

## Public access to community documents: a fundamental human right?

**Roy W. Davis**

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### Keywords

access to documents, Sweden, U.K., Amsterdam Treaty, transparency, fundamental/human rights, European citizenship, democracy, law

### Abstract

There is a marked difference between the culture of open government in some Member States, particularly Sweden, and the culture of secrecy in Britain. Recent calls for a uniform interpretation of the law regarding public access to documents held by the Community Institutions seem to suggest that a Swedish-style right of access should be adopted at EU level, on the grounds that public access to government-held information is a fundamental human right. To date, however, it seems that insufficient arguments have been advanced in order to justify this particular claim. Notable constitutional lawyers remain sceptical, as do some Member State governments. Furthermore, in the absence of a convincing philosophical justification for the claim, a situation may be created in which certain people are said to enjoy a fundamental human right, not because they are human beings, but by virtue of their status as citizens or residents of an EU Member State. This appears to be counter-intuitive, if it is accepted that fundamental human rights should be enjoyed by all and should therefore be justified on the basis of universally-shared fundamental values. It therefore seems that further explanation of the importance of public access to documents is required, and further justification of the claim that this is, or should be regarded as, a fundamental human right.

### Kurzfassung

Es gibt einen auffälligen Unterschied zwischen der Kultur des "open government" in manchen Mitgliedstaaten, insbesondere Schweden, und der "culture of secrecy" in Großbritannien. Jüngste Aufrufe zu einer einheitlichen Interpretation des Rechts auf Zugang zu den Dokumenten im Besitz der Gemeinschaftsinstitutionen schlagen vor, daß auf EU-Ebene ein Zugangsrecht vom schwedischen Typus eingerichtet werden sollte. Dies wird mit der Behauptung begründet, daß dieses Zugangsrecht ein fundamentales Menschenrecht sei. Bis jetzt wurden allerdings nach Meinung des Autors nur unzureichende Argumente zur Untermauerung dieser Behauptung vorgebracht. Darüber hinaus könnte bei Fehlen einer überzeugenden philosophischen Rechtfertigung für diese Behauptung eine Situation herbeigeführt werden, in der bestimmte Leute sich auf ein fundamentales Menschenrecht berufen könnten, nicht weil sie Menschen sind, sondern auf Grundlage ihres Status als Staatsbürger oder Einwohner eines EU-Staates. Dies erscheint nicht überzeugend, wenn man akzeptiert, daß sich alle auf ein Menschenrecht berufen können sollten und letztere daher auf Basis von universell geteilten fundamentalen Werten gerechtfertigt werden sollten. Es scheint daher, daß eine weitere Erklärung für die Wichtigkeit des öffentlichen Zugangs zu Dokumenten sowie weitere Gründe für die Behauptung, daß es sich um ein Menschenrecht handelt, gefordert sind.

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## I. Introduction

There is a growing volume of legal literature concerning the right of public access to Community-held documents (hereafter "public access"). Dyrberg, commenting on the debate contained therein, suggests that in spite of an apparently increasing level of support for transparency within the EU, a shared, Community-wide understanding of the importance of public access has yet to materialise (Dyrberg, 1999, at 157). Taking this viewpoint further, this article suggests that further clarification and explanation is required from the supporters of public access, who claim that this is a fundamental human right, in order to convince at least a few more sceptics of the validity of this claim and of the consequent need to adopt a genuinely liberal approach to public access and transparency at EU level. A high degree of scepticism is evident from the literature, in connection with claims that public access is a fundamental right and/or of great importance to democracy. At best, this scepticism cannot be helping the development of a truly liberal public access regime for the EU: at worst, it may be actively hindering such a development. This, in turn, does not bode well for the concept of "Citizenship of the Union". A secretive, bureaucratic regime cannot possibly be as credible as a liberal, transparent regime when claiming to have established a "People's Europe".

## II. Two cultural viewpoints

The Netherlands has of course lobbied for a more liberal attitude towards public access at EU level (see, e.g. Case C-58/94 *Netherlands v Council* [1996] ECR I-2169), but it appears that Sweden currently has the most liberal public access regime of the Member States, particularly when contrasted with the decidedly illiberal British regime. (Despite the 1997 election pledges of the current UK Government concerning freedom of information, doubt and scepticism on the part of UK civil libertarians, impatient with the culture of secrecy, has if anything increased in light of the Government's actual progress on this issue.) Much can be learned from Österdahl's comparatively

