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LEAVE NO TRACE: THE RIGHT TO INFORMATION AND THE DUTY TO DOCUMENT

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vouliwatch

About this Expert Paper:

This paper is based on research carried out by Access Info Europe and TASC (Think tank for Action on Social Change), along with research partners in 12 European countries and the European Union, from September to December 2016.

The lead researcher and author was Nuala Haughey of TASC. The paper was reviewed and edited by Andreas Pavlou, Alba Gutiérrez, Luisa Izuzquiza, and Helen Darbishire of Access Info Europe.

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For more information on the Decision-Making Transparency project, please visit https://www.access-info.org/decision-making-transparency

Expert Paper on Duty to Document and Decision-Making Transparency

Contents

1. Executive Summary

This report, *Leave No Trace*, contains the first comprehensive research into the laws, guidelines, and practices on record keeping across a range of European jurisdictions.

It reveals an extremely weak legal infrastructure and hugely variable practice on record keeping, which is undermining the public's right of access to information: it is impossible to obtain documents that do not exist.

The direct consequence of the lack of clear-cut rules requiring public bodies to keep track of the decisions they are taking is to be found in the other findings of Access Info's Decision-Making Transparency project, conducted with partners across Europe, which revealed that in many cases the information needed to participate in decision making or to hold government to account simply does not exist. Such information includes minutes of meetings – including those with outside lobbyists, copies of legal opinions or other advice or evidence used in formulating policy, and justifications of the decisions themselves.

It is clear, then, that the lack of a legal framework defining what information should be documented and when, is having a negative effect on the right of access to information.

A further key finding of this research is that access to information laws (ATI laws, also known as freedom of information or FOI laws), have failed to anticipate this problem: access to information laws do not, in most cases, require that decision-making processes be documented or that specific classes of information be created.

This failure to include record keeping in access to information laws could be seen as a huge oversight by the right to information community, and it seems to have been based on a presumption that information and documents already existed. Perhaps it is only now as access to information laws are deployed, that we are realising the true extent of the paucity of record creation across huge swathes of government.

This situation is compounded by the fact that the nature of communication has changed radically in recent years. Established bureaucratic practices – not always codified in law but sometimes in guidance –traditionally resulted in certain records being created, and often issued with official reference numbers, as part of administrative files. Today these good practices simply fail to capture decision-making processes which may be just as likely to take place via email or even text messages as in a formal meeting where a secretary takes notes in a standardised format.

Such developments mean that, for members of the public – including civil society organisations, journalists, academics, and active citizens – interested in following a decision-making process, it's increasingly hard to find the information. Absent rules that require records to be kept, we are soon going to find that there is indeed no trace of how a decision was taken, undermining both real-time participation as well as undermining accountability to oversight bodies, such as parliaments, ombudsmen, and even on occasion law enforcement and the courts.

Where access to information laws do, in part at least, address this problem is through their proactive publication provisions, but even these are usually based on the presumption that the documents are already there and just need to be put onto a public body's website.

There is no doubt that proactive publication requirements contribute to driving record creation, but the wording of such laws rarely frames the creation of documents in terms of a legal obligation, weakening the role of oversight mechanisms such as information commissioners in cases of failure to comply with the duty to publish.

The research found that only one jurisdiction, that of Scotland (which has a separate freedom of information regime from the remainder of the UK), has specific requirements that particular types of records of government decision making be created: a specific "duty to document" clearly set out in law with a specific oversight mechanism.

For the remainder of the countries surveyed, we found that some that have guidelines on good administration, and some others that have good practices, developed organically over time. This is generally positive although we also found, as this report sets out in detail, instance where such practices have evolved separately within the same bureaucratic ecosystem, resulting in a proliferation of disparate record-keeping systems of varying quality. This variation helps explain the variety of responses that information requesters experience when asking multiple national public bodies for any particular type of document (such as minutes of meetings or justifications of decisions taken) – something that can be seen in the request-based monitoring of decision-making transparency carried out by Access Info and our partners (more information on the results of the monitoring can be found here LINK). This variety is reflected in this Leave No Trace report where our national experts often reported "practice varies!" There is clearly a pressing need to harmonise the rules and practice in many of the jurisdictions studied.

The picture is not totally bleak however: many countries have provisions requiring particular types of records to be created. The details are set out in Box A below. Importantly, in at least some of these jurisdictions – in particular Finland, Italy, Slovenia, Sweden and the United Kingdom – there are oversight mechanisms, and sometimes sanctions can be imposed for non-compliance.

Overall, then, the Leave No Trace research found that whilst the legal frameworks are practically non-existent, there are a range of bureaucratic good guidelines and at least patchy good practices that could form a strong foundation for strengthening the obligations of public bodies to keep a record of the process or taking decisions, thereby improving both the possibility of real-time participation and ensuring accountability for those decisions.

1.1 *Leave No Trace* Recommendations

This report captures the research findings and does not contain detailed recommendations by country. Rather, the Leave No Trace finding contribute to the other findings of the Decision-Making Transparency project conducted between 2014 to 2017

by Access Info Europe and partners across Europe. These findings are now being used to take forward discussions on how to address the problems identified, many of which require a range of tailored solutions to address the particular issues in each jurisdiction.

That said, there are some clear general recommendations for governments that we can make here:

- For the classes of information needed to participate in and hold to account decision-making processes, governments should ensure that the legal framework requires both the creation of records and their proactive publication. These classes of information include:
    - Appointments diaries for those responsible for decision making;
    - Record of the holding of and detailed minutes of internal government meetings;
    - Record of the holding of and detailed minutes of meetings with external actors, such as interest groups (lobbyists), be these formal or informal meetings;
    - Legal opinions by internal or external legal experts: such advice should, generally, not be given orally and if it is in exceptional circumstances, there should be a detailed minute of the meeting at which it was delivered;
    - Policy advice to government departments by either internal or external experts or advisors;
    - Justifications for decisions, with related documentation such as the evidence that was used as the basis for the decision.
- The legal framework should make clear which decision-making related information should be published and within what timeframe;
- There should be adequate training of all public officials on record-keeping obligations;
- An appropriate oversight mechanism – such as an information commissioner – should be established and should be empowered to conduct on-site inspections and to impose sanctions for non-compliance.

It is also strongly recommended that the right to information community across Europe and globally engage in a discussion about how to strengthen record creation rules and practice. This is something that Access Info has already started to do (a workshop on this was held at the Open Government Partnership Summit in Paris in December 2016, and we have raised this in multiple fora since, and held discussions with Information Commissioners and Ombudsmen) and we encourage all those interested in taking forward this agenda to contact us.

The right to information community has achieved a huge amount in the past two decades, securing recognition of the right of access to information as a fundamental human right. The next challenge is to ensure the existence of the information to which that right applies, so that there is indeed a trace of government decision making.

Findings by class of information

Ministerial Diaries: Ministerial diaries are routinely kept by government department as a matter of good administrative practice. This study finds that none of the thirteen (13) jurisdictions have laws in relation to the proactive publication of Ministerial diaries. In practice, these diaries are published proactively in Ireland, Scotland, the United Kingdom and the European Commission. They are routinely released in response to access to information request in at least three countries– Finland, Ireland and the United Kingdom.

Internal government department meetings: Five out of the 13 jurisdictions examined – Hungary, Scotland, Sweden, the United Kingdom and the European Commission – have legal provisions providing for record keeping of meetings with internal actors in the decision-making processes of government department. In practice, this study establishes that records of internal government department meetings are routinely created in seven jurisdictions – Finland, Germany, Ireland, Scotland, Sweden, the United Kingdom and the European Commission. However; these documents are not proactively published in most countries.

Meetings with external actors in formal decision-making: Five jurisdictions – Ireland, Scotland, Sweden, the United Kingdom, and the European Commission – have either laws or guidelines for the documentation of meetings of external actors as part of the formal decision-making processes of government departments. In practice, six countries proactively publish information on formal government departments meetings with external actors – these are Germany, Ireland, Poland, Scotland, Sweden, and the United Kingdom. This class of information is released under FOI in Germany, Ireland, Scotland and Sweden, although practice varies.

Meetings with external actors in informal decision-making: Four of the 13 jurisdictions surveyed have laws that relate to the documentation of the information that such meetings generate. These are Poland, Scotland, Slovenia and the United Kingdom. In addition, Ireland, Scotland, the United Kingdom and the European Commission have policy or guidelines in place in relation to this class of information.

In practice, this class of information may be proactively published in five jurisdictions – Italy, Poland, Scotland, the United Kingdom and the European Commission (in a limited way). FOI release is possible in four countries – Ireland, Poland, Scotland and the United Kingdom

Legal advice to government departments: Three jurisdictions have laws requiring this class of information to be documented, namely Poland, Spain, and the European Commission. In addition, guidelines are in place in Ireland and the United Kingdom.

Policy advice to government departments: None of the 13 jurisdictions examined in this research have laws relating to the proactive publication of policy advice given to government departments. While guidelines in relation to proactive publication are identified in the United Kingdom, in practice this class of information is not proactively published elsewhere in Europe and in Germany is it released under FOI.

Justifications for policy decisions: Italy and Sweden have laws relating to the documentation of justifications for policy decisions. As for guidelines, the situation is unclear in five countries, Austria, Finland, Germany, Hungary and Sweden. In practice, this research finds that justifications for policy decisions are documented in practice in the six countries of Germany, Ireland, Italy, Poland, Sweden and the United Kingdom. Laws relating to the proactive publication of justifications for policy decisions are in place in Ireland, Italy and Slovenia. Three countries have guidelines in place - Ireland, Poland and the United Kingdom. When it comes to practice, these same three countries proactively publish this class of information. This class of information is routinely released under FOI in Germany and Ireland.

2. Introduction

Good record-keeping is essential for good government. Records – such as emails, memos and minutes of meetings – tell us what, where, and when something was done, and how and why a decision was made.

Recording and giving reasons for actions and decisions is not just a matter of good administrative practice: it also ensures that we have adequate "paper trails" in case a decision or action is questioned or needs to be revisited or scrutinised.

