

Anja-Maria Gardain
Office of the Berlin Commissioner
for Data Protection and Freedom of Information

Paper delivered at the
5th International Conference of Information Commissioners

How do We Design an Effective Oversight Body ?

The Berlin Commissioner for Data Protection (DP) and Freedom of Information (FOI) looks back to only 8 years of ‘expertise’ in FOI-matters, because the Berlin FOI Act entered in to force as late as in 1999 being the second FOI law in the Federal Republic of Germany. 20 years before that, in 1979, the office was established as DP Commission with the status of ‘Supreme State Authority’. This status is only held by an authority, if its rights are guaranteed by the constitution. Thus, Art. 47 of the Berlin Constitution stipulates that to protect the [fundamental] right to informational self-determination, parliament elects a DP Commissioner. He/She is appointed by the Speaker of the House and subjected in person to his/her supervision, but only as far as duties arising from public services law are concerned. The position outside of the administrative hierarchy is the most independent one a control body in Germany can have. It is unique to the DP Commissioners as well as to the Accounting Offices.

This introduction is necessary to make clear and understand right from the beginning that becoming a FOI-Commissioner meant in a way to profit from this kind of strong image the Privacy Commissioner already had. When the Green Party in Berlin promoted the FOI Act, the DP Commissioner supported the proposal by stressing that DP and FOI are not mutually exclusive but 2 sides of the same coin which can be harmonized. Maybe this clear statement of someone who ostensibly should be hostile to the idea of FOI was one of the main reasons why the Berlin FOI Act eventually was passed.

Also, the last political opponents were won by the offer of the DP Commissioner to act as mediator in cases where either the claimant or the public institution needed help. Thus, no new costly institution was necessary. This is one of the pros for our institutional design, having DP and FOI ‘under one roof’. Another advantage of this structure is that there is no time-consuming discussion or even lawsuit between 2 institutions which argue about access to information or non-access because of DP. The split is in our opinion conflicting with one of the main FOI-pillars which is the right to a non-bureaucratic access to information. Having 2 institutions can mean an additional level of bureaucracy to the disadvantage of the requestor.

More details to find out what oversight body could be the most effective for the benefit of the requestor shall be given by using the following 3 categories to show what we have (A), what we do not have (B) and what we need (C).

(A) What We Have...

1. We have a clear office title which reflects both of our functions in ‘chronological order’. We think that this is the most transparent description of who we are and what we do. Other titles as ‘Information Commissioner’ are shorter and more practical, yet less concise because for citizens it is not obvious what stands behind the wide word ‘information’. If we could change the office title, we would swap the functions to show that FOI is the general rule and DP the exception to it.
2. We have a status of ‘Supreme State Authority’ inherited from the DP-status as initially described. An important consequence is that we have our own budget in the amount of almost 4 Mio €per year which is granted by parliament and which guarantees our autonomy.
3. We have a mediating role which is not named in the Berlin FOI Act but widely recognized as such following section 18 para. 2. It states that every person [which includes citizens and staff from public institutions] has the right to call upon the Commissioner for DP and FOI. We encourage the public body to answer the request properly. In contrast, the DP Commissioner acts as stakeholder for the right to privacy.

4. We have a duty to report to parliament. It has established its own (and named as such) 'Subcommittee for DP and FOI' which meets every second week to publicly discuss our findings with us and members of parliament and government departments. Sometimes they can be convinced under the pressure of the politicians to change their attitude. But the minimum result of the discussion is to raise again the awareness for FOI-matters.

(B) What We Do Not Have...

1. We do not have the rights of a DP Commissioner. His 'sharpest knife' in the public sector, the right to lodge an official complaint, is combined with a deadline for a statement which must be given by the public institution. Although this formal procedure reflects a certain intensity of the infringement, the practical effect is limited as the Commissioner's complaint is not binding the agency.
2. We do not have additional budget for FOI-matters. We did not get more money nor more staff for our new task. And we did not claim it for one single reason. Opponents to the FOI law often stated that public institutions would be flooded by FOI-claims so that this new task could not be fulfilled without more personal (which for budget reasons would obviously not be granted). We did not want to fuel this fear by asking ourselves for more staff. This reluctance has led to changes concerning our internal institutional design. The new task of mediator was initially equally shared between the DP-experts in our office, e.g. the expert in charge of DP matters concerning the Home Office was also in charge of FOI requests against the Home Office). The advantage was that everybody was confronted with those 2 sides of the coin (DP and FOI) and not only a few colleagues.
3. We do not have the right to issue decrees or sanctions against public institutions nor do we have the right to go to court. The reason for this was indirectly given in my introduction. As the FOI-role was considered as a kind of annex to the older DP-function with its constitutional background, the new role could not lead to more competences. In view of the time factor, we do not think that these rights make an oversight body more effective (as long as the claimant has his own right to go to court).

(C) What We Need...

1. We need more manpower. There is only one person in our office (myself) doing the mediating job in addition to other tasks. With more staff our office could do 'own motion investigations'. For example we would like to verify whether the agencies follow the rule in section 17 para. 4 Berlin FOI Act. It states that every public body must have indexes which indicate the order and existence of files as well as their purpose. Also, we could offer regular FOI-training for civil servants at the Academy of Administrative Studies.
2. We need more interaction with the media to promote FOI. If we have cases which could be of interest for the press, we arrange a contact between the requestor and journalists, but they do not often report on such cases. In contrast, we do not interact too much with civil society organisations (e.g. by joining their press releases) in order to maintain our independent status as mediator.
3. We need a legal duty of agencies to consult our office (at least in cases of doubt). There are still cases which end up in court because simple demands of access to information have been answered insufficiently.
4. We need a legal right to be heard by court, especially if we have been involved before. Sometimes courts do not properly consider our written statements which we have given to the public body. A hearing to make clear what we mean would be most helpful.

At the end of this overview, you certainly share my view that our office does not have too much (executive) power. But don't you think it is in some ways more effective for the benefit of the claimant?
