CENTRE FOR LAW AND DEMOCRACY

Denmark

Comments on the draft Act on Openness in Administration

April 2013

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Introduction

It can be easy for democratic countries to adopt a complacent attitude towards the right to information (RTI), or right to access information held by public bodies. When elections are regular and peaceful, and core human rights are generally respected, people often take for granted that their country is meeting international standards of openness and transparency. The reality can be quite different. Over the past decade, leadership in designing and implementing the right to information has shifted from the developed to the developing world, as many emerging democracies have sought to cement government accountability by establishing robust structures for RTI. By contrast, as global standards have advanced, legal frameworks in many Western democracies have stagnated or even regressed to more secretive models. Nowhere are the implications of this shift more starkly visible than in Scandinavia, the birthplace of the right to information.

The RTI Rating, a comparative analysis of all national legal frameworks for the right to information by the Centre for Law and Democracy (CLD) and Access Info Europe,[1] found significant problems with every Scandinavian country's RTI framework. But even within this weak peer group, Denmark is the worst performer. Denmark is currently ranked 85th out of the 93 countries that have access to information laws:[2]

Country	RTI Rating Score (out of 150)	Global Ranking
1. Finland	104	20th
2. Sweden	95	29th
3. Norway	84	50th
4. Iceland	63	78th
5. Denmark	59	85th

A closer examination of Denmark's RTI Rating score, as derived from the Access to Public Administrative Documents Act which is currently in force (the current law), shows significant problems across every category:

RTI Rating Score of the current law

[1] See www.rti-rating.org for the full results of the Rating globally. Note that the Rating only assesses the legal framework for RTI, not how that framework is implemented in practice. For more information about the two contributing organizations, see www.law-democracy.org and http://www.access-info.org, respectively.

[2] Note that Denmark's score on the RTI Rating website is listed as 63. This discrepancy is because, at the time when the RTI Rating was last updated in September 2012, we had not yet received feedback on the score from a local expert in Denmark. Local expert review is a standard component of the RTI Rating process, which has been done for most countries. As part of the preparation for this analysis we were able to receive expert overview of our scores, which led to a few changes on some indicators.

Section	Max Points	Score
1. Right of Access	6	0
2. Scope	30	16
3. Requesting Procedures	30	16
4. Exceptions and Refusals	30	6
5. Appeals	30	21
6. Sanctions and Protections	8	0
7. Promotional Measures	16	0
Total Score	**150**	**59**

From this analysis, it is clear that Denmark is in dire need of sweeping, root-and-branch reform to improve its legal framework for the right to information. In this context, the decision to propose a revamp of the current law is certainly welcome. Unfortunately, the proposed Act on Openness in Administration (the draft Act) barely scratches the surface of what is needed. The majority of the reforms being proposed in the draft Act are superficial, and the few substantive improvements are countered by a significant weakening in terms of expanding the scope of the regime of exceptions. It may be noted that the regime of exceptions is a key element of the RTI system, since it is effectively the line between what information is available and what is not. An analysis of the draft Act carried out using the RTI Rating shows that the reforms will do little to improve Denmark's standing globally, or to improve access by citizens to the information their government holds.

RTI Rating Score of the draft Act:

Section	Max Points	Score
1. Right of Access	6	1
2. Scope	30	17
3. Requesting Procedures	30	19
4. Exceptions and Refusals	30	1
5. Appeals	30	21
6. Sanctions and Protections	8	0
7. Promotional Measures	16	4
Total Score	**150**	**63**

The draft Act, if passed, would bring Denmark up to just 78th place among the 93 countries which have national RTI laws, tied with Iceland but behind Latvia, Pakistan, Guinea-Conakry and Argentina. In other words, although the proposed amendments would improve Denmark's RTI framework very slightly, it would remain unacceptably weak for a country which prides itself in being an open democracy. In addition to significant problems with the regime of exceptions, the draft Act only weakly recognises the right to information and fails to establish any

sanctions for breaches of the right to information. Effective oversight is also lacking, and there are few measures in the draft Act to promote implementation of the right to information.