Good records are also vital for public participation in decision-making: how can citizens get involved in decisions that affect them if they aren't informed?

Our access to information rights too are fundamentally dependent on public bodies properly documenting their key activities and decisions. If we request records that do not exist because they haven't been properly created or maintained, then our right to know is denied.

This report comes at a time when governments the world over are moving away from paper-based records systems. New communications technologies, such as emails, sms messaging, and smart phones have expanded the volume and variability of official records. At the same time, changing work patterns mean that increasingly public officials are required to be their own records managers, often with little or no dedicated training, guidance, or oversight.

The global push for more open and transparent government has arguably never been stronger. An increasing number of governments in Europe and worldwide are signing up to open government reforms that require them to publish more and more information and data about what they do on a proactive basis and in open and accessible formats.

Yet, alongside these trends we also witness cases of excessive government secrecy and 'off-the-record' practices which leave no trace in the official records. Such practices defeat efforts at oversight and erode citizens' trust in government and institutions, while also impoverishing the historical record.

2.2 Background and research methodology

This paper is a follow up to research carried out as part of an Access Info Europe project on Decision-Making Transparency. The initial research in 2015 established that around Europe there appears to be a lack of any legal duty on governments to document key information which is necessary for public participation and accountability of decision making.

In this second research phase, we set out to determine in further detail whether there are laws, guidelines, and practices in place around Europe which:

- Require the routine creation and maintenance of information needed for participation and accountability in decision-making – a '**duty to document'**

- Require public bodies to **proactively publish** certain types of official information.

In this report we examine these two related areas in 12 European countries and the European Commission. The countries are: Austria, Finland, Germany, Hungary, Ireland, Italy, Poland, Scotland, Slovenia, Spain, Sweden and the United Kingdom.[1]

Chapters 2 and 3 of this study set out the key findings of the research. Chapter 2 presents the overall state of play when it comes to rules, guidelines, and practices among government officials in Europe in relation to documenting their decision-making processes – the duty to document.

Chapter 3 provides a similar overview in relation to rules, guidelines and practices for the proactive publication of information about government department decision-making.

Chapter 4 provides a more detailed examination of the rules, guidelines and practices in relation to the duty to document. Chapter 5 examines the rules, guidelines, and practices in relation to proactive publication.

In Chapters 6 to 11, we drill down further and explore rules, guidelines and practices within government departments when it comes to creating and proactively publishing seven specific classes of information. The focus here is on the types of information that we consider to be a prerequisite to achieving transparency, participation, and accountability in decision making (see below for further details).

The findings presented here are based on the responses of national experts to a set of detailed research questions circulated in autumn 2016. Further details about the methodology are available in Annex 1.

2.3 Focus on information for participation and accountability in decision making

In examining 'duty to document' and 'proactive publication' regimes in Europe, the research in this report focuses on information generated during the decision-making activities in central government. At European level, the equivalent institutions are the Directorates General of the European Commission.

This is because these institutions play a central role in the formulation and implementation of national policies, including spending decisions, that fundamentally affect citizens' lives.

The development of government policy is generally an iterative process that involves consultations, research, argument, counter-argument, negotiation, compromise and review.

As a routine part of the policy-making cycle, government officials engage external stakeholders, including interest groups and experts, both through formal consultations and informal meetings. Encounters with stakeholders tend to generate documentation,

[1] While Scotland is part of the United Kingdom, for the purposes of this report it has been considered separately because it has its own FOI and public record laws, passed by the Scottish Parliament.

including written submissions, correspondence via letter or email, and minutes of meetings.

Within government departments themselves, the policy-making process also generates written records on a day-to-day basis, including analysis of policy options, legal advice and officials' views on key policy issues.

The seven *types* or *classes* of information examined in this research are:

1. **Meetings with internal actors in decision-making process**

Minutes, agendas, and lists of participants of meetings with internal actors in decision-making processes of government departments, such as meetings of Ministers with civil servants and special advisors in relation to policy developments.

2. **Meetings with external actors in formal decision-making process**

Minutes, agendas, and lists of participants of meetings with external actors as part of the formal decision-making process of government departments (for example, expert, advisory, and working groups comprising officials and outside stakeholders which have defined terms of reference).

3. **Meetings with external actors in informal decision-making process**

Minutes, agendas, and lists of participants of ad hoc meetings with external actors as part of informal decision-making process of government departments (for example, meetings with lobby groups such as representative bodies, NGOs, trade unions, business interests, companies, professional lobbyists etc.)

4. **Legal advice given to government departments**

This excludes Attorney General/chief legal adviser advice.

5. **Policy advice given to government departments**

For example, briefing notes for Ministers from civil servants.

6. **Justification for policy decisions**

For example, internal government documents evaluating policy decisions following reports of expert groups, public consultations etc., and justification for spending of public funds.

7. **Ministerial diaries**

Recorded entries, including appointments and meetings, in the official diaries of government ministers.

In the 13 jurisdictions examined, this research documents the rules, guidelines and practices in relation to each of these seven classes of information. However, it must be noted that these classes of information are not always recognised as separate and distinct in the laws and practices of all the jurisdiction examined. For this reason, it was not always possible to give definitive responses to the questions posed in the methodology for each of the 13 jurisdictions. Where this is the case, textual explanations are included.

A duty to document – making and keeping records

A 'duty to document' is an obligation on public bodies to create full, accurate and complete records documenting their decision-making processes, procedures or transactions. This can take the form of a statute-based legal duty, or a duty based in regulations, codes, or guidelines.

A duty to document recognises that records, once created, must be properly maintained and stored so they remain authentic, reliable, and easily retrievable when subject to access to information requests or for use by audit or investigatory authorities. For such a duty to be meaningful, it must come with proper oversight and enforcement.

Proactive publication – what it means

Proactive publication is a key element to openness and transparency of public bodies. It generally requires authorities to identify the information that they hold, and to place this information in the public domain without requesters having to ask for it.

This would generally be information about authorities' administrative functions, structure, budgets, decision-making structures, procurement and financial information etc. Proactive publication regimes are often based on Model Publication Schemes issued by national Information Commissioners.

Proactive Publication is closely associated with the open government data approach in which governments make datasets available in machine-readable and reusable formats to allow users and intermediaries to analyse, visualise, and use it in new ways.

3. Key findings – duty to document

This paper maps the rules, guidelines and practice in 12 European countries and also the European Commission around the 'duty to document' and proactive publication of information. These are the main findings related to the 'duty to document':

3.1 Right of Access to Information (ATI) laws do not require public officials to create and keep records (a duty to document)

In none of the 13 jurisdictions surveyed do the access to information laws contain explicit provisions requiring officials in government departments to create and keep records. This finding is not surprising as it is generally not considered the function of rules on access to information to oblige public authorities to generate and hold particular information.

3.2 ATI laws presume that decision-making processes are documented

Access to information laws give people the right to access information held by public bodies. This information is contained in various kinds of records, including written documents. By granting access rights, these laws therefore presume that decision-making records are created and kept in the first place.

Firstly, ATI laws often contain secrecy exemptions for information relating to deliberations of government departments. By definition, a rule that creates an exemption to the release of certain information carries with it an implicit assumption that this information is routinely captured and maintained in records in the first place.

Secondly, many ATI laws contain 'proactive publication' requirements. These oblige public authorities to routinely publish and make available certain types of information about their work and functions on a proactive basis – that is before the information is requested. Proactive publication protocols can also be considered as an implied expectation that certain types of records containing specific classes of information are routinely created and kept.

However, the fact that many European ATI laws contain such tacit assumptions does not by any means provide a guarantee that specific classes of information will always be documented and maintained.

The findings of this research show that practices vary considerably within countries when it comes to the detail of how records of government decision making are created and maintained, and how the information in the documents themselves is organised and presented.

3.3 Information Commissioners do not weigh in on whether documents should be created

In none of the countries surveyed does our research identify Information Commissioners' decisions which stated that records or documents ought to have been created or should exist. However, in two countries – Scotland and Ireland – this study found that Information Commissioners had expressed concerns about public bodies' poor practices

with respect to the creation and retention of records relating to their activities. The European Ombudsman has also talked previously about the importance on keeping accurate and detailed records in government, and although slightly more specific, the Spanish Transparency Council has also recently published recommendations on how to record and publish lists of meetings.

3.4 A legal 'duty to document' is the exception to the rule

Only one of 13 jurisdictions surveyed, Scotland, has a specific legal duty on government departments to create and maintain records of their activities – a 'duty to document'.

Other countries do have guidelines on good administration as well as strong bureaucratic traditions of record keeping, but none reached the level of the kind of duty to document we were looking for. Scotland's law is therefore very innovative in this respect.

The Public Records (Scotland) Act 2011 requires some 250 specified public bodies, including government departments, to put in place Records Management Plans setting out proper arrangements for the management of their public records.

These plans must provide for the creation and management of authentic, reliable and useable records capable of supporting business functions and activities for as long as they are required.

This duty to document is overseen by a Keeper of the Records, who has powers to conduct reviews, issue improvement notices, and publicise failures by public bodies to show improvements – effectively a 'name and shame' provision.

3.5 Some countries have legal duties for documentation of some work of legislature and government

Many countries have provisions requiring *particular types* of records of government decision making to be created. These often relate to the work of the legislature and the executive. For example, Hungary's administrative law requires meetings of the cabinet or government to be documented.

Likewise, in Poland, there is an obligation on officials to prepare a written rationale and impact assessments for all draft bills issued by the government. Separately, archive laws routinely provide for preservation and destruction of certain records.

3.6 Laws and guidelines on the preservation of documents of historical value are common

Finally, while this research did not set out to examine laws and guidelines in relation the preservation of records for archival purposes, the study does reveal that these are routinely in place in all the countries surveyed.

