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À PROPOS DE NOUS

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ABOUT US

The **International Journal of Open Governments / Revue Internationale des Gouvernements ouverts (RIGO)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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IMODEV is an international, independent, non-profit scientific organization created in 2009 that promotes good public governance in the context of the information and digital society. This network brings together experts and researchers from around the world who, through their work and actions, contribute to a better knowledge and understanding of the digital society at the local, national or international level by analyzing, on the one hand, the actions of public authorities in the context of the regulation of the data society and the digital economy and, on the other hand, the ways in which digital public policies are implemented within public administrations and open governments.

IMODEV regularly organizes conferences and symposiums on these topics, and in particular every year in November the Academic days on open government and digital issues, whose sessions are published online [ISSN: 2553-6931].

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THE NORWEGIAN FREEDOM OF INFORMATION ACT – A NOT SO TRANSPARENT ACT?

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INTRODUCTION

According to a recently published report¹, Norway and Finland are the two most open Nordic countries². Norway, which has been part of the Open Government Partnership³ since its creation in 2010, is undoubtedly one of the most open governments in the world. Not only has Norway dedicated itself to improving openness and transparency, but it has achieved one of the highest degrees of information integrity.

A basic principle in Norway is that people shall be free to impart and receive information, ideas and opinions. Moreover, Norway is also committed to openness in that the general public has the right to access State and municipal documents, to be present when courts and elected assemblies meet. Article 84 of the Norwegian Constitution explicitly provides that the parliament “shall meet in open session, and its proceedings shall be published in print, except in those cases where a majority decides to the contrary”,⁴ while article 100 of the Constitution has guaranteed freedom of expression, media freedom and gives access to public documents since 2004.⁵ The fifth paragraph of article 100 (as amended in 2004)⁶ reads:

“Everyone has a right of access to documents of the State and municipalities and a right to follow the proceedings of the courts and democratically elected bodies. Limitations to this right may be prescribed by law to protect the privacy of the individual or for other weighty reasons.”⁷

¹ Oluf Jørgensen, *Access to Information in the Nordic Countries* (Nordicom, 2014).

² Bjørn Åge Mossin, Andreas Marckmann Andreassen, *Norge mest åpne land i Norden*, JOURNALISTEN, 14 November 2014, available at: <http://journalisten.no/2014/11/norge-mest-apne-land-i-norden>.

³ The Open Government Partnership is a multilateral initiative launched in 2011 that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. See <http://www.opengovpartnership.org/>

⁴ See also the rules on judicial hearings open to the public and on the pronouncement of a judgment in public in §§ 124 ff. in the Courts of Justice Act of 1915 [Lov om domstolene (domstolloven) av 13. aug. 1915 nr. 5], available at: <http://www.domstol.no/upload/DA/Internett/da.no/Internasjonalt/Courts%20of%20Justice%20Act%20English%20translation%20uten%20paragrafinnledning.pdf>.

⁵ Article 100 has granted freedom of speech since 1814, but in the form of freedom of the press (*trykkefrihet*).

⁶ See the preparatory works for the amendment of article 100 of the Constitution, NOU 1999:27, «YTRINGSFRIHED BØR FINDE STED», for ex. p. 13, 118.

⁷ The same article 100 also states that: “The authorities of the state shall create conditions that facilitate open and enlightened public discourse.”

Openness is reinforced by the Norwegian Human Rights Act⁸ which explicitly incorporates article 10⁹ of the European Convention on Human Rights (ECHR). This Act contains several legislative provisions more or less directly relate to openness, transparency and the right to access official documents and data (*innsynsrett*).

Perhaps the most comprehensive piece of legislation on access to information is the current “Freedom of Information Act” (FOIA).¹⁰ It was enacted in May 2006 and superseded the first FOIA of 1970¹¹ in January 2009. “Openness” and “transparency” of the public sector are key components of the FOIA. Indeed, as stated in § 1 FOIA and as reiterated in the Norway’s second Action Plan on Open Government Partnership.¹² The purpose of this latter act is to facilitate an open and transparent public administration, and thereby strengthen freedom of information and expression, democratic participation, legal safeguards for the individual, confidence in the public authorities and control by the public.¹³ - In other words, the Act requires the Norwegian government to provide for, and protect, all of the components of a well-functioning democracy.

In Norway, the short title of the FOIA is “*offentleglova*”. The word “*offentlig*” comes from the German term “*offen*”, which means “open”, and refers to what is “public”. The act requires openness and transparency in public administration, and the public sector (comprising the State and the regional and local authorities, as well as public undertakings). The Act also refers, more generally, to what is “public”, and to the administrative law principle of public access (*offentlighetsprinsippet*), which affirms the idea that the government is under a duty to provide information on request.¹⁴ Since the public sector is the common property of the general public in a democracy, “openness and transparency” should be required.¹⁵ Indeed, “democratic” concerns provide the keystone that underlies the Norwegian FOIA. The government emphasized, in proposing the Norwegian Parliament (the Storting) the bill on

⁸ Act relating to the strengthening of the status of human rights in Norwegian law, available at: <http://www.ub.uio.no/ujur/ulovdata/lov-19990521-030-eng.pdf>.

⁹ “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. (...)”

¹⁰ Sometimes translated as the “Public Access Act”. Act of 19 May 2006 No. 16 relating to the right of access to documents held by public authorities and public undertakings (short title: Freedom of Information Act) [Lov 19. mai 2006 nr 16 om rett til innsyn i dokument i offentlig verksemd] – Translation in English (NB: the translated text is not up to date!) available at: <http://www.ub.uio.no/ujur/ulovdata/lov-20060519-016-eng.pdf>

¹¹ Act of 19 September 1970 No. 69 on right of access within the public administration (Freedom of Information Act) [Lov 19. juni 1970 nr 69 om offentlighet i forvaltningen].

¹² Available at: <http://www.opengovpartnership.org/country/norway>

¹³ The act shall also facilitate the re-use of public information.

¹⁴ The documents produced by the public sector should, as a rule, be freely available to anyone who wishes to acquaint himself with them.

¹⁵ Nils, E.Øy, KOMMENTARBOOK TIL OFFENTLEGLOVA (Cappelen Damm Akademisk 2015), p. 13.

freedom of information, that the right to access documents is “a fundamental principle in our representative democracy.”¹⁶ And the parliament’s standing committee on justice has emphasized that “transparency should be the starting point since it ensures the population’s participation in and information on the democratic processes. This contributes to better control of the exercise of authority and increased popular confidence.”¹⁷

The aim of this paper is to assess the scope of the right to access public sector documents under Norwegian FOIA, as well as to identify the weaknesses in the FOIA law, and to suggest, whenever possible, possible improvements in that law.

§ 1 – THE 2006 FOIA – A GENEROUS LEGISLATIVE ACKNOWLEDGMENT OF THE RIGHT OF ACCESS TO INFORMATION

The 2006 FOIA involved both a continuation and an improvement of the 1970 FOIA. The new act increases the right of access to documents (*rett til innsyn*) and reduces government’s ability to shield documents from public access.

A) A Broad Right to Access

1) General Right to Information and to Access Document (*innsynsrett*)

Like the Environmental Information Act (*miljøinformasjonsloven*) and the Product Control Act (*produktkontrollloven*), the FOIA regulates a general right to access documents:¹⁸ Anyone has the right to access (certain) public documents, as well as records of public administration, at the national and local level (§ 3).

“Case documents, journals and similar registers of an administrative agency are public except as otherwise provided by statute or by regulations pursuant thereto. Any person may apply to an administrative agency for access to case documents, journals and similar registers of that administrative agency.”

