The relationship between the protection of privacy, the processing of personal data and the FOI-legislation in Belgium

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1. Introduction

In this introduction, we want to explain the legal position of freedom of information, the protection of privacy and the processing of personal data in the Belgian internal legal framework, with reference to the European legal context. Thereby, we will make a distinction between the constitutional and legislative level. We examine this legislative level from a historical perspective, because this is necessary to understand the nature and evolution of these legal documents.

1.1. On the constitutional level

In the same reform movement where the Belgian state was reformed to a federal state (the 4th phase of the reform of the state), two articles regarding fundamental rights were added in the Belgian Constitution.

On one hand, article 24ter of the Belgian Constitution - now article 32 of the Constitution[1] -, provides a right of access to administrative documents.[2] At that time, this right that was brand new, and never presented before. It was an independent right not linked to any other right. It doesn't contain for the public sector - as it is the case for classical right - a prohibition to intervene, but an obligation to a positive action of the administration if the public asks for it.

On the other hand, article 22 of the Belgian Constitution guaranteed a right of protection of his personal and family life to every citizen.[3] Although the inscription of this right can be considered as novel to the Belgian Constitution, the protection it gave to citizens was not new, because article 8 of the European Convention of the protection of Human Rights already guaranteed a similar protection. Further, already two specific rights related to the Protection of personal life already existed in the Belgian constitution, namely (1) the protection of letters[4] and (2) the protection of housing[5]. Article 8 ECHR and Article 22 of the Belgian Constitution are closely related because the content of article 22 of the Belgian Constitution has to be interpreted similar to article 8 ECHR and the ECrtHR case law.[6]

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[1] Constitutional reform of 8 June 1993, *Gazette* 29 July 1993, 15.584 (Article 24ter), consolidated version in *Gazette* 17 February 1994 (in the consolidated version, Article 24ter turned Article 32).

[2] [2]A. ALEN en K. MUYLLE, *Handboek van het Belgisch Staatsrecht,* Mechelen, Kluwer, 2011, nrs. 606-607, p. 674-678; M. BOES, "Openbaarheid van bestuur. Bevoegdheidsverdeling. De federale openbaarheidswetgeving", in A.M. DRAYE (ed.), *Openbaarheid van bestuur in Vlaanderen, België en de Europese instellingen*, Leuven, Instituut voor Milieurecht K.U.Leuven, 1996, 20; C. DE TERWANGNE, Le droit à la transparence administrative", in N. BONBLED en M. VERDRUSSEN, *Les droits constitutionnels en Belgique. Les enseignements jurispudentiels de la Cour constitutionnelle, du Conseil d'état et de la Cour de* cassation, Brussels, Bruylant, 2011, 703-746 ; E. BREMS, "De nieuwe grondrechten in de Belgische grondwet en hun verhouding tot het Internationale, inzonderheid het Europese Recht", *T.B.P.* 50, 1995, F. SCHRAM, *De federale openbaarheidswetgeving. Een introductie*, Brussel, Politeia, 2010, 25-32; F. SCHRAM, *Openbaarheid van bestuur*, (*Administratieve Rechtsbibliotheek – beknopt*), Brugge, die Keure, 2003, 177 p.

[3] P. DE HERT, *Artikel 8 E.V.R.M. en het Belgisch recht. De bescherming van privacy, gezin, woonst en communicatie*, Gent, Mys & Breesch, 1998; F. RIGAUX, *La protection de la vie privée et des autres biens de la personnalité*, Brussels, Bruylant, 1990.

[4] Article 29 of the Belgian Constitution.

[5] Article 15 of the Belgian Constitution.

[6] *Parl. Doc.*, Senate, S.S. 1991-92, nr. 100-4/5, 6 en *Parl. Doc.*, Chamber of Representatives, 1992-93, nr. 997/5, 2. See also the jurisprudence of the Constitutional Court : 50/2003 and 51/2003 of 30 April 2003 ; nr. 69/2005, 20 April 2005; nr. 101/2005, 1 June 2005; nr. 189/2005, 14 December 2005; nr. 194/2005, 21 December 2005; nr. 27/2006, 1 March 2006; nr. 91/2006, 7 June 2006; nr. 151/2006, 18 October 2006; nr. 118/2007, 19

Article 8 ECHR is no absolute right, but interferences must be justified on the conditions found in Article 8.2, namely that they are "in accordance with law", have a "legitimate aim", and are "necessary in a democratic society". That the interference is "in accordance with law" requires an assessment as whether the legal provision that lay on the basis of the interference is grounded in domestic law and is accessible and foreseeable. Not all aims can be accepted for interference, but only the "legitimate aims" presented in the list in Article 8.2 ECHR. An interference is only considered as "necessary in a democratic society", when there is a "pressing legitimate aim pursued", and there are relevant and sufficient reasons for the interference.

The only way in which Article 8 ECHR and Article 22 of the Belgian Constitution differ, is that article 22 of the Belgian Constitution only foresees in exemptions made by formal law together with the presence of two rules of divisions of power, where for article 8 ECHR the exemptions only need to be present in a material law.[7] Article 22 of the Belgian Constitution contains a protection of the individual against arbitrary government interference and a positive obligation to take the necessary measures to assure the effective enjoyment of his private and familial life.

In the Belgian Constitution no explicit right concerning the processing of personal data is present. This does not mean that a person is not protected against the processing of his personal data. The processing of personal data is protected as far as it falls within the scope of article 8 ECHR and article 22 of the Belgian Constitution.[8]

1.2. On law level

1.2.1. Privacy and processing of personal data

The protection of private life became the object of different laws.[9] The most important legislation was linked to the implementation of the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data[10]. The law of 8 December 1992 on the protection of privacy in relation to the processing of personal data[11], shows that the processing of personal data is approached more or less balanced. This approach changed with the implementation of the European

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September 2007; nr. 73/2008, 24 April 2008; nr. 119/2008, 31 July 2008; nr. 20/2011, 3 February 2011; nr. 96/2011, 31 May 2011; nr. 122/2011, 7 July 2011; nr. 139/2011, 27 July 2011; nr. 145/2011, 22 September 2011; nr. 166/2011, 10 November 2011; nr. 2/2012, 11 January 2012; nr. 6/2013, 14 February 2013; nr. 29/2013, 7 March 2013; nr. 39/2013, 14 March 2013; nr. 46/2013, 28 March 2013; nr. 54/2013, 18 April 2013; nr. 66/2013, 16 May 2013; nr. 96/2013, and nr. 105/2013, 9 July 2013.

