

Access or Re-use of PSI? A Cookie if You Get it Right!

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Abstract. This paper addresses the difference between the right of access of the citizen to information held by the public sector, and the re-use of public sector information. It argues that the distinction is difficult to maintain in a continuously evolving information society and questions whether the definition of re-use in the European directive on the re-use of public sector information should be revisited.

Keywords: public sector information; re-use; access

1 Introduction

Public sector bodies are increasingly confronted with demands for their information from third parties. For instance, as part of the growing trend towards openness and transparency, citizens want to obtain access to public sector information (PSI) in order to check if their governing authority has made the right decision on their taxes, building permits, etc. Next, PSI is also an interesting resource for the private sector to create information products and services and sell them on the market, or to develop their business or marketing strategies. Private companies consider PSI reliable and sustainable, and want to save on the sunk costs linked to the collection of data [1]. However, the rules for obtaining the PSI are not clear, which prevents these stakeholders from fully benefiting from its availability.

2 Access v. Re-use

Essentially, the obligation of public sector bodies to make PSI available to the citizens stems from national and international regulations on access to government information, such as the Freedom of Information Act, the Council of Europe Convention on Access to Official Documents, or the European Directive on Public Access to Environmental Information. The use of PSI by the information industry is governed by the European directive on the re-use of public sector information (PSI directive) and its transposing legislation. The difference between both types of use

lies in the purpose. Access can be described as the right to obtain information to check up on the proper functioning of the public administration and to exercise one's democratic rights or obligations. Re-use has an economic slant and is aimed at the development of the information market and the information industry [2]. As both types of use are fundamentally different, the applicable rules also differ with regard to the charges that can be made for the information, the possibility of licensing and use restrictions, etc.

3 Difficulty of the Distinction

However, new developments in media, internet and information technologies have made it very difficult for the public sector bodies to know which type of use they are dealing with. This is caused by the concept of re-use as it is defined in the PSI directive and the national legislation on re-use of PSI. Re-use is the use of PSI for "commercial or non-commercial purposes other than the initial purpose within the public task for which the documents were produced". Hence, re-use comprises any use of documents held by public sector bodies outside of the public task, whether for commercial or non-commercial purposes, and not just the creation of information products and services by the information industry, as was originally intended by the European Commission [3]. However, the distinction is not always easy to make.

Two traditional examples can already show this. In some cases, whether PSI is requested for access or re-use purposes is impossible to determine, because a particular request for information involves both a democratic purpose and a more economic or even truly commercial one. For example, journalists have traditionally been allowed to make use of national access legislation to obtain information from the public sector to publish articles about national and international policies, and to hold government accountable for its actions. They are regarded as the watchdogs of democracy, protecting the citizens from political arbitrariness. However, with the increasing globalization, convergence and commercialization of the media, journalists and newspapers are under increasing pressure to sell news items and to generate income. So journalists also just want to use PSI to make money. From this perspective, they would fall under the definition of re-use. So under which legislation should they apply for public sector documents? Another example is a lawyer filing a request to obtain PSI to defend his client in a court case. On the one hand, he performs such an activity in order to do the job that his client has entrusted him with and to obtain his lawyer fee. Hence, he is re-using PSI. On the other hand, such requests have traditionally also been dealt with under access legislation. In addition, the fundamental character of the right to defend oneself in a fair trial is an inherently democratic purpose in a state governed by the rule of law, which should be treated under the rules for access. Again, one could ask which legislation has to be applied.

While the previous two examples already show that the broad definition of re-use causes difficulties to distinguish such re-use from access, the web 2.0 developments have multiplied this problem. An ever increasing number of individual citizens use PSI as a part of user generated content on blogs, forums, communities, etc., or they

use PSI in data mashing activities to provide not-for-profit services to the community [4]. Wikipedia and OpenStreetMap are well-known examples, but there are many more. As these communities, blogs and other initiatives do not start from a truly “democratic” intention, they can be seen as a type of re-use. However, they also have the ability to increase public participation and they stimulate the freedom of expression and information. Hence, there is also an element of access involved. It may depend largely on national traditions and interpretations by the public sector bodies of the national access rules and PSI legislation which type of use will be considered appropriate. Hence, many users and public sector bodies will not know whether a particular request for PSI involves access or re-use, which leads to legal uncertainty and reticence of the public sector bodies to make their information easily available.

4 Finding a New Definition?

Some countries have realised the consequences of the broad definition of re-use in the PSI directive and paid explicit attention to the broad target group of existing re-users. The United Kingdom’s Office of Public Sector Information has led the way in this development. However, in several other European Member States the public sector bodies are still very confused or not even aware of the possible distinctions between the different types of use. In addition, where the public sector might be aware of the problem, the public bodies might be tempted to develop their data policies more with a focus on re-use rather than access and make the formal requirements, conditions of use or charges more demanding.

As the distinction between access and re-use is difficult and may hinder the development of new web 2.0 initiatives, should it be considered whether the definition of re-use should be narrowed and re-oriented towards its original target group, i.e. the information industry? If re-use only involves the development of information products and services based on PSI, the distinction with access will be much easier to make. However, the consequences of such a reduction of the definition of re-use should be carefully considered and it should be made sure that existing rights of citizens to create blogs, online communities, etc. are not withdrawn, leaving these users in a legal vacuum. Is it possible to include this kind of use under the national rules of access, or can an access-like right be created that safeguards the development of web 2.0 and the information society?

It should also be examined whether a distinction between re-use and access is really needed, and if it is not possible to impose the same conditions on both types of use, in this way doing away with the need for a demarcation. This would lead to a comparable situation as on the United States federal level, where access generally includes the right of use for any purpose. Is this also possible in the European Community?

For citations in the text please use square brackets and consecutive numbers: [1], [2], [3], etc.

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