ARTICLES

The Public Right of Access to Information on Nuclear Energy under the Spanish Legal System

by Mariano Baena del Alcázar*

1. Introduction

(A) The nature of my approach

I would like to begin by making clear from the outset the sense and focus of this paper which is written, primarily, in my capacity as Supreme Court Judge. This is because as a university professor I have devoted myself, especially in recent years, to the so-called Science of Administration, which I have been trying to introduce into Spain. Moreover, during my many years as professor of administrative law, the law on nuclear energy was never my speciality.

I propose to offer you my views on the subjective right of access to information on nuclear energy enjoyed by citizens of both Spain and the European Union. It should prove to be of some interest since it has given rise to conflicting judgements, though none of these judgements was delivered by the Supreme Court. Accordingly, now may be a good time to take a closer look at this issue since within the next two years, the Supreme Court is expected to make a final ruling.

(B) The triple interpretation of texts and systems

However, before commenting on these judgements, I propose to review the various regulations. I will begin with two observations. Firstly, to the best of my knowledge, there are no regulations that deal specifically with the right of access to information on nuclear energy. It is always a question of the right of access to information on the environment. Of course, this includes or could include information on nuclear energy, but its particular features are not the subject of any specific provisions.

Reviewing the legislation involves examining three types of texts belonging to different legal systems. On the one hand, there is the relevant Directive of the Council of the European Union.

---

* Mariano Baena del Alcázar is a Professor at *Universidad Complutense* of Madrid. This article was adapted from a presentation made at a seminar organised by the *Consejo de Seguridad Nuclear* and was published in Spanish in the publication "*Temas de derecho nuclear*", monography SPE 11.1, CSN, Madrid, 2002. The English translation was carried out by the OECD Secretariat. The author alone is responsible for the facts mentioned and opinions expressed in this article.

Obviously, this is an element of Community law. On the other hand, there are two Spanish laws: a general Law adopted in 1992 regulating the right of access to administrative information of all kinds and a 1995 Law which specifically regulates the right of access to information on the environment, although not specifically on nuclear energy.

2. The right of access to information under the Community Directive

Where Community law is concerned, I refer to the Council Directive 90/313/EEC of 7 June 1990 on freedom of access to information on the environment. I propose to examine several points of interest, bearing always in mind that this Directive applies directly in Spain. The circumstances of its implementation into Spanish law must be taken into account, but if it is not well implemented, the judges are required to apply directly the Directive upon which it is based.

(A) The configuration of this right

The Directive recognises, in very broad terms, this right of access to information. According to Article 3.1, "Member States shall ensure that public authorities are required to make available information relating to the environment to any natural or legal person...". We should not allow ourselves to be misled by the tortured language employed, since in any event there is a direct recipient of the mandate, namely the Member States. A subjective right is being recognised in due legal form. If the States have an obligation, the counterpart of that obligation is a right, and therefore the public must enjoy that right. Moreover, it should be noted that this right is granted in the very broadest terms, to any natural or legal person at his request and without his having to prove an interest.

At the same time, it may be possible, as I understand it, to identify a principle of non-restrictive interpretation of the right, a good example of which is the fact that a specific interest is not required, so that neither the authorities nor the courts can raise problems of standing. I should add that if it is not possible to provide complete information, for reasons to which I shall shortly return, there is an obligation to provide partial information, that is to say, the information available.

Although the right is clearly very extensive, it is also important to consider its limitations. With respect to the extent of the right, the principle of transparency presupposes that information must be submitted to the competent bodies. For example, in Spain the Parliament.

However, let us consider its limitations. The scope of the right is made subject to a double proviso. On the one hand, where information on nuclear energy or other environmental matters is requested, there are certain circumstances in which Member States and their public administrations may refuse the request. We shall consider these later. On the other hand, a request for information may also be refused not because it concerns specific subjects, proceedings or matters but because the information itself has certain characteristics or because the request is formulated in a particular way.