[7] A. ALEN en K. MUYLLE, *Handboek van het Belgisch Staatsrecht,* Mechelen, Kluwer, 2011, nrs. 788, p. 919; F. SCHRAM, *Eerste hulp bij de bescherming van de persoonlijke levenssfeer en van persoonsgegevens*, Bruges, Vanden Broele, 2011, 24 – 25; F. SCHRAM, *Verwerking van persoonsgegevens in België*, Brussels, ASP and Politeia, 2013, 26-30; P. LEMMENS, "Het recht op de eerbiediging van de persoonlijke levenssfeer in het algemeen en ten opzichte van de verwerking van de persoonsgegevens in het bijzonder" in X, *Om deze redenen*, Mys & Breesch, 1994, 313-326.,

[8] E. DEGRAVE, "L'article 22 de la Constitution et les traitements de données à caractère personnel", *JT* 2009, 365-371 ; E. DEGRAVE en Y. POULLET, "Les droit au respect de la vie privée face aux nouvelles technologies", in N. BONBLED en M. VERDRUSSEN, *Les droits constitutionnels en Belgique. Les enseignements jurisprudentiels de la Cour constitutionnelle, du Conseil d'état et de la Cour de* cassation, Brussels, Bruylant, 2011, 1001-1035. F. SCHRAM, *Verwerking van persoonsgegevens in België*, Brussels, ASP and Politeia, 2013, 15-39.

[9] F. SCHRAM, *Eerste hulp bij de bescherming van de persoonlijke levenssfeer en van persoonsgegevens*, Bruges, Vanden Broele, 2011, 29-119; F. SCHRAM, *Codex Privacy en Persoonsgegevens*, Brussels, Politeia, 2007.

[10] http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm

[11] *Official Gazette*18 March 1993.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[12] The Law of 11 December 1998 transposing the Directive 95/46/EC of 24 October 1995 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data[13] also changed the nature of the system regarding the processing of personal data: from a system where the processor has the ability to process personal data with exceptions to an in principle prohibition of processing of personal data with limited exceptions.[14]

1.2.2. The Freedom of Information legislation

Comparing to the federal level a very different approach was possible in the Regions and Communities[15] with regard to the implementation of article 32 of the Constitution because of the division of power rules within the constitutional framework.[16] Nevertheless the law of 11 April 1994 concerning the access to administrative documents was generally taken as an example by the Regions and Communities[17], with the exception of the Flemish Community. This resulted in the fact the relation between privacy protection and access to documents was approached very similarly. Most of the articles in the FOI-legislation deal with access on request. Only a few provisions contain active obligations, but they do not deal with the dissemination of documents.[18]

1.2.3. The absence of direct interrelationship between the two types of legislation

A historical background is needed to understand the relation between the two types of legislation. The law on access to administrative documents of 14 April 1994 and the law of 8 December 1992 were prepared at the same time. The first one was introduced in Parliament by the Minister of the Interiors; the latter by the Minister of Justice. Both Ministers, member of a different party, (respectively the Flemish socialist party and the Flemish christen democratic party) made a silent agreement because of their different ideologies. In that way both ministers could give their own interpretation to the subjects and could satisfy their electorate.

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[12] *Official Journal L 281,* 23 November 1995, p. 31-50.

[13] Official Gazette, 3 February 1999. It became into force with the royal decree of 13 February 2001 concerning the executing of the law of 7 December 1992 on the protection privacy in relation to the processing of personal data, *Official Gazette* 13 March 2001.

[14] R. DE CORTE, « De achterkant van de privacy », *NJW* 2003, 798-810; F. SCHRAM, *Eerste hulp bij de bescherming van de persoonlijke levenssfeer en van persoonsgegevens*, Brugge, Vanden Broele, 2011, 123.

[15] P. LEWALLE, L. DONNAY en G. ROUSOUX, « L'accès aux documents administratifs, un itinéraire soyeux », in D. RENDERS (ed.), *L'accès aux documents administratifs*, (*Centre d'Etudes constitutionnelles et administratives* 30), Brussels, Bruylant, 2008, 57.

[16] Ch. BAMPS, "Openbaarheid van bestuur. De federale wet van 11 april 1994 toegelicht", *Rec.Arr.RvS*, 1996, 23; F. SCHRAM, *Handboek Openbaarheid van bestuur*, Brussels, Politeia, 2008, 1. A. Algemene inleiding / 40; F. ORNELIS, "Een nieuw openbaarheidsdecreet voor Vlaanderen", in A.M. DRAYE (ed.), *Openbaarheid van bestuur. Stand van zaken*, Leuven, Instituut voor Administratief Recht K.U.Leuven, 1998, 13; A. ALEN and K. MUYLLE, *Handboek van het Belgisch Staatsrecht*, Mechelen, Kluwer, 2011, p. 676, nr. 606; E. BREMS, "De nieuwe grondrechten in de Belgische grondwet en hun verhouding tot het Internationale, inzonderheid het Europese Recht", *T.B.P.* jrg. 50, 1995, 620.

[17] F. SCHRAM, "Access to Administrative Documents in Belgium: an Example of Transparency within the European Union", *in G. SOMERS (ed.),* Confidentiality and Consumer Protection*, European Journal of Consumer Law/Revue européenne de droit de la Consommation* 2011, 663 - 699.

[18] F. SCHRAM, *Openbaarheid van bestuur*, Brussel, Politeia, 2012,

In the proposal of the law of 14 April 1994 no article was dedicated to the protection of personal life as an exemption to the disclosure of an administrative document.[19] This protection of personal life was seen as an element of the protection of all fundamental rights and freedoms, to be used as relative exemption. The exemption could only be invoked if no higher public interest comes into play to make the document public: "*It is not sufficient that the disclosure referred to an interest involved in this article that government is automatically is absolved of the obligation to provide the information. The disclosure of administrative documents may be refused only where the interests of the public does not outweigh the damage that could be inflicted to the fundamental interests other listed by disclosing. To the application of an exception therefore always a balancing of interests must be underlying*."[20]

In the proposal of the federal FOI-law the protection of the personal life only was mentioned to provide an exemption to the exemption: if in access has to be refused because of de protection of the personal life, de person concerned could agree with the making public of that information.[21]

Pressure from some French speaking parliamentarians, who made reference to the parliamentary treatment of de proposal of law on the processing of personal data, led to an independent exception related to the protection of personal life and was introduced with an absolute status.[22]

In this way the FOI-legislation and the legislation concerning processing of personal data stayed independent. At that point in time, too much interrelation would have resulted in interchange of ideas of the two proposals of law and would only have complicated the lawmaking process.

1.2.4. The nature of the right to administrative documents attributed to citizens

Although all legal acts on access to administrative documents contain a right of public access to administrative documents, they contain more than only the right of public access. Inspired by the French law concerning access to documents, they also require the need for a specific interest to get access to certain documents. Whoever wants access to 'documents of personal matter[23]' or 'information of personal matter'[24] needs this kind of interest.

Moreover, to prevent the blockage of people wanting access to personal documents, some standard exemptions cannot be invoked against the person who is asking access if the information in the administrative document is about themselves. For example, the exemption of the protection of personal life cannot be invoked against the person whose personal life is protected.