short article on the Swedish right of public access (Österdahl, 1998). There can be no doubt that this right is more generous than the Community version, as well as the version (if any) obtaining in several other Member States. People are not required to identify themselves or to supply reasons when requesting access to documents held by Swedish public authorities. The right of public access is extended to non-citizens. The very short list of mandatory exceptions to the Swedish right of public access includes documents relating to taxation issues, but not documents relating to confidential issues, personal privacy, or even national security. So, the majority of documents are not generally subject to a blanket ban on disclosure, as in the EU at present. The list of categories of documents that may be withheld from the general public, on account of their subject-matter, simply reminds public officials to apply a "harm test" before deciding whether to disclose such documents (Österdahl, 1998, at 339-40 and 343). The underlying Swedish notion of the ideal relationship between public authorities and ordinary citizens also seems to differ from that obtaining in Britain. The Swedes seem to have been less trusting of democratically-elected officials, for a much longer time, apparently giving more credence to the popular notion that power has an inherently corrupting influence (Österdahl, 1998, at 337). The British, on the other hand, have always relied heavily (although not always successfully) on the concept of "ministerial responsibility" to Parliament in order to secure public trust in government. The Swedes also link public access firmly to the long-established fundamental human right to freedom of expression. This move was actively resisted in the drafting of the European Convention on Human Rights and Fundamental Freedoms (ECHR) (see, e.g. Fenwick, 1994, at p. 59, Österdahl, 1992, at pp.56-7), in which Britain was of course involved from the outset.

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Following Österdahl to some extent, and purely for the sake of convenience, it is possible to think in terms of a "Swedish culture" of open government, which is markedly distinct from the "British culture", favouring secrecy. This terminology is not intended to imply, of course, that open government is not important to any other Member State, or even that Britain is alone in favouring secrecy for the EU Institutions. The sceptical arguments to which this article refers mostly appear to be the products of British-style cultural thinking, however. It seems logical to turn to the Swedish-style political culture in search of counter-arguments, yet it appears that no arguments have actually been advanced, that have not already been rejected by sceptical commentators. Österdahl and Eliasson (Eliasson, 1997) have spoken persuasively in favour of the Swedish-style right, but obviously without having the desired effect of actually securing this across the whole EU. There seem to be two particular issues underlying the sceptical arguments that have been raised.

### III. Two missing links

The cultural difference seems to explain satisfactorily why the Swedes in particular are both anxious to protect their own excellent standards of open government against any possibly illiberal EU harmonisation measures, and to persuade less liberal Member States to adopt Swedish standards in order to increase transparency at EU level. It is to be hoped that a more vigorous defence of the Swedish viewpoint will indeed be successful in hastening the "opening-up" of the EU Institutions to popular scrutiny. One major problem arising from the current debate, however, is that the recognition of public access as a fundamental human right by Sweden has clearly not sufficed to convince everyone involved that public access actually *is* a fundamental human right. Furthermore, the views of some academics seem to suggest that it may not suffice to prove this point even if public access were to be so designated by all the Member States at the next revision of the Treaties, for reasons that will become apparent later on.

Öberg suggests that the ECJ made a fundamental error when it did not explicitly recognise a general principle of public access in *Netherlands v Council* (cited above, see Öberg, 1998). It seems

reasonable to suppose that the ECJ had not been fully convinced, by the arguments raised before it, of the need to do so. Certain noteworthy commentators (e.g. Barendt, 1992, Mackaay, 1992 and Kabel, 1992) have continued to express doubt and scepticism regarding the assertion that public access is a fundamental human right, even though fully aware of the Swedish cultural link between public access and the freedom of expression, and even though it has been submitted by the right's supporters that public access may be of considerable value in enhancing democracy and public confidence in government (see, e.g., Österdahl, 1998: this particular point was of course also taken up in Declaration No. 17 annexed to the TEU(1)). Therefore, it is apparently not enough to make such observations as these in order to convince sceptics of the importance of public access. As indicated, this may explain why the ECJ declined to explicitly endorse the view of the European Parliament, which had intervened in *Netherlands v Council* (cited above, at para. 18) to assert that public access is an essential corollary of the fundamental human right to freedom of information (itself a fundamental corollary of the right to freedom of expression).

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Öberg further suggests that the ECJ's failure to explicitly recognise a general principle of public access constitutes a "missing link" in its reasoning in that case (Öberg, 1998, at p.4). Looking at the current literature, it would seem that the sceptics are exploiting two apparently missing links in the reasoning of those who maintain that public access is a fundamental human right. One such link lies between the claim that public access is valuable and/or essential to democracy and the claim that it is a fundamental human right. Support for this contention appears to be based upon practical considerations. For example, Mackaay observes that the US freedom of information legislation is more often than not used by commercial interests seeking to gain competitive advantages, which is hardly related to the participation of citizens in government (Mackaay, 1992, at p.173). There is also, of course, the classic British cultural sceptic's view, which would argue that public access is unnecessary because British democracy has functioned for so long without it. (The issue of exactly how *well* it has functioned to date is beyond the scope of this article to consider, although it is plain that there is now more public support for open government in Britain than in previous years.) However, some possible theoretical support for the existence of this particular missing link might be derived from the theories of Gewirth and Raz, as will be discussed shortly.

