

Access to information in Switzerland. From secrecy to transparency.

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Abstract

Access to information legislations are now present in over 50 countries world-wide. Lagging behind some of its own Cantons, the Swiss Federal government was until recently one of the few hold outs in Europe. But, in December 2004, the Confederation voted the ‘Loi sur la Transparence de l’administration’ or Law on Transparency (LTrans) a Law that came into effect in July 2006. This paper presents an overview of the new Law and underlines the main institutional challenges to its introduction in Switzerland.

Key words: Switzerland, Access to information, legislation, transparency, organisation.

Introduction

At first, linking the concept of transparency with Switzerland might seem a bit odd. In fact, to outside observers, Switzerland represents the exact opposite of transparency. With its banks, arcane federal structure and landscape of isolated mountain villages, it gives out an image of privacy and secrecy at all costs. Quite tellingly, it remains one of the few countries in Europe without a proper Law on access to information (Banisar, 2004; Mendel, 2003b). While states as different in their administrative cultures and institutional structures as Yemen, Ukraine and France have all enacted laws on access to information, how can a country such as Switzerland do without what has come to be seen as one of the corner stones of good administrative practices ? (OECD, 2002)

There are a number of elements explaining the relative ‘lateness’ of the adoption of such a Law at the federal level in Switzerland. First of all, the culture of secrecy is strongly present in the Swiss administrative and social system as a whole (Kriesi, 1998). This situation should never be underestimated, and its cultural impact downplayed. Secondly, Switzerland, with its federal system, is a country where an important part of the overall policy jurisdiction lies with the Cantons and the communal entities (Kissling-Näf and Wälti, 2004). In such a context, a large amount of information directly pertaining to the citizens is held, not by the federal government, but at the smaller and more accessible Cantonal and local levels. Finally, the Swiss political system in itself also accounts for this situation. At the federal level and in most Cantons, political parties govern according to the principle of ‘concordance’ (Kriesi, 1998). This means that every political party, from right and left, takes part in the forming of the executive and as such has direct access to all the information produced by the administration. It also means that the political need for transparency is that much lower.

For a number of years some of the Swiss Cantons have enacted laws giving citizens access to the documents and information collected and compiled by their governments (Conseil fédéral, 2003). But, at the federal level, the challenges appeared somehow more significant. Since December 2004, this ‘deficiency’ has been remedied at the Federal level with the signing of the ‘Loi sur la transparence de l’administration’ or Law on Transparency (LTrans). The law has taken effect in July 2006.

The challenges posed by transparency laws in countries more readily ‘adapted’ to its realities are great, and have been documented by numerous scholars (Blanton et al., 2003; Caddy, 2001; Frankel, 2001; Hasan, 2005; Héritier, 2003; Mendel, 2003a; Roberts, 2002b; Sanchez, 2002). In Switzerland, given its institutional structure, decision making apparatus and federal construction, these challenges seem more formidable yet. This paper will briefly outline the major steps undertaken to put this bill in front of Parliament, and detail its major aspects, exceptions and caveats. As well, we shall look at some of the ‘Swiss specific’ challenges in implementing a law on transparency.

Switzerland and transparency: A short history

To trace back the emergence of the LTrans in Switzerland, one needs to understand the various aspects of the Swiss federal structure. The authority for numerous policies such as education, health, police, taxation, are Cantonal jurisdiction. Thus, the daily decisions influencing the lives of the citizenry are generally taken at the Cantonal level. It is also at that level that a number of democratic advances are being made, to be later adopted at the federal level. It is perhaps in part for this reason that pressures for greater transparency were first felt in the Cantons.

The Canton of Bern, in 1993 (LIn, 1993), first introduced an Access to information law in Switzerland. Following a scandal on the existence of slush funds used to finance political propaganda, the Cantonal authorities tried to reinstitute a modicum of confidence in the administration by introducing a law on information; a number of other jurisdictions have since then followed suit: Geneva (LIPAD, 2001), Vaud (LInfo, 2002), Jura (Loi sur l'information, 2002), etc. The majority of Cantons are right now devising plans to introduce such legislation.

The signing of the LTrans in 2004 represents a major step for the Swiss federal administration. It is a step that was long in the making. The question had come to the fore at many times since the 1980s. We can find in 1982 a Commission of experts pleading for a federal project on the introduction of the principle of transparency in the activities of the administration. Similar proposals were put forward by various groups in 1986, 1989 and 1991 (Conseil fédéral, 2003).

