of how legislation is designed and the extent of statutory co-ordination (see above), it is important that government agencies make an effort to safeguard an appropriate level of information availability. To meet this challenge, a thorough analysis of the two phases that follow “Action”, on the “government side” of the model above is required, i.e. “Produce information” and “Distribute information”. Here, I will identify further elements linked to these phases and discuss how government may help to make access rights operative by developing an internal policy regarding access to government-held information.

Consideration of the production of information should start by identifying the government actions that are most likely to be relevant to the practise of access rights. If we extend the example presented in table 2 (above), “actions” may, for example, be stated as in table 3 below.²⁷ The point here is not the comprehensiveness of the list, but the attempt to make a detailed subcategorisation of government actions, linked to particular main categories. The main categories are useful primarily to organise the list, while the intention is to employ subcategories in concrete policy-making and planning processes (see below). It is certainly outside the scope of this article to discuss every one of the subcategories in the table, and I will limit myself to comment briefly on a couple of points.

²⁶ Even the government agency needs to survey the produced information. Thus, “survey” may also be placed on the government’s side of the model.

²⁷ The table is based on an article by Schartum; *Information access legislation for the future? – Some outlines of developments and possibilities based on the Norwegian experience*, under publication.

Performance of processes Statutory, Budgetary, Planning, Projects, Individual cases, etc.
Adoption of structures and systems Physical organisation, Formal organisation, Information systems, etc.
Social event(s) Parliamentary meetings, Conferences, etc.
Miscellaneous

Table 3

Access to information connected to statutory provisions is of great importance for many groups in society. Among the statutory instruments, regulations pursuant to Parliamentary acts e.g. issued by the Government or ministry are key. In Norway, preparatory work and draft legislation are generally regarded as important legal sources, in particular as a guide to the interpretation of new acts. Regulations are not often accompanied by the preparatory work, by and large leaving the reader to interpret the text itself. Thus, taking into consideration the performance of statutory processes (see table 3 above) and the question concerning production of accessible information, a key question for a ministry could for instance be: which documents related to new legislation should be produced and made accessible? Should, for instance, documentation describing the general and/or particular grounds for the legislation and/or each provision of the legislation be produced? In the next phase (in accordance with section 4 above), a further question should be: how should the relevant documents be distributed? Should they be published, announced, notified, or should the relevant government agency merely respond to requests to access the documents?

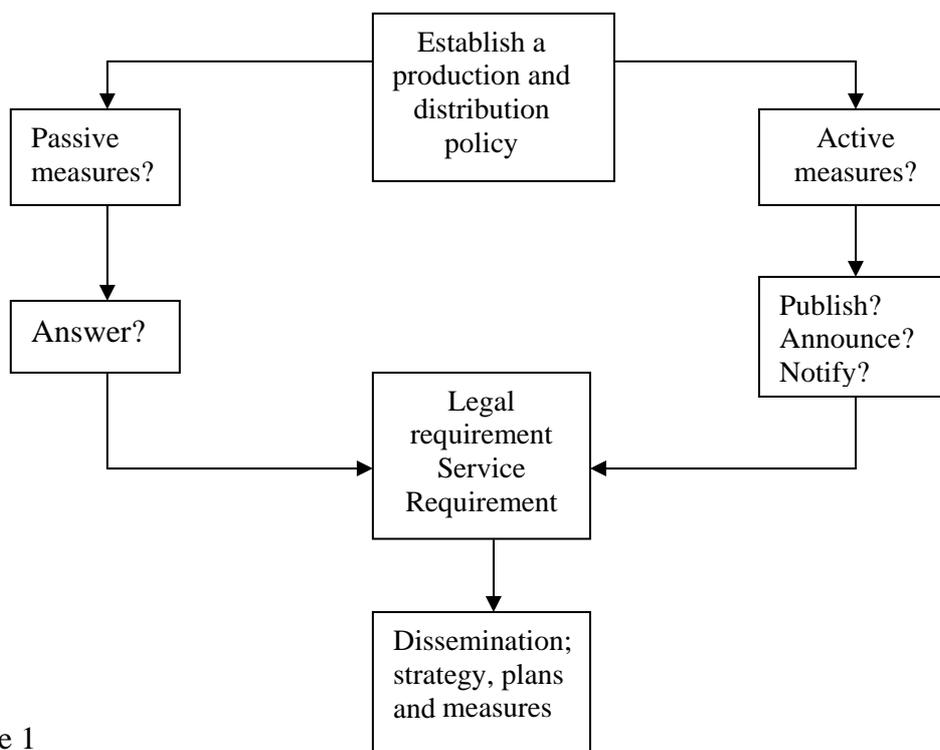


Figure 1

Another example concerns information linked to what I have cheerfully termed “social events” (see table 3 above), but which, in fact, designate the process whereby individuals (officials, politicians etc.) meet to take administrative or political actions. Such events may be of interest to citizens wishing some form of information access, for example the meetings of a decision-making body such as the Board of Social Affairs in a local government. According to my approach, the Board would first map the production of information in their meetings, as well as the types of document generated (agenda, spoken words, statements of cases, proposed decision, minutes etc.). The next phase would be to consider how the information should be distributed, i.e., which of the techniques identified in section 4 above, if any, should be applied. Who, for example, should have access to the meeting itself (and the spoken word), and in what form should minutes from the meeting be accessible (published on web-site only, announced and published, copies provided on request, etc.)?