3.7 Guidelines on records management are widespread and their scope is very general

In 12 of the 13 jurisdictions examined, general duties in relation to creating and keeping records within government departments can be found in guidelines or secondary laws, such as regulations or decrees. The exception is Hungary, where the research was not able to establish whether any guidelines exist as these are not publicly available.

3.8 Government department decision-making records are generally created in practice, but often not consistently

There are long standing customs and practices within government departments in Europe when it comes to documenting their decision-making processes. This research found that in practice government departments in all 13 jurisdictions do routinely create and maintain records relating to decision making. Practice varies in six of these jurisdictions, and inconsistencies are noted in terms of both what is documented and the degree of detail in the records. Other Access Info research has found that, even for relatively high profile decision-making processes, minutes of meetings were not created 30% of instances.

3.9 Oversight of documentation practices is often missing

In five out of the 13 jurisdictions surveyed, this research found provisions for oversight and monitoring, including sanctions for non-compliance. These are Finland, Italy, Slovenia, Sweden, and the United Kingdom.

4. Key findings – proactive publication

This paper maps the rules, guidelines and practice in 12 European countries and also the European Commission around the 'duty to document' and 'proactive publication' of information. These are the main findings related to the 'proactive publication':

4.1 ATI laws generally provide for proactive publication of some government records

A total of eleven out of the 13 jurisdictions examined in this study have proactive publication provisions in their access to information laws. These require public bodies, including government departments, to develop structured lists of the kind of information that is routinely made available to the public without the need to make a formal application under the ATI law. In eight jurisdictions, there are also guidelines in place in relation to the proactive publication of certain classes of information by government departments

4.2 Practice varies when it comes to the routine publication of government decision-making records

While government departments in 12 jurisdictions (except Hungary) routinely and proactively publish certain records as a matter of standard practice. However, in nine of these jurisdictions it was observed that practice varies both in terms of the type of information that is routinely proactively published and also how the information itself is presented. Such variance in practice is confirmed by research by Access Info which found that overall as much as 90% of information about decision making is not available via proactive publication, and that for even basic documents such as justifications of decisions taken, only 68% were available for the decision-making processes that we researched.

4.3 Oversight of proactive publication rules is prevalent

A total of eight jurisdictions – Finland, Ireland, Italy, Scotland, Slovenia, Spain, the United Kingdom and the European Commission – have some provisions for oversight and monitoring of the proactive publication requirements in their ATI laws.

5. Duty to document government information

This chapter presents an overview in relation to rules, guidelines, and practices for the duty to document information about government department decision making.

5.1 Overview

Laws and guidelines

Out of the 13 jurisdictions examined in this study, only one (Scotland) has a specific law which provides for the creation and management of records by government departments (See Table 1 page 10).

The Public Records (Scotland) Act 2011 requires some 250 specified public bodies, including government departments, to put in place Records Management Plans setting out proper arrangements for the management of their public records.

These plans must provide for the creation and management of authentic, reliable and useable records capable of supporting business functions and activities for as long as they are required.

This duty to document is overseen by a Keeper of the Records, who has powers to conduct reviews, issue improvement notices and publicise failures by public bodies to show improvements – effectively a 'name and shame' provision.

While none of the other countries surveyed has a similar statute-based duty to document, many countries have provisions requiring *particular types* government decision making to be documented. These often relate to the work of the legislature and the executive. For example, Hungary's administrative law requires meetings of the cabinet or government to be documented.

Likewise, in Poland, there is an obligation on officials to prepare a written rationale and impact assessments for all draft bills issued by the government. Separately, archive laws routinely provide for preservation and destruction of certain records.

In a total of 12 countries, this research identifies general guidelines or codes (or secondary legislation) which provide for the creation and maintenance of records by government departments. The exception is Hungary where guidelines could not be identified.

Practices

When it comes to actual practices in this area, the research findings indicate that government departments in all 13 jurisdictions generally create and maintain records in relation to their decision-making processes.

However, in six of these – Hungary, Ireland, Italy, Scotland, Spain and the United Kingdom – it was noted that practices often vary between government departments.

As there has been no comprehensive research documenting the practices of all government departments in the relevant countries, these assessments are based largely on anecdotal evidence as well as some direct experience. We suspect that the variance between government bodies also applies within the same public authorities, something that is particularly likely given the lack of legal obligations and the absence of clear guidance in most countries.

Oversight and monitoring

This research found that seven countries (Finland, Italy, Poland, Scotland, Slovenia, Sweden and the United Kingdom) have clear systems in place in relation to oversight and monitoring of statutory duties or guidelines to document information about government department decision making.

Duty to document by government departments: laws, guidelines, and oversight

Country	Duty to document by government departments		
	Law	Guidelines	Oversight
Austria	X	✓	NC
Finland	X	✓	✓
Germany	X	✓ partial	X
Hungary	X	NC	X
Ireland	X	✓	X
Italy	X	✓	✓
Poland	X	✓	✓
Scotland	✓	✓	✓
Slovenia	X	✓ decree	✓
Spain	X	✓ partial	X
Sweden	X	✓	✓
United Kingdom	X	✓	✓
European Commission	✓ partial	✓ partial	✓

X = No ✓ **=** Yes **NC =** Not clear/no data

Table 1: Duty to document in law, guidelines, and oversight. See Annex 1 for full details of the research questions provided for tables.

5.2 Detailed country findings

In **Austria**, whilst there is no law containing a general 'duty to document' rule for government departments, federal policy includes record-keeping rules for federal ministry staff.

The situation in practice is somewhat opaque. Based on responses provided to requests about meetings with lobbyists, our research found that there appears to be no standard process for documenting decision making across federal ministries.

The situation is also unclear in relation to the oversight and monitoring of whatever guidelines or internal policy may exist.

In **Finland**, there is no single statutory 'duty to document' that applies to the work of government departments. However a legal obligation that obliges authorities to create and realise good practice of information management is formulated in a general manner in Section 18 of the Act on the Openness of Government Activities 1999.

Guidelines also exist in this area, with a loose obligation to record certain information in Section 6 of the Regulation on the Openness of Government Activities and on Good Practice in Information Management (1030/1999).

In practice, Finnish government departments do routinely create (and proactively publish) certain records relating to decision making. For example, the governmental website, Hankerekisteri contains information on all on-going projects of the government.

In relation to oversight and sanctions, a complaint to the Ombudsman can be made in all kinds of cases of maladministration, including poor management of information. Moreover, if a negative decision is based on poor management of information and the impossibility of locating a document, this can also be challenged in the Court according to literature in Finland and Finnish expert, Olli Mäenpää (Julkisuusperiaate (Publicity Principle) 2016, p. 299).

In **Germany**, there is no specific law providing for a general duty to create records at government department level. However, different regulations at the federal and federal state level exist.

Guidelines containing provisions relating to the creation and maintenance of records by government departments exist, but they are different for every public authority.

Our research found that, in practice, government departments do routinely create and maintain records relating to decision-making processes. There are no provisions for oversight and monitoring in this area, including sanctions for non-compliance.

In **Hungary,** there is no specific law requiring all government departments to create and maintain records. In relation to meetings of the cabinet or government, an administrative

law provides for the creation and maintenance of a summary recording, including the date and place, the names of participants, the agenda, and details of matters discussed (Section 17 of Act 2010 XLIII, the Central State Administration Bodies and Members of the Government and State Secretaries).

When it comes to guidelines in this area, while ministries may have regulating procedures with recommendations on good practices, these are not publicly available. In relation to records covered by the FOI Act's publication list, there is weak regulation in place.

In relation to guidelines or codes on the creation and maintenance of records, bye-laws in the form of normative orders issued by the minister exercising control and oversight over a given collegiate public body could regulate creation and maintenance of records.

Hungarian government department records relating to decision making are not available for public access. While our researchers could not definitively establish whether records are routinely created and maintained, it is assumed that this is indeed the case, as a matter of good administrative practice.

In **Ireland**, there is no general law obliging government departments to create and maintain records of particular activities. To a large degree, records management is a matter for individual public bodies, including government departments, and institutional practices and standards vary. Over time, organic record-keeping practices have evolved including the proliferation of disparate record-keeping systems of varying quality.

At departmental level, records management plans are generally governed by the requirements of each body's business, including its statutory functions and responsibilities. Civil service training guidelines on records management from 2005 provide only very general information and advice. ("Old rules are still good rules - Record Management Guidelines" – not available online). These do not have any oversight provisions.

Although both the Freedom of Information Act 2014 and the National Archives Act 1986 give power to a government Minister to issue regulations (secondary laws), these powers have never been used to issue regulations in relation the record creation and maintenance.

While in practice government departments in Ireland do routinely create records relating to decision-making, practices vary. Also, concerns have been repeatedly raised by official inquiries about poor record keeping at government level. There are no dedicated oversight structures in place in this area.

In **Italy**, there are two main laws regulating record keeping. A presidential decree, Testo Unico sulla documentazione amministrativa, (445/2000) and the Code of Digital Administration (recently reformed by d.lgs 179/2016). Presidential Decree 445/2000 defines general rules on the production, the issuance, the preservation, and the management of paper and digital documents by public authorities. The Code of Digital Administration focuses on digital technologies and establishes the "digital first" principle for document production.

The main guidelines in this area are Decree of the Prime Minister (D.P.C.M., 03/12/2013) which establishes technical rules on creation and maintenance of records and identifies the "preservation manager" ("Responsabile della conservazione"), who is the public officer in charge of ensuring that records remain accessible and usable.

In relation to oversight and monitoring in this area, the College of Auditors (Collegi dei revisori) are in charge of assuring the observance of record-keeping rules: public officers who don't comply with these rules can be liable to disciplinary actions.

In **Poland**, each document that comes to the public institutions is registered and described. Additionally, documents related to administrative procedures are mentioned or linked in data sheets prepared for each case.

The proper treatment of documents is regulated by a Prime Minister's ordinance/decree. It says what should be done with documents that are submitted to the institutions, including how to register and order them. It concerns both the electronic and paper documents. Electronic documents are described with a use of metadata. The data sheets regulation that is describing who took part, what was done and which document refers to each administrative case, is regulated by an article in the Administrative Code. Data sheet maintenance duty is excluded in minor cases (list of those cases is prescribed by the Minister).

