

Issue | July 2015
No.2 | Special Issue: Privacy

Montesquieu Law Review

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a well-guarded secret?

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Program supported by the ANR
n°ANR-10-IDEX-03-02

FORUM
MONTESQUIEU
Faculté de droit et science politique

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de **BORDEAUX**

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Suggested citation: Marie-Odile Diemer, Privacy and the disclosure of administrative documents, 1 Montesquieu Law Review (2015), issue 2, available at <http://www.montesquieulawreview.eu/review.htm>

The dematerialization of procedures serves to improve the efficiency of the Administration and access to administrative data. The flipside of this dematerialization is the vast database that is the preserve of the Administration. Potentially open to all, this database can encroach on the private lives of citizens.

An administrative document is a document produced or received by the Administration (the State, local authorities, public establishments or even private bodies with a public service mission). Administrative documents can be in writing either as hard copy or in electronic format. This therefore applies to all documents produced under the auspices of the executive branch, and excludes any document related to the exercise of legislative or judicial power.

Firstly, administrative documents include reports issued by ministers or committees, or even ministerial circulars. Impersonal and produced for informational or policy purposes, these seem far removed from issues of privacy. Nevertheless, administrative documents are varied. They often contain elements relating to a citizen's private life, and that content can raise doubts as to their complete disconnection with private life. However, a citizen's life is not a citizen's private life: land use planning or notice of a civil service appointment provides information on a person's life without touching on personal details.

Other documents encroach significantly on the privacy of citizens. Where a person can be identified (when their name appears) or where personal details appear in an administrative document, such as an address or telephone number, the family situation or marital status, the person's assets and financial situation or even membership of a political party, the document is deemed to relate to the citizen's private life.

Private life is protected by leading national and international legislation, but it has not received any real definition either in law or in case law. Article 9 of the French Civil Code provides that "*everyone has the right to respect for his private life*". Private life corresponds overall to everything linked to a person's privacy, personal data, family life, doctor-patient confidentiality or even image rights. In short, it is everything relating to his own person, not his public life.

The relationship between the administrative authorities (and, more generally, government itself) and the protection of privacy is therefore a delicate subject.

The exceptional database available to the Administration must be strictly protected while the modalities for its disclosure must be carefully framed. Thus, while private life and administrative law would appear to be antithetical at first glance, private life regularly crosses paths with administrative law though the documents available to the Administration.

In France, the Law of 17 July 1978 sets down the principle that each person has a right of access to administrative documents. The *Commission d'accès aux documents administratifs* (CADA – Commission for Access to Administrative Documents), an independent administrative body, was established that same year to ensure compliance with the principle (1).

Article 6 II of the 1978 Law reiterates this requirement as to the protection of privacy in the context of the disclosure of administrative documents, providing that only the interested parties have a right of access to documents “*the disclosure of which would infringe the protection of privacy*” (2).

The Administration’s interference in private life can also sit alongside the thorny question of whether private life can be monitored.

In France, the forthcoming adoption of the new Law on intelligence, which has caused such controversy in a context of terrorist threats, raises crucial questions as to the protection of personal data and the confidentiality of correspondence (3). This new State prerogative will allow information concerning the private life of individuals to be monitored and collected as part of the war on terror. The pre-eminence of the protection of State interests justifies such an incursion by the Government.

The same problem affects the issue of the communicability of administrative documents. However, confidentiality is established as a genuine rule in administrative procedure. It serves to protect citizens, who remain assured that their own administrative documents will not be easily accessed by third parties. Confidentiality is, however, sometimes linked to aspects of the “private life” of the Administration itself, such as military secrecy in particular. Such administrative secrets stand as a genuine obstacle to the law of evidence and can sometimes prevent a citizen from obtaining elements that would help him prove that he has, for example, suffered harm as the result of an act of the Administration.

This protection for the secrets of public and private persons should not, however, overshadow the substantial expansion in the transparency of all administrative documents. A balance must be struck between transparency and the protection of privacy.

The extent of the disclosure of administrative documents thus concerns not only the “private life” of physical persons (section I) but also includes the “public life” of the Administration (section II).

I – Confidentiality within the Administration: protecting the private life of physical persons

One principle dominates the disclosure of administrative documents across Europe: the free movement of documents. This free movement is fundamental in any democratic society as it serves to ensure the transparency of administrative activities.

Sweden was alone in recognising this guarantee for citizens very early on, doing so at the end of the 18th century (4). The remaining European States – such as Germany, Italy or the United Kingdom, but especially France – all belatedly introduced legislation which is currently considered as recent (5).

