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Questionnaire on Switzerland

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Preliminary remarks:

As Switzerland is not a member of the European Union, there is no general obligation to apply or transpose the provisions of EU law in the discussed fields. However, Switzerland is bound by the "Agreement between the European Community and the Swiss Confederation concerning the latter's participation in the European Environment Agency and the European Environment Information and Observation Network" (Council Decision 2006/235/EC – L 90/37). The agreement does not contain an obligation for Switzerland to transpose the relevant provisions of EU law in the field of environmental information, but may factually contribute to a similar structure of environmental information as in the European Union and therefore constitute an additional incentive if not to directly impose the same regulatory framework, then at least to choose a similar orientation and design of the legal provisions in this field (on the relation between the Swiss and the European legal frameworks concerning the obligations from the Aarhus Convention cf. *Epiney*, 2011, 1512 et seqq.). In addition to this and more relevantly, Switzerland is a party to the Aarhus Convention and has also ratified the amendment on genetically modified organisms. The Convention only entered into force June 1st, 2014 after lengthy discussions during the ratification process, which mainly focussed on the obligation of granting legal standing to environmental non-governmental organisations (a right which is granted in Switzerland, but politically debated to the point that a so-called popular initiative [proposal for a constitutional amendment], purporting to abolish the access to justice for environmental organizations was launched. The popular initiative was voted upon but finally rejected in 2008.

1) *Constitutional frame, constitutionally guaranteed right of access to (environmental) information? Access to information as a fundamental (democratic) right?*

As for the constitutional framework concerning access to (environmental) information, at least three provisions may be named:

- Generally and most relevantly the **constitutional right to information** enshrined in Art. 16 (1 and 3) Federal Constitution, which is considered to be a part of the more general constitutional right to free expression (Art. 16 Const.). Art. 16 (3) provides for the right to freely receive information, to gather information from generally accessible sources and to disseminate information (cf. Decisions of the Federal Supreme Court [DFC] 138 I 8, cons. 2.3.1). The question whether a source is to be qualified as generally accessible is decided based on the relevant statutory and constitutional provisions. According to the jurisprudence of the Federal Supreme Court, there is not a general obligation of the authorities to inform the citizens about the activities of the administration resulting from the constitutional right to information (DFC 113 Ia 309, cons. 4b). Nor does the constitutional guarantee grant a right to access to information free of charge. However, the charges perceived may not be as high as to inhibit access (cf. DFC 139 I 114, cons. 4 and 4.3). Beyond the constitutional guarantees of Art. 16, Art. 10 ECHR and the relevant case law may provide for a more extensive right of access to information e.g. concerning information not contained in generally accessible sources in constellations where media have to fulfil their function as a social "watchdog" (Társasás a Szabadságjogokért v. Hungary 37374/05 [2009], § 35 et seqq.).
- In its case law, the Federal Supreme Court indicated that under certain circumstances, e.g. where the success of a research project depends on access to

specific sources of information, the **freedom of research and teaching** enshrined in Art. 20 Const. may grant a right of access to information reaching beyond the guarantee of Art. 16(3) Const. (DFC 127 I 145, cons. 4d).

- Finally, in the context of judicial proceedings, the **constitutional right to be heard** (Art. 29(2) Const.) includes the right of access to the files, which has to be granted unconditionally for any person involved in the proceeding (DFC 132 V 387, cons. 3.2). This right is not absolute and may be limited due to overriding public or private interests and it does also not include documents for internal use of the administration (cf. DFC 139 II 489, cons. 3.3 or DFC 125 II 473, cons. 4a). Yet, this distinction between documents, which have a purely internal character and other documents and the resulting option to restrict access rights, is contested in the literature.