1.2.5. The recognition of a different right of personal access in both legislations

Besides the right of personal access to administrative documents in the freedom of information legislations, the law of 8 December 1992 also contains a right of personal access.

Compared to the FOI legislation, the right of personal access is approached differently in the data protection legislation. Where the object in the first one is an administrative document, the law of 8

[19] *Parl. Doc.* Chamber of Representatives, 1992-1993, nr. 1112/1, 45.
[20] *Parl. Doc.* Chamber of Representatives, 1992-1993, nr. 1112/1, 16.
[21] *Parl. Doc.* Chamber of Representatives, 1992-1993, nr. 1112/1, 17.
[22] *Parl. Doc.* Chamber of Representatives, 1992-1993, nr. 1112/13, 58.
[23] Article 1, second paragraph, 3° of the Law of 11 April 1994.
[24] Article 3, 6° of the Flemish Decree of 26 March 2004.

December 1992 gives a right of access in head of the data subject to obtain certain information from the controller:

a) information on whether or not data relating to him is being processed, as well as information regarding the purposes of the processing, the categories of data the processing relates to, and the categories of recipients the data is disclosed to;
b) communication of the data being processed in an intelligible form, as well as of any available source information;
c) information about the basic logic involved in any automatic processing of data relating to him in case of automated decision making as defined by article 12 bis;
d) information regarding his appeal rights under articles 12 and 14 and his right to consult the public register referred to in article 18, if necessary.[25]
There is no obligation for the controller to give a copy of the requested personal data that are processed, nor to give access to the file where the personal data can be found.

In some cases the person concerned cannot exercise his right of access:

- when personal data are being processed for exclusively journalistic, artistic or literary purposes;
- when personal data is being processed by security services;
- when personal data is being processed by police;
- when personal data is being processed by Child Focus;
- when personal data is being processed by the Banking, Finance and Insurance Commission.[26]

Recently a new temporary exemption is introduced in the law of 8 December 1992: article 10 does not apply to processing operations of personal data managed by the Federal Public Service of Finance for the period in which the data subject is subject to an inspection, an investigation or related preparatory activities carried out by the Federal Public Service of Finance in the context of the fulfillment of its legal missions. This had to be considered to the extent that the application of this article would constitute a disadvantage for the inspection, investigation or the preparatory activities, and only as long as these activities last.[27]

The period in which article 10 is not applicable during these preparatory activities must, however, not exceed one year starting from the submitted request.

When the Federal Public Service of Finance makes use of this exception it shall be cancelled upon immediately upon the termination of the inspection, investigation or preparatory activities if these activities did not result in an inspection or an investigation.

[25] Article 10 of the Act of 8 December 1992 on the protection of privacy in relation to the procession of personal data.
[26] Article 3 of the Act of 8 December 1992 on the protection of privacy in relation to the processing of personal data.
[27] Law of 17 June 2013 concerning fiscal en financial provisions en provisions concerning sustainable development, *Official Gazette* 2013, 41.015.

The Information Security and Privacy Protection Service then shall inform the data subjects of this cancellation without delay and provides them with the full motivation as included in the decision of the controller who made use of the exception.[28]

Further, object and exemptions, deadlines and appeal procedure are quite different in both legislations. As for the the law of 8 December 1992 the deadline expires after 45 days[29], while in the freedom of access legislation the deadlines expires after 15[30] to 30[31] days, depending on the applicable legislation.

In the freedom of information legislation the administrative appeal procedure differs according to the applicable freedom of information law. An appeal is possible before the Council of State. The law of 8 December 1992 provides a right to complain before the Privacy Commission[32] and a special legal procedure can be initiated before the president of the court of First Instance in summary proceedings when the rights given to the person concerned are infringed[33].

2. The protection of personal life and personal data in the freedom of information legislation

Although the freedom of information legislation protects personal data in different ways, this article limits itself to the federal law of 14 April 1994 concerning access to administrative documents. Two mechanisms of protecting personal data can be distinguished. First, an interest has to be shown before getting access to documents of personal matter.

Secondly, access to personal data can be refused if certain interests are damaged. (1) Some exemptions have the protection of the personal life as a direct object, (2) others only lead to the protection of certain personal data in specific conditions; (3) still others only give indirect protection.

2.1. To prove an interest for access to documents of personal matter

A document of personal matter is a document that expresses an evaluation or a value judgment of a identified or identifiable natural person, or is a document which contains a description of such a behavior of which the disclosure could cause harm to that person.[34] Although there is a slight difference between the definitions in the different FOI-laws our description captures the essence of what documents of personal matter are.

To have access to this kind of documents, one needs to prove having an interest. For that matter, the FOI-legislations differ significantly. In most of the Belgian FOI-legislation the federal logic is followed which means that in principle such an interest equals the interest needed for going to appeal before the Council of State. The law concerning the Council of State does not include a definition of

[28] Article 3, § 7 of the Act of of 8 December 1992 on the protection of privacy in relation to the processing of personal data.
[29] Article 10, § 1, second paragraph of the Act of 8 December 1992.
[30] Article 6, § 5 of the Law of 11 April 1994.
[31] Article 20, § 2 of the Flemish Decree of 26 March 2004.
[32] Article 31, § 1 of the Act of 8 December 1992.
[33] Article 14 of the Act of 8 December 1992.
[34] Article 1, second paragraph, 3° of the law of 11 April 1994.

'interest', but the Council of State has given shape to the concept case-by-case: the interest should be personal, direct, actual and permissible.[35]

The Commission for access to and reuse of administrative documents, section freedom of information has given an even larger interpretation to the notion of interest. In this interpretation also journalists, politicians and historians are considered to have the needed interest in specific cases.[36]

In contrast, the approach in the Flemish decree of 24 March 2004, is far less flexible. In this decree the notion of interest is formally defined. A negative influence on the legal position of a person is needed to have an interest; a factual interest is not enough.[37]

Although the person, to whom the information relates, is considered to have the needed interest for information of personal interest related to himself, it is not excluded that a third person also can have the needed interest for having access to information of other persons.

It can be concluded that having an interest in itself sufficient to get access to administrative documents. The administrative authority first has to screen documents for the presence of exemptions. The claim of having an interest or to show an interest is not an exception, it is an admissibility requirement. Passing this test for documents of personal matter is the first step towards having access to that kind of document.

2.2. The exemptions that protects personal data[38]

2.2.1. The protection of the personal life

2.2.1.1 The content of the exemption

According to article 6, § 2, 1° of the law of 11 April 1994, the administrative authority has to refuse access to an administrative document when the disclosure of the document in question could harm personal life. Personal life is not protected as such, but only if the disclosure of information in an administrative documents should reveal information harming personal life. It is a so called 'absolute' exemption subject to a harm test. The administrative authority has to refuse access if the disclosure negatively influences the personal life of a person.