The people of Denmark deserve better than to languish in 78th place globally. Indeed, the changes proposed in the draft Act, which we understand has been seven years in the making, represent nothing less than a lost opportunity to put in place a properly democratic regime on RTI. Having made a decision to revise the law on RTI, CLD calls on the Danish government to significantly upgrade the current draft to deal with the significant problems noted in this analysis.

1. Right of Access

The draft Act provides slightly better protection for the right of access but it still fails to meet international standards. Section 1 contains a statement of principles which lists the benefits of the right to information, including promoting participation in democracy, disseminating information to the public and enhancing trust in government. However, the draft Act does not take the next step, which is to require a broad interpretation of its provisions so as to best give effect to these principles. This omission is particularly problematic since Denmark also lacks constitutional protection for the right to information. Because the draft Act is dealing with a human right, its provisions should be interpreted as expansively as possible.

The draft Act also lacks any presumption in favour of access to all public documents. Section 14, which calls on authorities to consider granting access beyond the minimum requirements of the law, is useful but is not the same as creating a strong presumption in favour of access to all information held by all public authorities. Public authorities should be compelled to consider all documents public, unless there is a specific and compelling reason to classify them.

Recommendations:

- Section 1 should be amended to require those interpreting the law to do so in the manner that best gives effect to the statement of principles it contains.
- Section 14 should be amended to include a specific presumption in favour of access to all documents.

2. Scope

The current law contains several problematic limitations on its applicability, the majority of which are carried over in the draft Act. Although the right of access extends to everyone, it does not apply to all information. Section 7 states that the right of access only applies to documents created or submitted to a public authority as part of the administrative processing associated with its activities. According to international standards, a right of access should extend to all information created or held by a public authority. Although certain information can be redacted in accordance with the regime of exceptions, the blanket exclusion of certain categories of information which is held by public authorities is not in accordance with international standards.

Section 10 states that the right of access does not extend to databases. Section 11 permits users to request a compilation of information contained within a database, but only if that compilation can be made using limited and simple commands. While it is understandable for public authorities to seek to limit onerous information processing, the present formulation goes too far. It is reasonable to expect public authorities to carry out reasonably complex processing in order to fulfil an access request, so long as this processing does not unreasonably interfere with the overall ability of the public authority to function. An even better solution in many cases would be to allow user access to complete databases, sparing the public authorities from processing the information altogether. Where certain information in a database was covered by the regime of exceptions, this might be removed or obscured first. This is consistent with global trends in the area of open government.

The draft Act, like its predecessor, applies broadly to the central government, and subordinate bodies, as well as local and regional governments. However, it does not apply to the Folketing (legislature) or the judiciary. These are very serious deficiencies. Oversight over parliamentary documents is critical to proper accountability. Expenses scandals in Canada and the United Kingdom are vivid demonstrations of the type of corruption that can flourish in the absence of proper oversight. Similarly, although Danish court proceedings are public, international better practice mandates that a full right of access to information should be applied to all records of the judiciary, as always subject to the regime of exceptions (including one covering records the disclosure of which would harm law enforcement or judicial processes).

According to section 3(1) of the draft Act, a right of access applies to any organisation or association created by law or with reference to an act, which should mean that all statutory and constitutional bodies are covered. Section 4 extends the law to apply to any company where more than 75% of the shares are owned by a Danish public authority, although this only covers companies which are listed on the

stock exchange. This exclusion should be dropped, since whether or not a company is listed on the stock exchange is immaterial to whether it should be considered a public body. The threshold for ownership should also be reduced. At the very least, the draft Act should apply to any company where a Danish public authority controls a majority of the shares, but a more progressive approach would be to apply a right of access to companies where a Danish public authority exercises effective control over the body, which often happens with a much smaller percentage of shares.