2) *Other (national) legal acts providing access to information held by public authorities. Relationship with laws transposing Dir 2003/98 on re-use of public sector information*

On a statutory level it is the **Federal Act on Freedom of Information in the Administration** of 17 December 2004 (Freedom of Information Act; FoIA) containing general provisions on the access to information and Art. 10e – 10g **Federal Act on the Protection of the Environment** (Environmental Protection Act, EPA) which set the general legal framework with regard to environmental information (for an ex ante perspective on the obligations to be transposed cf. *Sidler/Bally*, 732 et seqq.). In addition to this, there is a range of *lex specialis* provisions with specific regimes (Art. 73 and 74 Nuclear Energy Act (NEA) and Art. 18 Federal Act on Non-Human Gene Technology on passive information obligation as well as Art. 34 Federal Act on Forest; Art. 22a Federal Act on Fishery; Art. 25a Federal Act on the Protection of Nature and Cultural Heritage and Art. 50 Federal Act on the Protection of Waters on active information by the authorities; for an overview of the (former) framework cf. *Thurnherr,* 163 et seqq and 192 et seqq.; *Epiney/Scheyli*, 2000, 75 et seqq.).
Directive 2003/98 has not been transposed in Switzerland, but the Confederation is currently undertaking efforts to improve the legal framework with regard to Open Government Data, which may include changes in the legal framework (provisions on data protection, copyright and information security: cf. Report of the Federal Council, Open Government Data Strategy for Switzerland 2014-2018, Bern 2014, 11).

3) *National legal situation before Dir 90/313/EC: has the EC/EU legislation had a major impact on the national law on access to information?*

The legal situation in Switzerland underwent a significant change in the late 1990ies and early 2000 possibly also due to the developments in international public law and EU law, but mainly given a change in the political culture leading towards a stronger role of the principle of transparency with regard to information held by the public authorities. This led some cantons (canton of Bern as early as 1993) and later the Confederation to implement the principle of transparency as a constitutional or statutory standard, which gives a general right to access information without any interest-requirement. As Switzerland is not an EU member state, EU legislation only had an **indirect impact** on the evolution of national law in this field.

4) *Statistical information about the use of the access-right including types of users if known (eg NGOs, competitive industry, general public, environmental consultants, etc). Difficulties of the administration handling the number and/or the scope of applications.*

Some statistical data concerning general access to information under to the FoIA is available: In 2013 for instance, 469 requests for information have been filed. 100 requests concerned

the Federal Department of the Environment, Transport, Energy and Communications and **14 the Federal Office for the Environment**. Of the 76 users requiring a mediation procedure 24 were media representatives, 27 private persons, 8 organizations, 11 attorneys and 6 private undertakings (Federal Data Protection and Information Commissioner, Annual Report 2013/2014, Bern 2014, 129 et seqq.). Despite the scepticism before the establishment of the principle of transparency, when some feared excessive requests, the resulting work-load seems not to pose considerable problems to the Federal Administration. As for the specific access right based on Art. 10e EPA, no statistical data seem to be available due to the fact that the provisions have only been in force for a few months.

5) *Significant national law and jurisprudence on the definition of "environmental information" (Art. 1 para 1 Dir 2003/4/EC)*

The term "environmental information" was not explicitly defined in Swiss law prior to the statutory changes which had to be taken in order to ensure compliance with the Aarhus Convention (*Kettiger*, 2010, p. 17). Since June 1st 2014 however, **Art. 7(8) EPA** defines the term as "information in the fields addressed by this Act and in the fields addressed by legislation on the protection of nature and cultural heritage, landscape protection, waters protection, protection against natural hazards, forest conservation, hunting, fishing, gene technology and climate protection." This definition does not include information on radioactive substances and ionising rays (Art. 3(2) EPA), but in this respect Art. 73 and 74 NEA contain specific obligations both, with regard to active and to passive information. The definition also does not explicitly include information with regard to energy-provisions which concern environmental matters. However, Art. 10g(1) EPA extends the right to access to information also to data in the field of energy as far as it concerns environmental issues.