Since 1978 in France, the combination of the creation of an independent administrative authority and a law establishing the modalities for communicability, guarantees the disclosure of documents (section A). The guarantees are provided under the aegis of an especially benevolent administrative court, in charge of hearing what can at times be an abundance of litigation (section B).

A – The conditional opening for the disclosure of administrative documents impacting on private life

While the theory is to open the disclosure of administrative documents as wide as possible, this must necessarily respect private life.

Certain documents would appear to be quite unrelated to a person's private life, such as driving licence applications, tax files, or the deliberations of administrative authorities. However, there is a thin line between such documents and private life, and the former may indeed contain personal data.

Private life is recognised as such in the 1978 Law, but it is also scattered through many other provisions protecting the disclosure of documents.

The 1978 Law protects the modalities for disclosing documents *“containing an appreciation or value judgement of a physical person, named or readily identified or presenting a person's behaviour, where the disclosure of that behaviour could be prejudicial to that person”* (6). Where this is the case, such documents may only be disclosed to the interested parties. This category of documents includes those concerning private life, client confidentiality or doctor–patient confidentiality.

Doctor–patient confidentiality implies that the results of medical tests or examinations be disclosed solely to the person concerned. Third parties may only access these with the consent of the person concerned.

The “appreciation or value judgement” will, for example, concern candidates' grades in competitive examinations, or a complaint made to the administrative authority as to negligent behaviour on the part of a citizen or an official. Such documents may only be disclosed to the interested parties. The Administration thus protects a wide range of documents by allowing these to be disclosed only to the interested parties. The importance of confidentiality is emphasised here.

Nevertheless, some civil–status documents such as birth, marriage or death certificates are now readily accessible on the internet. The dematerialization of administrative procedures may render all of the rules set down null and void. It is now possible to obtain such certificates via municipal websites; indeed, with only a few details, it is easy to obtain such documents, which nevertheless contain personal data.

The protection of privacy is ensured by an administrative authority and the administrative courts.

B – Administrative and judicial protection of privacy

When a citizen wishes to obtain an administrative document, he submits a request in writing, by registered post with acknowledgement of receipt, to the relevant administrative department. He must clearly state which document he wishes to have disclosed to him. The Administration then has a month from the date of receipt to produce that document.

Silence on the part of the Administration is deemed to be an implicit refusal of the request. The reform of non-contentious administrative procedure which stated that “silence is deemed to signal consent” was not transposed to the rules governing the disclosure of administrative documents (7).

Where a citizen is faced with a refusal to disclose the document, he must apply to the *Commission d'accès aux documents administratifs* (CADA – Commission for access to administrative documents) before applying to the courts, and this within two months of the refusal. The CADA then gives a favourable or unfavourable opinion which is then notified to the administrative authority and the applicant. The administrative authority then has a month as of the date on which the CADA opinion is received in order to make known the action that it intends to take further to the request. The citizen will then have to apply to the administrative judge (first the administrative court, then the *Conseil d'Etat*) in order to assert his rights.

The link between the courts and the disclosure of administrative documents is significant.

Firstly, litigation concerning the disclosure of administrative documents falls within the remit of the administrative court. However, quite aside from the litigation itself, the court can ask that the Administration provide it with a document that is essential to resolving the dispute. The administrative court has considerable investigative powers. In the context of an inquisitorial procedure, the court directs the investigation and can then turn to a recalcitrant Administration and order it to disclose documents. The extent of the administrative court's powers could already be gauged in the well-known decision in *Barrel* (8), where the court enshrined its investigation methods by asking the Administration for all documents in light of which a decision had been made.

Transposed directly to the disclosure of an administrative document to a citizen, case law acknowledges that the court may “*require that competent administrations produce all necessary documents*” to decide the case. The court's investigative powers are so great that it may even require “*those documents for which the refusal to communicate is the very subject of the dispute*” (9). In such cases, the document will not necessarily be disclosed to the applicant (10) but will serve to inform the court as to the document's contents.

Privacy is therefore afforded particular protection by French administrative law, especially in relation to the modalities for disclosing documents. However, the obstacles to the disclosure of administrative documents (concerning, in particular, timescales for obtaining them, being protected by the court) come up against confidential matters held by the Administration.

II – The Administration’s secrets: protecting the privacy of public entities

The secrets held by public entities prove to be veritable fortresses preventing citizens from proving the harm they have suffered (section A). However, there are exceptions allowing citizens to obtain disclosure of such documents. More generally, the data relating to the Administration tend to be increasingly accessible and more frequently published (section B).