Section 2(2) of the draft Act brings private organisations that "engage in extensive public activities and are submitted to intensive public regulation, intensive public inspection, and intensive public control" within its scope. This is a step in the right direction, but the draft Act should extend to any private organisation that receives significant public funding, to the extent of that funding.

Recommendations:

- The words "as part of the administrative processing associated with its activities" should be deleted from section 7, extending a right of access to all documents created or held by a public authority.
- Section 10 should be deleted, allowing user access to electronic databases.
- Section 11 should be amended to require information processing as long as it would not unreasonably interfere with the functioning of the public authority.
- The draft Act should be extended to cover the Folketing and the judiciary, as well as any company in which a Danish public authority owns a significant share, regardless of whether it is listed on the stock exchange.
- The right of access should apply to any company that receives significant public funding, to the extent of that funding.

3. Requesting Procedures

Clear procedures are a vital ingredient in a robust RTI system, including requirements that requesters should not have to state reasons for their requests or to provide information beyond the details necessary for finding and delivering the information, and that requesting procedures are clear and simple, including an ability to submit requests by any means of communication. Although both the current law and the draft Act are generally silent on these aspects of the requesting procedure, our understanding is that these principles are broadly followed in practice. Nonetheless, it would be beneficial to set these principles out in the law, to ensure that they are universally and evenly respected.

Another key principle for a successful RTI system is that employees of public authorities should be required to assist requesters in formulating requests, and should contact requesters for clarification if their requests are unclear. Public officials should also be required to assist requesters with special needs, such as the illiterate or disabled. Again, our information suggests that Denmark's public authorities generally fulfil these requirements, but it is nonetheless beneficial to spell these practices out in law in order to ensure universal standards.

Section 36 of the draft Act is somewhat ambiguous as to the grounds under which information requests can be transferred from one authority to another. According to international better practice, requests should only be transferred if the authority that received the request does not hold the information and believes that another authority does. In all other circumstances, the authority that receives the request should be the one that answers it. In appropriate cases, that authority may wish to consult with other public authorities before reaching a decision on disclosure of the information.

According to section 16(2) of the current law, requests should be responded to as soon as possible and within ten days of receipt of the request. However, the law allows for virtually unlimited extensions of this timeline, with no sanctions for delays, effectively rendering the deadline meaningless. Section 36(2) of the draft Act improves this by limiting the timeframe for responses to seven working days, but it also fails to place any limits on extensions. Under these conditions, the shorter timeframe is unlikely to improve response times. Extensions should be capped at a reasonable number of additional days. In some jurisdictions, specific measures are put in place to compel better compliance with legal timelines. In Uruguay and Guatemala, for example, failure to respond within the legal time limits deprives the public authority of the right to charge for requests.

Recommendations:

- The draft Act should be amended to state that individuals do not have to provide reasons for their requests and do not have to provide information on their requests beyond what is necessary to locate and deliver the information. The draft Act should stipulate clear and simple procedures for processing requests, and should require public authorities to accept requests made by any means of communication.
- The draft Act should require public authorities to provide assistance to requesters as needed, particularly those with special needs.
- Section 36 should stipulate that the authority that receives the request is the one that should answer it, unless they do not have access to the information.

- There should be clear limits on the length of extensions to the time limits for processing requests and consideration should be given to providing for sanctions where the time limits are not respected.

4. Exceptions

The regime of exceptions is where the draft Act's weaknesses are most starkly evident. In contrast to the minor improvements noted in previous sections, the draft Act is significantly worse than the current law in terms of exceptions.