When establishing the law of 11 April 1994, the notion of personal life was based on the interpretation of the European Court of Human Rights. At that moment in time, a clear distinction was made between personal data protected by article 8 ECHR and other personal data. In more recent jurisprudence of the Court this distinction became blurred, especially when looking at personal data in data bases in hands of public sector.

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[35] *Parl. Doc.* Chamber of Representatives, 1992-1993, nr. 1112/1, 14.
[36] COMMISSION FOR THE ACCESS TO AND RESUSE OF ADMINISTRATIVE DOCUMENTS, advice 2013-50.
[37] Article 17, § 2 of the Decree of 26 March 2004 concerning freedom of information, *Official Gazette* 1 July 2004, erratum *Official Gazette* 18 August 2004. See for interpretation f.e.: APPEAL INSTANCE CONCERNING FREEDOM OF INFORMATION AND REUSE OF PUBLIC INFORMATION, SECTION FREEDOM OF INFORMATION, decision nr. 2012/8; 2012/19; 2012/21; 2012/43; 2012/49a+b; 2012/58; 2012/67; 2012/74; 2012/86a; 2012/88; 2012/93; 2012/93; 2012/98; 2012/208; 2012/296.
[38] F. SCHRAM, *Tussen openbaarheid en privacy: een verhaal van grijstinten*, Brussel, Politeia, 2006, 304 p.

In the advice practice of the Commission for the Access to Administrative Documents a clear distinction is made between personal data as such and personal data protected by the protection of personal life. Although the exemption of article 6, § 2, 1° of the law of 11 April 1994 is absolute, a concrete balanced exercise has to be made. According to specific conditions, one must consider if the protection of the personal life is legally protected.

2.2.1.2 An exemption within an exemption

The exemption of article 6, § 2, 1° of the law of 11 April 1994 can still be overruled if the person in charge of the inspection, interpretation of communication agreed on the disclosure. This exemption within the exemption refers to the principle of informational privacy, where the person is considered master of his own personal data. The possibility to overrule the exemption of private life is also present in the FOI-legislation of the Regions and the Communities, but it is not always formulated in the same way.

2.2.1.3 The exemption of article 6, § 1, 2° of the Law of 11 April 1994 as ground for protection the personal life

Because of the fact a separate exemption was created in Article 6, § 2, 1° of the law of 11 April 1994, it is accepted that Article 6, § 1, 2° could not be invoked to protect the same legal interest. In that case two different exemptions would apply, one as a relative and the other as an absolute exemption. Because data protection is not considered as a fundamental right, it couldn't be invoked as an exemption within the framework of the FOI-legislation.

2.2.2. The protection of specific personal data

2.2.2.1 The protection of the identity according to article 6, § 1, 8° of the law of 11 April 1994

Article 6, § 1, 8° of the law of 1 April 1994 protects the identity of a person who asks to handle in confidence information given to the public authority to declare a criminal offense or supposed fact. This exemption has to be considered relatively: only if the public authority determines that the interest of the disclosure does not outweigh the protection of the identity by handling information of a person who discloses information about a criminal offense or supposed fact in confidence.

2.2.2.2 The protection of an advice or opinion freely and confidently given to the public authority

A federal public authority can refuse a demand for access if this demand concerns an advice or opinion freely and confidentially given to the public authority. Different from the two exemptions mentioned before, this exemption is not obligatory so that disclosure can be given despite of the fact an advice or opinion is at stake. In these cases, the refusal of access to that kind of information needs to be better justified, because in principle all administrative documents are public. Three conditions need to be fulfilled: (1) not all information can be covered by it, but only an advice or an opinion; (2) the exemption can only be invoked when there exists no legal obligation to give the advice or the opinion to the public authority and (3) when giving the advice or the opinion to the public authority, the person has to claim confidentiality at that moment not afterwards.

2.2.2.3 The protection of a secret installed by law

Not all exemptions necessarily have to be found in the law of 11 April 1994. Article 6, § 2, 2° of this law makes it possible to link secret information found in other formal laws to the exemptions regarding access to documents. One of the most important secrets is the professional secret.

One of these professional secrets can be found in article 458 of the Criminal Code:

> "Medical practitioners, surgeons, health officers, pharmacists, midwives and all other persons who by virtue of their status or profession have knowledge of secrets entrusted to them, and who disclose his information, except in case they are called to testify in court or a in the context of a parliamentary inquiry and except in case the law requires them to disclose this information, are punished by imprisonment ranging from eight days to six months and with a fine ranging from one hundred euro to five hundred euro."

Although this clause about secrecy seems focus on medical professions, it is applicable to "all persons who by virtue of their status or profession have knowledge of secrets entrusted upon them". According to the Court of Cassation, one can only speak about the professional secrecy when a person receives confidential information only because of his status or profession.[39] The obtaining of confidential information is therefore inherent to the status or profession.[40] The Constitutional Court states that the primary intention of article 458 of the Criminal Code is not to attribute a privilege to people who are bound to a professional secrecy, but to safeguard the fundamental right of respect of the personal life of the person who takes someone in confidence, sometimes about something very personal.[41]

Another important professional secret can be found in the fiscal legislation.[42] An example of it can be found in article 337 Code of Income tax:

> "He who, for whatever reason, occurs in the application of tax laws or who has access to the office chambers of the administration of direct taxes, is, excepting during the exercise of his office, bound to the most absolute confidentiality concerning all matters of which he has knowledge by reason of performing his duty.
>
> Officials of the administration of direct taxes and of the administration of the land register are exercising their office when they provide other administrative departments of the State, including the prosecutors and clerks of the courts and all jurisdictions, and the Communities

[39] Cass. 20 februari 1905, *Pas.* 1905, I, 141, concl. Adv.- gen. JANSSENS

[40] F. SCHRAM, *Spreken of zwijgen? Een wegwijzer voor ambtenaren*, (*Porta-reeks*), Brussel, Politeia/ASP, 2012, 109 – 145; J. PUT en I. VAN DER STRAETE, *Beroepsgeheim en hulpverlening*, Brugge, die Keure, 2005, xvii-267 p.; J. STEVENS, "Het beroepsgeheim van de advocaat en dat van de geneesheer", *T.Gez.* 2002-2003 (1), 2-11; M. HERBIET, "Le secret dans l'administration", *Ann. Fac .Dr. Liège* 1975, 153-204; J. SAROT, "La déontologie de la fonction publique. Le devoir de réserve », in *Liber amicorum Prof. Em. E. Krings*, Brussel, Story-Scientia, 1991, 295-306; B. ALLEMEERSCH, "Het toepassingsgebied van artikel 458 Strafwetboek. Over het succes van dat beroepsgeheim en het geheim van dat succes", *RW* 2003, 1-19 en D. HAZEWINKEL-SURINGA, *De doolhof van het beroepsgeheim*, Haarlem, Tjeenk Willink*,* 1958, 187 p.