The second, and equally important, missing link lies between public access and the fundamental right to freedom of expression: it is evidently not abundantly clear that the former is an essential corollary to the latter (see especially Barendt, 1992). Evidence to support this second contention is often drawn from the case-law of the European Court of Human Rights. The case of *Leander v Sweden* ((1987) 9 EHRR 433) is perhaps most frequently cited (see, eg, Barendt, 1992, at p. 21). The actual handling of this case by the Court has been severely criticised by Tollborg and Lustgarten (*The Guardian* (newspaper) 30 December 1997, article at p. 9). The Court had accepted without question the assurance of the Swedish Government that national security issues were at stake in the case. This enabled the Court to dispose of Mr Leander's claim, that he had been unlawfully refused access to the secret service file concerning him, on the basis of the exceptions to the right to privacy in Article 8(2) ECHR. This was clearly not a prime example of effective judicial protection, for Professor Tollborg, Mr Leander's counsel, was later able to show that the Government had lied, following changes to the relevant law on access to secret service files, and was therefore able to secure compensation for his client. However, with regard to Mr Leander's additional claim, that the initial refusal to grant access to his file was also contrary to the freedom of expression in Article 10 ECHR, the Court's finding that there had been no breach of Article 10 because he remained free at all times to express his own political opinions (see Germer, 1987, at p. 71) does not seem to have been affected by the subsequent revelations. Germer's commentary on this case clearly suggests that there is cause for concern regarding the manner in which the Article 10 right is actually protected by states parties to the ECHR,

but sceptics still question the necessity for people to actually have access to government files in order to express their own opinions freely on any subject, including political issues, the performance of governments and the substance of official decisions. It does not seem to follow that people with access to an MP or MEP will be unable to find an effective means to protest, for example, against a decision they feel to be unjust, unfair or otherwise unfounded, even if they do not know precisely why it had been adopted, or by whom.

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## **IV. Democracy and the right to vote – fundamental human rights, or European cultural privileges?**

This section examines some indications that the right to vote (which is obviously essential to democracy) and the right to live in a democratic society (which may now be regarded as firmly established within the EU) do not actually meet with the definition of a fundamental human right advanced by Gewirth, and are not actually essential to comply with the demands of perfectionist liberalism as advanced by Raz. If these suggestions are accepted, it would seem to follow that no right could itself be classified as a fundamental human right for the sole reason that it was demonstrably valuable to, or even an essential corollary of, either democracy or the right to vote. In any event, however, such suggestions would tend to support the sceptics' case against public access, and must therefore be contested at some stage if the case for public access is to be strengthened.

According to Gewirth, human rights "are...moral rights which all persons equally have simply because they are human" (Gewirth, 1982, at p.1). Such rights are not normally absolute, however (*ibid*, at p.57). Therefore, they must give way to other fundamental rights and to various specified interests, in certain circumstances, all of which (in states parties to the ECHR) are of course open to scrutiny by the European Court of Human Rights (for some specific illustrations see, e.g. Harris, O'Boyle and Warbrick, 1995, at pp. 296-7). When the provision of the right to vote is critically scrutinised, it is not immediately clear that this particular right, although enshrined in Article 3, Protocol No. 1 to the ECHR, is actually quite as "fundamental", in practical terms, to human beings as their rights to privacy and to freedom of expression. Some empirical observations can be used to support this idea.

First, the traditional approach of European courts, when faced with cases involving human rights issues, is of course to examine with care the particular circumstances of the individual(s) claiming the right(s) in question. The right to vote, however, is in practice denied to a large number of individuals on the basis of a broad assumption to the effect that all persons under 18 years of age are emotionally and intellectually incapable of voting. No careful scrutiny of the particular circumstances of any individual 16- or 17-year-olds ever takes place, although 16- and 17-year-olds are apparently sufficiently competent at law to endanger their own health (and the health of others) by smoking, and are even competent to start families of their own. It would of course be impractical for any state to attempt to scrutinise each individual potential elector for competence to be given the right to vote. Nevertheless, the denial of a right to a large number of people on the basis of their age alone, without any consideration of their particular circumstances, does not accord particularly well with Gewirth's suggestion that people only need to be human beings in order to have fundamental human rights, unless there are particular individual circumstances or objectively-specified interests that can clearly be seen to justify the denial of such rights.

