Towards a Legal Framework for a Diffusion Policy for Data held by the Public Sector

Cécile de Terwangne, Herbert Burkert and Yves Poullet (eds.)

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List of Abbreviations

A.L.A.I.	Association littéraire et artisitique internationale
C.N.I.L.	Commission nationale Informatique et Libertés
C.A.D.A.	Commission d'accès aux documents administratifs
D.I.T.	Droit de l'informatique et des télécoms
D.T.I.	Department of Trade and Industry
ECR	European Court Reports
E.I.P.R.	European Intellectual Property Review
FOIA	Freedom of Information Act
I.W.G.D.I.S.	Interdepartmental Working Group on Database Industry Support
J.C.P.	Jurisclasseur périodique
J.T.	Journal des Tribunaux
I.R.M.	Information Resources Management
L.A.B.	Legal Advisory Board
L.R.Q.	Lois refondues du Québec
O.M.B.	Office of Management and Budget
ONP	Open Network Provision
WOB	Wet openbaarheid van bestuur

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A Study of Comparative Law and European Law[1]

Yves Poullet

I - From Information Gathered by the Public Sector to its Commercialization : the Community Guidelines and the Publaw Research

By very nature of their regulatory mission, civil services systematically and regularly gather information. Such information, whether it concerns financial data, information about car license holders or property owners, is valuable, both for the general public and for private companies, particularly those who, whether they increase its value by further processing or not, subsequently commercialize it.

The value of such information derives from characteristics inherent to its having been gathered by a public authority. *A priori*, the information is complete (all citizens targeted by the legislation in question being required to provide it), reliable (sanctions are envisaged for anyone giving false information) and inexpensive (civil services function on a non-profit basis). Thus a civil service becomes, in the words of the French observatory for new technologies, a 'natural deposit of information'. [2]

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1 Introductory summary of the PUBLAW study undertaken by the following institutions :
- the 'Centre de Recherches Informatique et Droit' (Namur, Belgium) Y. POULLET
- the 'Gesellschaft für Mathematik und Datenverarbeitung' (Köln/Germany) H. BURKERT
- the 'Centre for Information Law' (London/UK) J. MICHAEL.

This summary includes, under point III, certain passages already presented by the authors at the extended meeting of the L.A.B. on March 14th 1992.

2 in Ph. GAUDRAT, 'Commercialisation des données publiques', Report for the Observatoire Juridique des Nouvelles Technologies de l'Information, Paris, La Documentation française, 1992.

This explains the willingness of certain administrative bodies and certain companies, to commercialize data held by the civil service. The Commission of the European Communities, wishing to promote a European information market, [3] encourages this commercialization of 'administrative' data. Recently, the Commission has published its *Guidelines for improving the synergy between the public and private sectors in the information market* [4]. The essential goals of these guidelines, which otherwise consist only of straightforward recommendations, are the following :

— information held by the public sector must be accessible, except such as involves public safety, State security or such information as touches upon private interests (individual liberties and trade secrets); [5]
— the information must be made available for a reasonable charge or free of charge; [6]
— the information must be easy to re-format and re-use; [7]
— finally, information held by the public sector must be accessible and must be distributed in keeping with the principles of fair trade. [8]

This is corroborated by the American model, which affirms the will to commercialize data held in the public sector and specifies the limited, yet fundamental role to be played by the State. [9]

The PUBLAW research program, commissioned by the Commission of the European Communities, was called upon to study the regulatory framework of commercialization. [10] The present publication deals with the results of that study. Its intention is to describe the legal regime of the various national situations relative to the commercialization of data held by the public sector, to attempt a comparative synthesis of those regimes and, finally, to define a common policy for the dissemination of 'public' information. [11]

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3 Since it has been shown that 90% of the current information distribution market in Europe is in the hands of American organizations, the developement of a genuinely European information services market is currently one of the Community's priorities (Decision of the Council of Ministers, 26 July, 1988, J.O., L 28, p. 88/524/EEC).

4 Published by the Commission, 1989, Official Community publication, ISBN 92.825.9238.3.

5 Cf. Recommendations n° 1, 3, 7. Note that Recommendation n° 1 even affirms an obligation for the administrative departments to provide reasons for a refusal to render data accessible.

6 The price must reflect the costs of preparation and transfer to the private sector, without necessarily taking into account the full cost of such gathering and treatment as takes place within the framework of the civil service's work' (Recommendation n° 4).

7 This notably involves the use of standards and norms in the setting-up of storage systems (cf. Recommendation n° 3).

8 Recommendations n° 1, 8, 9, 11, etc.

9 Cf. in particular Recommendation n° 8 which limits direct commercialization by the public sector to cases where :
- it is essential in order to satisfy a public interest that the private sector cannot answer to;
- it represents the extension of an existing public service;
- a neutral service, separate from the private sector, is required.