The limitations laid down in the Directive fall into the following groups. Those relating to the confidentiality of the proceedings of public authorities, which I believe pose fewer problems, and those relating to the confidentiality of personal data and to material supplied by a third-party without that party being under a legal obligation to do so. Insofar as the request for information raises problems of this kind, that is to say, infringes these rights or relates to these matters, it may be refused. It may also be refused for reasons of public security.

As regards the other provisions, it is not only a question of matters relating to the confidentiality of proceedings, for example, those of the Council of Ministers. The Directive also mentions "matters which are, or have been, *sub judice* or under enquiry" and "material, the disclosure of which would make it more likely that the environment to which such material related would be damaged". In all these cases information may be refused but, in my opinion, as the right has to be interpreted broadly, the limitations must be interpreted narrowly. For example, as we shall see, whether wittingly or not, the Spanish authorities have confused the confidentiality of the proceedings of corporate bodies, the national government, the government of the autonomous regions and the municipal councils, with the actions of the State, the autonomous regions and the local authorities in general. Moreover, if I am not mistaken, matters which are *sub judice* are those in which a judicial, not an administrative decision is pending. Admittedly, the Directive also indicates that, where disciplinary proceedings are concerned, a request for information may be refused when enquiries or preliminary investigations affecting administrative actions are in progress. However, this only applies where a civil servant is being investigated for misconduct, a situation very different from that in which proceedings are instituted against some member of the public.

Moreover, the provision allowing for information to be refused if its disclosure would make it more likely that the environment would be damaged can be interpreted in two ways. On the one hand, it is clearly the public authorities who decide what would damage the environment and in this respect they have considerable discretion. However, the provision is concerned with what would damage the environment, not with what might alarm the public, as usually understood. That is to say, it is one thing to disclose information likely to damage the environment to be protected and another for certain persons, for example, concerned ecologists, to raise the alarm. That might have an effect on society but not on the environment.

Information may also be refused because of the nature of the information itself or the request, for example, where unfinished documents or data, not files, are concerned – this being precisely the issue raised in the case law – or where internal communications between public administrations are involved.

Finally, information may be refused where the request is manifestly unreasonable or formulated in too general a manner.

(B) The freedom of action of the Member States

Despite the requirements of the Directive, something is still left to the discretion of the Member States, although we should not lose sight of the fact that the Directive has full legal force in Spain, bestows rights on Spaniards and other citizens of the European Union, is directly applicable and takes precedence over Spanish law.

This said, it remains to refute the common preconception that the Directive does not have to be enforced until it has been implemented into Spanish law. It is, in fact, a question of Community, not international law. The Directive has been correctly implemented. However, even if it had not been implemented, it would still be binding. If a directive allows a grace period for completing the implementation, it will not be binding on the Member State in question until that period has expired. However, if the period expires without the directive having been implemented, it will apply. And if the directive does not mention any grace period, it will be applicable from the outset. And the Directive in question does not mention any grace period.

There is no doubt, however, that the Directive allows the Member States a certain discretion. Thus, for example, it provides for the Member States to define the practical arrangements under which information is effectively made available.

However, I believe that this should be interpreted as follows. The Member States may adopt legislative provisions of various kinds and the regulatory powers will be vested in some authority or other, since it is the laws of the Member States themselves that determine which authority is competent to lay down the rules. At the same time, these provisions will establish certain procedural principles, although this does not mean to say that they can go beyond the provisions of the Directive itself.

At any rate, there is a margin of discretion with respect to our subject matter. This margin of discretion does not relate to such questions as, for example, what is meant by public authorities or what is meant by disciplinary enquiry. In principle, these concepts should be understood in accordance with Spanish law, although they should sometimes be interpreted in accordance with Community law. However, this does not constitute a margin of discretion.

I refer to other matters, and especially to those specific points which grant the administrative authorities some degree of protection.

In particular, I have in mind those cases in which disclosure would make it more likely that the environment would be damaged, those cases in which the request is manifestly unreasonable and those in which the request is formulated in too general a manner. It is obvious that in all these cases, in exercising the statutory authority to agree to make specific documents or specific information available, there is a margin of discretion for the Member States, which can decide whether or not the above-mentioned circumstances exist.