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Secondly, in Gewirth's terms, fundamental human rights (in his terminology, "generic rights") are those which a "rational human agent" *must have*, as a matter of pure logical necessity (Gewirth, 1982, p.47ff). However, following the 1999 European Parliamentary election, it seems that 77% of voters in England and Wales chose not to exercise their right to vote, which does not accord with the notion that people cannot logically choose whether or not to accept the fact that they require a particular generic right. If a right is absolutely necessary, common sense suggests that most rational human agents would actually exercise it, given an opportunity to do so.

This second observation does not necessarily show that the right to vote is not a fundamental human right, however, for two reasons. First, people who have the right to vote evidently retain it, whether or not they choose to exercise it. Simply because a person might be unwilling to vote in one particular election does not imply that s/he would willingly relinquish the right to vote *per se*. Secondly, Raz has argued that although a right may be perceived as being of little worth to the actual right-holder, so that they personally do not care whether they actually have it or not, its existence may nevertheless serve the general or common good (Raz, 1994, at p. 30 and pp. 36-40). It is difficult to regard a democratic society as anything other than a general or common good (*ibid*, at pp. 137-8).

Thirdly, in support of the view that the right to vote may not actually be fundamental, EU migrant workers evidently seek to make a comfortable living for themselves and their families in another Member State and, whilst resident there, to enjoy their daily lives without undue interference from their host government. However, they have not actually been given the right to vote for that host government by the Member States, either acting collectively in the Council (i.e. via secondary legislation) or during revisions of the Treaties. Therefore, it would appear to be the case that for Citizens of the Union, Community rights of free movement have actually acquired more importance than the right to participate in the democratic government to which they currently owe allegiance as migrant workers (assuming, of course, that this allegiance is not owed on a very short-term basis, but that the worker intends to be present in the host State for a number of years).

In light of this third observation in particular, and in view of the self-evident fact that all EU citizens are human beings, but not all human beings resident in the EU are citizens possessing the right to vote, it could be more convincing to characterise the right to vote as a specific right of citizenship, instead of a fundamental human right. The right to vote is evidently granted by amenable (i.e. liberal democratic) states to persons who meet certain defined criteria (subject to possible revision from time to time) in terms of their nationality, age and personal conduct (since the right to vote is also denied to lawfully convicted prisoners). If fundamental human rights are indeed, as Gewirth says, those rights without which people cannot achieve a satisfactory standard of living, then it may be that rights of citizenship have a lesser status. This would not necessarily be true in moral terms, but it would seem to be plausible in purely practical terms. The right to vote does not appear to be "fundamental" to any person in quite the same way as freedom from torture (Article 3 ECHR) would be necessary, in order for him/her to be able to live a comfortable, enjoyable life (cf. Raz, 1994, at p. 137: "the value of the right to vote largely depends on the symbolic recognition of full membership in the community which it expresses, rather than arising out of the value of actually being able to vote...").

In order to show that, notwithstanding the foregoing arguments, the right to vote is a fundamental right which is unjustifiably denied to people born subject to other, non-democratic regimes, it would first have to be shown that there is in fact a fundamental human right to live in a democratic society. The right to vote is evidently essential in order to maintain an effective political democracy (see, at para. 42, the European Court of Human Rights in *Matthews v United Kingdom*).<sup>(2)</sup> However, it is difficult to imagine another interest or purpose that the right to vote might serve.

In connection with democracy itself, the theories of Raz and Gewirth certainly seem at first glance to endorse the popular view, that a democratic society is the best type of society in which to promote and protect fundamental human rights. Not surprisingly, this view is frequently encountered in the opinions of European (and North American) legal, political and philosophical commentators (see, e.g., Curtin and Meijers, 1995, at 399; Benn, 1979; Jacot-Guillarmod, 1987, at p. 43; and Tenekides, 1987, at p. 42). Nevertheless, it calls for careful definitions of "democracy" and of "a democratic society". The Confederate States of America could be regarded as democratic from a certain point of view, yet they failed to protect, or even to acknowledge, the fundamental human right of African-Americans to freedom from slavery (protected in Europe by Article 4 ECHR). Democracy, therefore, would evidently have to mean something other than the system obtaining in the Confederacy.

Raz, however, argues in favour of a "liberal culture" (Raz, 1986 & 1994), which may be distinguished as a concept from democracy. Even though democracy appears, on the basis of empirical observation of the world today, to be a very good method of obtaining such a liberal culture, it is by no means failsafe, as evidenced by the historic case of the American Confederacy (and possibly by the swift rise to power of Hitler in the Weimar Republic, which appears to have been facilitated by extreme popular discontent with the Republic itself). Nor is it theoretically necessary to operate a democracy in order to secure a liberal culture: all that is required in Raz's terms is a *sufficiently* liberal culture, able to offer to people a *sufficient* range of options from which they might choose their way of life. Thus, the People's Republic of China is most certainly not a democracy as Europeans understand the term, but it has nevertheless recognised basic human rights and affords its nationals a range of options so that they can then pursue autonomous lives.