As regards duty to document the law-making process, in the case of the draft bills prepared by the government, there is an obligation to proactively publish these on the special website of the Government Legislation Centre. There is information on the participants at consultation meetings published there, as well as on those who presented their opinions and proposals. There is also feedback of a given minister, especially in relation to whether suggested amendments will be approved or not.

The Council of Ministers (the government or cabinet) is obliged to record its meetings and prepare minutes in writing. There is no direct obligation to include the names of participants, but in practice this is generally done. According to the court ruling issued on 2013, these minutes cannot be publicly available as they fall under the provisions of the Law on Council of Ministers, which says that such meetings are closed.

In addition, a body called the Constant Permanent Committee of the Council of Ministers (Komitet Stały Rady Ministrów), which prepares legislative documents for Council of Minister meetings, has to create minutes of its meetings.

Regardless of the provisions concerning duty to document as regards law making, in practice, the situation in Poland is somewhat opaque. Firstly, because several meetings are closed and there are restrictions on access to documents; secondly as communication related to decision-making is often conducted via e-mails. This research identified a trend of communications related to decision-making going through e-mails that are not registered and cannot be requested using the access to information law. In one case in Poland, a request for emails between government officials and advisors in relation to draft legislation were turned down on the basis that they were 'internal' records. (Supreme Administrative Court judgment 2012)

In **Scotland**, a range of provisions exist obliging Scottish public authorities, including government departments, to create and keep records.

The main law is the Public Records (Scotland) Act 2011 which requires named public authorities to carry out effective and efficient records management. Under Section 1 (1) of the Act, public authorities including government departments must prepare and implement Records Management Plans (RMPs) setting out proper arrangements for the management of their public records.

To assist authorities in complying with their obligations, a statutory body called the Keeper of the Records of Scotland produces a detailed Model Records Management Plan, as well as guidance to the form and content of RMPs (Sections 1 (4) and 8 of the Act).

Each authority's RMP should include a Records Management Policy statement describing how it "creates and manages authentic, reliable and useable records, capable of supporting business functions and activities for as long as they are required." The policy statement should be made available to all staff, at all levels in the authority (Element 3, Model Records Management Plan).

Under the law, which has been in force since January 2013, an authority's RMP may make different provision for the management of different kinds of public records. This allows public bodies to take into account, for example, the different levels of risk associated with the management of different kinds of records.

All individual RMPs are agreed with the Keeper of the Records of Scotland and are regularly reviewed by the authorities themselves. The Keeper has powers (Section 6) to undertake records management reviews and, where authorities fail to meet their obligations under the Act, to issue Action Notices for improvement (Section 7). If an authority fails to comply with any of the requirements of an Action Notice, the Keeper may publicise the failure.

The Public Records (Scotland) Act 2011 currently applies to a total of 250 public bodies, and the law allows for more authorities to be added by Ministers by statutory instrument. According to the National Records of Scotland, a total of 132 Scottish public authorities had agreed RMPs by December 2016. (Correspondence with author)

In addition, a range of other sector-specific statutes in Scotland also contain their own requirements for the creation and maintenance of records.

For example, the Public Finance and Accountability (Scotland) Act 2000, section 19 requires bodies to whom sums are paid out of the Scottish Consolidated Fund to prepare accounts of expenditure and receipt; the Town and Country Planning (Scotland) Act 1997, section 36 requires every planning authority to keep a register of applications for planning permission; and the Procurement Reform (Scotland) Act 2014, section 15 requires contracting authorities which expect significant procurement expenditure to prepare a procurement strategy.

The Public Records (Scotland) Act 2011 is separate and distinct from Scotland's FOI law, which applies to many more public authorities. A code issued under the Freedom of

Information (Scotland) Act 2002 sets out practices which authorities should follow in relation to the "creation, keeping, management and final disposal of their records". (2011 Code of Practice on Records Management Under Section 61 of FOISA). The Code stresses the importance of authorities identifying "what records they are likely to need to document their activities, and the risks of not having those records".

The code also describes the particular arrangements which apply to authorities which transfer their records to the National Records of Scotland or other public archives.

It is important to note that not all bodies covered by this FOI code are also subject to the records management obligations in the Public Records Act (Scotland) 2011. In that sense, the Act remains complementary to the code. However, it should be noted that the code forms the basis of the Scottish Information Commissioner's Model Publication Scheme which has been adopted by all Scottish public authorities.

There is also a separate Code of practice for the Scottish Health Service (Scottish Government Records Management: NHS Code Of Practice (Scotland) Version 2.1 January 2012), while Scottish government departments issue circulars and guidance which include the creation and maintenance of particular records, for example Strategic Environmental Assessment for Development Planning.

In practice, when it comes to the routine creation and maintenance of records relating to decision making by government departments, this research found that local custom and practice in Scotland vary. This variation is both in terms of detail and how the information is organised and presented.

In **Slovenia**, there is no single law with specific provisions relating to creating and maintaining documents by government departments.

A 2005 Decree on Administrative Operations states that when public authorities carry out administrative tasks, "they must be documented with a corresponding written record" and that "matters arising from the work of bodies must always contain all the documents with attachments that are relevant to the case". This decree covers government departments.

The regulation does not provide a definition of an "administrative task," but the General Administrative Procedure Act 2006 stipulates in Article 2 that an "administrative matter is the decision on the right, obligation or legal benefit of a natural or legal person or other parties in the field of administrative law. An administrative matter shall be deemed to be an administrative matter if the regulation stipulates that an authority shall conduct an administrative procedure in a particular case, decide in an administrative procedure or issue an administrative decision, or if, for the sake of protection of the public interest, it arises from the nature of the case." The Act covers administrative and other state authorities, local communities and public service authorities, when deciding about administrative matters and about rights, obligations or legal interests of individuals, legal persons and other parties (Article 1).

Supervision of general acts and regulations applying to the administrative procedures (including the implementation of the General Administrative Procedure Act and Decree on Administrative Operations) is performed by the Public Sector Inspectorate.

In **Spain**, Law 19/2013, of 9 December, on Transparency, Access to Public Information and Good Governance does not incorporate any duty to document decision-making processes.

There is also no general law on public records and archives that expressly regulates this duty. The closest provisions are to be found in the General Administrative Procedure Act 2015 (Law 39/2015 of 1st of October), that covers all government departments, and considers electronic records to be the primary medium to document administrative acts.

However, two main restrictions included in this law highly minimise the duty to document:

- It is limited to activities regulated by the Administrative Law (not including political acts nor activities that are not formally regulated).

- Information from "information systems, data files and computer databases, notes, drafts, opinions, summaries, communications and internal reports or between units or administrative bodies, as well as value judgments issued by Public Administrations" are excluded from the record-keeping obligations.

Hence, the duty to document does not apply to many of the classes of information relevant for participation in and accountability of decision making.

The previously-mentioned General Administrative Procedure Act 2015 also establishes the basic requirements for the creation and maintenance of electronic records. Such requirements are broadly regulated through the guidelines contained in the e-Government regulation on Technical Standards for Interoperability ("Normas Técnicas de Interoperabilidad") with which all government departments must comply.

Each Department is required to adopt an electronic record-keeping policy according to those technical standards, as well as archival regulations, mainly the Decree establishing the Spanish Archival System and regulating the Central Government / Central State Administration's Archival System, and the set of rules on access to it (Real Decreto 1708/2011, de 18 de noviembre, por el que se establece el Sistema Español de Archivos y se regula el Sistema de Archivos de la Administración General del Estado y de sus Organismos Públicos y su régimen de acceso).

Yet to date, only three Departments have approved their own policy: the Ministry of Finance and Public Administration, the Ministry of Education, Culture, and Sports, and the Ministry of Defence. There is, however, no evidence of implementation. While in practice, government departments do routinely create and maintain records in relation to decision making, there are no sound records management systems established, and procedures and practices vary.

There are no provisions for oversight and monitoring in this area, and the only sanctions included in Spanish legislation are those concerning the fraudulent destruction of records.

For example, the Law 16/1985, of 25th of June, on Spanish Cultural Heritage, establishes administrative sanctions for the elimination of assets from Documentary Heritage (under this law, every public record is considered as documentary heritage from the moment it is created).

In **Sweden**, there is a general obligation according to law of administration (”Förvaltningslagen”) to document/take notes of information given to an authority or discovered during inspections. There is also an obligation to keep registers (”diarier”).

Under the Public Access to Information and Secrecy Act 2009, all public authorities have an obligation to keep records of their official documents including received and sent letters/mails. This is a very extensive law which codifies the principle of access to official documents in the Constitution and outlines all the exemptions to the general principle of transparency. There are no binding rules to publish records proactively.

In relation to oversight in this area, criticism from the Ombudsman is regarded as a sanction although not legally binding. In very rare cases sanctions would consist of taking a civil servant to court for misconduct, or for example breach of security rules.

But sanctions would more likely be some kind of disciplinary punishment depending of workplace and tasks, possible leading to dismissal. This has happened also to members of government.

In practice, this research found that Swedish government departments in general do routinely create and maintain records related to decision-making.

In the **United Kingdom**, the Public Records Act 1958 makes general provision with respect to public records, including government department records, and the Public Records Office. In addition, Scotland and Northern Ireland, which are both part of the United Kingdom, have their own public records legislation.

A Code of Practice on the management of records issued under section 46 of the UK’s Freedom of Information Act 2000 advises that public authorities should ensure they keep the records they will need for business, regulatory, legal, and accountability purposes.

Specifically, the code says that authorities including government departments should have in place a records management policy and “clearly defined instructions, applying to staff at all levels of the authority, to create, keep and manage records” documenting their principal activities (par 6.1 (d)).

In enforcing the provisions of the Freedom of Information Act 2000, the Information Commissioner’s Office (ICO) can become aware of an authority’s records management policy and practices.