[41] CONSTITUTIONAL COURT, nr. 127/2013, B.3.1 and B.29.1.

[42] L. ORBAN, "Le secret professionnel des agents du fisc", *Revue Générale du Contentieux Fiscal* 2007 (6), 167 e.f ; J.-P. BOURS, « Etendue et limites, tant en Belgique qu'à l'étranger, des pouvoirs d'investigation du fisc belge », in M. BOURGEOIS en J.-P. BOURS, *Actualités en droit fiscal. Les effets de la crise bancaire et dix ans de réforme de la procédure fiscale* », Limal, Anthemis, 2009, 78 – 116.

and Regions and the public institutions referred to in Article 329, with information which is necessary for those services and institutions to properly execute the assigned implementation of legal or regulatory provisions.

Officials of the administration of direct taxes also hold office when they grant access to, or make a statement about the fiscal state of a taxpayer, to the spouse on whose property the tax is collected.

Individuals who belong to the services to which the administration of direct taxes or the administration of the land register, pursuant to the second paragraph, has provided information of a fiscal nature to, are bound to the same duty of confidentiality and are not allowed to use the obtained information outside the scope of the statutory provisions for the execution of which they were provided.

The provisions of the fourth paragraph are also applicable to the persons belonging to services which are organized under the control pursuant to Articles 320 and 321, information of a fiscal nature would be provided.

Officials of the administration of the land register also hold office likewise when they provide information, extracts or duplicates of the cadastral records pursuant to the provisions of Article 504, second and third paragraph."

The Commission for the Access to Administrative Documents demands from administrations that they always indicate whether the information falls under the professional secrecy in case they want to invoke the exemption of article 6, § 2, 2° of the law of 11 April 1994 in combination with a professional secret.[43] The Commission stresses that not all professional secrets have the same scope: some only cover information that is by nature confidential, others cover all information received by a certain administration. In the first case, the professional secret cannot be extended to all the information in an administrative document.

3. The interpretation of the relationship between freedom of information laws and the legislation concerning the processing of personal data

The interpretation of the relationship between freedom of information and the legislation relating to the processing of personal data has changed over time.

3.1 No access based on the FOI-legislation if someone asks access to personal data

At first, the Commission for the Access to Administrative Documents considered that if someone demands access to documents containing information about himself or a third person, he has to invoke the legislation concerning the processing of personal data and could not invoke the freedom of information legislation. This is the so-called 'priority doctrine'. This doctrine was based on arguments related to the data protection law as well as on arguments related to the FOI-legislation. The Commission ruled that it would be appropriate to make a difference between a situation where someone asks access to his own personal data and a situation where someone requests access to personal data of a third person.

[43] COMMISSION FOR THE ACCESS TO AND REUSE OF ADMINISTRATIVE DOCUMENTS, SECTION FREEDOM OF INFORMATION*, Advice 2013-48.*

3.1.1 No access on ground of the FOI-legislation if someone asks access to his own personal data

Arguments to maintain the 'priority doctrine' were both found in the law of 11 April 1994 and in the Data Protection Act.

First we will take a look at the arguments related to the law of 11 April 1994. A clause in the parliamentary preparation states that the purpose of this FOI-law is not to derogate from a more strict provision in the data protection legislation. This clause is contrary to the consistent position of the Minister of the Interiors.[44] Each demand for access to an administrative document has to be solved by using the law of 11 April 1994.[45] One can argue that the legislatior has worked out a minimal package with the law of 11 April 1994. Although it is not excluded that other provisions on access to administrative documents exists in other legislation than the FOI-legislation, this legislations must be in line with article 32 of the Constitution.[46]

This starting point can be related to article 13 of the Law of 11 April 1994: "This law does not affect legislative provisions that provide more access". A proposal to amend this article with the following paragraph: "This law does not affect the specific provisions which, under the Act of 8 December 1992 (…) apply (…)"[47] was explicitly rejected.

At that time, priority was given to the Data Protection Act at the expense of the law of 11 April 1994. The creation of an absolute and general exemption is inconsistent with the Constitution and with the interpretation of Article 32 by the Constitutional Court that when someone invokes an exemption no simple refusal is possible.

Apart from that, the arguments related to the Data Protection Act do not convince. The Data Protection Act only provides a right on access to automatic and manual systematic processing of personal data.[48] No additional forms of access are excluded.

Such right of access is not only feasible, but also desirable from the idea of 'data protection'. From the international standards – including Article 13 of the European Directive of 1995, Article 9 of the Convention of the Council of Europe of 28 January 1981[49] and principle 6 of the European Recommendation R (87) 15[50] – the idea arises that with regard to security and police, one should in principle be able to use the ordinary right of inspection unless is overridden by the interest of the security of the State or law enforcement. This can also be derived from the case-law of the European Court of Human Rights. In particular, one can refer to the Leander case[51], in which the inability to contest data processing was called a breach of privacy. The right of access by authorities like the

[44] *Parl. Doc.* Chamber of Representatives, 1992-1993, nr. 1112/13, 69.
[45] *Parl. Doc.* Chamber of Representatives, 1992-1993, nr. 1112/13, 35.
[46] *Parl. Doc.* Chamber of Representatives, 1992-1993, nr. 1112/13, 69.
[47] *Parl. Doc.* Chamber of Representatives, 1992-1993, nr. 1112/3, 8-9.
[48] Article 3, § 1 of the Act of 8 December 1992.
[49] Convention of the Council of Europe on 28 January 1981 for the protection of individuals with regard to automatic processing of personal data, approved by the Law of 17 June 1991 approving the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, *Official Gazette* 30 December 1993, 29.024-29.030.
[50] Recommendation R (87) 15 of the Committee of Ministers of the Council of Europe of 17 September 1987 regulating the use of personal data in police matters, See: COUNCIL OF EUROPE, *Data protection. Compilation of Council of Europe text*, Strasbourg, Directorate General of Human Rights and Legal Affairs, 2010, 68-70.
[51] ECrtHR, Case of 26 March 1987, Leander v. Sweden.

security services can only be refused if a necessity exists for this purpose and safeguards to prevent abuse.[52] The HCrtHR has recently confirmed that also security services fall under the scope of Article 10 ECHR.[53]

The indirect access provided by the Data Protection Act should not be put into the place of the direct access.[54] A refusal to direct access should only be permitted when "it is necessary to safeguard" the respective interests (state security, public safety), which must be determined in each concrete case.

3.1.2 No access based on the FOI-legislation if someone asks access to personal data of a third person

The 'priority doctrine' was not only used in case of demands for access to one's own personal data, but also to refuse access to personal data of a third person. In most of the cases, the Commission for access to administrative documents referred the applicant to the Commission for the Protection of Privacy.