3. This right of access to information under the Spanish legal system prior to publication of the specific law

Turning now to the Spanish legal system, it may be useful to consider the general regulations on the right of access to information available to the government. I refer to information in general and not just to specific information on the environment or nuclear energy. This will make it possible to show the significance of the third text, i.e., the 1995 Law, which we shall need to examine in relation to the Directive and the previous Spanish Law.

(A) The contrast between the Constitution and Law 30/1992

In Spain, the right to information about official data in general is governed by Law 30/92 of 26 November 1992 on the Legal Regime for Public Administrations and Common Administrative Procedures, which is well known to jurists. Allow me to voice a long-standing concern to the effect that this Law restricts the right of access to official information established in broader terms by the Constitution. It is my view that in this respect the Law is unconstitutional. This is a purely subjective opinion but one which I believe is not without foundation.

Article 105(b) of the Constitution provides for the Law to regulate public access to administrative records and archives, with three exceptions: matters involving national security and defence, criminal investigations and personal privacy. The Constitution says nothing further, whereas Article 37(5) of Law 30/92, which recognises the right of access to information, in addition to

incorporating these three constitutional provisions, stipulates that the right may also not be exercised where the proceedings of the national and regional governments or material protected by commercial confidentiality and administrative proceedings deriving from monetary policy are concerned. All this without prejudice to the matters regulated by special laws, such as the legislation on classified material, that is to say on official secrets. This excess of zeal displayed by Law 30/92 in curtailing rights granted to all Spaniards by the Constitution has failed to elicit the slightest explanation on the part of the public authorities. As we shall see, this question has implications, albeit indirect, for our present topic. However, above all, it illustrates the attitude of the Spanish authorities to providing access to information.

(B) Regulation under Law 30/92

Law 30/92 begins with the general recognition of the right to information and access to administrative records and archives. Only a careful and detailed analysis reveals nuances that tend to deny the right in some cases and curtail it in others. Thus, for example, and you will notice the difference with respect to the Directive we have just been considering, a general limit is placed on the right since it can only be exercised in respect of already completed administrative proceedings and not in respect of proceedings which are still in progress.

However, the Law also establishes a rule which seems to imply the existence of a principle of restriction of the right, deals with cases in which the right exists but its exercise can be refused, and refers to others in which the right does not really exist since it cannot be exercised. We will consider these various cases.

The “restrictive principle” consists in that if a document is nominative, that is, if it mentions individuals by name, even though it may contain nothing about their private lives, a legitimate and direct interest is required to obtain access. Thus, not only does the Law say the opposite of the Directive, but it uses a formula more restrictive than that used for access to the courts of justice. Moreover, according to this general law, the right exists but may be denied for reasons of public interest or in favour of third-party interests deemed more worthy of protection, if so laid down by law. Clearly, in these first two instances the authorities are allowed broad discretion. Finally, the right cannot be exercised in the above-mentioned list of cases which restrict the provisions of the Constitution.

4. Regulation under Law 30/1995

These were the general rules on access to information held by the authorities until the enactment of Law 38/1995 of 12 December 1995. This Law regulates access to information on the environment, as the general Law of 1992 did not deal either with the environment in general or with nuclear energy in particular. Thus, the preamble to the 1995 Law openly acknowledges that the Spanish legislation is more restrictive than the European Directive as regards information on the environment and tries to correct this by laying down various more generous rules which assume the implementation of the Directive. Let us see how faithful this implementation is, a question which is all the more important in that the Directive is directly applicable and there are no specific regulations for nuclear energy.

(A) Two preliminary points

I would like to make two preliminary points. The first is that the second Additional Provision of the Law declares that it is basic. That is to say, it lays down generic principles which the State approves and the autonomous regions can later develop. However, the Law is basic only with respect to its first and second articles and it is the third that gives a list of cases in which the right of access to information may be denied. This introduces a very dubious element with respect to the interpretation of the Law as compared with the Directive because of the possibility that in adopting additional rules the autonomous regions might introduce new restrictions.