The Information Commissioner has a duty under section 47 of the FOI Act to promote good practice in the observance by public authorities of the Section 46 Code on records management. The Commissioner may also issue a practice recommendation (section 48 FOI Act) where an authority does not conform to the Code specifying the steps that need to be taken in order to comply.

In addition, the UK's Civil Service Code requires civil servants to "keep accurate official records and handle information as openly as possible within the legal framework".

The National Archives provide a substantial range of information and guidance on records management for information professionals and through its Information Management Assessment programme seeks to raise standards in government.

The National Archives' Information Management Assessment (IMA) programme provides government departments and public bodies with an independent and bespoke assessment of how well they are managing their information, and mitigating related risks. Details of the programme and their reports are available on the National Archives' website

In addition, the Information Commissioner's Office has produced an online data protection self-assessment toolkit which includes a module on records management.

In practice, this research found that while records of departmental decision-making are routinely created and maintained, practices vary across the public sector and between government departments.

For the **European Commission**, the relevant guidelines and codes on a duty to document are the Commission's Document management and archival policy which contains a number of rules laid out in the Rules of Procedure, later adopted Annexes, as well as the implementing rules.

The Commission's Rules of Procedure (specifically, in the Annex contained in Commission Decision of 23rd January 2002 Amending its Rules of Procedure) states that "document management must ensure: the due creation, receipt and storage of documents".

The are no specific rules on when certain documents should be created, but there is an importance placed on documenting information to "preserve the institution's memory, facilitate the exchange of information, provide proof of operations carried out and meet the department's legal obligations" and to register these documents "if it contains important information which is not short-lived and/or may involve action or follow-up by the Commission or one of its departments."

The Commission has published a list of possible files that can be created (Common Commission-Level Retention List for European Commission Files - First Revision), including their retention periods before being considered for archival purposes – largely inter-institutional documents or with official bodies, rather than, say, documents containing minutes of ad hoc meetings with private stakeholders. The Secretariat General has confirmed to our researchers that it does not have any documents that regulate exactly which, or how, external meetings should be recorded.

The Implementing Rules of the Commission's Rules of Procedure aim to ensure the consistency of document management in all Commission departments. These rules are implemented through the IT system ARES/NOMCOM where documents are centrally registered (Electronic Archiving and Document Management Policy of the European Commission). Furthermore, some Directorates General within the

European Commission have their own limited, tailored, guidance in relation to record creation.

Regulation 1049/2001 'regarding public access to European Parliament, Council and Commission documents' does not contain a specific clause regarding a duty to document. It only refers to documents held by an institution. It states that "this Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union." The regulation does not contain an obligation to create those documents in the first place.

When it comes to practice, the Commission publishes in its public register many of these documents proactively, and these are accessible using the register search function. This does not include however, much information that is created around ad hoc or unofficial activities that form decision-making processes, such as minutes of meetings with external actors outside formal participation mechanisms.

6. Proactive publication of government information

6.1 Overview

Laws and guidelines

A total of eleven out of the 13 jurisdictions examined in this study have proactive publication provisions in their access to information laws (see Table 2 page 22). These are: Finland, Germany, Hungary, Ireland, Italy, Poland, Scotland, Slovenia, Spain, the United Kingdom and the European Commission.

These typically require a range of public bodies – and in some cases also listed private bodies – to develop structured lists of the kinds of information that is routinely made available to the public without the need to make a formal application under the access to information law.

A total of seven countries – Finland, Ireland, Italy, Poland, Scotland, Slovenia and the United Kingdom – also have guidelines in place in relation to the proactive publication of certain classes of information.

Practices

This research found that in 12 jurisdictions, government departments routinely and proactively publish certain records as a matter of standard practice. In nine of these jurisdictions it was observed that practice varies both in terms of the type of information that is routinely proactively published and also how the information itself is presented.

Oversight and monitoring

A total of eight jurisdictions – Finland, Ireland, Italy, Scotland, Slovenia, Spain, the United Kingdom and the European Commission – have some provisions for oversight and monitoring of the proactive publication requirements in their ATI laws.

6.2 Detailed country findings

Austria's access to information law does not contain any provisions in relation to the proactive publication of records by government departments. Nor do any general guidelines or codes exist.

In practice, the government proactively publishes the agenda and most documents related to agenda points of meetings of the Council of Ministers (the cabinet or government) on the website of the Federal Chancellery.

This practice was introduced in September 2016. Prior to this, information requests for the agenda of Council of Ministers' meetings were denied. The change in practice does not reflect a change in the legal framework.

In addition, there is a tradition in Austria that draft laws on the federal level are subject to a pre-parliamentary process. Government Ministries release a first draft of a bill for public consultation, and other ministries and government agencies, regional government

bodies, pressure groups, civil society groups, companies or individual citizens can provide written comments.

These comments are generally published on the website of the Parliament. The feedback is incorporated by the ministry that drafted the bill before the draft law is adopted by the Council of Ministers and then submitted to parliament.

This research has not been able to determine any legal basis for this process. It appears to originate from agreements between the federal government and regional governments in order to allow them to contribute to draft laws.

Proactive publication by government departments: laws, guidelines, and oversight

Country	Proactive publication by government departments		
	ATI law	Guidelines	Oversight
Austria	X	X	X
Finland	✓	✓	✓ S
Germany	✓ S	X	X
Hungary	✓ S	NC	X
Ireland	✓	✓	✓
Italy	✓	✓	✓
Poland	✓	✓ S	X
Scotland	✓	✓	✓
Slovenia	✓	✓ decree	✓
Spain	✓	X	✓ S
Sweden	X	X	X
United Kingdom	✓	✓	✓
European Commission	✓ S	X	✓ S

Table 2: Proactive publication by government departments: laws, guidelines, and oversight

See Annex 1 for the research questions asked for this table.

✓ = Yes x = No **S** = Some **NC** = Not Clear

In **Finland**, Sections 18-20 of the Act on the Openness of Government Activities 1999 (the equivalent of an access to information law) contain provisions that require the authorities to see to the appropriate availability of certain records. It does not explicitly require them to publish these records online for example.

Separately, section 7 of the governmental Decree on the Openness of Government Activities and on Good Practice in Information Management contains some provisions on the availability of the information. It states that records and the obligatory plan for keeping archives needs to be accessible to the public in the registry or service point of the authority.

In practice, government departments routinely and proactively publish information on the government website. The type of information published varies, depending on the decision-making process involved. If there is a working group, then the decision on the composition of the working group is published. Drafts of government legislative proposals that are open for consultation are also published on this website, as well as the individual feedback from the consultation rounds.

There are no dedicated legal provisions for oversight and monitoring, nor for non-compliance in this area. However, in cases where there is a negative decision on access to documents through non-existence of a document and there are also related proactive publication rules, then oversight is a possibility. How this applies in practice depends on the specific case.

In **Germany**, the FOI law (Federal Act Governing Access to Information held by the Federal Government) has proactive publication provisions relating to general filing plans and organisational plans, however the research found there were no further guidelines or codes relating to the proactive publication of records by government departments. The German FOI law applies to government departments on the federal level. At the State level in Hamburg, a lot of records have to be published, for example public contracts.

In practice, government departments do routinely publish certain records proactively, but usually upon request or if they deem it useful. Practices also vary between different government ministries. There are no provisions for oversight and monitoring.

Hungary's access to information law contains a Standard Disclosure List which specifies the kinds of information which bodies subject to the legislation are required to disseminate (Annex I of Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information).

The list obliges collegiate bodies to publish on their websites specific data including procedural rules, place and time of settings of the collegiate body, publicity, decisions, minutes or summaries of meetings, and information on voting in the collegiate body, if this is not restricted by law (Point 8 of Standard Disclosure List, section II).

Under the law, the public bodies must publish the information immediately upon the change taking effect, and store previous data in the archive for a year. No other proactive publication regulations could be observed in the legislation.

This duty to publish, however, only applies to public organs which have a duty to perform public tasks in general. There are specific sectoral regulations which create exemptions from mandatory data publishing. For example, Act XLIII of 2010 on central state administrative organs and on the legal status of Government members and state secretaries declares that government meetings and voice records of the meetings that are not accessible to the public (Act 2010 XLIII, the Central State Administration Bodies and Members of the Government and State Secretaries). A written summary of meetings is administered by the undersecretary for administration of the Prime Minister's Office and are also not public by default.

Internal data management regulations and bye-laws of Ministries can also regulate public data management. However, they usually just repeat the relevant provisions of the FOI Act or remain silent about a particular publishing issue. In practice, government departments do not routinely and proactively publish certain records.

In relation to guidelines in this area, the situation in Hungary is unclear. The FOI Act prescribes the components of the standard publication list that should be published by every public organ performing a public function (in addition, collegiate bodies are obliged to proactively publish data about decision making), but the scope of the required information as well as the subjects are restricted and the researchers of this study are aware of no other guidelines or regulations on this matter.

The National Authority for Data Protection and Freedom of Information has the power to investigate individual cases of non-compliance with public data publishing rules (or unjust rejections of public data requests).

It only can address recommendations or initiate lawsuits against public authorities ("data owners") failing to perform their duty. It is not entitled to impose fines in relation to access to information cases.

Apart from the types of data listed in the Standard Disclosure List, other types of records are either unregulated or left up to governmental discretion and articulated in normative orders or internal regulations. In practice this means that most government information is not accessible for the public.

In **Ireland**, the Freedom of Information Act 2014 requires bodies bound by the Act to have a publication scheme and to publish information covered by the scheme in the public interest. A Model Publication Scheme sets out six categories of information that must be routinely published. These are: Information About the body; Services Provided or to be provided to the Public; Decision-making process for major policy proposals; Financial information; Procurement; FOI disclosure log and other information to be published routinely. There is also guidance to the Model Scheme.

Under the law, the Information Commissioner may examine and report in his or her annual report on the extent to which bodies are in compliance with the proactive publication provisions.

In practice, implementation of the publication scheme requirements varies considerably between public bodies, including in relation to the types of information supplied and the timeliness of the web publication of routine information.