The right to information is not absolute, but under international law it may be overridden only in limited and justifiable circumstances. Specifically, information should be withheld only if its disclosure would be materially harmful to a legitimate interest, and if the likely harm caused by the disclosure outweighs the public interest in the release of the information. This effectively leads to a three-part test for assessing the legitimacy of exceptions: they should cover only narrow and legitimate interests listed in the law; they should only extend to information the disclosure of which would pose a serious risk of harm to those interests; and they should be subject to a public interest override. Both the current law and the draft Act fail to pass muster in relation to all three parts of this test.

Several exceptions in the current law are either illegitimate or overbroad, according to international standards and better practice. For example, although it is legitimate for public authorities to withhold information the disclosure of which would be harmful to the deliberative process, sections 7 and 10 go far beyond that, exempting any document prepared by an authority for its own use as well as all correspondence within or between public authorities. In the draft Act, internal deliberations are protected by sections 23 and 24, which cover any document which has not been submitted to third parties, in relation to which there is evidence that a minister has required or will require the counsel or aid of the civil service, and which has been exchanged in connection with economic or political negotiations or discussions regarding joint municipal and regional political initiatives. While this is a slight improvement on the formulation contained in the current law, it remains very significantly overbroad. It also lacks any harm test. In other words, information whose disclosure would not in any way harm the deliberative process or the functioning of government can still be withheld under this formulation. By defining "internal information" as including any correspondence that has not been shared with a third party, the draft Act also excludes enormous amounts of information that is not even part of the decision-making process, such as mundane internal memos or administrative information.

Several other wholly illegitimate exceptions are carried over from the current law into the draft Act, including the exception for material gathered as a basis for compiling public statistics or scientific research (section 10(6) of the current law, 27(5) of the draft Act).

Another exception carried over from the current law into the draft Act is for "private and public interests where the special nature of the matter means that secrecy is required" (section 13(6) of the current law, 33(5) of the draft Act). This formulation is incredibly vague and, in essence, grants blanket power to public authorities to classify anything that does not fall under another exception. As such, it is one of the most serious problems with both the current law and the draft Act. The exception for information which should be withheld to protect public supervisory, regulatory and planning activities and measures planned under tax law (section 13(4) of the current law, 33(2) of the draft Act) is also overbroad. Although some information within that category, such as information harmful to regulatory enforcement or tax collection, may legitimately be withheld, the provision as currently phrased captures far more than is necessary.

One exception which has attracted significant controversy in the draft Act is section 27(2), which excludes documents exchanged between ministers and members of the Folketing involving legislation. This has been broadly criticised for its potential to generate secrecy around the legislative drafting process. These criticisms are well founded, and the exception should be deleted. However, it is worth noting that this is just one of the many problematical exceptions in the draft Act. Others include the exception regarding pending legislation (section 20), appointments or promotions in the public sector (section 21), the use of a calendar (section 22), protocols for meetings of state parties (section 27(1)), documents, which have been exchanged in connection with the execution of tasks by one ministry for another ministry (section 27(3)), and the original ideas of scientists and artists as well as preliminary scientific results and manuscripts (section 33(4)). All of these exceptions are unnecessary, and violate international better practice.

It may be noted that for every critique above, there are many countries, both more and less developed, that do not include these sorts of exceptions in their RTI laws, and yet have not suffered any appreciable negative effects as a result of this. It is, therefore, clear that Denmark does not need to protect these categories of information (or to the extent that it is proposing to do).

Another key aspect of a strong regime of exceptions is harm tests, whereby information should only be withheld if its disclosure would harm a legitimate protected interest. Harm tests are signally absent from both the current law and the draft Act. Although several exceptions include a requirement that information only be withheld to the extent necessary to protect substantial considerations, this

phrasing is absent from exceptions for internal documents (sections 23-29), personal privacy and third-party finances (section 30), national defence and security (section 31) and international relations (section 32). The exceptions for third-party privacy and commercial interests also lack any mechanism for consulting with concerned third parties to obtain either their consent to release of the information or their objections thereto. Better practice laws require public authorities to contact third parties in order to obtain their views, including potentially their consent, on the release of the information.