In 1992, the Federal Council adopted in its legislative agenda the specific objective of being ‘closer to citizen via increased transparency’; it wanted to examine the possibility of introducing the principle of transparency in the activities of the administration in the more general framework of governmental reform (Conseil fédéral, 2003). It is to be noted that similar steps forward, in putting transparency on the table as a subject of debate, were made through the 1990s. In April 2000, the Federal Council decided to send for consultation a bill on transparency in the federal administration. The project presented the main concept of a legislation on information and, most notably, the basic principles as to the rights of access for citizens. The general reaction to the draft project was rather positive. The criticisms levelled were nevertheless often serious, but also quite divergent depending on the group making the representations (Conseil fédéral, 2003:1825).

Opposition was clearest from private sector enterprises and organisms regulated by special laws and belonging in part or in total to the Confederation. Representatives of the media were worried that access procedures would in fact complicate access to information (forms to fill, tighter screening of documents released, etc) that was until then obtained informally. Representatives of the economy were particularly interested in the protection of private interests (overriding private interest, business and professional secrets, patents, etc). They worried that these particular considerations might not be fully accounted for in the decisions to make public or not certain documents. Others, were worried about the overall cost of transparency (Conseil fédéral, 2003: 1824-1825). There were a number of adaptations made to the draft project, but in essence it remained largely unchanged.

Institutional challenges

Aside from the usual reticence of public organisations to open to all their various procedures and information (costs, security of the state, private interests, etc), there are a number of elements, particular to Switzerland, that make the application of transparency laws even more complicated. That does not mean that transparency is impossible, au contraire, but simply that these challenges must be recognized and addressed in establishing the basis of freedom of information. Of all these challenges, two are of particular importance: 1) the principle of collegiality, and 2) the principle of executive federalism.

Collegiality

The federal executive is made up of 7 members coming from 4 different political parties (from populist right to socialists). It is the principle used in reaching a decision in this politically diverse executive that differs from other democratic countries used to a principle of majority governments and parliamentary opposition. The Federal Council takes all of its decisions as one and applies the concept of collegiality (Constitution, 1998: Art. 177; Klöti, 2004). This means that decisions, after having been debated among the 7 members of the government, must then be defended by all, even by those who opposed it in the confines of the Council. Those who had to rally to the majority do not make their opposition public, and hence would prefer to keep private their own argumentation on the case.

There thus remains, at the heart of the political system, a zone of secrecy, shared by members of various political families. This particular configuration thus gives, at least at the executive level, a broad access to information to a representative of all major political parties and, consequently, gives everyone a certain stake in the preservation of secrecy. That being said

there nevertheless remains a number of smaller parties that are represented in Parliament but that are not in the executive. In that decision making process, two steps must be distinguished: the procedure of 'co-rapport' and the consultation phase. They both have direct influence on the development and understanding of access to information.

The procedure of 'co-rapport' refers to all the documents written by the government and their staff following a proposition made by one the 7 members of government. These reports are then circulated between departments, at various levels of the hierarchy, for feedback. In such a system, the opening to all of the inside workings of the government would be problematic, and shake the basis of the concept that has served as the foundation of Swiss politics for decades.

The second level in the production of opinion within the Swiss federal government is the consultation of the various offices or departments. In the process leading to the preparation of the proposals devised by the Federal Council, the responsible administration invites the other administrations impacted by the proposal to give their input. It is based, in part, on these documents that the Federal Council will take its decision. The right to access to this information does exist, but only after the decision has been made.

Other, if not most jurisdictions do protect the formation of opinion at the center of government; nevertheless, the Swiss case is probably the only one where the process is so central to the very configuration of the governmental architecture.

Executive federalism

The second element touches the federal structure of Switzerland and, most particularly its ‘fédéralisme d’exécution’ or executive federalism (Kissling-Näf and Wälti, 2004). Contrary to most federal states, the central government does not carry-out all of its decisions, but rather delegates this task to the various Cantons - it is implementation by federal delegation (Linder and Vatter, 2001). Such a system ensures a greater level of adaptation of the legislation to the particular realities of each Canton. This structure also entails numerous interactions between the various levels of government, and most of these governments do not yet have legislation on access to information. The level of transparency wished by some might not, is not, welcomed by all (Busslinger, 2004). This in fact resembles the challenges posed by networked governance and transparency laws in institutions such as the European Union, the United Nations and the World Bank (Bunyan, 2002; CPA and Association, 2004; Roberts, 2002a). To make sure that information provided by the Cantons do not ‘escape’ the federal attempt at transparency, which would cover a very large number of federal documents and hence diminish the effectiveness of the legislation, the LTrans applies to all documents held by the federal administration, be they produced by or simply have been communicated to it.