All government department websites routinely publish a range of information and documents about their activities including draft legislation (bills), submissions to public consultations, and in some cases, minutes of senior management meetings and expert group/working group meetings.

In **Italy**, Legislative Decree 33/2013 (reformed by Legislative Decree 97/2016) regulates proactive transparency listing the types of documents and records that should be available on the institutional websites of public bodies, economic public bodies, professional associations, public control bodies and other bodies.

The National Anticorruption Authority (ANAC) has issued a number of guidelines related to proactive transparency: the most important is Deliberation 50/2013 which clarifies the scope of the decree and how information should be published on government websites. ANAC also issued other guidelines to further clarify some specific duties of public bodies and public control bodies in proactive transparency.

In practice, every institutional website in Italy has a section called Administrative Transparency (Amministrazione Trasparente) which contains the documents that have to be published by public bodies. ANAC has the duty to monitor the observation of transparency duties and can apply sanctions for non-compliance (see. Art. 47 d.lgs 33/2013)

In **Poland**, under the Access to Public Information Act, all public institutions have an obligation to run an official website for the proactive publication of documents – called the Public Information Bulletin.

The law is not precise as to which information should be published as regards decision making. However the Lobbying in the Law Making Act 2005 regulates that all plans related to legislation should be announced in the Public Information Bulletin six months advance. Several government ministries have had problems meeting this requirement.

There are no guidelines or codes with provisions relating to the proactive publication of records by government departments. In practice, government departments only publish documents which they are obliged to publish.

In addition, the government's draft bills and decrees are proactively published in a dedicated section of the Government Legislation Centre. This is an organisational solution, having the status of the Public Information Bulletin's section on the governmental legislative process, and is mentioned in all guidelines and procedural descriptions. The information to be published there includes not only the documents themselves but also all documents related to a bill or decree, such as cover letters sent as part of the consultation procedure (where it is listed who was invited to consult the document) and the opinions that were sent in the consultation process by other ministries and external institutions.

This proactive publication obligation does not exist in relation to bills initiated by parliamentarians or the President. This is a shortcoming as, in practice, some bills are prepared by the government but are submitted as proposals by a group of fifteen members of parliament. This is generally done in order to speed up the legislative process. However, when a bill is submitted as a MPs' bill, and if it was prepared by a government official, the proceedings at the government level are not disclosed and are probably not registered.

In **Scotland**, Section 23 of the Freedom of Information (Scotland) Act 2002 requires authorities to adopt and maintain a Publication Scheme containing the classes of information that they make routinely available. This publication scheme must be approved by the Scottish Information Commissioner.

The Scottish Information Commissioner has produced a Model Publication Scheme (MPS) which all Scottish public authorities have adopted. Adoption automatically bestows Commissioner approval. The Model Publication Scheme sets out nine classes of information that authorities should publish. The guidance that supports the MPS provides detailed guidance on the legal requirements and the types of information the Information Commissioner expects authorities to publish. The Commissioner has powers to monitor and to enforce the publication scheme duty and the duty to actively disseminate. The Commissioner will always enforce if a Scottish public authority does not have an approved publication scheme.

When deciding what to publish, authorities must consider the public interest in the information they hold. They must also make arrangements for access to and specify any charges for the information they publish.

In addition, Regulation 4 of the Environmental Information (Scotland) Regulations 2004 requires authorities to actively disseminate environmental information relevant to their functions. It specifies particular types of information that should be published as a minimum.

The Scottish Ministers code of practice is published the under section 60 of the Scottish FOI law. Section 3 of the Code sets out good practice in terms of proactive publication in keeping with Section 23 of the FOI Act. The code sets out the minimum information that should be published. This is information on: the authorities' functions, how they operate (including their decision-making processes), and their performance; their finances, including funding allocation, procurement and the awarding of contracts.

In **Slovenia**, Article 10 of the Access to Public Information Act 2013 obliges public bodies covered by the law, including government departments, to publish on the internet seven categories of information.

These are: consolidated texts of regulations relating to the field of work of the body; certain programmes, strategies, views, opinions and instructions of general nature; proposals for regulations, programmes, strategies, and other similar documents relating to the field of work of the body; publications and tendering documentation; information on their activities and administrative, judicial and other services; all public information

requested by the applicants at least three times; other public information. Each body is required to facilitate, free of charge, access to these classes of information. Bodies are required under Article 10a of the Act to publish specific types of expenditure information in the public interest.

In addition, the Decree/Regulation on Provision and Re-use of Public Sector Information states that "ministries and government departments have to publish unofficial consolidated texts of regulations relating their area of work on the internet." (Official Gazette of RS, no. 24/16)

The same provision applies to local authorities and other bodies including government departments. These bodies have to publish on the internet: programmes, strategies, views, opinions, analysis and other similar documents; proposed regulation, programmes, strategies and other similar documents; and details of services provided by authorities and other public information. The authorities have to ensure smooth accessibility, affordability, and rational and user-friendly design of their websites.

In practice, most authorities publish the information that they are legally obliged to publish under Article 10 of the Public Access to Information Act. However, this information is not always kept up to date. The Information Commissioner does not have the full oversight on how this provision is respected and implemented in practice. This is because the inspection and supervision over the implementation of the PAI Act is performed by the Ministry of Public Administration, except for the provision referred to paragraph 3 of Article 10a of this Act, for the implementation of which the body responsible for public payments is competent.

In **Spain**, Chapter II of Law 19/2013, of 9th December, on Transparency, Access to Public Information and Good Governance provides for proactive publication of information from all Government departments, including institutional, organisational and planning information; some information of legal relevance; and financial, budgetary and statistical information.

The Council for Transparency and Good Governance is responsible for overseeing compliance with those provisions.

This research could not identify any guidelines or codes containing provisions relating to the proactive publication of records by government departments. There are some guidelines on the publication of datasets and public sector information for re-use to be found on the Open Data Portal of the Government of Spain (Datos.gob.es). These do not, however, apply in general to public records nor in particular application to records needed for participation and accountability.

In practice, government departments in Spain comply with the proactive requirements in the Transparency Law by publishing documents on the Transparency Portal (Portal de Transparencia). The information typically published includes documents about organisational structure and budgetary information. There has not yet been a systematic monitoring of compliance with this obligation but at least some documents that should have been published are not available.

Documents related to public contracting are also released on the Public Sector Procurement Platform (Plataforma de Contratación del Sector Público).

Nonetheless, since these practices are not based on any policy or sound records management system, there is no guarantee that they are carried out in a complete and reliable way. Thus, the presentation and organisation of the information is questionable, and this hinders retrieval of information and resource discovery.

No sanctions are established for non-compliance with the mentioned provisions about proactive publication of information. On the contrary, the Transparency Law establishes sanctions, applicable to high-ranking government officials, for "publishing or making improper use of documents or information accessed by virtue of one's position or duties" (art. 29). Similar sanctions are applicable to the rest of civil servants, according the Royal Legislative Decree 5/2015, of 30th of October, "por el que se aprueba el texto refundido de la Ley del Estatuto Básico del Empleado Público" (approving the consolidated text of the Law on the Basic Statute of the Civil Servant).

In **Sweden**, there is no law for proactive publication, other than what follows from the EU-directive based on the Aarhus Convention on environmental information and the PSI-directive (Public Sector Information).

The research was not able to identify any policy guidelines drawn up by the respective authorities. In practice, government departments do routinely and proactively publish certain records. The researcher has no knowledge of provisions for oversight, monitoring and compliance in relation to proactive publication issue.

In the **United Kingdom**, Section 19 of Freedom of Information Act 2000 requires authorities to adopt and maintain a Publication Scheme which should be reviewed from time to time.

Separately, Regulation 4 of the Environmental Information Regulations (EIR) requires that public authorities progressively make the information available to the public by electronic means which are easily accessible; and take reasonable steps to organise the information relevant to its functions with a view to the active and systematic dissemination of the information to the public.

The Section 46 Code of Practice on Records Management issued under the Freedom of Information Act 2000 includes good practice in terms of proactive publication. The Information Commissioner's Office (ICO) has also produced guidance to the Section 46 Code. In addition, the ICO publishes significant guidelines on the proactive publication of information.

This includes a Model Publication Scheme to be adopted by all public authorities in England, Wales and Northern Ireland and an accompanying suite of 'definition documents' setting out the range of information to be made proactively available by specific types of public authority and sectors. It also includes guidance on charging for information in a publication scheme.

In practice government departments in the UK do routinely and proactively publish certain information - however this varies between departments. The websites of all government departments and many other agencies and public bodies have been merged into the website GOV.UK, where all policies, announcements, publications, statistics and consultations are available.

The Information Commissioner has powers to monitor and enforce the duty in s19 of the FOI Act to have a publication scheme and to disseminate information. Her powers are set out in the Information Commissioner's FOI Regulatory Action Policy.

The research did not identify any specific law on the proactive publication of information for **European Union** institutions. Article 12 of Regulation 1049/2001 on access to EU documents, however, provides general rules around the proactive publication of information. It states that:

> *1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.*
>
> *2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.*
>
> *3. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible.*

In practice, the European Union proactively publishes documents in its various institutional public documents registers. These registers have in the past been criticised by civil society and academics for not containing all the documents generated by the respective European Union institutions.

For the **European Commission**, the register should contain documents that date from 2001 onwards and that (1) relate to official instruments for which the Commission has sole responsibility, (2) are proposed legislation and other Commission communications to the Council and/or the other institutions, and (3) and their preparatory papers and documents which cannot be classified in any of the other series. (C, COM, SEC documents).

It is also possible to request the agendas and minutes of College of Commissioner meetings. For those documents that are in the register, but not proactively accessible, it is possible to request these documents (although some of these documents may by subject, in part or in full, to the exceptions established in the EU's access to documents rules).