6) *Significant national law and jurisprudence on determining the access right holder ("without having to state an interest", Art. 3 para 1 Dir 2003/4/EC)*

Both, the general access right according to Art. 6 FoIA and the specific provision of Art. 10g(1) EPA, which has been formulated in a similar manner, grant access rights to **any person**, meaning any Swiss or foreign person, domiciled in Switzerland or abroad, minor or full age, be it a legal entity or a natural person (*Mahon/Gonin*, in: Brunner/Mader, 2008, Art. 6 para. 20; *Flückiger*, 2009, 759). Art. 7(1) Ordinance on Freedom of Information in the Administration (FoIO) specifies that an application for access to an official document may be submitted in any form without stating the grounds. Therefrom also results the principle of "assess to one, access to all", once a person has been granted access, each further applicant is granted such access to the same degree (Art. 6 FoIA and Art. 2 FoIO). As Art. 10g(2) EPA states that the provisions of the FoIA shall also apply accordingly in the case of federal authorities, these principles and conditions equally apply with regard to environmental information. Similarly most of the cantons extend the access rights to "any person" (cf. Flückiger 2009, 760).

7) *Significant national law and jurisprudence on the realm and obligations of private persons as defined by Art. 2 No. 2 b and c 4/EC. (see ECJ 279/11 (Fish Legal)*

On the cantonal level, information-access rights are also often defined quite broadly in this respect and usually cover any entities fulfilling public tasks (see e.g. Art. 2(2)(c) Information Act of the Canton of Berne). On the federal level however, Art. 2(1) FoIA only includes private persons as far as they enact legislation or issue first instance rulings.
Yet, with regard to environmental information, Art. 10g(3) EPA extends the right to inspect also to information held by public corporations and private individuals who have been **entrusted with enforcement duties** but do not have the power to issue rulings. With the exception of some punctual restrictions of access rights in some cantons, the legal framework in Switzerland thus seems to be in compliance with Art. 2(2)(b) Aarhus Convention in this respect.

8) *National law and jurisprudence on the public authorities to be addressed ("information held by or for them") (Art. 3 para 1 Dir 2003/4/EC)*

As far as cantonal authorities are concerned the access right is governed by cantonal law. In general public authorities falling under the obligation to grant access are defined quite broadly. Yet, in some of the cantons restrictions apply: In the Canton of Schwyz for instance, the provisions do not apply to the activities of the cantonal, district or municipal authorities, if their activities do not include sovereign acts (§ 3 Act on the Transparency of Public Authorities and Data Protection of the Canton of Schwyz). If the cantons have not enacted provisions on access rights, the rules of the EPA and the FoIA apply *mutatis mutandis* (Art. 10g(4) EPA).
On the federal level the access right extends to the **Federal Administration**, **public (and private) bodies outside the Federal Administration, insofar as they enact legislation or issue first instance rulings** and to the **Parliamentary Services** (Art. 2(1) FoIA), but not to the Swiss National Bank or the Swiss Financial Market Supervisory Authority (Art. 2(2) FoIA). The law is also not applicable to the Federal Council, the government, as it is not part of the Federal Administration (DFC 136 II 399 cons. 2.2). In addition to this, the Federal Council may exclude further organizational units of the Federal Administration or organizations outside the Federal Administration, if the functions assigned to them require so, if their competitiveness would be prejudiced or if the functions assigned to them are of minor importance (Art. 2(3) FoIA). Art. 10g(2) EPA refers to these provisions with the sole difference that public corporations (and private individuals), who have been entrusted with enforcement duties in the field of environment protection, but do not have the power to issue rulings, also incur the obligation to grant access to their information (Art. 10g(3) EPA).

9) *Significant national law and jurisprudence on practices on access conditions (terms, "practical arrangements") (see Art.3 paras 3 – 5 Dir 2003/4/EC)*

For the **practices on access conditions** Art. 10g(2) EPA refers to the conditions and procedures contained in the Freedom of Information Act. According to the FoIA applications for access have to be addressed to the authority which created the document or received it as primary addressee from third parties not subject to the Act (Art. 10(1) FoIA) (see *Flückiger*, 2009, 761 et seq.). The application must be formulated in a sufficiently accurate manner (Art. 10(3) FoIA), which means that it has to be sufficiently detailed and thus to contain indications, which allow to identify the data, such as a specific time frame, the issuing authority or the subject concerned (Art. 7(2) FoIO). When processing applications by the media, authorities shall take account of the journalist's reporting deadlines as far as possible (Art. 9 FoIO). The authority shall make a decision as soon as possible and in any case no longer than 20 days after receipt of the application (Art. 12(1) FoIA). Under exceptional circumstances the deadline may be extended by 20 days, if the application concerns a large number of documents or documents which are complex or difficult to obtain (Art. 12(2) FoIA). The authority has to inform the applicant with summary grounds of any extension of the deadline, limitation or refusal of access (Art. 12(4) FoIA).