Literally anybody, anywhere in the world can request access to Norway’s public documents and records. The law preserves anonymity because the administration may not require the requester to state his/her name, but may only demand enough information to allow it to deliver the information to the person

¹⁶ “Prinsippet om at borgarane har rett til innsyn i saksdokumenta i forvaltninga er såleis eit fundamental prinsipp i vårt representative demokrati.” - Ot.prp. nr. 102 (2004-2005), Om lov om rett til innsyn i dokument i offentleg verksemd (offentleglova), p. 25.

¹⁷ “(...) åpenhet skal være utgangspunktet, da det sikrer befolkningen medvirkning og innsyn i demokratiske prosesser. Dette bidrar igjen til bedre kontroll av myndighetsutøvelse og økt tillit i befolkningen.” - Innst. O. nr. 41 (2005-2006), p. 3.

¹⁸ There are also several legislative provisions regulating the individual right to access documents, but when an individual’s rights or interests are at stake. See, for example, the Public administration Act (*forvaltningsloven*) §§ 17-21, the laws on the administration of justice (*rettspleielovene*), the Personal Data Act (*personopplysningsloven*), and special provisions contained in the legislation on health, social security or competition.

who requests it.¹⁹ The right of access includes the right to obtain a copy of the document free of charge.²⁰ If the request is denied, there is a right to know the basis for the refusal, and there is also a right to complain and appeal in case of refusal. § 6 FOIA (1st paragraph) implements articles 10 (non-discrimination) and 11 (prohibition of exclusive arrangements) of the 2003 Directive on the re-use of public sector information (PSI Directive)²¹ and contains rules against discrimination: “(...) no discrimination may be made between comparable requests for access and no agreement may be made granting any person an exclusive right to information.” Yet the administrative entity may enter into exclusive arrangements with individual re-users, excluding others. Such exclusive rights may only be authorised in exceptional circumstances, “where such agreement is necessary for the provision of a service in the public interest”.²²

This right of access also imposes a duty on administrative authorities to maintain records,²³ in accordance with the rules of the Archives Act and associated regulations (§ 10 FOIA, see also § 30 FOIA), and to actively publish authentic documents. In an effort to ensure transparency, administrative bodies must grant access to documents that were already available, the administration must consider granting “enhanced access”²⁴ and must ensure that the rules of procedure contained in §§ 28-33 of the FOIA are followed.

2) An Extended Scope for the 2006 FOIA

§ 3 of the 2006 FOIA imposes a duty on administrative agencies to keep (and manage) records (*journalføringsplikt*). This duty now

¹⁹ The FOIA rules have to be read with the rules of the Public Administration Act (PAA, *forvaltningsloven*), chapter IV, among others. When one is a party in a case, the right to access document is founded, inter alia, on the PAA. When one is not directly involved (as a party) in a case, one will have access to information via the FOIA.

²⁰ According to § 30 FOIA, a “paper copy or electronic copy of the document may be requested” from the administrative agency. But some electronic copy may not be requested. See § 5 of the Freedom of Information Regulation (FOIR).

²¹ Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, Official Journal L 345, 31/12/2003, pp. 90-96, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0098:En:HTML>

²² See FOIA article 6, 2nd paragraph: “The prohibition in the first paragraph does not prevent the conclusion of agreements granting exclusive rights where such agreement is necessary for the provision of a service in the public interest. The validity of the reason for concluding such agreements shall be reviewed every three years. Agreements on exclusive rights that are concluded pursuant to this paragraph shall be made public. No agreement may be concluded on exclusive rights to information to which the public have a statutory right of access pursuant to provisions of law or regulations.”

²³ Record: “Systematic and continuous logging of information in a registry. In accordance with Section 2-6 of the Archives Regulation, all incoming and outgoing documents that are used in case handling and have documentation value must be registered. Internal documents are registered where appropriate. In the legislation, the time of record is used as a basis for determining deadlines in connection with case handling.” – The National Archives of Norway, *Archives Terminology*, available at: <http://www.arkivverket.no/eng/content/view/full/1910>.

²⁴ See our developments, *infra*.

extends to far more agencies and entities than it did prior to 2009. The 1970 FOIA imposed obligations on the state, on county authorities and municipal authorities, as well as on any other legal entity that could be considered to be an administrative agency, *i.e.* in cases where an entity makes individual decisions or issues regulations.²⁵ The scope of the 1970 FOIA act was extended by the 2006 FOIA. Under § 2 of the current FOIA, the act's obligations have been extended to independent legal entities (such as companies, inter-municipal companies [*IKS*], corporations [*foretak*], joint-stock companies [*AS*] or foundations [*stiftelser*]) where the public sector has a “dominating influence”, including publicly owned companies (where the State owns more than 50%) or semi-public institutions.²⁶

“(c) any independent legal person in which the state, county authority or municipal authority directly or indirectly has an equity share that gives it more than half of the votes in the highest body of that legal person, and

(d) any independent legal person in which the state, county authority or municipal authority directly or indirectly has the right to elect more than half of the voting members in the highest body of that legal person.”²⁷

The Act is subject to various exemptions. The scope of the act does not extend to the parliament (Storting), the Office of the Auditor General, the Storting's Ombudsman for Public Administration and other institutions within the Storting. It does not extend to the courts of law and other public agencies that act in the role of justice administration agencies, pursuant to Norway's statutes governing the administration of justice either.²⁸ The Act does not apply to police functions as well as to prosecuting authorities acting under the Criminal Procedure Act. There is also an exception in the Health Personnel Act (*helsepersonelloven*), to protect “information relating to people's health or medical condition or other personal information” from disclosure.²⁹ § 1 of the Freedom of Information

²⁵ § 1 FOIA of 1970: “This Act applies to such activities as are conducted by administrative agencies unless otherwise provided by or pursuant to statute. For the purposes of this Act, any central or local government body shall be considered to be an administrative agency. A private legal person shall be considered to be an administrative agency in cases where such person makes individual decisions or issues regulations. [...]”

²⁶ In other words, it applies in situations where the State or the local authority, as a shareholder, holds more than half of the votes in the highest organ of the entity or where they have the right to appoint more than half of the board members. Even though the conditions stated at § 2 c. or d. are fulfilled, the FOIA does not apply to independent legal persons who “mainly carry on business in direct competition with and on the same conditions as private legal persons” and thus operate in a market where there is strong competition.

²⁷ Art. 2 FOIA.

²⁸ See the Freedom of Information regulation, § 3, for the list of acts concerning the administration of justice (*rettspleielovene*).

²⁹ See § 21 of the Health Personnel Act: “Health personnel shall prevent others from gaining access to or knowledge of information relating to people's health or medical condition or other personal information that they get to know in their capacity as health personnel.” Act available at: <https://www.regjeringen.no/nb/dokumenter/act-of-2-july-1999-no-64-relating-to-hea/id107079/>.

Regulation (FOIR, *offentlegforskrifta*) lists different legal persons or entities that are exempt from the act.

3) *The Nature of Accessible Documents and Data*

§ 3 of the FOIA articulates the assumption that individuals will be given access to “case documents” (even those that are not recorded [*journalført*]), “journals” (which register the case documents dealt with by an administrative entity) and “similar registers” originated by or received by a public body or other body covered by the rules of the FOIA. All exceptions must be authorised by law (statute or regulation).³⁰

These rules on access to information are in accord with the Tromsø Convention³¹ and extend to documents that relate to tasks performed by public bodies. However, before it will be subject to the act, a document must relate to the administrative entity’s sphere of responsibility or activity. As a result, § 3 FOIA does not apply to private documents, that is personal communications that do not relate to the entity’s sphere of responsibility. It also does not apply to e-mails and other documents relating to the private lives of employees or politicians or to other functions not covered by the FOIA.