Both the current law and the draft Act also fail to include any public interest override. According to international standards and better practice, even if information would cause harm to a protected interest, it should still be released if the public interest in the disclosure outweighs the potential for harm. For example, documents about police mismanagement may cause harm to the law enforcement process by exposing investigative techniques, but the overall public interest will often be served by exposing the problem, so that it can effectively be resolved. The public interest override is a core ingredient in a strong RTI regime, and its absence is particularly conspicuous in Denmark's framework.

Another key element missing from the current law and the draft Act are sunset clauses, which mandate that protected information shall be released after a period of time (often of 15 or 20 years).

The current law and the draft Act also lack any requirement that, when an information request is refused, the requester must be notified of the exact grounds for the refusal, and of their options to appeal against the refusal.

Together, these deficiencies add up to one of the worst exceptions regimes in the world, which excludes enormous amounts of information that should be accessible. Any serious effort at improving RTI in Denmark should take steps to address this issue. It is extremely unfortunate that the draft Act actually exacerbates, rather than resolves, this problem.

Recommendations:

- Section 23 should define "internal information" as information relating to an impending decision the disclosure of which would harm the decision making process.
- The exceptions for statistics and research data should be deleted.
- The exception for interests whose special nature requires secrecy should be deleted.
- The exceptions for pending legislation, public sector appointments or

promotions, calendars, protocols of meetings, documents exchanged between ministries for the execution of tasks and the original ideas of scientists and artists should be deleted.
- The exceptions for personal privacy, third-party commercial information, national defence and security and international relations should be rephrased to include a requirement of harm.
- The draft Act should include a public interest override, whereby information which is harmful to a protected interest should nonetheless be released if the public interest in disclosure outweighs the potential harm.
- The draft Act should include a sunset clause, whereby exceptions do not apply to information which is more than 15 years old.
- The draft Act should include a mechanism for consulting with third-parties where requests are made for information relating to them.
- The draft Act should include a requirement that requesters whose requests are refused be notified of the exact reasons why, as well as information about their options for appealing.

5. Oversight and Appeals

Effective oversight is critical to a successful RTI regime. The most important element in this is an independent administrative appeals mechanism for requesters whose requests are refused, unduly delayed, or otherwise not treated in compliance with the rules. In both the current law and the draft Act, the main appeal is an internal appeal within the public authority which originally processed the request. Although an internal appeal is a good first step for resolving disputes, alone it does not provide effective oversight since it is not an independent review.

Most RTI regimes, and every progressive RTI regime, provide for an external administrative level of appeal, usually to a dedicated body such as an information commission or commissioner. Denmark has no such dedicated administrative oversight body, though it is possible to file a complaint with the Ombudsman. Experience around the world has clearly demonstrated the importance of having a specialised oversight body as compared to a general government oversight body, like an ombudsman. An information commissioner will develop specialised skills and understanding related to information disclosure and management standards, and will be able to focus solely on promoting openness and transparency. In addition to this general concern, there are specific areas where the Danish approach in the area of appeals falls short of international standards.

First and foremost is the fact that the Ombudsman's decisions are not binding, greatly undermining his or her ability to require compliance with the RTI law. The

most direct problem with this is that the Ombudsman is unable to offer an effective remedy for complainants who believe that information is being withheld illegitimately. All the Ombudsman can do is to criticise the public authority's conduct. This acts as a significant disincentive for requesters seeking to appeal refusals, since even a favourable ruling by the Ombudsman may not result in disclosure of the information they are seeking.

While everyone has the right to file a complaint with the Ombudsman, the Ombudsman's obligation to follow up is less clear. There is apparently no guarantee that the Ombudsman will investigate every case that comes across their desk. In other words, while there is a complaints mechanism which is generally accessible, this may not necessarily lead to a decision or any follow up at all.