These elements do account, in a certain measure, for the relative lateness of the introduction of access to information in Switzerland. Now that the LTrans has come into effect, it is interesting to note that these institutional elements have been taken into account in the construction of a transparency *à la Suisse*.

The main elements of the Swiss LTrans

Laws on access to information always have relatively similar characteristics (Frankel, 2001).

Among those, we shall underline the important elements pertaining to the coverage of the law (what organisations and what type of documents), exceptions (what is officially off line), the practicalities (how to use it) as well as its regulatory framework (appeal process).

Coverage

The law will cover the totality of the federal administration as well as other organisations as long as they provide decisions of ‘first instance’ (decisions based on federal public laws and which, inter alia, create or modify rights or obligations or rule on the existence and extent of rights and obligations.) With this principle in place, state enterprises active on private markets will come under the Law for all the decisions that they give in their role as public authorities.

However, the Law does not apply to a number of institutions, notably: the Swiss National Bank, the Federal Banking Commission, the Federal Assembly, Parliamentary Commissions and the Federal Council (LTRANS, 2004: Art.2). Moreover, Parliament can also effectively withdraw from the obligations of the Law particular administrative units or organisations if their mandates require it, if it might possibly damage their competitive position or if their tasks are deemed to be of minor importance (LTRANS, 2004: Art.2, al.3). The flexibility given to the authority on this matter appears to be quite consequent.

Only *completed* official documents are to come under the Law. For the LTrans, an ‘Official Document’ must meet with all three of the following criteria (LTRANS, 2004: Art.5) :

1. The information has been registered on a specific support;
2. the information is located within a specific administration;
3. the information is linked to the execution of a public task.

The first of these cumulative criteria aims at distinguishing between the concept of document and the larger concept of information. It refers to a report, an expertise, statistics, visual or audio documents, electronic sources, etc. The second criteria aims at ensuring that the administration can effectively access the information requested. The third element, the link to a public task, means that it must not be linked to a general notion of public interest, but rather to an effective task carried out by the Confederation (Conseil fédéral, 2003: 1834-1838).

Documents that are not in their definitive state or that are destined to a personal use are not subjected to the Law (LTRANS, 2004: Art.5, al.3). The idea behind this provision is to ensure that the administration retains the possibility to modify projects and avoid misunderstandings and external pressures based on draft documents (Conseil fédéral, 2003: 1840). Of course, the concept of what is and what is not a 'definitive state' will have to be validated and tested with use.

That being said, a personal letter regarding official information will be subject to the Law (Conseil fédéral, 2003: 1840). Documents sold by an organisation (maps, books, statistics, etc) are not considered official documents in the application of the Law (Conseil fédéral, 2003: 1839).

The law will not cover access to documents related to legal procedures, be they civil, criminal or linked to international cases. Moreover, information linked to personal data will still be protected by the Federal Law of June 19th 1992 on Data protection (LPD, 1992: Art. 3,9,11,12). By personal data is meant inter alia, data related to opinion (religious, political,

etc), elements touching health related matters, or any assemblage of information allowing for the appreciation of one's personality or physical traits.

Exceptions

The right of access can be legally limited, delayed or refused for different reasons. These reasons are somewhat similar to those used in other jurisdictions (Canada, 1985; Frankel, 2001; Ireland, 2003).

As we have seen, access can be refused if the document is susceptible to hamper the free formation of opinion (LTRANS, 2004: Art.7, al.1). By protecting the formation of opinion, the legislation aims at preventing the premature dissemination of the government's position, thus insuring its ability to develop positions without the pressure of the media or the population.

Disclosure can also be blocked if the document is deemed to potentially compromise the relations between the Confederation and the Cantons or the relations between Cantons (LTRANS, 2004: Art.7, al.1e). This is a crucial element for most of the Cantons have no legislation on transparency. Unfortunately it also means yet one more area where transparency will not be applied.

As well, disclosure will be refused when the document could compromise internal or external security, the interests of Switzerland in terms of foreign, economic or monetary policy, as well as in terms of foreign affairs or international affairs (LTRANS, 2004: Art.7, al.1c,d,f). This aspect is particularly important as it has been shown in other jurisdictions to be used as a trump card in favour of secrecy (Blanton, 2003; Canada, 1994; Canada, 2004; Pasquier and

Villeneuve, 2004; Pasquier and Villeneuve, 2005; Roberts, 2003). The terminology between jurisdictions does vary, but the concepts surrounding notions of 'international relations' are, in the case of access to information laws, always framed in the most imprecise way, thus creating additional wiggling room to 'hide' information. This situation is likely to get even more acute as multi-lateral fora multiply and international agencies regulate more and more sectors of activities.