Under § 28 of FOIA, a request for access must relate to “a specific case”. The person requesting access to a document has to explain which specific case he/she wishes to access. The case, not just the document, should be identified in the request, so that the administrative agency’s workload is not required to spend time trying to identify the case. The person who requests a document must “help” the administrative agency to comply with this request whenever possible (*bistandsplikt*).

However, the same legislative provision (§ 28 FOIA) also opens for the possibility to request, “within reasonable limits”, access to specific types of cases. In other words, it allows the requester to seek documents in a particular practice area so that the requester can determine how the entity handles that particular type of case. Moreover, under § 9 of FOIA, it is permissible to “request access to a collation of information that is electronically stored in the databases of an administrative agency” as long as the agency can compile and produce the information “using simple procedures”.³² In Norway, administrative agencies are required to register documents that the agency receives and sends, as well as internal documents that are not exempt from the obligation to allow public access. The agency’s register must state various types of information, including

³⁰ See our developments, *infra*.

³¹ Council of Europe, COUNCIL OF EUROPE CONVENTION ON ACCESS TO OFFICIAL DOCUMENTS, 18 June 2009, available at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/205.htm>

³² But the risk may be that this data compilation, which constitutes a new document, partially or totally falls under the other provisions (such as the exemptions) of the FOIA. Note that electronic data compilation is also necessary to fulfil purposes of the PSI Directive.

the date of origin, dispatch and registration of the document, the case or document number, the sender and/or recipient, and a short description of the content or subject of the case.

Access will generally be granted to “case documents” (*saksdokument*), which are defined in § 4 of the FOIA:

“The case documents of an administrative agency are documents which have been received by or submitted to an administrative agency, or which the administrative agency itself has drawn up, and which relate to that agency’s area of responsibility or activities. [...]”

The same provision states that “[a] document is considered to be drawn up when it has been dispatched by the agency. If this does not take place, the document shall be considered to have been drawn up when it has been finalised”.

By contrast, unfinished internal agency documents are not subject to the rules on public access. Access to a document will generally be granted only after it has been sent (*avsendt*) or has been finalised (*ferdigbehandlet*). Even then, there are situations when the administrative agency may defer access to the document.³³

The definition of “internal documents” was narrowed in the 2006 FOIA.³⁴ As for external documents, the FOIA allows an authority to exempt from public access documents that it has obtained from subordinate bodies for “its internal preparation of a case”, that is for pre-decisional and deliberative purposes. There is a corresponding exception for information that one government department obtains from another department, as well as an exception for external advice that the agency has received about how it should handle a case.

The 2006 FOIA divides the documents in three categories:

- Documents for which there is an unconditional right of access;
- Documents for which the administrative entity has the possibility, but not the duty, to refuse access;
- Documents for which the administrative entity has a duty to exempt access to information protected by a statutory duty of confidentiality.³⁵

4) *Processing the Request*

§ 29 (1st paragraph) FOIA states: “An administrative agency that receives a request for access shall consider the request on a concrete and independent basis. The request shall be decided without undue delay.” Although the request can be formulated orally or in writing, an agency’s refusal to grant access must be in writing and justified, with reference to a legal basis.

³³ § 5 FOIA.

³⁴ See § 14 and 15, as well as § 8 in the FOIR on the health trusts (*belseforetak*) and university/college (*høgskole*).

³⁵ Access denial based on § 13 FOIA must be accompanied by an exact reference to the provision which stipulates the duty of confidentiality. It should be found either in a legislative act or in regulations pursuant to the Act.

The Act contains strict time limits. In a normal case, a request for access must be dealt with “without undue delay” (§ 29 FOIA, 1st paragraph). Usually, the application will be dealt with within three days. A reply should be made within at least five working days after the administrative agency receives the request (§ 32 FOIA, 2nd paragraph), otherwise, at the end of this 5-day period, it will be considered as a refusal that may be appealed under § 32 FOIA, 1st paragraph. In such a case, “[a]n appeal shall be prepared and decided without undue delay”.³⁶

5) Norway at the Forefront in Terms of “Electronic Openness”³⁷³⁸ and Public Information on Environment and Public Health and Safety.

Norway has committed itself to managing and making digital records accessible, as one aspect of its drive for transparency, openness and democracy in the public sector. As part of that commitment, the 2006 FOIA implements the 2003 Directive on the re-use of public sector information (PSI Directive), the latter being an EU directive that encourages EU member states to make as much public sector information available for re-use as possible.³⁹ The last sentence of § 1 FOIA states: “The Act shall also facilitate the re-use of public information.” The Norwegian Ministry of Justice and Police had indeed expressed the wish, in its guidelines on the FOIA, in 2009, that the administration is to be considered as a “data bank” (*informasjonsbank*).⁴⁰ In November 2014, 112 Norwegian ministries and public agencies⁴¹ delivered their public records⁴² to the Electronic Public Records (*offentlig elektronisk postjournal*, OEP),⁴³ an online access portal to public records, including e-mails, that has existed since

³⁶ § 32 FOIA.

³⁷ Electronic communication is also encouraged in § 15 a PAA.

³⁸ Norway is the only Nordic country where information on everyone’s taxable income and tax payments is accessible online.

³⁹ See §§ 1, 6, 7, 8, 30 of the FOIA.

⁴⁰ Justis-og politidepartement, RETTLEIAR TIL OFFENTLEGLOVA (Justis-og politidepartementet lovavdelinga 2009) p. 11.

⁴¹ They are listed in Nils, E.Øy, KOMMENTARBOK TIL OFFENTLEGLOVA, *op. cit.*, p. 380-2.

⁴² Public records are lists of incoming and outgoing mail. In some records, internal memorandums are also registered. All public entities keep records in accordance with specific regulations. In addition to the FOIA, there are a number of laws and regulations which regulate the right to access information and how to process requests to view case documents. See <https://www.oep.no/content/regulations>.

⁴³ The OEP is a collaborative tool which central government agencies use to publicise their public records online. Public record data is stored in a searchable database. Everyone is entitled to search for information in this database and to order access to the information they find interesting. Having located relevant case documents, users may submit requests to view these. Requests are sent to the respective agencies responsible for the case documents and public record entries. The agencies themselves then process requests, sent to them via OEP, and reply to users directly. See www.oep.no NB: The OEP only contains documents from the period after May 2010 and the old, password protected, version developed in the 1990s, the EPJ, is still running parallel to the new OEP. The EPJ contains information on more than eight million documents in 36 agencies, between 1993 and 2011, but is only open to journalists and researchers.

2010.⁴⁴ The Agency for Public Management and eGovernment (Difi) has administrative responsibility over this service which it derives from the Ministry of Government Administration, Reform and Church Affairs, which owns the service.

The OEP is a joint service that all State authorities use to register documents. The OEP extends to the central entities of State authorities (including ministries and agencies) and their undertakings. However, there is no obligation on the part of public bodies, other than State bodies, to publish in the document registers. Yet, many communal and regional authorities choose to publish in it. If they do, they must state the criteria on which their publication is based. It should be emphasized that about one fifth of records are classified for security reasons, and therefore are not listed in the Electronic Public Records.