10) *Law and practices/jurisprudence on charges for access (copying? administrative time?)*

According to the Freedom of Information Act, access to official documents is **generally subject to payment of a fee**. No fee is foreseen if the processing only gives rise to minimal costs, for mediation proceedings and for proceedings before the first instance (Art. 17 FoIA). Fees of less than 100 francs (about 95 euros) are not charged and when application is denied or only partially granted, fees may also be waived (Art. 15(1) and (3) FoIO). In the early days of the provision, fees were apparently often waived for journalists. When the authorities started to collect full fees also from the media, fees were at times successfully contested in

court (cf. e.g. DFC 139 I 114), based on the argumentation that the authorities did not sufficiently take account of the special situation of the media as they are obliged to do according to Art. 10(4) FoIA and the constitutionally guaranteed freedom of the media. This debate ended with the adoption of a specific provision in 2014, obliging the authorities to reduce fees for applications made by journalists by 50%, except where the processing is particularly extensive (Art. 15(4) FoIO).
According to the schedule of fees (Annex 1 FoIO) a photocopy and an electronic copy are both charged 0.20 francs per page, a CD-ROM or DVD 35 francs and the work undertaken for the review and preparation of official documents 100 francs per hour.

11) *Do any public authorities claim copyright in the material supplied, and impose conditions relating to use of information under copyright law (such as due acknowledgement and user fees in case of re-publication)?*

Art. 6 FoIA requires that the **legislation concerning copyright is reserved** with regard to the access to official documents. If the document is subject to copyright, the authority is under the obligation to inform the applicant as to the applicable limitations on its use (Art. 5(2) FoIO). The legislation on copyright does not apply to acts, ordinances, international treaties and other official enactments as well as decisions, minutes and reports issued by authorities and public administrations (Art. 5 (1)(a) and (c) Federal Act on Copyright and Related Rights [CopA]). The exception from copyright protection also extends to documents, which are not individual in character, meaning that they do not achieve a minimal level of originality (Art. 2(1) CopA). These documents can therefore be freely used (also commercially) and copied. Other documents may fall under the obligations contained in the Copyright Act, which means that except for private use (e.g within a circle of friends, by a teacher in his class or for internal information in an enterprise – Art. 19(1) CopA), the production of copies or the offering, transferring or other forms of distribution of copies of the work have to be decided upon by the author of the work (Art. 10(1) CopA). This would also include an obligation to pay remuneration to the author of the work (Art. 13(1) CopA). However, in literature, copyright based restrictions inhibiting the publication administrative information are generally not seen as acceptable (*Mahon/Gonin*, in: Brunner/Mader, 2008, Art. 6 para. 58) because they may undermine the purpose of the transparency principle. Hence such restrictions should be reduced to documents established by third parties, which do not waive their copyrights once they hand documents over to the authorities. In addition to this and more generally, published works may be freely quoted if the quotation serves as an explanation, a reference or an illustration. Quotations must be designated as such and the source given (Art. 25 CopA).

12) *National law and jurisprudence on the role of affected third parties in access procedures esp. concerning trade secrets and personal data (designation of trade secrets, consultation prior to release of information, etc)*

The Federal Act on Freedom of Information in the Administration foresees an exception to the access right (limitation, deferral or refusal of access), if access would be likely to prejudice the privacy of a third party. Yet, in cases where the public interest outweighs privacy interests, access may nevertheless be granted (Art. 7(2) FoIA). This counter-exception is not provided for when it comes to other grounds for restriction (cf. below). Additionally, the Freedom of Information Act also provides for an exception if the right of access is likely to reveal professional, business or manufacturing secrets (Art. 7(1)(g) FoIA). Again, these provisions also apply in the case of environmental information (Art. 10g(2) EPA). Further, the Environment Protection Act also explicitly provides for exceptions with regard to active information of the authorities, when overriding private and public interest in confidentiality and manufacturing and business secrecy are concerned (Art. 10e(2) EPA; cf. also Art. 50(2) Federal Act on the Protection of Waters).
If an application for access is made for official documents containing personal data, the authority is under the obligation to consult the person concerned if it considers granting the

application. In this case the concerned person is afforded the opportunity to submit comments within ten days and shall be informed on the position the authority intends to take (Art. 11 FoIA). The consulted person may in this case file a request for mediation (Art. 13(1)(c) FoIA; cf. below).