Obviously, the subcategories in table 3 above will often be linked together. For example, a meeting of an administrative body may be called in order to make decisions, implying that questions regarding access to information concerning the meeting and other parts of the total decision-making process must be seen as a whole. In table 4 below, I have used a small example to illustrate such a combination, and have, in addition, applied some of the other categories presented earlier in this article. My intention is to illustrate how the various categories may be used to approach questions of access in a systematic manner which may, in turn, be employed to develop strategies, plans and specific measures to address access rights in a more satisfactory way than in current legislation.

Meta information	Transient information	Documented information	Means of Access
Correspondence list		Letter from parties	On request
	Telephone calls from parties	Sound recordings	On request
Agenda			Publish + announce
		Statements of cases	On request
		Proposed decisions	On request
	Spoken word (meeting)	Video recordings	Via Internet
		Minutes	Publish
		Decisions	On request
Correspondence list		Letters to parties	On request

Table 4

In table 4, the last row contains examples of the types of access methods that may be employed. A crucial question for government agencies concerns which of the two communicating parties (government agency or citizen) should initially play the active role? From the government agency’s point of view, the question is to what extent the strategy etc. should contain active and passive elements, and what the interplay between these two groups of elements should be. This division corresponds with the division between the duties of

government and citizens' rights. Based on the overview described in section 4, different measures may be roughly classified in accordance with this division:

Active distribution (duties of government agencies)	Passive distribution (rights of citizens)
publish	access meta information
make information available	access documents
announce	access specific types of information
produce information	access to meetings in government bodies
inform actively	guidance from government agencies
notify	grounds for decisions
provide guidance	
give grounds for decisions	

Table 5

The first step in the distributing information phase would be to identify any legal obligation of the government agency in question to actively distribute information and any legal right of citizens (or groups of citizens) to obtain information from the agency. The next step would be to consider whether or not the agency should provide services to citizens additional to those mandated by statutory rights and duties, see figure 1 above.

In Norway, the general principle of additional access to information is recognised, implying that more information may be provided than that guaranteed by statutory law, provided that no requirements for secrecy hinder such access. In other words, statutory access rights represent a minimum standard and can be exceeded at the government's discretion. Of course, certain additional access initiatives may only be decided on a case-by-case basis, while others may be decided and fully established beforehand. General policies and procedures regarding active information vis-à-vis parties or data subjects may, for instance, be established independently of concrete cases. At the same time, the extent to which active and passive measures might interplay with each other should be exposed and considered. The obvious example is that the right to receive guidance and the duty to provide guidance are closely related. However, even less complimentary relationships should be examined, for instance the connection between notification and the volume and nature of access requirements. The aim of this process should be to find the right balance between "active" and "passive" access strategies, and, furthermore, identify a corresponding and balanced set of measures. A systematic approach similar to that outlined above may contribute to a carefully considered information strategy that also provides the basis for evaluation and a dynamic and adaptive endeavour to secure satisfactory open government.

6 Rights and Usability

Individual rights have been reinforced in the amended Norwegian data protection legislation, the underlying assumption being that, with the PDA, individuals will play an active part in the effort to achieve an acceptable level of data protection. Moreover, a Norwegian expert committee has proposed an amendment to the AGI, extending individuals' rights to access documents, particularly those in the "grey zone" between government and private agencies. However, giving citizens legal rights is not in itself sufficient to improve access. In addition, how and to what extent data subjects may be helped or encouraged to maintain their interest in exercising their statutory rights is crucial.

In recent discussion concerning the AGI, two of the main themes have been, a) a discussion about how to improve openness through statutory amendments, and, b) the potential for increasing the efficiency of existing access rights by means of information technology. Concerning the second theme, the premiss is that the legislation may be sufficient, even if its practise deviates from political objectives. In other words, what might be deficient are the organisational and practical arrangements necessary for citizens to exploit the full potential of existing legislation. Seen from this perspective, an important question regarding the implementation of access legislation is the extent to which existing legislation is accompanied by adequate enabling initiatives, i.e. technological and other measures that make it comparatively simple for citizens to exercise their statutory rights. In any case, there is obviously a significant difference between "anonymous" formal rights on the statute book and a "materialised right" in the shape of a publicly available computerised tool, accessible, for example, via the Internet.