Anyone, anywhere in the world, may request access to OEP records free of charge.⁴⁵ It is *inter alia* possible to archive searches and to receive automatic notification about the addition of new documents in a given case. Agencies have five days to respond to information requests, whether they are made through the OEP or directly to the agency, and they must provide the documents by e-mail, fax or regular mail, normally within two to three days. However, an effort is underway within Norway to give individuals direct access to the content of documents contained in the OEP. At the beginning of April 2015, there were 12,908,903 documents available in the OEP, and 864,413 recorded requests. However, about one fifth of the records are classified for security reasons, and are not listed in the register.⁴⁶

⁴⁴ Within five to ten years of creation, records and associated metadata documenting their creation and subsequent alterations are transferred to the National Archives digital repository, creating an audit trail of context and changes in status so that the records continue to meet legal, administrative, fiscal or other evidentiary needs over time (trusted digital repository complying with several international standards). Noark is a Norwegian abbreviation for *Norsk arkivstandard*, or “Norwegian Archive Standard”. Noark was developed as a specification of requirements for electronic recordkeeping systems used in public administration in 1984 and quickly became established as the *de facto* standard. Section 2-9 of the Archives Regulation states that, as a general rule, public bodies shall use a Noark-approved system to maintain an electronic register of documents and their archives. The current version of the standard is “Noark 5”, available at: <http://www.arkivverket.no/eng/Public-Sector/Noark>

⁴⁵ In 2012, 61% of the requests were work-related, 28% were private and 7% were made in the name of organisations or associations. See Difi-rapport 2012:5, BRUKERUNDERSØKELSE FOR OFFENTLIG ELEKTRONISK POSTJOURNAL 2011, available at:

http://www.difi.no/sites/difino/files/brukerundersokelse_oe_2_1.pdf, at p. 9. A new user survey will probably be published by the Difi in 2015. According to another source, the greatest number of requests comes from journalists (50%). Citizens and businesses make 22% of requests, public employees 21% and researchers 3%.

See: <http://www.opengovguide.com/country-examples/norway-has-developed-an-electronic-public-records-tool-which-is-used-by-central-government-agencies-to-publish-their-public-records-online-and-which-is-open-for-everyone-to-use/>
These statistics show that, thanks to the FOIA and the OEP, the Norwegian media can work more effectively to serve the public interests.

⁴⁶ Each public entity can register certain documents in such a manner that they do not appear in the public records, see the Freedom of Information Act section 4 and the Regulations relating to public archives section 2-6. One can nevertheless order access to documents not entered in the records. In such case, the person must contact the entity

B) Numerous Exemptions from Public Disclosure

Freedom of information is an extension of freedom of speech and is a fundamental human right. The main principles on which the right to be informed and the publicity of documents are based are: democracy, control, legal certainty (*rettsikkerhet*),⁴⁷ as well as on the idea that the administration should act as a “data bank”, as a repository of data facilitating access to information. Nonetheless, there are valid reasons for limiting access to information, including a possible adverse impact on public and private interests, the need for effective decision-making in the public service, and finally resource limitations.⁴⁸ Of course, while agencies may have the right to exempt certain documents from public disclosure, the exemptions may result in less than an optimal level of openness and transparency. The challenge for society is to find a balance between the need for secrecy and the desire for transparency, trying to attain as much transparency as possible in the public sector. The Norwegian FOIA lists various exceptions (*unntakslov*) to the main rule which provides for a general right of access to information.

1) The Exemptions

The aim of the new FOIA is *inter alia* to strengthen confidence in the public authority (§ 1 FOIA) by promoting open government. FOIA thus upholds the principle of maximum disclosure of information and of minimum limitations to – or exemptions from – the right of access (§ 11 FOIA). It does so by providing a more narrow and defined list of exemptions (art. 13 to 27) than were provided for in the 1970 FOIA. Moreover, the majority of the exemptions allow the agency to withhold only pieces of information rather than an entire document.

As Professor Jan Fridthjof Bernt has remarked, FOIA has two functions: one “manifest” (a general principle of transparency and access to information) and one “latent” (which makes it possible to maintain the secrecy of certain types of information).⁴⁹ For example, an entity’s records may contain information that is protected by a statutory duty of confidentiality that by law can or must be exempted from public disclosure. In such a case, the entity is bound to prevent others from gaining access to this information. Therefore, all or parts of these case documents can be hidden in the published public records. However, in such cases, the entity that owns the records must state the legal basis for non-disclosure.

that is responsible for the case to which he wishes access in order to request access to the whole case.

⁴⁷ NOU 2003: 30, NY OFFENTLIGHETSLOV, p. 42-44.

⁴⁸ NOU 2003: 30, NY OFFENTLIGHETSLOV, p. 44-46.

⁴⁹ Jan Fridthjof Bernt, *Innsyn i forvaltningsmessige prosesser. Ønske det, mene det, ville det, men...?* Foredrag på Partnersforums høstkonferanse, 2012. Available at:

<http://www.uio.no/om/samarbeid/samfunn-og-naringsliv/partnerforum/arrangementer/konferanser/2012/bernt.pdf>; Jan Fridthjof Bernt, *Allmennbetens innsyn i det offentlige virksomhet – En oversikt*, JUSSENS VENNER, No. 5, 2009, p. 265-284.

Moreover, the fact that information is supposed to be exempt from public disclosure does not always prevent an individual from requesting access to the document anyway.⁵⁰ It depends on the category of case. Indeed, the Freedom of Information Act (§§ 13-27) sets forth two main categories of exemptions from the right of access:

- cases where access to information must be denied because of a duty of confidentiality (§ 13 FOIA) and
- cases where access to information can be denied (§§ 14 to 26 FOIA).
- §§ 14 and 15 FOIA in particular account for 50% of the exemption cases.

Those who work or carry out tasks for administrative entities are bound by a duty of confidentiality (all forms of expression), under the general rule set forth in § 13 of the Public Administration Act, or under other laws, such as the Act on health and caring services (*belse- og omsorgstjenesteloven*) § 12-1, the Tax Assessment Act (*ligningsloven*) § 3-13, the Security Act (*sikkerhetsloven*) § 12. Since FOIA grants open access to documents, § 13 FOIA helps ensure that information protected by a duty of confidentiality are not accessible to third parties or unauthorized persons. However, the agency must first determine that there is a duty of confidentiality that is imposed by law.⁵¹ The administrative entity has a duty to carefully assess whether the exception for confidential information applies before either denying access or sending information to the recipient.⁵²

FOIA articles 14 to 26 list situations when access to information may be denied. Under those articles, the administrative entity does not have a duty to either deny or grant access to information, but rather has the freedom to consider whether the information should be disclosed, and to decide whether or not to grant access.⁵³

This list of exemptions was expanded in December 2011,⁵⁴ when the FOIA was amended so as to add new restrictions on the general rule of public access to documents, including § 25's exception for payroll statements (*lønnsoppgaver*) (information about salaries, other than the salaries of those in senior positions) and § 26's exceptions

⁵⁰ See our developments, *infra*.

⁵¹ There are situations where access to information may be granted in spite of the duty of confidentiality: when there is no need for protection (§ 13 (a) PAA), that is to say when the consent of the person entitled to confidentiality has been obtained (§ 13, 3rd paragraph FOIA and § 13 (a) 1. PAA), when there is no legitimate interest at stake, when the information is being presented in the form of statistics or identificatory characteristics have been eliminated (§ 13 (a) 2. PAA), when the information is generally known or accessible elsewhere (§ 13(a) 3. PAA) or when there are reasons of private and public interest to give access to information (§ 13(b) PAA and also §§ 11 & 13, 3rd paragraph FOIA).

⁵² See the explanatory tables in Else Marie Moe, OFFENTLIGHETSLOVEN I ALL ENKELHET (Kommuneforlaget 2015), p. 62-3, 65.

⁵³ Else Marie Moe, OFFENTLIGHETSLOVEN I ALL ENKELHET, *op. cit.*, p. 32.