The European Ombudsman provides the oversight mechanism for maladministration or access to documents. Investigations are initiated via complaints from the public. The Ombudsman is also able to undertake Own Initiative Inquiries, which often do focus on

transparency and touch on aspects of proactive publication, although there has not yet been a systematic investigation into the proactive publication of documents/information.

7. Detailed findings – seven classes of information

This section examines in detail the rules, guidelines, and practices for the documentation and proactive publication of seven distinct classes of information.

These are types of information that government departments routinely create as part of their decision-making processes. They include minutes and agendas of internal and external meetings, legal and policy advice and Ministerial diaries. We also ask whether these classes of information are routinely released under in response to requests for information.

While this research sets out to catalogue in tabular format the different regimes in each of the 13 jurisdictions, it is not always possible to be definitive. This is because the seven classes of information examined are not recognised as separate and distinct in the laws, guidelines and practices of all countries.

For example, minutes of meetings of expert groups established by government departments to help with policy making are recognised as a distinct class of information in guidelines in Ireland, Scotland, Sweden, the United Kingdom and the European Commission.

However, in other countries this class of information is not specifically catered for. Instead, general rules and codes in relation to the creation or publication of records apply.

These findings do not necessarily mean that one country's legal or administrative regime is superior to another's. In many cases, the findings merely reflect the different cultural traditions that underpin statues, guidelines and practices in different European jurisdictions.

Given the different cultural and legal traditions, it has not always been possible to give definitive responses to the questions posed in the methodology for each of the 13 jurisdictions. Where this is the case, textual explanations are included.

7.1 Class I: Internal government department meetings

Minutes, agendas and lists of participants of meetings with internal actors in decision-making processes of government departments, such as meetings of Ministers with civil servants and special advisors in relation to policy developments.

Overview and country findings

Laws, guidelines and practices – duty to document

This study found that the picture is somewhat opaque when it comes to rules, guidelines and practices on documenting meetings with internal actors in the decision-making processes of government departments across Europe. These would typically include, for example, meetings of Ministers with civil servants and special advisors in relation to policy developments.

Only five out of the 13 jurisdictions examined – Hungary, Scotland, Sweden, the United Kingdom and the European Commission – have legal provisions providing for record keeping of meetings with internal actors in the decision-making processes of government department (see Table 3, page 34).

However, even though there is not in all jurisdictions a specific duty to document this information, the documentation of internal department meetings falls under general statutory rules on record creation and maintenance.

Furthermore, the research identifies relevant record-keeping guidelines in Finland, Ireland, Scotland and the UK. In five jurisdictions – Austria, Germany, Hungary, Sweden and the European Commission – this research found that there is a lack of clarity in relation to whether guidelines cover this class of information. In a further four countries – Italy, Poland, Slovenia, Spain – no guidelines could be identified.

This research found that it is difficult to determine whether there is consistent and clear practice when it comes to the routine documentation of meetings with internal actors in decision-making processes of government departments in Europe.

In practice, this study establishes that records of internal government department meetings are routinely created in seven jurisdictions – Finland, Germany, Ireland, Scotland, Sweden, the United Kingdom and the European Commission. This practice was not identified in Austria, Hungary and Slovenia, while the situation was unclear in Italy, Poland and Spain.

This is at least in part due to the fact that this class of information is not routinely proactively published (see below). In addition, the type of information held in internal government department meeting records may also be exempt under ATI laws.

Laws, guidelines and practices – proactive publication

Minutes of meetings with internal actors in decision-making processes at departmental level are not proactively published in most countries. This research identifies relevant proactive publication laws, guidelines or practices in only Hungary, Germany, Scotland, the UK, and European Commission.

This research found that only four countries – Hungary, Scotland, Sweden and the United Kingdom – have laws relating to the proactive publication of minutes of meetings with internal actors in decision-making processes at departmental level.

In addition, only Scotland, Sweden and the United Kingdom are identified as having in place guidelines that cover this class of records, when it comes to the proactive publication of this class of information.

In practice, this study found that minutes of internal government department meetings may be published in Germany, Scotland, Sweden, the United Kingdom and the European Commission.

In addition, this class of records may be released under access to information laws in seven countries – Finland, Germany, Hungary, Ireland, Scotland, Sweden and the United

Kingdom. In some jurisdictions, the exact content of the records, rather than the class of information per se, will determine whether they are released or withheld.

Given the nature of this study, it has not been possible to comprehensively assess the extent to which minutes of internal government departments meetings consistently include the agenda and names of all attendees. It would be expected that there are variations in terms of how exactly meetings are minuted. For example, in some government departments all individual contributions at internal meetings may be anonymised, or minutes might consist of 'action points' rather than details of specific contributions to any discussion.

Detailed country findings

In **Austria**, there is no specific legal duty obliging officials to document internal decision-making meetings in government departments. In addition, there are no laws or guidelines in relation to the proactive publication of minutes of such internal government department meetings.

In practice, minutes of meetings of the cabinet, known as the Council of Ministers, are routinely recorded. Requests for the agendas of Council of Ministers meetings have been denied in the past. However, in September 2016 the government changed its policy and is now proactively publishing the agenda and most (but not all) detailed documents related to agenda points and decisions.

However, there has been no change in the legal framework, highlighting the fact that decisions about disclosure are arbitrary and dependant on political good will. Announcements of government decisions and supporting materials are in practice proactively published on the website of the Federal Chancellery.

In **Finland**, there are no specific duties relating to documents generated at internal government department meetings. However, this category of records comes under the general rules and guidelines on good information management. Section 5(4) of the Act on the Openness of Government Activities excludes from the scope of the law certain documents prepared for purely internal purposes.

A legal obligation that obliges authorities to create and realise good practice of information management is formulated in **Finland** in a general manner in Section 18 of the Act on the Openness of Government Activities. There is no specific legal obligation to compile or record minutes of meetings, but there is a loose obligation to record certain information in Section 6 of the Decree on the Openness of Government Activities and on Good Practice in Information Management (1030/1999).

Table 3: Internal government department meetings: duty to document and proactive publication

Class of information: *Minutes, agendas and lists of participants of* ***meetings with internal actors in decision-making processes of government departments****, such as meetings of Ministers with civil servants and special advisors in relation to policy developments.*					
Country	**Is there a duty to document?**		**Are there provisions for proactive publication?**		
	Law	**Guidelines**	**Law**	**Guidelines**	**Consistently released under FOI**
Austria	X	NC	X	X	X
Finland	X	✓ S	X	X	✓ S
Germany	X	NC	X	NC	✓ S
Hungary	✓ S	NC	✓ S	NC	✓ S
Ireland	X	✓	X	X	✓ S
Italy	X	X	X	X	X
Poland	X	X	X	X	NC
Scotland	✓ S	✓ S	✓	✓	✓ S
Slovenia	X	X	X	X	NC
Spain	X	X	X	X	X
Sweden	✓	NC	✓ S	✓ S	✓
United Kingdom	✓ S	✓ S	✓	✓	✓ S
European Commission	✓ S	NC	S	X	NC

✓ = Yes X = No **NC** = Not clear/ No data **S** =Some

Table 3: Duty to document and proactive publication – internal government department decision-making meetings.

These types of documents would also be examined individually after a Freedom of Information request, and could be released if there is no exception covering the documents.

In **Germany** there are no specific legal obligations on government departments, to compile or proactively publish minutes of meetings related to internal decision-making processes.

In **Hungary**, this research establishes that there is a partial legal duty to document internal decision-making meetings at government department level. The relevant law is Annex I of the FOI Act, which contains a Standard Disclosure list detailing the kind of information that should be disseminated by bodies subject to the law. This includes information relating to activities and operations of collegiate bodies (Annex No. 1 to Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information).

The list obliges collegiate bodies to publish on their websites specific data including procedural rules, place and time of settings of the collegiate body, publicity, decisions, minutes or summaries of meetings, and information on voting in the collegiate body, if this is not restricted by law (Point 8 of Standard Disclosure List, section II).

Within the category of "information relating to activities and operations," collegiate bodies are obliged to publish data of the "decision-making process, means of participation by the general public, procedural rules, place and time of settings of the collegiate body, publicity, decisions, minutes or summaries of meetings; information on voting in the collegiate body, if this is not restricted by law."

In **Ireland**, while there are no specific legal provisions in this area, the general guidelines on record keeping would cover internal meetings of government departments. A Model Publication Scheme published under the Freedom of Information Act 2014, requires government departments to publish certain information in relation to their internal decision-making.

This includes "details of major policy proposals including any public consultation exercises, background information relating to major policy proposals and decisions, expenditure reviews and policy assessments." The scheme does not specify, however, that departments should proactively publish minutes, agendas and lists of participants at internal departmental meetings at which decisions are made.

In practice, records of meetings related to internal government department decision making would be expected to kept as a matter of routine, although practices have been shown to vary. When it comes to release of this class of records in response to requests, this is possible as long as the information contained in the records is not exempt.

In **Italy and Poland**, there is no specific law or guidelines in relation to this class of information, and practices remain unclear.

In **Scotland**, authorities are required to operate good governance and this extends to recording decision making.

In addition, as outlined already in this paper, under the Public Records (Scotland) Act 2011, government departments must have in place Records Management Plans setting out proper arrangements for the management of their public records. These plans must

provide for the creation and management of authentic, reliable and useable records capable of supporting business functions and activities for as long as they are required.

In addition, the Information Commissioner's Model Publication Scheme published under the Freedom of Information (Scotland) Act 2002 includes a compulsory class of information called 'How we take decisions and what we have decided.'

The Commissioner expects authorities, including government departments, to publish, as a minimum the following information: decisions taken by the organisation: agendas, reports and papers provided for consideration and minutes of Board (or equivalent) meetings; public consultation and engagement strategies; and reports of regulatory inspections, audits and investigations carried out by the authority. If an authority held such information but did not publish it, the Information Commissioner would consider it a potential matter for enforcement.

If an authority held this information but did not publish it, the Information Commissioner would consider what action to take under her intervention procedures. While her approach is to seek agreement from Scottish public authorities, ultimately formal enforcement action is open to her.