In contrast to Raz, Gewirth explicitly asserts that it is necessary to give each person a right to participate actively in the political processes leading to the creation of law and government (Gewirth, 1982, at p. 61-2). This certainly seems to suggest that there ought to be a fundamental human right to live in a democratic society (and to vote). However, this particular contention is less well supported in logical terms than Gewirth's principal argument. This argument states that people should respect the Principle of Generic Consistency (PGC), whereby every person must respect the generic rights of every other person. It does not seem to follow that people require democratic government in order to ensure that they observe the PGC, a version of which has of course been in existence since Biblical times. In order for Gewirth's theory to be put into practice, a particular type of culture is required, in which people value each other as well as themselves. Such a culture could easily be equated with Raz's "sufficiently liberal culture", but, as stated, this would not necessarily be a democracy in the European sense. Gewirth does contend that democracy is "morally preferable", because it can help to avoid excessive economic and political power concentrating in some hands at the expense of others (*ibid*, at p. 327). Nevertheless, to claim that something is morally preferable does not prove that it is necessary. Nor does the existence of democracy offer any guarantee that imbalances of power will be compensated for, so that it could honestly be claimed that there would be no "have-nots" in a democracy. Again, much would depend on the precise definition of the democracy being contemplated.

It is not possible in this article to fully address the question of whether there actually is, or should be, a fundamental human right to live in a democratic society of the type obtaining in EU Member States. This particular right evidently lacks universal acclaim in global terms, however. In order to show that the right is "fundamental" and that it is being unjustifiably denied to a substantial proportion of the world's population, legal and political philosophers will obviously be required to convince both authoritarian governments and their subjects of this fact. Arguments based upon moral preferences alone will no doubt always be treated with some caution, if not outright scepticism, as morality evidently means different things to different cultures, and the notion of morally preferable government clearly means radically different things to libertarians and liberal democrats, for example, even within

the European/American democratic culture.

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Convincing the world of the need for democracy may also prove to be a depressingly challenging task, particularly in view of the continuing support for authoritarian government in the former East Germany, and in Russia. Those who do not value democracy must, in effect, be convinced by legal and political philosophers that they are deluding themselves, that they cannot possibly be happy unless they have an opportunity to participate in government decision-making and, basically, accept democratic cultural and social values in place of their own, even though they might honestly be willing to fight and die in defence of their current cultural and social values. It is not, of course, inevitable that those who reject European-style democracy will also reject fundamental human rights as a matter of course (otherwise neither China nor the former Soviet Union would have entered into any international human rights treaties with European states). However, it is much more likely that fundamental human rights will be rejected unless they are unequivocally based upon *shared, universal* fundamental human values. So, the states of Europe and North America may band together in international accord and designate certain "fundamental human rights" - rights to live in a democratic society, to vote, or even to inspect government documents - but unless they are able to justify the claim that such rights truly have fundamental status by means of a convincing philosophical argument, they risk creating a situation in which certain people will be said to enjoy a fundamental human right, not because they are human, but because they happen to be citizens or residents of a European or North American state.

Perrott has suggested that a right can be recognised as fundamental if a "sufficiently large proportion of individuals in the relevant society" decide to claim it, since this would give the claim a sufficient degree of objectivity (Perrott, 1973, esp. at p.10). This method of approach, however, would not necessarily ensure that the right thereby claimed would meet Gewirth's definition. There would be no guarantee that it would be accorded to all people, everywhere, simply because they are human. There is a similar problem of non-universality in connection with the Swedish right of public access: although accorded to non-citizens, as noted, this right is evidently only going to be valuable to people who wish to have access to documents actually held by Sweden's public authorities. It will not help people struggling to gain access to British or EU files. In order to ensure that the enjoyment of any right designated as "fundamental" does not depend on an accident of birth or residence, and in order to compensate for any lack of a convincing philosophical justification for the status of the right, universal acclaim by all governments seems to be required (cf. van Boven, 1982, at pp. 43-5, who suggests that fundamental rights actually owe their special status to international acclaim). All the governments of the world could, in theory, agree that even though a right may not appear to be a fundamental human right in purely philosophical terms, they will provide it as such anyway. It would then seem to be morally wrong to start arguing that people need not have, or even that they should not have, that particular right. It would be morally wrong on Raz's terms in particular, because there seems to be no reason at all why governments should not aspire to give people as many rights as they feel capable of giving them. The granting of many rights can only imply that a government is truly liberal in terms of its culture.

## V. Public access revisited

The highly sceptical arguments that apparently remain to be addressed may, as indicated, be weakening the case in favour of adopting a credible public access regime at EU level. Excluding objections based on such material considerations as the need to provide resources (archives, personnel, etc) in order to facilitate public access, there appear to be seven major objections to the claim that this is actually necessary to a democratic society, and/or the claim that it is a fundamental

human right. These are summarised below, in order to facilitate critical scrutiny.