⁵⁴ Lov 16. desember 2011 nr. 62. Preparatory works: Prop. 125 L (2010-2011), Innst. 66 L (2011-2012).

for birth registration numbers (*fødselsnummer*), personal registration numbers and similar information (for ex. *D-nummer*, *DUF-nummer*). §§ 14-16 concern documents that are part of the early preparation process and relate to the so-called internal preparation of the case (*intern saksforberedelse*). The other sections, § 13 and §§ 17-26 FOIA focus on the content of the documents at stake. § 27 FOIA authorizes the adoption of regulations “for exemption from access in respect of journals and all documents in types of cases where exemption from access may or shall be made in respect of the great majority of the documents” or “or exemption from access in respect of documents in archival repositories when this is necessary on conservation grounds”.

Two factors must be taken into account when administrative entities decide whether to deny access to information. The first factor is whether access to the document would have harmful or damaging effects (*skadelige virkninger*) on interests that are protected by the legislative provision. For example, § 15 FOIA (documents obtained externally for internal preparation of a case), § 20 FOIA (exemptions that pertain to Norway’s foreign policy interests), § 21 FOIA (exemptions for national defense and security interests), § 23 FOIA, 1st and 2nd paragraphs (exemptions for the government’s negotiating positions, and the like), § 24 FOIA (exemptions for regulatory or control measures, documents relating to offenses and information liable to facilitate the commission of an offense and the like). The second factor is whether the exemption can be linked to specific information (*opplysninger*), not necessarily an entire document, as, for example, in § 13 FOIA (information subject to a duty of confidentiality), § 21 FOIA (exemptions for national defense and security interests), § 22 FOIA (exemptions in certain budget matters), § 26 FOIA 2nd, 3rd and 4th paragraphs (exemptions in respect of examination papers and grades, information on scientific research (*forskningsopplysninger*), birth registration numbers and so on).

2) “Enhanced Exemption (*merunntak*) and Delayed Access (*utsatt innsyn*)

The main rule of § 12 FOIA is that there can *a priori* be no legal basis for exempting an entire document from public access. The administrative agency’s determination to deny access must be limited to certain types of information or certain parts of a document. The remainder of the document must remain open to the public and accessible to all. Only in a relatively rare few instances may an agency deny access to an entire document when only parts of the document are entitled to exemption from access. These instances are limited to situations when:

- “(a) these parts alone would give a clearly misleading picture of the content,
- (b) it would be unreasonably demanding for the agency to separate them, or

(c) the exempted information constitutes the most essential part of the document.”⁵⁵

§ 5 FOIA also suggests that the agency may be able to delay access to documents “until a later stage in the preparation of the case than that stipulated in sections 3 and 4,” especially when the document would “give a directly misleading impression of the case.”⁵⁶ An entire document might also be withheld when disclosure could be “detrimental to obvious public or private interests”, for example case documents drawn up by or for the Office of the Auditor General (*riksrevisjonen*) that involve “significant private or public interests.”

3) The possibility for “Enhanced Access to Information” (*Merinnsyn*)

When an exemption is based on a provision permitting the withholding of a document (§§ 14-27 FOIA), the administrative entity must consider whether to provide enhanced access to information (*merinnsyn*), even though access to documents was restricted or even denied in the first instance. This principle of “enhanced access to information” is rooted in the belief that the right to confidentiality (*taushetsrett*) is not the same as a duty of confidentiality (*taushetsplikt*), and that there is an obligation, in certain contexts, to assess whether documents (or parts of documents) which may be exempted from public disclosure, should nonetheless be disclosed.

The administrative entity is obliged to consider granting enhanced public access when the duty of confidentiality only applies to some information, but not an entire document (but see § 12 FOIA). In that situation, the entity must choose between keeping a document entirely confidential or granting partial or full access to the document. § 11 FOIA that states:

“Where there is occasion to exempt information from access, an administrative agency shall nonetheless consider allowing full or partial access. The administrative agency should allow access if the interest of public access outweighs the need for exemption”.

Under this provision, it has become more difficult for administrative agencies to exempt entire documents from public access.⁵⁷

However, FOIA contains two provisions that forbid agencies from granting enhanced access to information. If a document contains information protected by the duty of confidentiality, access to this information must be denied. If the conditions of § 13 FOIA are fulfilled, there is no right of access and there is no room for the

⁵⁵ § 12 FOIA.

⁵⁶ For example, an early stage in an investigation or in a case where serious accusations are made against a public officer or a private person.

⁵⁷ One may wonder whether the introduction of “enhanced access to information” has actually led to more transparency and openness. This is one of the issues that will probably be addressed by the committee currently evaluating the FOIA.

agency to assess whether access should be granted or not. The same applies to § 5, 2nd paragraph, FOIA.⁵⁸

§ 2 – THE 2006 FOIA – AN ACT THAT NEEDS IMPROVEMENT

The main premise of freedom of information and transparency is that the right to be informed is an essential element of the people's ability to participate in public debate in a democratic society. But what happens if a law itself is difficult to understand and apply, both for those who may need access and for those who have to consider whether access should be allowed. If a law is either too short, or too complex, it creates considerable possibilities for administrative entities to exercise discretion.

With the digital revolution and the development of the internet, it is easier to gain access to the public sphere. But it is not really that much easier for the public to access information. The flood of information and the opacity of the act in certain respects create problems. The public's lack of knowledge regarding information that is not accessible presents an additional problem.

A) A Lack of Clarity That Needs to Be Solved

A premise that underlies the movement for freedom of information and transparency is that those who must implement legislative provisions must understand them fully in order to apply them correctly. Moreover, those who have a right of access to information must know what they can get access to and where to request it.

There are several aspects of the FOIA that make it difficult for both applicants and administrative entities to apply it correctly and efficiently. For one thing, there is a need for clarification of FOIA's text, which should include both a simplification and a sharpening of the language, and a simplification of the exemptions. The need for clarification and simplification is revealed by the number of introductory courses on the FOIA organized at both national and local levels, and the number of publications of commentaries and manuals on the FOIA⁵⁹ are emblematic of the need.

1) *Identifying the Governmental Bodies to Whom the FOIA Applies*

Under FOIA, it is not always easy to define the term “public sector” for purposes of determining to whom the act applies.

⁵⁸ “For case documents drawn up by or for the Office of the Auditor General in cases that the said Office is considering presenting to the Storting as part of the exercise of constitutional control, *access will not be given* until the case has been received by the Storting or when the Office of the Auditor General has notified the administrative agency concerned of the conclusion of the handling of the case, see section 18 second paragraph of the Act of 7 May 2004 No. 21 relating to the Office of the Auditor General.” (our emphasis).

⁵⁹ Such as Nils E.Øy, *Kommentarbok til offentleglova*, *op. cit.*; Marie Else Moe, *Offentlighetsloven i all enkelhet*, *op. cit.*

Indeed, it is not always easy to distinguish between the public and the private sector. Today, there are many services that are provided by private entities that used to be provided by state and local governments (for example kindergartens, health and care services, and education).

As a result, questions remain regarding whether private legal entities are covered by FOIA. For example, there are independent legal entities that are fully owned by a State or local authority, but who operate pure business activities, and thus are in direct competition (for at least half of their business)⁶⁰ with privately owned companies (FOIA § 2). These entities fall outside of the scope of the act. On the other hand, there are also legal entities that seem to be engaged in traditional business management, but which are regarded as administrative bodies. Since it is difficult to identify which other organizations or entities fall under FOIA § 2, 1st paragraph, c) and d), one must examine the exceptions listed in the FOIA § 1.

There are many publicly owned legal entities that fall between these two categories, in some sort of gray zone where an assessment must be made regarding their status. This assessment must take into account several factors, including the kind of business involved, whether it has a legal or *de facto* monopoly, the extent to which the government is involved in the political management of the business, the extent of the entity's organizational and financial links to the public sector. This kind of assessment may be difficult and time-consuming.