In Norway, the Section for Information Technology and Administrative Systems (SITAS) at the University of Oslo has developed a general, free of charge, internet based routine in order to make enable some of the core access rights of the PDA.²⁸ The function of the tool is threefold: firstly, to offer legal information services by making available the relevant statutes, together with intelligible, well-grounded explanations and practical examples; secondly, to generate access requests (neatly arranged, with references to legal bases etc.) and, thirdly, to generate advice to the recipients of requests (the "controllers") regarding how the requests should be processed.

My general point here is that access rights in the form of statutory and associated explanatory texts, are insufficient to create conditions where access rights have any real effects for more than a small number of citizens. To increase the usability of such rights, they must be transformed into tools that perform the functions the access provisions describe. In other words, the usefulness of access rights should, as far as possible, be independent of an individual's ability to identify, access, interpret and act upon formal legislation. Rights should, as far as possible, be brought down to the "ground level" of peoples' everyday life, with no or very low thresholds to exceed.

²⁸ The routine has been further developed in collaboration with the EC/IAP sponsored SAFT project (Safety, Awareness, Facts and Tools) and the Norwegian Board of Education, see "http://www.saftonline.no/krev_innsyn/".

One obvious objection to such an easy, populist approach is the danger of generating too much discussion and disturbance, as a consequence of a large volume of access requests. In my view, there are at least three weighty replies to such an admonition. Firstly, there is, in my view, little reason to fear that the extent to which people exercise their access rights will change dramatically as a result of improved usability. As the figures referred to in the next section illustrate, the use of access rights is minimal and, although it may increase, will probably not exceed a moderate level. Secondly, to the extent that use of access rights will increase, there are a number of obvious strategies to reduce the attendant costs. It may, for instance, be more cost-effective to change from a passive to an active approach: publishing information once rather than answering 20 individual requests. Moreover, just as the usability of rights may increase if internet based tools were available, the administrative costs associated with providing access may be reduced if tools were developed to assist government agencies in processing requests. Thirdly, and most importantly, there are costs associated with the creation and maintenance of an open society. Such increased costs should, to a necessary extent, be both expected and accepted.

7 Taking Access Rights Seriously

In a special Eurobarometer carried out in the autumn of 2003, only 32% of citizens in the (at the time) 15 EU countries had heard of laws that, for example, granted individuals access to their personal data held by others. The results ranged from 13% in Greece to 53% in Italy, with Sweden and Denmark as low as 26% and 23% respectively.²⁹ Norwegian citizens did not take part in the survey, but there is no reason to believe that the result would have deviated significantly from the average figures. In 2002, European companies were asked about their experience with regard to access requests. Average figures showed that almost half the respondents (49%) had received less than 10 access requests in the course of 2002, while 14% indicated that their company had received between 10 and 50 requests. Only 8% of respondents stated that they had received 50 access requests or more. The average for companies never having received access requests was 23%, ranging from 7% in Germany to 58% in Italy.³⁰ On a smaller scale, a survey carried out in Norway by SITAS revealed that a mere 42% of the access requests (n=93) submitted by pupils at a Norwegian secondary school received a response within 30 days (the deadline defined in the PDA).³¹ The data available concerning data protection law seems to paint a rather discouraging picture of somewhat ignorant and passive citizens.

²⁹ See Special Eurobarometer 196, question 33 a.2, Internet: "http://europa.eu.int/comm/public_opinion/archives/ebs/ebs_196_data_protection.pdf."

³⁰ See EOS Gallup Europe - FLASH EB N°147 "Data protection in the European Union" - Report p. 47, question 11, Internet: "http://europa.eu.int/comm/public_opinion/flash/fl147_data_protect.pdf."

³¹ The research has been carried out by researcher Are Vegard Haug, SITAS. Final report will be published early autumn 2004.

Furthermore, more than half of the few who do know how to make use of their rights have been disappointed. Viewed scientifically, such figures cannot, of course, be combined in such an offhand manner. Nonetheless, the figures should be taken as an indication that access rights in accordance with European data protection legislation are of rather modest significance.

Indeed, figures concerning data protection may not provide a basis for generalisations regarding the situation for access rights pursuant to other legislation. However, in my view, there is reason to be concerned about a trend where access rights, for others than representatives of the press, become symbols of good intentions rather than reality for the ordinary citizen. Taking access rights seriously implies effort to contribute both to a high level of public knowledge, easy to use access rights, and responding effectively when individuals actually exercise their rights. Taking access rights seriously is about making access rights operative.