Requesters also have a right to lodge a judicial appeal against refusals, but due to the time and expense that this generally entails, it is no substitute for an independent administrative appeal. It is simply unrealistic to expect the vast majority of requesters to resort to the courts every time they are refused information.

Another problem is that neither the current law nor the draft Act contains a definitive statement that, in an appeal process, the government bears the burden of demonstrating that they have acted in compliance with their legal obligations. Given that denials of access to information represent a limited exception to the human right to access information, the onus should lie on the government to justify such refusals.

Recommendations:

- Consideration should be given to creating a dedicated administrative oversight mechanisms, such as an information commissioner, to adjudicate appeals against refusals to provide information or other claimed breaches of the rules.
- The oversight body, whether it is the Ombudsman or a dedicated body, should have the power to make binding decisions, including to order the release of information.
- The Ombudsman should be required to review all complaints in some detail, and to render decisions in all but the most frivolous cases.
- The law should make it clear that, in the course of an appeal, the burden of proof is on the public authority to demonstrate that they acted in compliance with the law.

6. Sanctions and Protections

This is another major area of weakness in both the current law and the draft Act. Neither provides for any sanctions whatsoever for individuals or organisations found to be non-compliant with their openness obligations, even where this is done wilfully. Although the rule of law is strong in Denmark, meaning that sanctions will likely be less important to compliance than in some countries, experience suggests that the possibility of being sanctioned for wilful obstruction of the RTI law is necessary to promote respect by public authorities and officials of their obligations. These should include specific penalties for destroying documents or otherwise undermining the right to information in contravention of the law, as well as some system for redressing cases where public authorities regularly fail to live up to their openness obligations.

Hand in hand with effective sanctions and enforcement are systems to protect public employees who disclose information. This should include immunity for any disclosures or other actions taken in good faith pursuant to the RTI law.

The free disclosure of information is also stymied by the fact that Denmark lacks any form of whistleblower protection legislation, an omission that should be remedied either in the draft Act or in parallel legislation.

Recommendations:

- The draft Act should include sanctions for improperly destroying documents and for otherwise wilfully obstructing the right to information.
- The draft Act should allow for appropriate structural solutions to be imposed on public authorities who regularly breach their openness obligations.
- Public employees should be granted immunity for disclosures or other actions taken in good faith pursuant to the RTI law.
- Denmark should enact comprehensive whistleblower protection legislation.

7. Promotional Measures

Another key feature of a strong legal framework for RTI is promotional measures designed to enhance understanding and implementation of the law. The draft Act contains some minor improvements in this vein, but remains far short of international standards.

One positive development is section 15 of the draft Act, which mandates a system of data management in order to ease processing and accessibility of information. This is complimented by section 16, which mentions establishing registers of certain categories of documents. However, these provisions are limited and are not mandatory. Section 16 should be strengthened to require all public authorities to create and publish registries of all of the documents in their possession.

Section 17 of the draft Act also requires public authorities to distribute certain information on their website about their openness obligations. Public authorities are also required to set up a portal containing acts, administrative directions, draft legislation and statements regarding the right of access by the ombudsman of the Danish Parliament.

Unfortunately, these limited provisions represent the full extent of the promotional measures within the draft Act. Public bodies are not required to appoint dedicated information officers, nor are they required to train officials on the right to information.

The draft Act also contains no reporting requirements for public bodies on what they have done to implement the law, which will make compliance difficult to track. The draft Act also fails to designate a central body with overall responsibility for promoting the right to information or for monitoring compliance with the law.

Recommendations:

- Section 16 should require public authorities to create and publish registers of all of the documents in their possession.
- The draft Act should require public authorities to appoint dedicated information officers.
- The draft Act should require public authorities to train employees on the right to information.
- The draft Act should require public authorities to report annually on what they have done to implement the law, and should designate a central body with responsibility for preparing an annual report, based on these individual reports, to be laid before the legislature.
- The draft Act should designate a central public body with overall responsibility for promoting the right to information.