The expert committee in charge of the new FOIA took the position that FOIA's scope should be broadened and should extend to "all legal entities that provide services within specific areas, regardless of organizational form and who owns the businesses",⁶¹ but its advice was not followed.⁶²

2) The Need for a Clearer Definition of the Documents that are to be Subjected to Public Record-Keeping

An essential element of freedom of information and transparency is the idea that the public must be aware of what information is actually available. Even though the obligation to keep records is fundamental to democratic participation, public control and legal protection, an agency's obligation must extend to a determination of which documents fall under the scope of the FOIA and therefore must be retained.

⁶⁰ Justis- og politidepartement, RETTLEIAR TIL OFFENTLEGLOVA, p. 18.

⁶¹ "Utvalget (...) mener at offentlighetslovens virkeområde bør utvides til å omfatte alle rettssubjekter som tilbyr tjenester innenfor bestemte områder, uavhengig av organisasjonsform og hvem som eier virksomhetene." – NOU 2003: 30, NY OFFENTLIGHETSLOV, p. 70.

⁶² See also the proposal (rejected) in Ot.prp. nr. 102 (2004-2005), p. 36.

Under Norwegian law, it can sometimes be difficult to determine whether a particular document is subject to FOIA. There are three conditions that must be met before an ingoing or outgoing document will be subject to public record-keeping requirements: First, it must be a case document as defined in FOIA; second, the document must be subject to case management; and third, it must have value as documentation. “New” document types have emerged, including text messages (SMS),⁶³ e-mail⁶⁴ and social media such as Facebook and Twitter.⁶⁵ Some of these new types of documents fall partly outside of the traditional definition of the term “document”, and therefore there are questions regarding whether they are subject to public record-keeping requirements. The Norwegian Parliamentary Ombudsman has had to deal with several cases of this nature in recent years.

3) The need to Expand the Number of Public Entities Transmitting Records via the OEP?

Beyond the issue of recording documents, questions have arisen regarding which public administrative entities must deliver their records to/via the OEP. The number of entities is larger than it was when the FOIA came into force. However, additional entities must still be added to the list for the sake of transparency.

B) Improving the Legislation on Exceptions to Freedom of Access to Documents

As Francis Sejersted put it in 2005 (before the adoption of the 2006 FOIA), “Norway is a typical Western liberal democracy, where freedom of expression and freedom of information are taken for granted. However, this does not preclude the possibility of considerable disagreement concerning where the boundaries for this freedom should be drawn.”⁶⁶ His remarks retain validity today. Indeed, even though exemptions to the right of access are specifically listed in the FOIA, and are thus inherently limited in number, they are not always easily identifiable. FOIA provisions must be read with other laws and regulations in mind.⁶⁷ Moreover, there have been many disagreements concerning the criteria for such exemptions and the extent of the discretionary power vested in administrative entities.

There are at least four additional issues that relate to the scope of FOIA exceptions.

⁶³ See Nils E.Øy, KOMMENTARBOK TIL OFFENTLEGLOVA, *op. cit.*, p. 119-120.

⁶⁴ *Ibidem*, p. 119.

⁶⁵ *Ibidem*, p. 78.

⁶⁶ Francis Sejersted, *Freedom of Information in a Modern Society*, IFLA JOURNAL 31(4), pp. 301–306, p. 301.

⁶⁷ See Jan Fridthjof Bernt, *Offentleglova og andre regler om innsyn i det offentlige virksombet – en oversikt*, in Jan Fridthjof Bernt, Harald Hove, OFFENTLEGLOVA – MED KOMMENTARER (Fagbokforlaget 2009), p. 57-70.

1) Need to Enlarge the Scope of the FOIA?

A principal criticism of commentators on the 2006 FOIA was that large administrative areas, such as social security (*trygdesektoren*), social sector (*sosialsektoren*), child welfare (*barnevern*) and health (*helse*), are not included in the principle of public access (*offentlighetsprinsippet*).⁶⁸

There has been an understandable desire to protect the privacy of individuals as much as possible. In that respect, the OEP still needs some improvement, even though, after a year, one can no longer search using personal names in OEP.⁶⁹ There may also be a confidentiality breach “where three departments have screened the names to which confidential information is related, while a fourth department has left the names unscreened but has chosen to screen the document title. This means that the name can be associated with the document title, so that the confidential information becomes available. Links of this type can largely be avoided by determining common rules governing record keeping.”⁷⁰ One must not forget that the right to access to information directly correlates to a thriving democracy, public debates, and the accountability of public authorities, but public access should not be accomplished to the detriment of the people. The former Ombudsman, Arne Fliflet, illuminated the problem: “I have been contacted by people who felt they had been compromised - even where confidentiality has not been breached. Some have told me that municipal records linked to the document can be Googled for a long time. In one specific case, an ‘angry’ letter of complaint in a building case was displayed high on the list when the complainant Googled himself.”⁷¹ Hopefully the system will not evolve to a “Big Brother”-like centralized system of information...

2) Need to Replace (as much as Possible) Secrecy and Non-Disclosure by Delayed or Deferred Access to Information?

There are three common “strategies” for providing access to information protected by the duty of secrecy: one approach is to be clear and transparent regarding the reasons why a piece of information or a document should be kept classified. In other words, the entity must thoroughly explain the decision to classify, giving solid bases for the choice made (e.g., that it implicates

⁶⁸ Harald Hove, *Den nye offentleglova i et historisk perspektiv*, in Jan Fridthjof Bernt, Harald Hove, *OFFENTLEGLOVA – MED KOMMENTARER*, *op. cit.*, p. 15-56, p. 56.

⁶⁹ This is justified because, after a certain period of time, considerations of privacy outweigh the considerations of freedom of information and transparency.

⁷⁰ Arne Fliflet, *Freedom of information and the Norwegian electronic public records (OEP)*, The International Ombudsman Institute, Wellington Conference 2012, available at: <http://www.theioi.org/publications/wellington-2012-conference-papers>.

⁷¹ Arne Fliflet, *Freedom of information and the Norwegian electronic public records (OEP)*, The International Ombudsman Institute, Wellington Conference 2012, available at: <http://www.theioi.org/publications/wellington-2012-conference-papers>.

foreign policy strategies or security measures).⁷² It also must explain why it is not possible to anonymize and/or generalizes the information contained in the document (*anonymisering / generalisering*) (§ 11), as well as why it is not possible to provide partial access to the information contained in the document (*delvis innsyn*). For example, in some instances, agencies can provide the general public with general information, statistics and similar information. It may also be possible to provide deferred access to information (§ 5 FOIA). In other words, the entity does not permanently refuse to provide the public with access to information, but rather simply delays the access. This solution combines the advantages of keeping information classified for as long as it needs to be (if non-disclosure is based on solid/valid reasons), but ultimately vindicating the interest in openness and transparency by eventually providing disclosure.

3) *Less Discretion for the Administration Entities?*

Many provisions of the FOIA are subject to discretionary assessment (*skjønnsmessig vurdering*) by the affected administrative entity. This raises, at the beginning, concerns connected to the rule of law or legal certainty (*rettsikkerhet*).