13) *Significant national law and jurisprudence on exceptions (Art. 4 Dir 2003/4/EC)*

More specifically:

a. *Confidentiality of commercial or industrial information*
b. *Confidentiality of the proceedings of public authorities / internal communications /*
c. *Approach to the disclosure of:*
   - *"raw data' (Aarhus Compliance Committee case ACC/53/ Uk – see AC Implementation Guide 2014 p 85)*
   - *"material in the course of completion" vs "unfinished documents" see AC Implementation Guide 2014 p 85*
d. *"Information on emissions into the environment" (Art. 4 para 2 subpara 2 Dir 2003/4/EC, see T-545/11*
e. *International relations, public security, national defence (see T-301/10 Sophie t' Veldt)*
f. *Weighing of interests in every particular case(Art. 4 para 2 subpara 2 Dir 2003/4/EC*

a/b: Art. 7 FoIA contains an **exhaustive list of exceptions** to the principle of access. The access may be limited, deferred or refused, if it "significantly impairs the free opinion-forming and decision-making processes of an authority" or it is "likely to reveal professional, business or manufacturing secrets" (Art. 7(1)(a) and (g) FoIA).
c: According to Art. 5(3)(c) FoIA "documents which have not been issued" (actually rather "**unfinished documents**") are not deemed to be official documents and are thus not under the access regime. A document is deemed definitively issued where "it has been signed by the authority from which it originated" or "where its creator has provided a final copy thereof to the recipient for information purposes or so that the latter may take a position or decision" (Art. 1(2) FoIO). According to the government, unfinished documents shall for example include provisional reports, informal notes, notes from a meeting etc. (BBl 2003 1997). The objective of this exception of course being that the elaboration process of official documents shall not be hindered or intervened with. As to the question whether access to raw data or to documents that are not finished but at the same time not worked upon has to be granted, there seems to be no specific case law, at least not on the federal level. At the same time it can be said that access to raw data should usually be granted as long as they fall under the notion of environmental information (Art. 7(8) EPA) and other exceptions do not apply, as this should in general not hamper the decision-making process within the authority concerned. Access to unfinished documents which are not "in the course of completion" may prove to be more problematic, at least if the decision-making process in the concerned field is not yet completed. In any case it is remarkable that the notion of "internal documents" exempt from access is unknown to the Swiss regulatory framework since the enactment of the FoIA.
d: Swiss federal law does not explicitly provide for the obligation to take into account whether the information requested relates to emissions into the environment (Art. 4(2)(2) Dir. 2003/4; Art. 4(4)(2) Aarhus Convention). Yet, an **interpretation of national law in conformity with the obligations from international public law** requires to take the interest into account to disclose information related to emissions. As a tool of active information Switzerland has also established a Pollutant Release and Transfer Register based on Art. 5(9) Aarhus Convention after the RRTR-Protocol entered into force in 2009. The register lists about 240 undertakings, which are under the obligation to report data on releases of specific pollutants to air, water or land, on transfers of waste and on transfers of pollutants in waste water annually.

