

software was developed by a private company in the United States).

Queensland Treasury realised quality improvements were necessary in view of the previously cumbersome, labour intensive and resource-demanding systems for processing Fol applications. The Fol processing software was sourced and trialled with a view to improving the quality of government service delivery relevant to Fol applications. The software was developed further by the United States provider based on Queensland Treasury's requirements and design specifications.

The Fol initiative demonstrates a public sector that is committed to service improvements that uphold and improve the condition of the environment through the near elimination of consumption of millions of pieces of paper and large quantities of ink and toner annually which were necessary to respond to Fol applications.

Initially some agencies were reluctant to embrace this new technology. However, following exposure to the extensive demonstrations and education by Treasury these departments now wholeheartedly support the diversification that this software provides. Almost one half of government departments are now using the software on a daily basis.

The utilisation of Treasury's Fol processing initiative has brought savings to both applicants and the department. The savings across government are conservatively estimated at \$4.6 million annually. These savings are multiplied when the sharing of experiences and knowledge relating to the initiative with other states are considered. The savings are the result of improved performance in the processing of applications by, in many instances, reducing one-third of the time taken to process applications. Considerable savings also arise in the area of consumables, which were previously utilised during the manual processing of Fol requests and are now almost completely eliminated:

- paper, stationery and toners
- machinery 'wear and tear'
- labour (photocopying and stamping Fol documents).

Implementation of the Fol processing initiative has resulted in the following advantages not only to Treasury but also to other departments through active knowledge sharing:

- reduced costs in the processing of Fol applications
- reduced timeframes in the processing of applications
- reduced paper wastage
- improved service delivery
- improved client satisfaction
- ability to electronically incorporate additional information into documents with the added benefit of increased accuracy by eliminating the need to retype lengthy documents
- ability to turn an image into computer editable text, or to completely eliminate the image from the document.

Since the introduction of the Fol initiative, clients have enjoyed improved service. They no longer need to attend viewings of documents, which can be costly due to travel and time spent perusing the documents. The Fol initiative has enabled clients to obtain the releasable information via an email attachment or on CD-ROM.

The Office of the Information Commissioner has embraced this initiative and has already reviewed a number of cases where electronic processing has been used. Practitioners no longer need to send bundles of documents to the Information Commissioner as copies of originals, marked and released material are now supplied on CD-ROM.

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## Freedom of Information in Germany

One could say, with a touch of irony, that 1 May 2004 was a good day for freedom of information (Fol) in Germany. Before that date, Germany was rather isolated in the European Union (EU) 15 club, being the only EU (and OECD) member state apart from Luxembourg that did not have national Fol legislation. The new EU members, Malta and Cyprus, have joined the questionable club of countries that practise their very own avant-garde transparency: government secrecy as the rule rather than the exemption.

It is not out of sheer ignorance that Germany still lacks a national law. Rather, it is the result of a very long tradition of German administration that hates nothing more than loss of control. Transparency provides the tools for criticism, publicity being among the most important. So it is not surprising that in a country that knows so much about Max Weber's theories of bureaucracy and so little about Niskanen's, the 'secret state' is a concept that very few German academics would question in principle.

Without doubt, Germany is a latecomer on this issue, but starting in 1997, drafts for a national Freedom of Information Act (FoIA) have regularly been discussed. Parallel to the

national debate, some of the federal states (the 'Länder') have taken the initiative and passed their own legislation for their respective administrations (that would not be affected by a national law). Between 1998 and 2002, four state laws were passed: Brandenburg, Berlin, Schleswig-Holstein and North-Rhine Westfalia.

Some direction came and still does come from the EU level. Since 2001, there has been an EU regulation reaffirming the principle that the European Commission, Council and Parliament documents must be accessible to the public. There is, however, no general obligation for member states to pass an FoIA. But pressure comes from specialised areas. There is an EU directive on access to environmental information that forced Germany to pass the federal *Environmental Information Act* [*Umweltinformationsgesetz*, UIG] in 1994 and there is a joint declaration on the commercial use of public information (adopted as a directive in November 2003) that may lead to the creation of a uniform market for public-sector information in the EU in the medium term.

## The beginnings

While the states gathered experience with the implementation of their laws, the national level remained hesitant. The general elections in 1998 brought about a fundamental change — in theory: the red-green coalition under Chancellor Schröder signed a coalition agreement that included the promise to pass a national Fol law.