In theory, this discretionary authority might be regarded as positive because it provides administrative entities with greater authority and more room to maneuver. However, increased discretionary authority may actually burden entities by requiring them to engage in time-consuming assessment of documents in light of legislative provisions that are difficult to assess and apply because they contain a multitude of terms and guidelines. Thus, administrative entities may be left with uncertainty regarding how to properly apply the governing rules. Entities may be forced to balance various and conflicting considerations on a case-by-case basis, thereby consuming a significant amount of resources. Administrative entities face similar problems when they must decide whether an exemption from the right of access is really needed, or whether an exception to the exception should be granted. Sometimes it is possible to find guidance in the legislative provisions, inserted there to help entities determine whether to exempt a document or information from access, such as in § 20 FOIA. But such guidance is not always available. If the law were clearer, the burden would be lessened.

When entities face a provision that provides for administrative discretion, the administrative entity must attempt to assess the damage that may occur, as well as other consequences that may result, and try to assess the likelihood that the damage occurs. “If there is a great risk that damage would occur, the damaging effects

⁷² See Marit Skivenes, Sissel Trygstad, ÅPENHET, YTRING OG VARSLING (Gyldendal akademisk 2012), p. 33-4.

do not need to be as important as in situations where it is less likely that such damaging effects would occur. Minimal damaging effects will not be considered as opening for exemption from the right of access.”⁷³

Three grades of exceptions (<i>påkrevd unntak</i>) to the right of access in § 20 FOIA	Signal: A high level of openness is desired
“required out of regard for Norway’s foreign policy interests” [1 st paragraph]	[In this case, there will usually be] more cases where access [to information] is granted than refused
“required out of regard for weighty foreign policy interests” [2 nd paragraph]	The main rule is that the documents are public and that an exception must be based on compelling reasons (<i>tungtveiende grunner</i>).
“required by particularly weighty foreign policy interests” [3 rd paragraph]	Exceptions to the rule of disclosure are only permitted in exceptional circumstances pursuant to this clause

Table based on Else Marie Moe, OFFENTLIGHETSLOVEN I ALL ENKELHET, *op. cit.*, p. 37.

Another issue that arises is the fact that, although there are undeniably many exemptions to the right of access (usually for situations when the decision to provide access may cause harm to individuals or reveal business secrets), the list of FOIA exemptions is not complete. The Freedom of Information regulation (FOIR),⁷⁴ expands the scope of FOIA, extending to, among other things, preparatory works, governmental declarations, interpretations or guidelines, as well as statements made by the Ombudsman. Moreover, it can be difficult for entities to determine when the right of access may be denied since many provisions of the FOIA provide for administrative discretion. Moreover, all exemptions must be read in the light of the overlapping provisions on “restricted access to certain kinds of information” of such acts as § 19 of the Public Administration Act (PAA).

4) The Issue of the Lack of Access to “Factual Information”

FOIA’s silence sometimes leads to confusion regarding the scope of exemptions listed in the act. Under § 15 FOIA, “exemptions may be made in respect of parts of any document containing advice on and assessments of how an administrative agency should stand on a case, and which the agency has obtained for use in its internal

⁷³ Else Marie Moe, OFFENTLIGHETSLOVEN I ALL ENKELHET, *op. cit.*, p. 37-8.

⁷⁴ The FOIR contains many provisions on exemptions of various types, lists of bodies/entities that do not fall under the scope of the FOIA, exceptions for several records.

preparation of the case”, namely advice and assessments made by consultants, advocates or any other authorities. The FOIA does not ensure the right to obtain information about the factual basis of a case. As Professor Harald Hove explained, the legislative commission on the Freedom of Information in 2003 took into account the public’s right of access to factual information in its proposal for § 15, 2nd paragraph, b) and c) FOIA and § 20 FOIA. But the proposal was not included either in the bill, since it was regarded as “too demanding to implement in practice”, nor by the Storting in its examination of the proposal. Indeed, when compared to § 18, 3rd paragraph of the Public Administration Act,⁷⁵ or the Danish FOIA,⁷⁶ the Norwegian FOIA is silent. Nils Øy agrees with Hove⁷⁷ about the negative consequences of the lack of right to access, noting that: “there are good reasons to believe that [this legislative choice] results in far less transparency, far more refusals [to grant access] and far more complaints than the solution that had been proposed by the majority of the legislative commission.”⁷⁸ For Harald Hove, “[i]t is a significant weakness in today’s new FOIA that an almost unlimited access to factual information in the documents is not granted.”⁷⁹

C) An Unsatisfying Review System?

1) The lack of Independent Appeals Mechanism?

In Norway, an administrative entity’s refusal to grant access to documents or information can be appealed to a higher administrative body,⁸⁰ the one that is immediately superior to the administrative agency that made the decision (§ 32 FOIA). The aggrieved person may complain about the way that access to the document or information has been provided (for example, if the agency refuses to provide the requester with a copy, or demands payment for copies or prints). If the administrative entity does not respond for 5 working days, an appeal is permitted.⁸¹ The appeals body is allowed to consider whether there was a valid reason for refusing to provide access. In that regard, the appeals body may

⁷⁵ “(...) the party shall have the right to acquaint himself with those parts of the document which contain factual information or summaries or other presentation of the facts.”

⁷⁶ Lov om offentlighet i forvaltningen av 2013, § 28.

⁷⁷ “Det vil kunne være av vesentlig interesse for den offentlige debatt nettopp å kunne gjøre seg kjent med faglige råd og vurderinger, og så se hvordan disse sveives mot mer generelle synspunkter. Innsyn i eventuell uenighet mellom faglig ansvarlig i et forvaltningsorgan og øverste ledelse ville kunne vært svært nyttig for å danne seg et bilde av hvordan beslutningen treffes, og hvilke hensyn som har vært sentrale.” – Harald Hove, *Den nye offentleglova i et historisk perspektiv*, in Jan Fridthjof Bernt, Harald Hove, OFFENTLEGLOVA – MED KOMMENTARER, op. cit., p. 15-56, p. 55.

⁷⁸ Nils E. Øy, KOMMENTARBOK TIL OFFENTLEGLOVA, op. cit., p. 29.

⁷⁹ Harald Hove, *Den nye offentleglova i et historisk perspektiv*, in Jan Fridthjof Bernt, Harald Hove, OFFENTLEGLOVA – MED KOMMENTARER, op. cit., p. 15-56, p. 54.

⁸⁰ For independent administrative agencies and state-owned companies, a Ministry will typically be the appeals body; for municipally owned companies, it would be the county governor (*fylkesmann*); and in complaints based on the Environmental Information Act, the appeals board for Environmental Information (*klagenemnda for miljøinformasjon*).

⁸¹ There are a few exceptions to the five working day rule.

examine all the aspects of the decision.⁸² If the conclusion is negative, it can order the administrative entity to provide a right of access.⁸³

The decisions of administrative entities may also be reviewed by the Parliamentary Ombudsman and by the ordinary courts.⁸⁴ However, before a complaint is submitted to the Ombudsman,⁸⁵ the public administration must first be given the opportunity to rectify the matter in question and reach a final decision. In other words, before an individual can lodge a complaint with the Parliamentary Ombudsman, the parties must have exhausted all of their appeals to superior administrative bodies.

The legality of administrative decisions on access issues can also be challenged in court. In order to prevail in court, the claimant must show “a genuine need to have the claim determined against the defendant”. This issue will be resolved by the court based on “a total assessment of the relevance of the claim and the parties’ connection to the claim.”⁸⁶ As a general rule, the right to resort to the courts is limited to those who are entitled to access documents, and whose access request has been rejected by the administrative entity. However, when these conditions are satisfied, “an organization or association may bring an action in its own name in relation to matters that fall within its purpose and normal scope”.⁸⁷ The courts will decide whether the administrative entity is required to make an exception to the right of access and whether it has adequately considered whether there should be a right of “enhanced access”. However, courts have limited authority to review decisions by administrative entities on enhanced access issues since those issues lie within the discretionary power of the administration. Courts may examine whether the entity’s assessment is based on correct facts, has taken into account other external considerations, and so on.⁸⁸

⁸² Justis- og politidepartment, RETTLEIAR TIL OFFENTLEGLOVA, p. 175.