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The first objection is based on the arguments considered in the previous section. To a sceptic, it may not be clear that there is actually a fundamental human right to live in a democratic society, or to vote, therefore any right that may be fundamental (in the sense of a prior requisite) to the exercise of those particular rights of citizenship, might not itself qualify as a fundamental human right purely for that reason.

The second objection was suggested by Barendt (Barendt, 1992, at pp. 21-22). In a democracy, information should flow from the government to the electorate. The electorate should not need to go in search of information in order to be able to exercise their right to vote, etc. The "should" in this context is heavily laced with the idea that a democratic government has a moral duty to keep the public adequately informed about issues that concern them. Therefore, there simply should not be any need for people to claim novel fundamental human rights as against a democratic state, in order for that state to operate as a liberal democracy. The moral duty of the state to provide sufficient information already exists - or, at least, it ought to.

In an imperfect world, however, and especially in the wake of the scandal surrounding the European Commission earlier this year, it does seem unreasonable to expect those in a position to manipulate the flow of information to be unfailingly truthful. Possibly one of the earliest examples of "spin doctoring" in history involved Gregory Potemkin, the Tsarist Russian official whose deception of Catherine the Great lent us the phrase "Potemkin village" (a situation in which everything appears to be as it should, but only upon a casual inspection). Evidently, officials cannot always be trusted to comply with their moral duty to govern according to the best interests of their subjects. There is no particular reason to believe that officials will comport themselves more or less honestly depending on whether they have actually been elected or appointed to office.

This seems to answer the second objection: officials cannot be trusted to supply sufficient, and accurate, information, therefore the public should be able to keep watch over them. However, the example of Potemkin shows that subordinate officials can manipulate information to which their superiors should certainly have access, even in a primarily secretive regime such as that of Britain. Therefore, if democratically-elected officials do fall prey to corruption and fail to comply with their moral duty, it is not immediately apparent that granting a general right of public access will actually prevent them from actively concealing certain important facts. If the facts concerned fall within the remit of the inevitable exceptions to the right of access, such as the perennial national security or public interest exception, it is difficult to see how the public might help to disclose instances of official "cover-ups" when even responsible Ministers might be kept in ignorance of the truth. It is worth noting at this point that exceptions to the right of access are inevitable because *complete* openness, in a world still divided politically into sovereign states that may not always enjoy friendly mutual relations, could render a state vulnerable to its potential enemies (Hondius, 1987, at p.17).

Leigh and Lustgarten, recognising the inadequacies of current Freedom of Information legislation worldwide, have proposed creating an Information Tribune, perhaps best described (with reference to the Swedish culture) as a "super-Ombudsman", with powers to carry out "dawn raids" on the homes, offices and computers of suspect officials, if need be (Leigh and Lustgarten, 1996, at 715ff). Something like this official seems to be required in order to ensure that matters traditionally recognised as lying outside the public domain (national security matters in particular) are less vulnerable to corruption than they are at present. The question *quis custodiet ipsos custodes?* remains valid, even in a democracy (and even in connection with a super-Ombudsman), but it is not clear to

the sceptics that the best answer is "the general public". As Dyrberg says, most members of the general public would not actually make use of a right of public access if they had one (Dyrberg, 1999, at 158). Journalists and academics probably would (*ibid*) but the former cannot always be trusted to be free from bias, and the latter do not always reach a wide enough audience if they succeed in uncovering something that the public should know about.

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It seems that a general right of public access could constitute a certain, limited safeguard against official corruption, by making officials aware that the general public have a right to see what they are doing, but this may not be enough. It could be more useful to appoint an Information Tribune, and perhaps to employ inspectors or auditors to carry out random, surprise inspections of local government, Ministries, and even privatised agencies in order to make sure that good administrative practices were being complied with, than to trust some public-spirited citizen or other to perform this task. Public officials might then have good reason to believe that they were under close scrutiny. At the very least, they would face a threat of being exposed to effective scrutiny at any moment. They should also face immediate, strong disciplinary action if found to be guilty of corrupt practices. This idea leads to the third objection to public access: it seems unrealistic to expect the general public to thwart the threat of corruption, when the state should (again, morally speaking) already be doing all in its power to ensure that corruption cannot take root in government. Or, to put it another way, if the state is already corrupt and untrustworthy, granting a general right of public access would not necessarily resolve this particular problem. There would always be, as Birkinshaw puts it, "the spectre of the file behind the file, the meeting behind the meeting, the state behind the state" - in other words, the very granting of public access could itself prove to be a Potemkin village, and the public would never know the truth (Birkinshaw, 1996, at p.49).