The Ministry of the Interior took the lead in the decision-making process and developed a draft. After this had gone through the hands of all the stakeholders, little, however, remained of a 'transparency' law. As the 2002 general elections approached, the topic was discarded for the time being as not attractive enough for electoral campaigning. Even within the human rights activists' circles within Bündnis 90/Die Grünen there was little hope that an abstract topic such as 'freedom of information' could help win the very close election against such 'big topics' as unemployment or health insurance.

The law reappeared in the political process in early 2004, when the Ministry of the Interior remembered the promise made to the electorate (in the meantime, the second coalition agreement of the Schröder government had repeated the FoIA promise). Without much enthusiasm, the old drafts were reanimated and the process of reaching consensus between the ministries started anew.

It may be sheer speculation, but it is not impossible, that the government's new attention to freedom of information had to do with an increasing pressure by some influential German non-governmental organisations. In mid-2002, the Bertelsmann Foundation (the largest German private foundation) had initiated a project that sought to identify the reasons for Germany's hesitation on the subject matter as well as examples for how to overcome these hurdles. In April of 2003, a conference in Berlin with an audience of Information Commissioners, academics and politicians from around the globe delivered the statement: 'The problems we are discussing in Germany have already been solved in so many other places that the government's hesitation is not credible anymore'.

## Opposition from industry

As it turned out, the conference marked a turning point in a number of ways. Attention for the topic grew, as did opposition. Starting with a statement on one of the panels by a board member on that day, the Federation of the German Industry (BDI) opposed the law vehemently. This, indeed, is a novelty. No one in the international community appears ever to have heard of an industry player actively opposing Fol legislation. BDI did, with two lines of argument: (1) the risk to businesses as a result of the disclosure of confidential or incorrect information, and (2) possible negative repercussions for the national economy as a result of rising administrative costs and the feared increase in the public-sector share of the GDP.

Fol supporters did their best to deliver counter-arguments, yet the success was moderate. Of course, it was said, all Fol laws worldwide contain formulations that protect industry and business secrets from revelation if that would harm business interests. On the other hand, there is hardly any way of countering the argument that even if business secrets are protected by the law, they could still be revealed by bureaucrats handling the law erroneously.

Well, yes. A quick international survey by the Bertelsmann Foundation showed that there are no examples of anything serious happening in that respect, but of course that does not mean it *could* not happen.

The second argument (the economic consequences of over-regulation) had its background in another project the industry federation has been nurturing for years. The industry federation had argued that a regulatory impact analysis should be conducted before the passing of any law, showing the economic consequences of the new legislation. Without such an analysis showing that an Fol law was indeed not interfering with the economy's performance, BDI would oppose this (and any other) law. While no one questioned the benefits of such an analysis, it was clear that this would not happen — at least not in time for an FoIA to be passed.

The BDI's fundamental opposition could have been nothing more than one lobby voice among many, had it not been for the industry's most important ally. Probably without realising it, the German Chancellor had strengthened the industry players against his own government by giving out the order that no new legislation should be passed that was against industry's interest (in his struggle for success in fostering economic growth). Now the Ministry of the Interior had a 'Chancellor's Directive' on the one hand, an increasing pile of statements, letters and protest notes from the industry federation on the other. For a law that did not have any enthusiastic supporters within the government to begin with, that caused a stall in the push for Fol legislation. The parliamentary factions of the governing Socialist Party and the Green Party were unable to overcome this hurdle.

## Public debate

On the other hand, public debate was opened. More and more journalists became more pronounced on the issue, quoted experiences from other countries and joined forces to repeatedly call for the law. The Bertelsmann Foundation continued to collect and publish material and examples on the formulation and implementation of FoIAs around the globe. A number of NGOs joined forces to write their own law. In April of 2004, Transparency International (an international organisation to fight corruption, based in Germany), Netzwerk Recherche (an association of investigative journalists) and other journalists and human rights associations presented a fully-fledged German Fol law to the President of the German Parliament. In various constellations, these organisations engaged in a number of other activities (such as a poster campaign in Berlin or an online collection of signatures that was conducted together with the most important German online news portal politik-digital.de) that all had the same aims: increase pressure on political decision-makers through raising awareness for the importance of the right of access to public-sector information. Even Parliament woke up to the call. Two members of the German Parliament's Subcommittee for New Media announced that they would recoup the initiative for the law from the Ministry of the Interior and meet for 'Fol Breakfasts' every Thursday at 8 am, until the law was passed. Shortly after this announcement, a representative of the ministry joined the breakfast club.