⁸³ According to § 32 FOIA, last paragraph, “Decisions of the appellate instance constitute special grounds for enforcement under the Enforcement Act chapter 13 in regard to municipal and county authorities and legal persons encompassed by section 2 first paragraph (b) to (d)”. They can be forced by the District court to pay daily penalties until access is actually granted.

⁸⁴ Under the Personal Data Act (2000), the Norwegian Data Protection Authority (*datatilsynet*) is in charge of the protection of individuals from violation of their right to privacy through processing of their personal data, while the Norwegian Media Authority (*medietilsynet*) and the Norwegian Press Association (*Norsk Presseforbund*) ensure free press and receive complaints from the media.

⁸⁵ The Ombudsman may also address issues on his own initiative.

⁸⁶ § 1-3 of the Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes (The Dispute Act) [*tvisteloven*].

⁸⁷ § 1-4 Dispute Act.

⁸⁸ Justis- og politidepartment, RETTLEIAR TIL OFFENTLEGLOVA, p. 180.

Article 8 of the Tromsø Convention⁸⁹ requires governments to provide expeditious review by an independent body.⁹⁰ It is questionable whether this requirement is satisfied in Denmark and Norway because the first appeal is to the administrative level (“hierarchical appeals procedure”), very few appeals are heard in the ordinary courts⁹¹ and reports of an Ombudsman are the only means of reviewing the decisions of the highest level of the state administration, other than protracted litigation through the ordinary courts. Indeed, the Ombudsman can express his opinion on matters that fall within his mandate,⁹² but he does not have the authority to adopt binding decisions or to reverse decisions made by the administration. Nor does he have the power to issue legally binding instructions to the authorities or sanctions.⁹³ Moreover, he cannot review a decision taken by the King in Council of State (*Kongen i statsråd*) as a ministry’s appeals body,⁹⁴ by the parliament (Storting), the courts and some other elected bodies, and he has only limited powers to criticize discretionary decisions adopted by the public authorities.⁹⁵

The creation of a common independent appeals body (*en felles uavhengig klageinstans*) was proposed by a minority during the preparatory works of the FOIA,⁹⁶ but was rejected by the government.

2) Conclusions to be Drawn Based on the Statistically Low Level of Complaints

There have been few complaints under the FOIA although the number of complaints has increased since the law came into force in 2009, as well as after the opening of the OEP in 2010. Norway’s 18 county governors (*fylkesmenn*) received approximately 100 to 200 complaints yearly between 2008 and 2012. With a total of 769 complaints over five years, the county governors each received a

⁸⁹ Council of Europe, COUNCIL OF EUROPE CONVENTION ON ACCESS TO OFFICIAL DOCUMENTS, 18 June 2009, available at: <http://conventions.coe.int/Treaty/EN/Treaties/Html/205.htm>.

⁹⁰ Article 8: “1. An applicant whose request for an official document has been denied, expressly or impliedly, whether in part or in full, shall have access to a review procedure before a court or another independent and impartial body established by law.

2. An applicant shall always have access to an expeditious and inexpensive review procedure, involving either reconsideration by a public authority or review in accordance with paragraph 1.”

⁹¹ See examples in Nils E. Øy, KOMMENTARBOOK TIL OFFENTLEGLOVA, *op. cit.*, p. 37.

⁹² He can point out that errors or negligence have been committed by a public administration agency or a civil servant. He may also request that the public administration agency in question rectify the error, negligence or unfairness. See Act of 22 June 1962 No. 8, Act relating to the Parliamentary Ombudsman for Public Administration (the Parliamentary Ombudsman Act), § 10.

⁹³ In practice, however, the authorities comply with the requests and recommendations of the Ombudsman.

⁹⁴ That is why appeals from decisions taken by a Ministry are usually directly sent to the Ombudsman.

⁹⁵ See https://www.sivilombudsmannen.no/klage/faq_2/#whatcan; Nils E. Øy, Kommentarbok til offentleglova, p. 309.

⁹⁶ See NOU 2003:30, p. 240.

little less than 9 complaints per year.⁹⁷ Does the low rate of complaints suggest that the people are generally satisfied with the FOIA's functioning? Alternatively, is the complaint process so difficult that potential complainers are dissuaded from pursuing that remedy. It is difficult to answer this issue. We will have to wait for the results of the FOIA evaluation⁹⁸.

CONCLUDING REMARKS

As Francis Sejersted reminds us, “No society is completely open. In Norway in the 1960s, it was maintained that the public debate only produced noise, while the important decisions were taken behind closed doors by the top persons of society. Even in a well-established liberal democracy like Norway there was apparently a lack of transparency.”⁹⁹ But now, freedom of information is explicitly included in the Constitution and is a fundamental principle that governs the actions of public authorities. In the meantime, a strong culture of openness has developed in Norway. The FOIA is proof of that evolution, even though it obviously needs some improvements.

In its newly published report on Access to information in the Nordic countries, Oluf Jørgensen concludes that

“the Norwegian law on environmental information is clearly the most open in the Nordic countries as it also covers private undertakings and contains clear requirements to make the information public. Norway has gone further than its international obligations, while the other Nordic countries have not fully complied with the requirements for making environmental information public.

Norway is also clearly in the lead with internet access to registers of documents and good searching facilities.”¹⁰⁰

But the Norwegian efforts will not end there. The Independent Reporting Mechanism, which is charged with assessing Norway's progress towards open government during the period 2011-2013, has recommended the strengthening of the FOIA. Its evaluation followed a resolution adopted by the Norwegian parliament already in 2006, at the time of the adoption of the act.¹⁰¹ The FOIA is now being re-evaluated by a group of independent researchers hired by the Ministry of Justice and Public Security. They are focusing on how the FOIA has been implemented in practice. The experts intend to assess, among other things, whether, during its five years

⁹⁷ Nils E. Øy, KOMMENTARBOK TIL OFFENTLEGLOVA, *op. cit.*, p. 35.

⁹⁸ See the concluding remarks.

⁹⁹ Francis Sejersted, *Freedom of Information in a Modern Society*, IFLA JOURNAL 31(4), pp. 301–306, p. 302.

¹⁰⁰ Oluf Jørgensen, ACCESS TO INFORMATION IN THE NORDIC COUNTRIES, *op. cit.*, p. 34-5; For the whole report (in Danish), see Oluf Jørgensen, OFFENTLIGHED I NORDEN (Nordicom 2014). See the results of Norway in terms of e-Government in the United Nations E-Government Survey 2014, E-GOVERNMENT FOR THE FUTURE WE WANT, available at: http://unpan3.un.org/egovkb/Portals/egovkb/Documents/un/2014-Survey/E-Gov_Complete_Survey-2014.pdf.

¹⁰¹ Innst. O. nr. 41 (2005-2006), p. 37.

of existence, the FOIA has resulted in greater public access to information than was provided under the prior. The experts also intend to determine which parts of the FOIA have led to a change in the amount of access granted, whether the OEP has influenced the allocation of resources, and the effectiveness of public access under the OEP. The experts will not make recommendations regarding possible legislative changes to the FOIA. The Ministry of Justice and Public Security has been charged with that text, but is expected to consider the expert's report¹⁰² and their empirical results. This initiative may have potentially far-reaching consequences. As discussed, a well-functioning democracy requires real openness and transparency, and that requirement is not satisfied simply by enshrining the words in a document.

¹⁰² The report will be submitted to the Ministry of Justice and Public Security in November 2015.