The second point is that according to the first Final Provision of the Law the general Law described above will apply residually, that is to say, where the more specific law is silent or ambiguous. This seems to me to jeopardise the recognition of the right where citizens of Spain are concerned since it means that in unforeseen or doubtful circumstances a law which the text itself admits is more restrictive will be applied.

(B) The implementation of Community law

The question of greatest interest, however, is how the implementation of the Community Directive was carried out. It should be borne in mind that certain rules were modified by a law that accompanied the budget, Law 55/1999 of 29 December 1999 on administrative, fiscal and social measures, which amended certain specific articles of Law 95.

As regards faithfulness to the Directive, it is worth noting that among legal writers and in some government circles it is considered that the Directive was not faithfully implemented. My own conclusion is somewhat different. After studying the question, I believe that, in general, the Spanish Law follows the Directive, but the implementation has been strained by adhering as closely as possible to the Spanish legislation which, as we have seen, is more restrictive.

This follows from the presence of certain ambiguities. For example, the possibility, mentioned above, of the autonomous regions imposing restrictions on the right to information or introducing new grounds for denial. Another issue relates to the amendment of Article 4(3) of the earlier Law of 1995 by the 1999 Law accompanying the budget. Under the earlier Law, once an authority had taken a decision to refuse a request for information, it was possible to resort directly to the courts. Following its amendment it is now necessary to lodge the appropriate appeals and complaints with the administration before taking one's case to the courts. What is the purpose of this? To provide further opportunities for review? Or to ensure that the decision takes as long as possible to reach the courts? I shall leave this question unanswered. Another point is the possible residual application of the general law, to which I have already drawn attention.

Moreover, there is the question of why the Law deals in two provisions with issues which in the Directive are dealt with in one. The Directive refers in the same breath to the investigation of offences and to enquiries and preliminary investigation proceedings in connection with breaches of discipline. In the Law these issues are divided up between two different provisions. I shall return to this point, which could be a source of conflict. Finally, there is another question of considerable theoretical interest and an old war-horse for those of us concerned with these issues. This is the question of the possible denial of information about the actions of the national government and the autonomous regions taken in the exercise of powers not subject to administrative law. But, it might be asked, are there powers not subject to administrative law? The answer can be found in the Law regulating administrative jurisdiction of 13 July 1998. This Law states that where it is a question of the protection

of fundamental rights, elements of acts of authority regulated by law, and damages, then, whatever the nature of the act, even if it has maximum political content, the case may always be reviewed by the courts and administrative law is therefore applicable. The drafters of the 1999 Law accompanying the budget, so anxious to introduce an administrative remedy before recourse may be had to the courts, failed to take into account the fact that since the previous year there had been no government acts that were not, at least in part, subject to administrative law.

Above all, however, I believe that there are clearly several points of conflict. First of all, the Spanish Law states that access to information may be denied where actions of the national government and the autonomous regions are involved. The Directive refers to the confidentiality of the proceedings of public authorities, which is not the same as their actions in general. The second point of conflict concerns a question which I earlier left unanswered. Why are cases in which matters are *sub judice* separated from those involving the imposition of a sanction? Since the Spanish legislator, instead of referring to disciplinary enquiries which relate only to officials, introduces as a reason for denying information the existence of any sort of sanction-imposing proceeding instituted against a citizen, which obviously goes beyond the requirements of the Directive.

5. The case law

I now propose to turn to the legal precedents, although I shall only refer specifically to those concerning information on nuclear energy.

(A) Limited nature

The precedents are limited and, as I have already pointed out, include not a single Supreme Court judgement. What most catches the eye is the existence of two contradictory judgements, both delivered by the Higher Court of Madrid, on 2 March and 9 June 1999, respectively. One of these, that of 2 March, concerns an appeal by the Association for the Protection of Nature (*Asociación de Defensa de la Naturaleza* – (AEDENAT) and orders certain reports on the inspection of a nuclear power station to be made available. The other, that of 9 June 1999, dismisses an appeal, also lodged by AEDENAT, and declares the refusal to hand over reports to be lawful.