The non-disclosure of information is allowed when that information has been given by a third party to an organisation that has guaranteed its secret (LTRANS, 2004: Art.7, al.1h). This particular elements means, among other things that secret information passed on by other governments will not be accessible. This provision does not apply to information provided by individuals as part of a legal obligation (Conseil fédéral, 2003: 1853).

The standard protection is guaranteed for element that could lead to the release of professional, business or patent information(LTRANS, 2004: Art.7, al.1g). As well, a document might be withheld if it might damage private interests, unless an overriding public interest is found to exist (LTRANS, 2004: Art.7, al.2).

Nevertheless, all these cases of predominant interest (public or private) must always be balanced with the overriding public interest of transparency. As we can see, these exemptions are not unprecedented, for most of them can be found in other jurisdictions. Nevertheless, they were carefully crafted to ensure the protection of some of the Swiss specific mechanisms such as the concept of collegiality and Federal-Cantonal negotiations. It remains to be seen whether all these limitations will have a large or small impact on the benefits of transparency.

Practicalities

The requests for information must be directly addressed to the authority in charge of their production, and be as precise as possible (LTRANS, 2004: Art.10). The access is fee based; nevertheless, no fee will be collected for demands that entail small expenses for the administration or that are directly linked to mediation procedures. Overall, it is the Federal Council that will establish the modalities and tariffs to be charged (LTRANS, 2004: Art.10).

The time limit afforded to the organisation is 20 days starting with the day the demand has been received. The time provided to reply can be exceptionally extended if the demand requires more work in terms of volume or in terms of complexity (LTRANS, 2004: Art.12).

Regulatory framework

As with most freedom of information legislation, the Swiss Law has provisions to deal with complaints on the non-compliance with the law. A citizen can ask for mediation if the demand has been limited, delayed or refused (LTRANS, 2004: Art.13, al.1). The demand for mediation must be presented to the 'Préposé fédéral à la protection des données et à la transparence', the Officer in charge of data protection and transparency, within a delay of 20 days starting at the reception of the decision.

This is, first and foremost, a mediation procedure where the 'Préposé' will try to reconcile the differences. It is hoped that this mediation approach will help take care of the bulk of demands without having to systematically resort to a more demanding system. This 'Préposé' is an independent agent that is not under the hierarchical purview of the Federal Council. He also has the use of his own secretariat. It is to be noted that the 'Préposé' has no power to force a decision. Aside from its role as supervisor of the Law and authority, the 'Préposé' is

charged with the evaluation of the Law and with presenting an annual report to the Council on its application. More than only taking care of mediation, this 'Préposé' is in a sense a competency center on questions of transparency (Conseil fédéral, 2003: 1869).

A failure of the mediation process can subsequently be taken to the federal Commission on data protection and transparency. The Commission has the same provision as the Préposé in terms of independence. In such a case the Commission would have access to the documents, even if they are deemed secret. The Commission has to reach a decision within 2 months. This decision is not final, as it can be appealed to Federal Tribunal, the highest authority in Switzerland.

Final dispositions

Interestingly, the present legislation only covers official documents that have been produced or received after the enactment of the legislation (LTRANS, 2004: Art.23). That means that contrary to the situation with the new information legislation in the United Kingdom and the statutes in most countries with freedom of information regimes, no document from previous administrations will be accessible (Happold, 2005).

Conclusion

Overall, the LTrans is somewhat similar to other freedom of information legislations around the world. The great difference is of course the attempt made to accommodate some of the particular institutions of the country such as the federal-cantonal relations and the concept of collegiality. It remain to be seen if these attempts at adapting transparency to the local socio-political institutional arrangements are necessary cultural modulation of transparency, or simply a convenient way of deflecting the full glare of transparency's lights.

The impact of various legal provisions on the overall transparency of an administration have been analysed by numerous scholars. Of all these analysis, covering most continents, and various administrative systems, one can only conclude that it is truly the practice that they succeed or fail to yield all the benefits of transparency. The overall consequences for Swiss public administration are likely to be positive. But, as of now, few seem to be aware of this new legislation, and fewer still aware of the cultural revolution it is likely to entail for the whole system.

In its capacity to adapt to this new reality, Switzerland will prove a testing ground for transparency. Of particular interest will be its ability to face not only an administrative cultural revolution, but one that also goes against a more generalised social conception of the role and function of the state.

In the opening remarks of the inaugural issue of Open Government, Steve Wood mentioned the impressive reporting on the Freedom of Information Act in the United Kingdom. It is to be hoped that after a few months, Swiss citizens will be as adept as the British at using transparency to its fullest.

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