

Uncovering the Public Sector:

Freedom of Speech for civil Servants, Information Agencies and Access to Information

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The three main elements of the subject-matter, to be understood in combination

The relevant provisions of the Constitution of Norway (1814, amended 2004) as an *example* (not necessarily as a model)

Ideal and reality: Challenging in Norway as everywhere

1 a Why freedom of expression for public servants?

Point of departure: Art. 100 § 2 (democracy, truth, individual autonomy)

Covering public servants as well: Individuals/Members of the society

Strengthened for public servants. In general:

- Educated people, huge knowledge (individually or at least as groups)
- Needed in the public debate

In other words: In their own interest, but even more in the interest of the society/the common good

- Good governance
- Anti-corruption

Thus: Important element in the open/transparent society

Regard in conjunction with the right to info on the initiative of others/the right to require info *even if* public servants remain quiet/refuse to speak/take part in the open formation of the common good

1-b The extent of the freedom of speech

Internal freedom (within the services)

The ideal:

- Without undue fear for negative sanctions, destroyed career ...
- In the minister's/political leader's best interest to hear any kinds of arguments (counterarguments included) in time
- In the society's best interest

External freedom (in society)

- Point of departure: Yes!
- Quite evidently legitimate limitations
 - o if politically neutral bodies supposed to serve changing/different political parties and/or personalities
 - o if particularly sensitive posts
 - diplomatic, military ...
 - close to the political leadership (the top civil servants, etc.)
 - when speaking in the name of the government/the relevant body

- What remains is therefore that the point of departure (cf. Art. 100 § 3) applies for
 - o those speaking in their own name and
 - o (a fortiori) on questions belonging to other parts of the public sector than their own

2 Information agencies/spokespersons

Speaking on behalf of the government/the relevant responsible leader or administrative body

Useful because

- adding to the public knowledge of presumably important matter of common concern on their own initiative
- facilitating "outsider's" access to experts or files

But sometimes untrustworthy or even dangerous

- Always acting on behalf of key actors and in their interest
- Possibly selective approach (if not direct lies)
- Possibly monopolizing info from the "inside" to society

3-a Right to access to information

If/When the "inside"

- Remains silent,
- Provides incomplete or even misleading information, or
- In case of distrust (which should always be kept alive!)

Right to access to public files *on the initiative of "outsiders"* becomes vital

Great varieties in law and practice within Europe (the "North" tending to be more open than the "South", etc.).

With similar reservations, the *point of departure* remains (or at least: should be) the one enshrined in Art. 100 § 5 f the Const. of Norway

Legitimate limits may include references to the privacy of other private citizens, to concerns regarding security, to the need for uninterrupted internal considerations ...

The other way round: The right to access is (or at least: should be) extended towards publicly owned companies, monopolies, etc. and – not the least – to correspondence between such entities and the government (and other public bodies)

In order to make the right to access operational, several remedies are (or at least: ought to be) called upon, like

- the opening up of data registers/files
- the right to recourse against refusals to grant access

3-b Potential misuse: The minor problem

Media – a nuisance (or at least unpleasant)?

- Not always trustworthy
- Insisting on minor items
- ...

Yes, certainly!

But please consider the price to be paid if access was closed due to similar considerations, for

- Good governance (on behalf of the “people”/the tax-payer)
- The possibility of trust-building (not the least when no “scandal” or misuse is found)

Together with systems for trustworthy accountancy, audits, statistics, etc.:

As much transparency as possible

- imposed by law,
- reasonably observed in practice by public bodies and
- actually used by the media (and by civil society actors),

is invaluable as a tool in the interest of all – i.e. of the society.

Attachment:

**The relevant provisions of the Constitution of Norway as an
*example***

Constitution of Norway (1814)

Article 100 (as amended 2004)

There shall be freedom of expression.

No person may be held liable in law for having imparted or received information, ideas or messages unless this can be justified in relation to the grounds for freedom of expression, which are the seeking of truth, the promotion of democracy and the individual's freedom to form opinions. Such legal liability shall be prescribed by law.

Everyone shall be free to speak his mind frankly on the administration of the State and on any other subject whatsoever. Clearly defined limitations to this right may only be imposed when particularly weighty considerations so justify in relation to the grounds for freedom of expression.

Prior censorship and other preventive measures may not be applied unless so required in order to protect children and young persons from the harmful influence of moving pictures. Censorship of letters may only be imposed in institutions.

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

It is the responsibility of the authorities of the State to create conditions that facilitate open and enlightened public discourse.