The fourth objection was also suggested by Barendt, but may be supported by reference to Beers. Concerning *Leander v Sweden* (cited above), Barendt notes that Mr Leander's claim could have been settled by reference to his fundamental right to privacy, whereas the Swedish right of public access is linked to the right to freedom of expression (Barendt, 1992, at pp. 21-2). Beers' contribution to the public access debate also suggests that a *general* right of public access, such as that contemplated for the EU, would not have been necessary for Mr Leander to have succeeded in his claim (assuming that the European Court of Human Rights had been more willing to question the national security issues that were allegedly at stake). According to Beers, there are in fact four distinct *rights* of access to official information, that may be granted to a greater or lesser extent in various States (Beers, 1992, pp. 178 *ff*). There is a right of *official access* to documents, whereby public officials and judges may inspect government files; a right of *party access* whereby parties to a given court case may seek discovery of documents; a right of *personal access* (whereby people such as Mr Leander could ensure the accuracy of any information concerning them in the State's files and thereby protect their privacy); and a residual right of (general) public access by which everybody might be given access to a limited category of files (not necessarily including the type of file in which Mr Leander was interested).

The classic British sceptical viewpoint, as indicated earlier, constitutes a fifth objection to the need for public access. Quite a large number of empirical observations might be advanced in order to suggest that democracy in fact functions perfectly well without public access.

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First, it could be argued that public access would not, in all probability, completely resolve the

problem of official corruption (as noted earlier), nor would it necessarily avail a maligned individual against his government if the judiciary was not prepared to step in to help (cf. *Leander v Sweden*). The sceptic might argue that a strong, independent judiciary is an inherently better "guardian of the guards" than the general public, in a democracy. Whilst acknowledging that public access could stimulate public awareness and debate of important issues, it could be argued that this is the job of the Opposition and the press. Furthermore, people in all Member States have ready access to empirical evidence regarding the performance of their government, so far as certain important policies are concerned, and can use this in order to help them decide how to vote at the next election. (The 'Eurobarometer' survey would, obviously, not be valuable if people were not also able to form opinions on the performance of the EU Institutions.) The sceptic could go on to argue that public access alone will not bolster public confidence in the government if it is not already performing to the satisfaction of most people, in those key policy areas concerning which they normally have empirical evidence to hand. These policy areas include the general economy (most people are aware of their own purchasing power); education (many parents are able to choose a school for their child(ren)); health (most people know the cost of NHS treatment, and many know about waiting lists); and (un)employment (the unemployed will certainly know how easy it is to find employment and will not therefore be impressed by any spurious governmental claims). Crime is a particular problem: as legal sociologists well know, even if statistics are fully, honestly and accurately reported to the public, they may be curiously unrevealing. A fall in reported crime might indicate, not so much that the police are doing a good job in preventing crime, but that people are so unhappy with the performance of the police and/or courts that they simply no longer bother to report offences to which they have fallen victim. From a sceptical viewpoint, it might be asked how, if at all, public access might help to uncover the reality of such a situation.

Regarding access to information and the freedom of expression, the sceptic might argue that, although people undoubtedly require access to information in order to be able to express themselves, they first require access to a balanced, objective and honest education, so that they might effectively assess the empirical evidence available to them concerning the performance of government. They then require access to information freely provided by other people, which, obviously, facilitates social contact. They would also benefit from a free and fair press, to keep them advised about matters they might not otherwise learn about. (Granting a right of public access might not necessarily resolve any problems relating to fairness in the press). Finally, people require notification of the criteria upon which certain decisions will be made by officials (e.g. regarding the provision of social security benefits). It would then be pointed out that such information is already available. It seems to be sufficient to enable people to express themselves in any way they choose, even to stand for political office. It is not therefore immediately clear why people also need to know the *minutiae* of daily government business, in order to be able to express themselves. (Further support for some of these contentions is provided by Barendt, 1992; support for some others is furnished by Birkinshaw, 1996).

One area in which public access might initially seem to be of great potential benefit is in the field of environmental policy. Many members of the general public are at least vaguely uneasy about such matters as ozone depletion, G-M foods, nuclear waste, global warming, acid rain etc. and feel that they have a right to know what is taking place in their environment. However, it might be asked whether members of the general public actually have the necessary expertise to validate for themselves the conclusions drawn from any raw scientific data concerning such issues, however honestly, completely and accurately such data might be published. This suggestion is not intended to cast any slur on the intelligence of any member of the general public, but to question the extent of his/her actual knowledge and experience. For example, the issue of the safety of mobile telephone use is currently controversial. One day, it seems, a scientist may announce that is safe for people to use

mobile telephones, the following day another scientist may suggest that mobile telephone use might result in a brain tumour. It may be doubted whether more than a very few members of the general public could resolve this controversy by examining the actual reports of the scientific studies into mobile telephone use themselves, unless they already had some expertise concerning "safe" electromagnetic radiation levels and the effects of such radiations on human health.