10 H.BURKERT, J. MICHAEL, Th. DAVIO, C. de TERWANGNE, Y. POULLET, 'Commercialization of data held by the public sector', PUBLAW Report, DG XIII/EEC, presented to the Legal Advisory Board and the SOAC, 21 February 1991.

11 The first PUBLAW project was followed by a second one under the direction of the Policy Studies Institute (London), the Gesellschaft für Mathematik und Datenverarbeitung MbH (Bonn) and the Centre de Recherches Informatique et Droit (Namur). This second project :

II - THE PUBLAW RESEARCH : FIVE THEMES

Analysing the legal framework of the public sector's diffusion of information draws upon different types of legislation. Before such a choice can be contested, we have, *a priori*, identified five types :

— laws relating to public access to civil service records are often presented as a framework favourable to the diffusion of information gathered by governments (A);
— government secrecy laws as well as laws of data protection may, *a priori*, be considered as a brake on such diffusion (B);
— finally, two areas of legislation are expected to profoundly influence both methods of distribution and the relationship between the principle public and private parties : these relate to the existence of copyright held in the name of the government and that of the private sector competitor (C).

Each of these subjects invites to do certain general considerations.

A. Persuasive Factors : Laws of Access to Government Records

A number of European countries, following the recommendation of the Council of Europe [12], have adopted legislation on access to public records inspired by the American model, the Freedom of Information Act. Reference may be made to the Austrian, Danish [13], Finnish, French [14], Dutch [15], Norwegian [16] and Swedish [17] national legislations. All these texts aim essentially at ensuring that every citizen can monitor and understand his government's actions. It is clear that the commercialization of government information, if not the primary object of such legislation, is indirectly encouraged thereby, except in the particular case of the French law.

The justification for the laws of access forming a basis for commercialization of government data runs as follows :

— the right of access itself is based on a human right : the right to

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'An evaluation of the implementation of the Commission's Guidelines' aimed at examining in detail the policy of each country with regard to the Guidelines and evaluating the policy to be adopted by the Commission.

12 Recommendation n° R (81) 19 of the committee of Ministers on access to documents held by government. Note that the European Community Council has recently adopted an access directive from the ministerial committee concerning access to environmental documents.

13 Lov 280 af 10 juni 1970 om offentlighed i forvaltningen, amended by the Lov 572 af 19 december 1985.

14 Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public, J.O. 18 juillet 1978, modifiée par la loi n° 79-587 du 11 juillet 1979 relative à la motivation des actes administratifs, J.O. 12-13 juillet 1979.

15 Wet openbaarheid van bestuur van 9 november 1978, Stb, 1978, 581, revised by the Law of October 31 1991 containing dispositions relative to the public access to governmental information.

16 Lov 19 juni 1970 nr. 69 om offentlighed i forvaltningen.

17 Chapter 2 'Om allmänna handlingars offentlighed' of the Svensk författningssamling 1982 : 941.

information enshrined in article 10 of the European Convention on human rights. Such a basis forbids — and this is the fundamental principle of human rights — any inquiry as to finalities. Since its second monitoring report, and notwithstanding article 10 of their national law, the French commission (Commission d'accès aux documents administratifs) has been well able to recognize that the right of access exercised for a commercial purpose may avail itself of the law;
— the commercialization of civil service data merely expands the degree of dissemination of government information, which is in itself, the aim of the right of access;
— finally, to comprehend the drift of those who demand a separation of the rules of commercialization from those of right of access, their ultimate justification is surely the desire to escape from the principle of gratuity in that which pertains to right of access and to establish the possibility of a certain profitability in the exploitation of data by the public sector itself. However, if the laws of access, for obvious social reasons, oblige the provision of a means of on-site access to records, which is free of charge, such a mode of access by no means exhaustively satisfies the right of access.

In our opinion, the laws of access constitute a partial regulatory framework for the commercialization of civil service data, even if the communication of data in large quantities and an increase in its inherent value by the private sector oblige us to view the protection of privacy exception differently, even in the light of the laws of access themselves, and to study the competition questions between the public and the private sector, and the laws of copyright, in a new context.

B. Dissuasive Factors : the Official Secrets Act the Data Protection Legislation

a. The civil servant's obligation to secrecy (Official secrets act)

The official secrets act binds civil servants under many west-European legislations in the form of a legal obligation carrying the threat of penal sanctions or disciplinary action. Traditionally, it is considered as a necessary prerequisite to assuring that the citizen gives his government correct information. Thus the oath of statistical secrecy imposes an obligation to secrecy upon collecting officials with regard to any nominative information they gather. This obligation to secrecy is the corollary of the obligation to inform which bears upon the individual who submits to statistical enquiry.

One may therefore perceive without difficulty that the commercialization of information could prove detrimental to the upholding of administrative secrecy. Access and secrecy are, *a priori*, contradictory notions.