This referral was legally questionable. A citizen was referred from a system of broad access (regardless the carrier), also for personal data of others, to a system of limited access (only for certain carriers) and not for personal data of others.

This advisory practice was inconsistent and difficult to reconcile with the legislative history of the Law of 11 April 1994. The foregoing should be viewed in the light of the case law of the Constitutional Court. When people depend on the material support of the government information subject to a separate system, with its own procedures and rights, a system that clearly offers fewer opportunities on disclosing documents, the question arises whether the distinction can withstand the examination under Articles 10 and 11 of the Constitution.

Is it acceptable that by denying to any person who requests access to a systematical non-automated data file or an automated processing of personal data, a measure is taken that creates a general and absolute exemption which is not proportionate to the objective pursued? One can speak of a breach of Articles 10 and 11, read in conjunction with Article 32 of the Constitution. A practical consequence of referral to the Data Protection Act is that third parties automatically are denied access. This situation caused the declaration of unconstitutionality by the Constitutional Court in its judgment of 25 March 1997.[55]

3.2 The existence of personal data in an administrative document doesn't prevent the use of FOI-legislation

3.2.1 The jurisprudence of the Council of State and its influence on the advice practice of the Commission for the Access to Administrative Documents

Since the Council of State has to pronounce itself in a specific case, the interpretation of this subject in the advice practice of the Commission for access to administrative documents changed.

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[52] B. DE SCHUTTER en P. DE HERT, "Het politioneel gebruik van informatie en de privacywet", *Politeia* 1994, 6, 7-14; B. HAVELANGE en Y. POULLET, *o.c.*, 251-252; Th. LEONARD en Y. POULLET, *o.c.*, 390; P. LEMMENS, "De verwerking van persoonsgegevens door politiediensten en de eerbiediging van de persoonlijke levenssfeer", in *Liber Amicorum Jules D'Haenens*, Gent, Mys & Breesch, 1993, 212.
[53] ECrtHR, Case of Youth Initiative for Human Rights v. Serbia, 25 June 2013.
[54] Article 13 of the Act of 8 December 1992.
[55] CONSTITUTIONAL COURT, case 17/97.

It all started when a parliamentarian of a right-wing party asked access to documents his personal file, possessed by a Security Service. Access was refused on the grounds of the law of 8 December 1992. In its advice within the administrative appeal procedure the Commission on access to administrative documents considered as well that the law of 11 April 1994 on access to administrative documents was not applicable. Before the Council of State he parliamentarian invoked the following argument: "I do not ask access to my personal data files within the Security Service, but to my personal life, which is broader, since it also relates to my party, photographs of public meetings of the party, etc. For such large requests, the Data Protection Act is unsuitable, which makes that the Security Service shouldn't have referred to it".

The verdict of the Council of State takes these arguments largely over.[56] First, the Council of State rejects the 'priority doctrine', then the decision of the Minister assessed against the Law of 11 April which had been found wanting. Remarkable fact: the priority doctrine is not rejected on the basis of arguments derived from the statutory or constitutional history, but on the basis of a comparison of the objectives of the Data Protection Act and the law of April 11, 1994 and the form given in both laws to the right of access and its exceptions. This equation imposes itself, according to the Council, because the doctrine would imply that the law of April 11, 1994 would almost always be subject to Data Protection Act. By the ongoing computerization less disclosure would be the result. This is not evident, not only because the objectives of both laws vary , but the scope , in particular because the Data Protection Act does not have grant access to all the data (but only to personal data) and gives no access to all files (but only to files stored on certain material carriers). Although the terminology used by the Council of State is not always purely according to the Data Protection Act and the description of the right of inspection organized by the Data Protection Act sometimes doesn't seem always done with sufficient attention to the extent of that right, his conclusion is flawless: "Whereas the applicant's application is not related specifically or exclusively to personal data in manual or automatically processed files, it cannot be rejected on the basis of reason, that not the law of 11 April 1994 but that of December 8, 1992 was applicable.

The jurisprudence of the Council of State doesn't fully exclude that the right of access guaranteed by the law of 11 April 1994 has to be put aside for the data protection legislation when personal data are at stake: the Council of State only stressed that the two different kinds of legislation have another goal and that some administrative documents don't fall within the scope of the Data Protection Act, in which case a referral from the first to the latter isn't possible.

In our opinion there is not only a different goal, but both kinds of legislation have also a different object concerning the right of access. The Data Protection Act only has a right of personal access in Article 10 and that right of access doesn't guarantee a right of access to an administrative document. It only guarantees a right to certain information about the processing of personal data. The Data Processing Act also contains its own exemptions that are quite different from the exemptions in the FOI-legislation.

After this judgment the Commission for access to administrative documents accepted that the federal legislation concerning access to administrative documents was also applicable in situations where a person demands access to his personal files, but it concluded likewise that it would never use the law of 8 December as a framework for considering whether an administrative document

[56] Council of State, Dewinter v. Belgian State, nr. 91.531, 11 December 2000, *C.D.P.K.* 2001, 473.

could be made accessible or not. Only the exemptions within the access legislation can - according to the Commission for access to administrative documents - taken into account.

This approach does not arise solemnly from the very narrow possibilities the data protection legislation provides for granting access to personal data to third persons, but also with the fact that two different commissions are responsible for the two topics. Both Commissions have exclusive competences. So, the Commission for access to administrative documents is exclusive competent for the interpretation of the general federal FOI-legislation; the Commission for the Protection of Privacy only for the interpretation of the Law of 8 December 1992, not for the protection of privacy as a whole. On the institutional level, the two commissions are quite different as well: the Commission for access to administrative documents is part of the executive, although it is independent and cannot receive any instructions of the executive[57]; the Commission for the Protection of Privacy is linked to the legislative power.[58] Also the personal scope of the two commissions is quite different: the Commission of access to administrative documents is only competent regarding federal administrative authorities[59]; the Commission for Protection of Privacy is qualified regarding all controllers (private or public, federal and non-federal)[60]. Finally, the two commissions have different powers: the Commission for access to administrative documents gives advice in the context of an administrative appeal procedure; the Commission for the Protection of Privacy gives advices, gives authorizations to process personal data (preventive) and treats complaints regarding the correct processing of personal data. The result is that according to the Commission for the Access to Administrative Documents data protection is falling out of the scope of the FOI-legislation on federal level.

This interpretation is globally accepted at the regional and communitarian level, although on the Flemish level, a demand for access to personal data in an administrative document results most of the time in the appreciation that the divulgation of that kind of information does harm the protection of personal life.