This sixth objection is a special case of the more general argument, that members of the public are not necessarily the best "guardians of the guards" in a democracy. It might be more useful, to ensure the accuracy of environmental information and the validity of a government's environmental policy, to establish a truly independent panel of environmental experts, who could be trusted to advise people honestly about the government's performance in respect of making the environment safe, and trusted not to allow products to enter the consumer market until it was either known that they were safe, or that all the potential risks had been duly highlighted. Obviously, such experts, like the Information Tribune proposed by Leigh and Lustgarten, might not prove to be incorruptible, but the same could be said of any independent authorities established to monitor the activities of any government. The problems of preventing and exposing corruption might never be completely eliminated, although further consideration of this particular issue is beyond the scope of this article.

The seventh, and final, principal objection to public access is related to some extent to the second objection. Raz speaks of a "relationship of trust" between the governed and the government (Raz, 1994, p. 353), and it is evident that such a relationship is necessary if democracy is to function effectively. Democracy obviously offers plenty of scope for endless debate: therefore, at some point, in the interest of actually getting things done, decisions must be made and issues "resolved" (cf. Marsh, 1987, at p. 5). The task of "resolving" national and international dilemmas and making high-level decisions must, in a democracy, be delegated to people who can be trusted to look after the best interests of the public. People cannot, and therefore should not, trust public officials to be incorruptible, but if the public cannot trust officials from the very moment of their appointment/inauguration/election to act in accordance with their moral duty to defend the public interest, it would seem that there must be something fundamentally wrong with society, that could not be cured simply by granting a right of public access. The Swedish culture certainly seems to be based upon a healthy mistrust of public officials, as noted earlier: it apparently respects the notion that power corrupts to a far greater extent than, say, the traditional British faith in ministerial responsibility. If such mistrust ever became pathological, however, it could perhaps lead to widespread paranoia and a feeling that, in spite of public access, nobody could actually be trusted to govern. Obviously, this idea refers back to Birkinshaw's aforementioned "spectre" of the "file behind the file". Furthermore, while supporters of public access contend that it increases administrative efficiency and the quality of decision-making (see, e.g. Eliasson, 1997, at p.34), opponents simply maintain that it would *decrease* administrative efficiency and perhaps expose decision-makers to unnecessary challenges (see, e.g. Birkinshaw, 1996, at p. 49). It would be extremely unfortunate if, following the introduction of a right of public access, people came to believe that democracy, instead of being the best available system of government, was actually the best of a very poor range of options. It could appear especially ironic, given the notion that public access is valuable to democracy, if this were to happen because people started to believe that they could not trust any elected official to comply with his/her existing moral duty to act in their best interests, without having the right to look over his/her shoulder at all times - and perhaps not even then - or because the introduction of public access simply did not have the beneficial effect that it was supposed to (cf. Birkinshaw, 1996, at p. 14: "Ironically, freedom of information could make us a very undemocratic and very unprincipled, indeed a more callous society").

## VI. Conclusion

This article has sought to summarise the main objections to the claim that public access is a fundamental human right, and/or essential to democracy. As indicated at the outset, these suggest that a more vigorous defence of the right - showing, in particular, exactly why it should be given "fundamental" status - is required in light of the fact that the arguments offered to date do not appear to have silenced the sceptics.

If the objections referred to cannot convincingly be dismissed as unfounded, and if the ultimate aim is to secure more democratic legitimacy for the European Union, it may be desirable to look for an alternative method of ensuring that the EU becomes a "People's Europe" than by seeking public access to the files of the Institutions. It might, for example, be better to concentrate upon the issue of how (relatively powerless) individual citizens could ensure that their legitimate concerns were actually being heeded at EU level. The development of a truly liberal public access culture at EU level will almost certainly be hindered, or at least delayed, unless and until everyone who might possibly influence the least liberal Member States has been convinced of the need to adopt a Swedish-style regime. Scepticism and doubt concerning this need seems to be rife, at the present stage of the debate. On the other hand, there might be much less scepticism, in all the Member States, concerning the need for decisions to be taken as closely as possible to the people. If that were so, subsidiarity could perhaps have more potential as a means of developing a "People's Europe" than public access. Obviously, that idea requires further consideration and discussion. However, before the issue of public access to Community documents might be abandoned in that manner by those who seek to democratise the EU, it seems to be both necessary and desirable to give it some further consideration, as well.

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## Endnotes

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(1) "The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions."

(2) Application No. 24833/94, Judgment of 18.ii.99, available via <http://www.dhcour.coe.fr/>.

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