Laws of access to official documents represent a clear infraction of the secrecy principle, inasmuch as they are intended to render administrative transparency, which is conceived as a citizen's right. Of course, access laws do not permit everyone to monitor everyone, reserving for the sole individual concerned

the right of access to nominative data, yet they nonetheless constitute an inversion of the burden of proof. To evade the obligation to transparency, the civil service is called upon to prove that maintaining secrecy is not only necessary to the accomplishment of their legal mission, but is furthermore justified by the need to protect their citizen's interests. In this sense, a government department need have no scruples about refusing access to documents relating to criminal proceedings or in cases where such access would involve a breach of business ethics.

b. Protecting personal data

The counterbalance between laws of access and personal data protection laws is evident and of two kinds :

> — access laws reinforce the right that, according to privacy laws, each individual has to be aware of, rectify and complete such nominative data as an administration holds on him personally;
>
> — by contrast, inasmuch as they authorize a citizen, in the interests of transparency, to have access to nominative data relating to another, access laws enter into conflict with the requirements of privacy legislation.

In this respect, access laws establish a clear superiority to privacy legislation. Among nominative data, confidential data are considered non-communicable, while other nominative data are subjected to a particular examination. Block transmission of such data, especially for commercial purposes, transforms this examination and increases its necessity.

Establishing harmony between the imperatives of data protection legislation and the requirements of the legislation for administrative transparency in the public sector is really no easy thing [18]. It is not a question of prohibiting all marketing of nominative data held by the State, but of posing certain limits. Recommendation n° R (91) 10 on the communication to third parties of personal data held by public bodies [19], already sets the first limit :

> '(...) personal data or personal data files may not be communicated to third parties for purposes incompatible with those for which the data were collected.'

If the laws of access legitimate *a priori* the placing of non-confidential nominative data at the disposal of third parties, this availability must be made subject to a case by case examination and kept in accordance with the principles of the data subject's having over the data concerned both right of access and right of refusal for legitimate reasons [20], both principles deriving from data protection legislation. In

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18 We would like to cite, incidently, the supple approach to the matter taken in Quebec, where both access and data protection are the objects of a single legislative instrument (Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels, L.R.Q., chap. 1.2.1.).

19 Recommendation of 9 september 1991 (cf. in particular annex 2.2. of this Recommendation).

20 Another limit can be adduced from recommendation n° R (85) 20 relative to direct

this sense, verifying the stated purposes of those who demand access to the data is in fact justified by the application of data protection law [21]. Anyone applying for access to a nominative data base, must justify the pertinence of his use of that data with regard to his stated and legitimate aims, as well as the absence of any higher interest of the data subject or subjects in protecting the information concerning them [22]. One can see that this subtle balancing of interests must take place case by case and satisfy not only the specific regulations applying to the information product in question, but also, and particularly, those regarding the category of the potential client for that product. For example, it can be considered that a list of the students registered in a university can be sold to suppliers of goods or services directly connected to education.

C. Factors Which Give Structure to the Diffusion of Public Sector Information : a Public Authority's Copyright and the Rules of Fair Trade

a. Public authority's copyright

Different factors can compete to give structure to the diffusion of information held by the public sector. By means of specific rulings, various legislations permit certain public sector information products to be exempt from or included in the protection of copyright laws. This becomes an important issue at the level of national data banks. Is the State, or its government, right to claim copyright on the data bank information it administrates ? Copyright could be considered as a means whereby the public sector retains control of the material it collects in pursuance of its function. This calls into question the very concept of public service and the principle of gratuity by which it would seem, *a priori,* to be bound.

The recent European Commission's proposal for a directive concerning the protection of computer data bases [23] contains certain rules which resolve this debate.

Although the draft directive upholds the principle of conceding the protection of copyright to data bases, it reaffirms the demands of that protection and reserves a lesser protection, based on the rules of unfair competition, for insufficiently original data bases. Fair trade demands that protection under copyright does not permit a producer in a dominant position, in this case the government, to abuse that position. Following the *Magill* ruling, the draft directive imposes a system of so-called obligatory licences. More recently, the 'voice telephony' Open

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marketing, which accords the data subject the right to know the destination of the file, as well as the right to refuse to have his name in the communicated list (cf. as regards telephone directories and orange or pink lists).

21 Which, as we have observed, is not the case where non-nominative data are concerned (supra, n° 6 and particularly footnote (9)).

22 On this delicate issue of balancing interests, see Th. LEONARD, Y. POULLET, 'Les libertés comme fondement de la protection des données nominatives', in F. RIGAUX, 'La vie privée, une liberté parmi les autres ?', Travaux de la Faculté de droit de Namur, Bruxelles, Larcier, 1992, p. 242.

23 J.O.C.E., C/156, 23 June 1992, p. 9 ff.