e: Pursuant to Art. 7(1)(c) and (d), the right of access shall be limited, deferred or refused if it "is likely to compromise the domestic and international security of Switzerland" or "to affect the interests of Switzerland in matters of foreign policy and international relations". In a recent case the Federal Administrative Court held that the exception on national security did not apply for some statistical information on the Swiss secret service, e.g. with regard to the number of employees, but at the same time refused access to other information such as a full list of the names of the employees of the service or a list of other secret service entities, with which the Swiss secret service cooperates (Federal Administrative Court, decision A-1177/2014). This decision may be taken as a sign that the aforementioned exceptions are not to be construed too broadly, which actually already results from the general principle that exceptions have to be **interpreted narrowly**. In the specific field of environment information there seem to no cases, where these grounds have been invoked for a refusal of access.
f: According to Art. 7 FoIA, weighing of interests is only foreseen with regard to a likely prejudice to the privacy of a third party. As for the other exceptions, the right to access shall be limited, deferred or refused if one of the exceptions is given and therefore the **legislator already predetermined the weighing process** (cf. *Thurnherr*, 2003, 299 et seq.). The pivotal parameter of the decision therefore resides in the likeliness of the event at stake (e.g. prejudice to the domestic or international security of Switzerland) or the risk of harm, which – to a certain extent – may in practice be used as a substitute to the process of weighing. Nevertheless in this respect the legal framework in Switzerland may be considered to be in contradiction with the obligations of the Aarhus Convention.

14) *Judicial control of access-decisions*

a. *Have specialised administrative appeal bodies (information officer etc) been set up? How do they work? Are their opinions respected?*

Yes, the **Federal Data Protection and Information Commissioner** acts as a mediator. A request to the mediator is open to any person whose access right has been limited, deferred or refused, whose application was not decided within the deadline or who was consulted with regard to personal data, if the authority wants to grant access contrary to the wishes of the concerned person (Art. 13(1) FoIA). The request has to be filed within 20 days of the receipt of the decision. If mediation fails, the Commissioner has to provide the participants to the proceedings with a written recommendation within 30 days of receipt of the request (Art. 14 FoIA). Within ten days of receipt of the recommendation the applicant may request a decision by the authority. The authority is obliged to hand down a decision, where, contrary to the recommendation of the Commissioner it intends to limit, defer or refuse the right of access or grant the right of access to an official document containing personal information. A decision shall be issued within 20 days of receipt of the recommendation or the request for a decision (Art. 15 FoIA).

b. *Court review: "in-camera"-control? Standing of parties affected by decisions denying or granting access?*

In case of a threat to security, public order, public morals or if justified by the interest of a person concerned, both the Act on the Federal Administrative Court and the Act on the Federal Supreme Court foresee the possibility of **"in-camera" review** (Art. 40(3) and Art. 59(2)). When it comes to access to environmental information, the most frequent case in this context is likely to be the protection of professional, business or manufacturing secrets which may constitute an "interest of a person concerned".

15) *How do states fulfill the duty to make information actively available?*

According to Art. 10e EPA, authorities are under the **obligation to inform the public adequately** about environmental protection and levels of environmental pollution (cf. *Flückiger*, 2009, 781 et seqq.; *Epiney/Fasnacht/Pirker/Reitemeyer*, 2014, 29 et seqq.;

Tschannen, 2003, Art. 6 N 14 et seqq. and Griffel/Rausch, Art. 57 et seqq. regarding the former provision of Art. 6 EPA). The obligation of the authorities extends to the publication of studies on environmental pollution and the success of measures under the EPA and they may publish the results of the conformity assessment of series-produced installations, the result of inspections of installations as well as information provided by entities which are required to enforce the EPA (Art. 10e(1) EPA). In addition to this, the EPA provides for a legal basis for registers on air pollution, noise and vibrations, waste and its disposal and the types, amounts and assessment of substances and organisms (Art. 46(2) EPA). As *lex specialis* provisions the Art. 10 Act on Energy and Art. 74 NEA contain similar obligations of active information. In practice active information consists in the regular publication of reports on the state of land, water, air, landscape, biodiversity, climate etc., the publication of the annual environment report of the government, which takes stock of environment quality and the implementation of environmental policy. In addition to this the website of the Federal Office for the Environment (www.bafu.admin.ch) provides information on a broad range of topics, data on about 150 environment indicators and an interactive map containing very detailed information on more than hundred categories of data with regard to biodiversity, landscape, forest, chemicals, natural hazards, noise, air and water, ranging from the distribution of quaking bogs, over the distribution of nighttime railway noise to nitrate pollution in water (cf. http://map.bafu.admin.ch). Finally the data gathered by the various monitoring programs established by the Federal Office for the Environment are mostly also accessible online and the administration considers to make available even more data in the course of the ongoing Project on Open Government Data.

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