A – The Administration’s secrets: an obstruction to the law of evidence in legal proceedings

Where a document relates to a government secret and affects State interests more generally, the Administration must refuse to disclose the same. The result is a failure to produce evidence in support of the allegations made by the applicants.

Documents relating to military secrets, foreign policy, State security or even public or individual security cannot be disclosed. Thus any documents that may reveal negotiations with other States, intelligence or data gathered by a State on the behaviour of another State and thus challenging the latter, or even documents that may have repercussions for current State relations are classified.

The 1978 Law also makes general reference to secrets that are protected by law, thus precluding the need for an exhaustive, closed list of documents not to be disclosed.

In the context of administrative proceedings and in order to obtain evidence, the only possibility of obtaining a classified document is for it to be declassified.

Documents relating to public security or that may affect the safety of physical persons may occasionally be disclosed in whole or in part where disclosure of the same does not run the risk of having repercussions that worsen the situation for said persons. This is the case, for instance, for *gendarme* or police reports where legal action has not been taken.

In tandem with the protection of official secrets, there is now greater transparency in the publication of data held by the Administration.

B – The expansion in the disclosure of administrative data

Data held by the Administration includes data concerning public persons representing the Administration, such as members of the Government (who may be called upon to publish their tax returns), as well as the Administration’s own public data.

The latter category is overseen by the *Direction de l’information légale et administrative* (DILA – the Directorate of Legal and Administrative Information), which is a central administrative directorate within the Prime Minister’s Office. The DILA is also responsible for publishing and distributing the *Journal officiel*, the legislature’s Official Journal containing French legislation and regulations.

This distribution makes all French legal rules available to all, and guarantees economic and financial transparency through the national publication of all legal, economic and financial information pertaining to businesses and the voluntary sector. The DILA interfaces with each Ministry website, together with the Légifrance site, which provides access to all legislation, case

law and Codes. Citizens thus have guaranteed access to documents produced by the Administration that can generally concern them.

The growth of open data fits into the above approach. Open data allows government data to be accessed in digital format. In the context of respect for the general interest, public information is part of a common good. Data may therefore be accessed by all, allowing restrictions on rights of access to and the re-use of data to be circumvented.

The publication of open data is possible thanks to open knowledge. The latter is defined as knowledge of any work, whatever its format, be it musical, cinematographic, etc. It also concerns data such as a scientific paper, or geographical, governmental or administrative information. This open access to data allows original works to be used, re-used and distributed freely.

Open data fits into a broader initiative for transparency and citizen participation that can be found in all open access policies and is sometimes known by the ODOSOS acronym ("open data, open source and open standards").

This dematerialization of and large-scale access to public data must not, however, affect personal data. As regards dematerialization, be it of public or personal data, the protection of privacy and of personal data can currently be seen as a principle defended in vain. The ease and freedom of access afforded by the internet must not obscure the potential invasions of privacy that it can engender.

The new challenge for the Administration is therefore not to improve the timeframes applicable to disclosure or appeals, but above all to ensure that secrets are sufficiently well guarded. The balance between transparency and privacy has yet to be struck in a satisfactory manner, as that same balance is upset by new technologies that have yet to be fully understood.

Notes:

(1) (<http://www.cada.fr>)

(2) Full title: *Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal.*

(3) *Projet de loi sur le renseignement*, 2015.

(4) Sweden has recognised the right of access since 1776.

(5) The Spanish Constitution has protected the right to information since 1978, Italy since a law of 7 August 1990, and Germany since 2006.

(6) Article 6 of the 1978 Law.

(7) *Décret n° 2014-1263 du 23 octobre 2014 et Décret n° 2014-1264 du 23 octobre 2014 relatif aux exceptions à l'application du principe « silence vaut acceptation » ainsi qu'aux exceptions au délai de deux mois de naissance des décisions implicites sur le fondement du II de l'article 21 de la loi n° 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations* (Decree n° 2014-1263 of 23 October 2014 and Decree n°2014-1264 of 23 October 2014 on exceptions to the application of the principle of "silence is deemed to signal acceptance", together with exceptions to the two-month timeframe from the date of decisions implicit in the basis of para. II of Article 21 of Law n° 2000-231 of 12 April 2000 on

citizens' rights in their relations with administrations).

(8) CE, Ass., 28 May 1954, *Barrel*, Rec., p. 308.

(9) CE, 23 December 1988, *Banque de France c/ Huberschwiller*, n° 395310.

(10) CE, 14 March 2003, *Kerangueven*, n° 231661.