It is difficult to resolve the issue on the basis of these judgements alone. Both were delivered by the Higher Court of Madrid. Both were appealed before the Supreme Court under what is technically known as the remedy of judicial review. However, the Supreme Court refused to admit either appeal because of procedural defects. Consequently, the two contradictory judgements, one of which says one thing and one the other, still stand.

Nevertheless, a possible solution is in the offing because a judgement of the *Audiencia Nacional*, a special division of the Supreme Court, of 29 February 2000 dealt with the same issue and allowed the appeal, also lodged by AEDENAT. An application has been made for a judicial review of this judgement and the application has been accepted. Accordingly, relatively soon the Supreme Court will have to decide whether there is a right of access to these reports or whether the authorities can refuse to make them available. We shall have to wait until this judgement is delivered, although when it has been delivered it will be the only one and at least two consistent judgements of the Supreme Court are required before the case law becomes firm and binding.

(B) The contradictory nature of the judgements and possible reasons for it

Let us see where the contradictions in these judgements actually lie. Here is the first discrepancy. Why were two of the judgements delivered by the Higher Court of Madrid and the last one by the *Audiencia Nacional*? Doubtless as a result of the application of the tortured rules on the competence of the courts contained in Article 8(ff) of the Law on jurisdiction for suits under administrative law. On the other hand, the preamble to the judgement of the Audiencia Nacional leaves me perplexed since it refers to the Ministry – Nuclear Safety Council and as far as I know the Nuclear Safety Council is not a Ministry and no ministry is called the Nuclear Safety Council.

As regards the reasons for the discrepancies between the various judgements, the fact that in one of the two cases decided by the Madrid Court, the 1995 Law was already in force whereas in the other it was not is of absolutely no consequence. In fact, both rulings relate to the same specific question, namely, whether the inspection reports are or are not unfinished documents. Why are they contradictory? Community law is being applied by the Spanish courts but with a certain degree of discomfort. The judges are accustomed to ruling in accordance with Spanish law. Moreover, although these are judgements of the same court and the same chamber, they were delivered by different divisions which often apply different standards.

(C) The nature of the inspection reports

Judgements often contain a long exposition of the general theory and only at the end rule on the specific problem. In our case, the general theory expounded in the judgements is of no use at all. The question of whether the reports are unfinished documents, that is to say, whether the authorities have the right to make them available or, on the contrary, to refuse to do so, is addressed only in the final paragraphs.

According to the first of these judgements, the report is only the initial act of a file or proceeding (*expediente*) and is not an unfinished document, and Article 3.3 of the Directive refers to a document, not to a file. In its second judgement the Higher Court of Madrid ruled that the reports were documents that contained unfinished data, since they reflected partial data which had to be supplemented with other information, and therefore refused the request for access to the reports. The *Audiencia Nacional* found that the reports were not unfinished data because they contained all the data to which they related.

In my personal opinion, it is necessary to distinguish between data and documents and the reports are documents and not unfinished documents.

6. Final considerations

To conclude, I will tell you what I would do if I had to rule on this issue, that is, on whether the inspection reports should be made available or not. First, I would ask myself whether the reports could be an element of a sanction-imposing proceeding, since that would confront us with one of the situations in which, according to the Directive, the right to obtain them would exist. After that, I would ask myself what relationship there was between the Nuclear Safety Council and the power station. Was it a relationship which made it possible to conclude that a disciplinary enquiry was being conducted? Or was it simply a relationship that might perhaps permit the imposition of a sanction, as on any citizen with whom there was no special relationship? Afterwards I would have to reflect on how the contradiction between the Spanish Law and the Directive could be resolved.

I will end with a suggestion. Where information is to be refused, the refusal should not be based on commercial or industrial confidentiality, a case in connection with which the legislation mentions spills and waste. I would suggest that decisions should not be based on ambiguities and that any refusal should be justified on general grounds, by the unreasonableness of the request, by the generic formulation of the request, or by the damage to the environment itself, which should not be confused with the public alarm created.