The position taken by the Commission for the Access to Administrative Documents does not mean that the law of 8 December 1992 isn't applicable when someone asks for access to administrative documents that contain personal data, it only means that the evaluation on grounds of the Data Protection Act does not take place within the FOI-legislation, but outside it when after an evaluation on grounds of the FOD legislation personal data could be made public. So if the examination on grounds of the FOI-legislation leads to the conclusion that no personal data could be made available to the applicant because this harm the personal life of the person concerned, that no examination on grounds of the Act of 8 December 1992 is needed.

3.2.2 Problems within the jurisprudence of the Council of State

Although not taken into account by the Commission for access to administrative documents, the incomplete reasoning of the Council of State could endanger the right of access guaranteed by the Law of 11 April 1994. This became clear in a judgment of 13 November 2006 that has the same legal

[57] Article 8 of the Royal Decree of 29 April 2008 concerning the composition and functioning of the Commission for access to and reuse of administrative documents.
[58] Article 23 of the Act of 8 December 1992.
[59] Article 8 of the Law of 11 April 1994.
[60] Article 29 of the Act of 8 December 1992.

question as the before mentioned judgment: "*Whereas the right of access to personal data contained in manual files or that are subject to regular automatic processing in a special way by the Act of 8 December 1992, it has to be said that the right of access to and the control of processing data managed by the Security Services by the Commission for the Protection of Privacy excludes the general scheme provided for in Article 4 of the Law of April 11, 1994*".[61]

The Council of State seems to make a distinction between personal data contained in manual files or that are the subject of a regular automatic processing and personal data for which this is not the case. In the first case the right of access could be excluded based on of the FOI-law. In the second case, this is not possible. In the Dewinter judgment the Council of State had nevertheless stressed: "*That this view* (that the files of the State Security or by an automated file are arranged and files necessary part of that file included and can be therefore recognized only in accordance with the procedure of the Law of 8 December 1992, is tantamount to the set in relation to all persons who access wish to obtain any administrative document of a personal nature that themselves relates) can only be accepted if it appears that law of April 11, 1994 out of action a person through the procedure of the Law of 8 December 1992 on an equally broad access to features and through the law of April 11, 1994, however this is not evident ".[62] In our opinion, although the right of access based on article 10 of the Data Protection Act doesn't exclude that access to a document can be given, it doesn't guarantee it. It only guarantees that certain information of the processing of personal data has to be given to the person concerned. So from a legal point of view Article 10 of the Data Protection Act and the Law of 11 April 1994 do not guarantee the same right of access, so the one right of access cannot be replaced by the other one. This interpretation has also recently followed by the legislation when he recently changed the Data Protection Act.

4. The impact of changing positions on the European and international level

We bring two important elements to the attention: first there is an evolution in the case-law of the European Court of Human Rights to consider data protection legislation in examining article 8 ECHR; secondly, there is the explicit recognition of the existence of a right of data protection within the European Union.

4.1 The case-law of the European Court of Human Rights

As already mentioned, the case-law of the European Court of Human Rights has moved to the recognition of a closer relationship between the protection of privacy and data protection, certainly when the personal data can be found in official databases and the evaluation is done from the point of view of protection. A right of personal access cannot be equally derived from article 8 EVRM. In its case-law the European Court of Human Rights often refers to the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data when dealing with privacy issues.[63]

4.2 The recognition of data protection as a human right within the EU legal framework

[61] Council of State, Annemans v. Belgian State, nr. 164.654, 13 November 2006.
[62] Council of State, Dewinter v. Belgian State, nr. 91.531, 11 December 2000, *C.D.P.K.* 2001, 473.
[63] M. McDONAGH, "Balancing disclosure of information and the right to respect for private life in Europe", *Journal of Internet Law* 2012, 16(3), 5-6. F. SCHRAM, *Verwerking van persoonsgegevens in België*, Brussels, ASP and Politeia, 2013, 18-24.

4.2.1 The unequal position of FOI and data protection within the EU legal framework

In the European legal framework there is an unbalance between freedom of information and data protection. The European Treaties did not fully recognize freedom of information as a fundamental human right, it was considered rather as an important working rule of the European institutions.[64] Only after the Lisbon Treaty freedom of information received the status of a full human right, but limited to the European institutions, bodies, offices and agencies.[65]

Already under the Treaty of the European Community, a right to the protection of personal data concerning them was recognized.[66] The right is not limited to the processing of personal data by Union institutions, bodies, offices and agencies but is also guaranteed to the processing of personal data by the Member States when carrying out activities which fall within the scope of Union law and the rules relating to the free movement of such data.[67] It was with the coming into force of the Lisbon Treaty that a right to the protection of personal data was fully recognized as a human right.

There is also the case-law of the Court of Justice on the relation between freedom of information and data protection. This case law HVJ C-92/09 and C-93/09 of 9 November 2010 Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v. Land Hessen[68] was clearly expressed in the case: if the disclosure of personal data in a document is at stake, the criteria applicable on personal data should be respected. The result of that jurisprudence is that the solution of a confrontation between transparency by making information public and data protection within the framework of data protection legislation and not in by balancing rights against each other in a concrete case. In this case it should be noted that community law applicable on the European Institutions were two Regulations, one that provided the publication of personal data of farmers[69] and Regulation 45/2001 of the European Parliament and the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[70]. Although the Court of Justice has confirmed the importance of transparency in a democratic society, the solution a conflict between transparency and data protection has to be found with the framework of the latter.

The case-law of the Court of Justice contains also an interpretation of access of personal data in documents. Access to documents of the Institutions of the European Union is organized in Regulation 1049/2001 that contains an exemption that refers to data protection regulations: “The institutions

[64] Article 255 of the Treaty of the European Community.
[65] Article 15.3 of the Treaty of the Functioning of the European Union.
[66] Article 286 of the Treaty of the European Community.
[67] Article 16 of the Treaty of the Functioning of the European Union.
[68] ECJ, Grand Chamber, 9 November 2010.
[69] Regulation 259/2008 of 18 March 2008 laying down detailed rules for the application of Council Regulation (EC) N° 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), *OJ* L. 76, 19 March 2008, 28-30. See f.e. M. BOBEK, “Joined Cases C-92/09 and C-93/09, Volker und Markus Schecke GbR and Hartmut Eifert, Judgement of the Court of Justice (Grand Chamber) of 9 November 2010 N.Y.R., *Common Market Law Review*, 2011, 48(6); A.-S. LIND and M. STRAND, “A New Porportionality Test for Fundamental Rights? The Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v. Land Hessen”, *European Policy Analysis* 2011, August, 1-11; S. DE VRIES, *The protection of fundamental rights within Europe’s internal market after Lisbon – An endeavor for more harmony,* (*The Europa Institute Working Papers* 4/10), Utrecht, Utrecht University, 2010, 46 p.
[70] *OJ* L. 8/1, 12 January 2001, 1-22.

shall refuse access to a document where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data".[71] According to the Grand Chamber of the Court of Justice the application of the exemption in Article 4(1)(b) cannot be limited to situations in which the privacy or integrity of the individual would be infringed for the purposes of Article 8 ECHR, without taking into account the EU legislation concerning the protection of personal data. Any undermining of privacy and the integrity must always be assessed in conformity with EU legislation concerning the protection of personal data.[72] It is not allowed that cases of processing of personal data be separated into two categories, namely a category in which that treatment is examined solely on the basis of Article 8 of the European Court of Human Rights (ECHR) and the case-law of the European Court of Human Rights relating to that article and another category in which that processing is subject to data protection legislation.

