

Butlletí 91 Gener – Març 2009

Butlletí Informatiu de l'Associació d'Arxivers de Catalunya

Access versus Privacy

“The Government of Catalonia, in accordance with the principle of transparency, must publish the information required for citizens to be able to assess its management”. This extract from Article 71 of the Statute of Autonomy of Catalonia expresses the new direction assumed by the government with regard to the implementation of good government and administrative transparency policies, especially from the perspective of citizens' access to public information and documents.

From our perspective, 18 years ago the AAC dedicated a professional encounter, the 3rd Archive Conference of Catalonia in Girona, on the subject of access to documentation. It was not the last event of its kind, as the following year another seminar was organised—this time centred on studies and debate regarding access to documentation and information.

Since then, numerous regulatory changes and the emergence of e-government policies have led us to once again put forward the question of access as the subject for a meeting of experts. In this case, we are referring to the 12th Congress of Catalan Archivists, which is to be held in the city of Tarragona from 21 to 23 May this year.

The first regulatory change was the approval of Law 30/1992 on the legal regime of public authorities and common administrative procedure, Article 37 of which establishes that citizens have the right to access records and documents held in administrative archives, irrespective of their format, provided that the corresponding records are closed.

In spite of this legal initiative, which is of great significance as an example of administrative transparency policy, the large number of resulting limitations (records with data that affects the intimacy of people, referring to activities carried out by the national government and the governments of the autonomous communities not subject to administrative law, defence and national security, monetary policy, classified subject matter, etc.) make it appear that access is the exception rather than the norm.

In late 1999, Organic Law 15/1999 on the protection of personal data was introduced. It imposed further limitations on citizens' access to government documents and records due to the broad interpretation of the term "personal data".

Subsequently, Law 10/2001 on archives and records, confirmed access to public documents as a right of citizens, except in legally established cases. The major change to this regulation was brought about through the creation of the National Document Access, Assessment and Selection Committee (CNAATD),

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a national body whose aim was and is to foster the right to access documents, to resolve issues concerning refused access and to establish criteria with regard to the application of the regulation governing access to public documents.

Finally, two years ago Law 11/2007 on electronic access of citizens to public services was approved. Its aim was to definitively promote the development of electronic administration and, therefore, of policies of good government and administrative transparency. This law considers the rights of citizens to be the central focus: the right to electronic contact with the government, to choose the communication channel, to be informed on the status of procedures, to not having to present documents several times, etc.

However, the most important matter may be whether our access rights have really been recognised. The fact that this law was included in Article 105.b of the Constitution, within Section IV on the Government and the Administration, rather than being included in Section I, which compiles the fundamental rights of citizens, means that the legal configuration is rather limited.

The secondary position of the right to access is clearly shown when we contrast it with the right to personal data protection. The application of this right also shows the route that perhaps should be followed in order to move from access rights with low democratic quality to access rights commensurate with advanced societies. The scope of personal data protection involves a large number of regulations covered by specific laws (on information, consent, access to your data, opposition, rectification and cancellation of data), and there is an additional protection that enables monitoring to be carried out by specific public agencies, equipped with strengthened autonomy and full power to act, such as the **Spanish Data Protection Agency (AEPD)** and the **Catalan Data Protection Agency (APDCAT)**.

In contrast, the right to access information and public documents is not covered by a unitary regulation, nor does it have sufficient legal backing or a strengthened legal protection system. Its protection does not cover independent public entities, rather associated administrative bodies of a technical nature (National Document Access, Assessment and Selection Committee - CNAATD). The difference in scope between the two laws—the same that continues to separate individual rights from social rights—today clearly represents the importance placed on the protection of the two rights.

So what route should be followed from now on? The challenge to be met is the modification of the applicable legal framework, based on the constitutional recognition of the right to access public information and the principle of active information, preferably as a fundamental right, and backed with the obligation of public authorities to place the greatest amount of information possible at the disposal of citizens, as established in the current Statute.

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Within the legislative scope, it would be advisable to replace the current general regulation with a more ambitious legal stance, inspired by pioneering access regulations in place in Britain and Scandinavia. The creation of a specific law on access rights would contribute to strengthening this new orientation, based on the principles of quality, openness, responsibility and linguistic pluralism of information.

Furthermore, the protection of this right could be commended to an independent authority with an institutional design similar to that of the data protection agencies. The complementary nature of both rights could make it advisable to convert these agencies into bodies that jointly carry out the functions of protection and access, or perhaps through the creation of new bodies specifically created to ensure access rights.

Therefore, given this complex panorama, the Scientific Committee of the 12th Congress of Catalan Archivists has invited archival science professionals and other experts working with the right to access documents and information to comment on access policies and protocols, the linking of access and documentation in electronic formats, the refusal of access and data protection. The objective is to exchange experiences, carry out analyses and hold debates in order to determine what has been established so far, what the current situation is, what dynamic and secure mechanisms must be implemented and which quality strategies have to be established by our profession in order to promote the right to access documentation and information in order to achieve a more democratic, transparent and open society and government.