## New draft legislation due

While there still is no official statement on part of the government when a new draft will be presented, individual statements suggest that it cannot take long. In August, a Green Party spokeswoman was quoted by the news service 'Spiegel Online' with a promise of a 'short, modern, understandable' law, the Chancellor apparently personally gave a 'go' as part of his quest for new, voter-friendly reform projects, and Minister of the Interior Otto Schily surprised those parts of the audience that knew what he was talking about at a Bertelsmann Foundation conference in September with the sober words: '... and we will pass a Freedom of Information Law'.

The 'short, modern, understandable' law deserves closer scrutiny, as it indicates that the new draft will be rather remote from the old one that was discarded in 2002 before the elections (another irony with respect to this law: the new draft is treated as a state secret). The previous draft had neither been short nor modern, to say the least. Complete ministries had demanded to be exempt from any transparency obligation, thereby leading to a law that was too soft for Fol advocates to be acceptable.

The Ministry of Economic Affairs had argued that all fiscal action should be exempt from access requirements. It demanded the consent of all affected parties for any supply of information concerning the business of economic enterprises. The protection of business secrets also took a strange form of administrative self-protection. Apart from protecting business, it allowed administrative entities to declare themselves 'third parties.' Thus, the very entities which the law obliges to be transparent can easily withdraw from their obligation by referring to a vague concept of trade secret. If an administrative unit declares its fiscal activities a secret, the very area where abuse and corruption is most likely to take place gets excluded from any transparency obligations. Other areas to be exempted were the Ministry of Defense and the intelligence services, working under the auspices of the Chancellor's Office.

Beyond that, the right to access information was restricted in the case of ongoing administrative proceedings. As citizens are particularly interested in those proceedings that they can still influence, this restriction would have undermined the idea of citizens' participation on which Fol is based in the first place.

Another shortcoming of the old draft was that it did not specify how much time the administration had to reply to an Fol request. After three months without obtaining information, applicants could have taken legal action through recourse to general administrative procedural law. They were not, however, granted any specific rights stemming from Fol legislation.

In addition, with administration fees of up to €500 (plus copies and other expenses), a massive deterrent to making use of the law would have been put into place. The Ministry of Finances demanded that fees should in principle cover all costs of assembling, editing, and supplying information — even beyond the limit of €500.

There is hope that these massive shortcomings will be corrected in the new draft. Enough information was available to the parliamentarians and bureaucrats in charge of the text. An extensive international comparison of formulation and implementation of access laws, designed and conducted by the Bertelsmann Foundation with the sole purpose of being useful for the public decision-makers, was presented in early 2004. An 'Fol checklist' indicated the critical points within any proposed Fol law and how they could be resolved for Germany.

Germany will probably have a national freedom of information law by the end of the next election period in 2006.

### Note

Information on the Bertelsmann Foundation's Freedom of Information project is available (in German and English) at <[www.informationsfreiheit.info](http://www.informationsfreiheit.info)>.

The international comparison has been published as: T. Hart, C. Welzel, H. Garstka (eds), Freedom of Information: The 'Transparent Administration' as a Civic Right? Verlag Bertelsmann Stiftung 2004, in parts available in English at <[http://www.informationsfreiheit.info/en/general\\_information/own\\_reports\\_and\\_analysis/00069.php](http://www.informationsfreiheit.info/en/general_information/own_reports_and_analysis/00069.php)>

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## Is there a role for comparative Freedom of Information analysis?: Part 1

*Law in general is human reason, insofar as it governs all the peoples of the earth; and the political and civil laws of each nation should be only the particular cases to which human reason is applied.*

*Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.*

Montesquieu, *The Spirit of the Laws* 1748

### Introduction

It had been my intention in 2005 to write a major piece for the *Fol Review* on undertaking comparative freedom of information studies. The article would look at my experiences in this area since 1996 — in terms of writing, teaching and talks in a variety of countries about the essential elements of Fol design, practice and compliance. The untimely demise of the *Fol Review* and the unexpected delay in a promised article has encouraged me to undertake an early work in progress ahead of the proposed schedule.