4.2.2 The importance of the Lisbon Treaty for the Belgian FOI-legislation

a. The different position of fundamental rights in the European Union after the coming into force of the Lisbon Treaty

The come into force of the Lisbon Treaty has two important results for the position of data protection. First of all, the position of data protection in the Treaties is enforced. There is the new article 16 of the Treaty of the Functioning of the European Union and article 39 in the Treaty of the European Union. By this inclusion data protection gains a stronger legal base.

Secondly the legal value of the Charter of Fundamental Rights of the European Union[73] is changed. Article 6.1 of the Treaty of the European Union the Charter has the same legal value as the treaties themselves.[74] This Charter contains not only a right of respect for private and family life in article 7, but also a right of protection of personal data in article 8. This right is not absolute, but the limits are present in a separate article. Article 52 states that any limitation on the exercise of the rights and freedoms recognized by the Charter must be provided by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are

[71] Article 4.1.b of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ* L145, 31 May 2001, 0043-0048.

[72] COURT OF JUSTICE, case C-28/08 P Commission v. The Bavarian Lager Co. Ltd, 29 June 2010.

[73] *OJ* C 83, 30 March 2010, 389-403.

[74] G. ARESTIS, *Fundamental rights in the EU: three years after Lisbon, the Luxembourg perspective*, (*Research Papers in Law 2/2013*), Bruges, European Legal Studies, 2013, 14 p.; H. RUCHEVA, "Protection of Fundamental Rights in the European Union: The binding EU Charter", *Journal for European issues* 2012, 223-237 (http://studiorum.org.mk/ evrodijalog/16/pdf/Evrodijalog_br_16_6_H-Runceva_ENG.pdf); L.F.M. BESSELINK, *The Protection of Fundamental Rights post-Lisbon. The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions*, 48 p. (http://www.fide2012.eu/index.php?doc_id=94); X. GROUSSOT en L. PECH, "Fundamental Rights protection in the European Union post Lisbon Treaty", *European Issue* nr. 173, 14 juni 2010, 13 p.; J. DUTHEIL DE LA ROCHERE, "Challenges for the Protection of Fundamental Rights in the EU at the Time of the Entry into Force of the Lisbon Treaty", *Fordham International Law Journal* 33/6, 2011, 1776-1799; M. DE MOL, *Het toepassingsgebied van Unierechtelijke grondrechten & het beginsel van de allocatie van bevoegdheden*, (*Maastricht Working Papers. Faculty of Law 2012-2*), Maastricht, 2012, 98 p.; X. GROUSSOT, L. PECH en G.T. PETURSSON, *The scope of application of EU Fundamental Rights on Member States' Action: in search of Certainty in EU Adjudication*, (*Eric Stein Working Paper N° 1/ 2011*), 36 p. (http://www.ericsteinpapers.eu/images/doc/eswp-2011-01-groussot.pdf).

necessary and genuinely meet objectives of general interest recognized by the Union on the need to protect the rights and freedoms of others. The field of application of the rights in the Charter are in the first place addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers ad tasks as defined in the Treaties.[75] But unlike the right of access to documents that in the Charter and in the Treaty of the Functioning of the European Union is limited to the institutions, bodies, offices and agencies of the Union, the Union was already be competent in the field of data protection to the member states with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

b. The influence of the recognition of data protection as a fundamental right for the Belgian FOI-legislation

If also the processing of personal data is to be considered as a fundamental right within the European Union that guarantees another right than provided by article 8 ECHR and article 22 of the Belgian Constitution it can be covered under the exemption of article 6, § 1, 2° of the law of 11 April 1994. The result is that elements (finality, proportionality, security measures) that are strange to the concept of public access are brought into the framework. But the data protection considerations aren't working absolute. There need to be done a public interest test, so a balance had to be done between the interest of disclosure and the protected interest.

As a result of that interpretation a step backwards could arise, where according to the Belgian Constitution there is no difference in value between the fundamental rights and a conflict between access to administrative documents and data protection could only be found in a balance exercise between the two rights in a concrete case.

5. The classification of documents

5.1 Classification according to Belgian law

Classification has to be considered as the awarding of protection and confidentiality to ad document. Classification of documents is a method to limit access not only to certain people with a security clearance, but prohibits that documents or information can be made public. Classification is possible on security grounds. In Belgium two kinds of legislations make classification of information or documents possible: the Act of 11 December 1998 concerning classification and security clearance, security attests and security advices[76] and the Act of 15 April 1994 on the protection of the

[75] Article 51 of the Charter of Fundamental Rights.
[76] *Official Gazette* 7 February 2003 amended by the law of 3 May 2005, *Official Gazette,* 27 May 2005

population and the environment against the dangers arising out of ionizing radiation and on the Federal Agency for Nuclear Control[77].

5.2 Classification as an exemption for access to administrative documents

If information in a document is sensible and a document is for that reason classified, the whole document is exempted from the right of access to administrative documents as guaranteed by the law of 11 April 1994.[78] The only thing that has to be done is to prove that the

This exclusion does not apply to environmental information.[79] I can be considered that this wasn't the intention, because the implementation of Directive 90/313/EEC was done in the law of 11 April 1994, but this was not the case for the implementation of Directive 2003/4/EC.

If personal data are in a classified document, no access is possible nor by a third person, neither by the person concerned. Also the access of the person concerned is excluded on basis of the law of 8 December 1992.

6. Conclusion

Where according to the Belgian Constitution all fundamental rights has the same value and conflicts between them can only be solved be an weighing exercise in a concrete case, the unbalance between the right of access to documents and data protection on the level of the European Union with regard to the member states, can endanger a fair balance between the two rights. On only the strengthening of data protection within the framework of the European Union, but also the classification of information can harm that fair balance.

[77] *Official Gazette* 29 July 1994. The possibility to classify documents in the nuclear sector was provided by amending the law of 15 April 1994 by the law of 30 March 2011, *Official Gazette* 18 April 2011.
[78] Article 2bis of the Act of 15 April 1994 and article 26, § 1 of the Act of 11 December 1998.
[79] Y. MOSSOUX, "La législation fédérale relative à l'accès à l'information en matière d'environnement : la fin du secret administratif ? », *Aménagement-Environnement* 2011(3), 183.