In relation to whether such documents are consistently released in response to requests, this research found that it would be inaccurate to give a definitive yes or no. In theory the response is yes, but the extent to which information contained within such documents varies, depending on how they were produced.

For example, some authorities disclose names routinely in their minutes of meetings, while others do not, but will instead redact the information for release if requested, or, alternatively, anonymise minutes as part of the drafting process.

In **Spain**, the duty to document meetings of formally established departmental or interdepartmental bodies is required by the Law 40/2015, of 1st of October, on the Legal Regime of Public Sector (art. 18), but it does not exist for other types of meetings with internal actors in decision-making processes (at least in general terms).

In **Sweden**, there are no specific provisions regarding the documentation or release of records relating to internal meetings. Whether such documents are published depends on the legal definition of accessible documents, called "allmän handling" (public or general document). Such documents can very well include minutes and lists of participants if they otherwise fulfil the requirements.

In the **United Kingdom**, the Information Commissioner's Model Publication Scheme issued under the Freedom of Information Act 2000 includes a compulsory class of information called 'How we make decisions'. This includes policy proposals and decisions, decision-making processes, internal criteria and procedures, consultations.

A supporting definition document details the information to be made proactively available by government departments. This includes minutes of senior-level meetings – the Information Commissioner expects management board minutes and the minutes of similar meetings where decisions are made about providing services to be readily

available (apart from information that is properly regarded as private to a meeting). It also includes reports and papers provided for consideration at senior-level meetings. Information presented to those at meetings making executive decisions (once more, apart from information that is properly regarded as private to the meeting).

Information falling within this category may also be provided in response to a request under the Freedom of Information Act 2000.

As mentioned previously, the **European Commission** Rules of Procedure require that documents are created and filed in order to "preserve the institution's memory, facilitate the exchange of information, provide proof of operations carried out and meet the department's legal obligations."

The "Common Commission-Level Retention List For European Commission Files" outlines the number of years during which the Commission is required to keep a file depending on its usefulness for administrative purposes and the relevant statutory and legal obligations. Two out of 33 Commission Directorates General also provide further guidelines.

7.2 Class II: Meetings with external actors in formal decision-making

Minutes, agendas and lists of participants of meetings with external actors as part of the formal decision-making process of government departments (e.g. expert, advisory and working groups comprising officials and outside stakeholders which have defined terms of reference).

Overview and country findings

Laws, guidelines and practices – duty to document

This class of information includes meetings of working groups or advisory groups that are routinely set up by government departments to consider specific legislative or policy proposals. These sorts of groups usually comprise both officials and invited external experts or stakeholders.

The work of these kinds of groups can be viewed as a form of lobbying from the inside, as invited external members have unique access to policy makers and an explicit mandate to propose reforms to existing policies or laws.

This study found that only five jurisdictions – Ireland, Scotland, Sweden, the United Kingdom and the European Commission – have either laws or guidelines for the documentation of meetings of external actors as part of the formal decision-making processes of government departments (see Table 4, page 39).

In addition, the situation in relation to guidelines is unclear in Austria, Finland, Germany, Hungary and Sweden. However, it may well be the case that general guidelines on record keeping would indeed cover this particular class of information.

When it comes to the practice of documenting formal meetings with external actors, this study found that practice varies between countries. In seven jurisdictions – Finland,

Germany, Ireland, Scotland, Sweden, the United Kingdom and the European Commission – the practice is observed to varying degrees.

Laws, guidelines and practices – proactive publication

In four countries – Italy, Scotland, Sweden and the United Kingdom – this research found laws providing for the proactive publication of this class of information. Guidelines exist in Ireland, Poland, Scotland, Sweden, and the United Kingdom.

In practice, six countries proactively publish information on formal government departments meetings with external actors – these are Germany, Ireland, Poland, Scotland, Sweden, and the United Kingdom. This class of information is released in response to requests in Germany, Ireland, Scotland and Sweden, although practice varies.

Country findings

In **Austria**, our research found that information requests to various ministries show that there appears to be no consistent duty to document and keep records or minutes of formal decision-making meetings with external actors, although some ministries appear to be better organised in this regard than others.

Likewise, there are no laws, guidelines, or discernible practices in place when it comes to the proactive release of this class of information, which is also not consistently released.

In **Finland**, there is no specific legal duty to document minutes, agendas and lists of participants of meetings with external actors as part of formal decision-making processes of government departments. As with records of internal meetings, these records would come under the general rules on documentation and record keeping.

When it comes to the proactive publication of this class of information, no specific legal obligation exists and it is unclear whether there are guidelines in place or whether good practices prevail. Once more, the general obligations on good information management would apply.

In relation to the release of such a class of documents, they would be examined individually per request and could be released if there was no exception covering them.

Table 4: Formal external government department meetings: duty to document and proactive publication

***Class of information**: Minutes, agendas and lists of participants of **meetings with external actors as part of the formal decision-making process** of government departments (e.g. expert, advisory and working groups comprising officials and outside stakeholders which have defined terms of reference).*					
Country	**Is there a duty to document?**		**Are there provisions for proactive publication?**		
	Law	**Guidelines**	**Law**	**Guidelines**	**Consistently released under FOI**
Austria	**X**	**NC**	**X**	**X**	**X**
Finland	**X**	**NC**	**X**	**NC**	**NC**
Germany	**X**	**NC**	**X**	**X**	✓ **S**
Hungary	**NC**	**NC**	**NC**	**NC**	**X**
Ireland	**X**	✓ **S**	**X**	✓ **S**	✓ **S**
Italy	**X**	**X**	✓	**X**	**NC**
Poland	**X**	**X**	**X**	✓ **S**	**X**
Scotland	✓ **S**	✓ **S**	✓	✓	✓ **S**
Slovenia	**X**	**X**	**X**	**X**	**NC**
Spain	**X**	**X**	**X**	**X**	**X**
Sweden	✓	**NC**	✓ **S**	✓ **S**	✓
United Kingdom	**X**	✓ **S**	✓	✓	**NC**
European Commission	✓ **S**	**X**	**X**	**NC**	**NC**

✓ = Yes **X** = No **NC** = Not clear/no data **S** =Some

Table 4: Duty to document and proactive publication – meetings with external actors in formal decision-making process of government departments.

In **Hungary**, every piece of information that is not prescribed to be published as part of the Standard Disclosure List under the country's Freedom of Information law is usually not accessible for the public. In the absence of lobby laws, exact details about consultations are not regulated by law, and are not accessible to the public.

However, Act CXXXI of 2010 on Public Participation in Developing Legislation obliges Ministers competent to drafting legal provisions to submit the draft law to public consultation. Section (5) of article 5 of the Act gives permission to omit consultation in case of prevailing public interest that warrants a rapid passage of the law.

Article 13 of the law also enables Ministers responsible for drafting to create strategic partnership agreements with, for example, non-governmental organisations, churches, public bodies, etc. This style of consultation is not mandatory and only the fact that an agreement has been made must be published on the website of the relevant Ministry. Exact details and manner of the consultations are not regulated by law (therefore not accessible for the public).

In **Ireland**, a Transparency Code issued under the Regulation of Lobbying Act 2015 provides for details of meetings of certain ministerial advisory groups and taskforces to be documented and proactively published on the websites of public bodies, including government departments.

Information that should be captured includes the names of members of the groups, their terms of reference and the agendas and minutes of meetings. By adhering to the Transparency Code, communications within these bodies are exempted from a legal requirement to register and report on lobbying activities (Transparency Code prepared in accordance with Section 5 (7) of the Regulation of Lobbying Act 2015).

In practice, meetings of external groups involved in formal decision-making processes at departmental level tend to be documented as a routine administrative process. This class of information may be released following requests, depending on its exact content.

In **Poland**, there is some good practice in documenting work of different bodies, e.g. the Digitalization Council that formally advises the Minister of Administration and Digitalization. It consists of 20 members from public administration, entrepreneurs running the internet and digitalization related business, non-governmental organisations dealing with the topic and representatives of the academic world. It is an opinion making and advisory body to the Minister. According to Article 17 point 5 of the Law on Public Information's Digitalization, all opinions, minutes, and other documents are proactively released in the Public Information Bulletin of the Ministry of Administration and Digitalization. The obligation to do this is regulated by the Minister in the Council's Code of Conduct.

In **Scotland**, and the **United Kingdom**, the provisions outlined in Chapter 5 are relevant for this class of information also. In both these jurisdictions, the laws and codes do not distinguish between information that may relate to internal or external participants and decision makers.

In **Scotland**, this research found that the experience of responding to FOI appeals suggests that practice varies when it comes to disclosure of this class of information.

This may be for entirely valid reasons (e.g. a matter related to national security or risk where disclosure would be inappropriate in the public interest, or there is an absolute exemption preventing disclosure), but equally it could simply reflect the approach that a particular part of Government takes or where it sees the balance of the public interest lying.

In the **United Kingdom**, a definition document published along with the Information Commissioner's Model Publication Scheme says that information relating to the following should be made proactively available:

- Ministerial meetings with external organisations (including meetings with newspaper and other media proprietors, editors and senior executives).
- Permanent Secretary meetings with external organisations (including meetings with newspaper and other media proprietors, editors and senior executives).
- Special adviser meetings with external organisations (including meetings with newspaper and other media proprietors, editors and senior executives).

In general, at **European Commission** level, minutes of meetings of experts groups are created and if they are not proactively published (although many are), they can be requested under the regular EU transparency rules. Deliberations of expert groups are not available to the public unless the members of the expert group agree that they can be.

7.3 Class III. Meetings with external actors in informal decision-making

Minutes, agendas and lists of participants of ad hoc meetings with external actors as part of informal decision-making process of government departments (e.g. meetings with lobby groups such as representative bodies, NGOs, trade unions, business interests, companies, professional lobbyists etc.).

Overview and country findings

Laws, guidelines and practices – duty to document

Ad-hoc meetings between officials and various stakeholder or interest groups are a reality of the informal policy-making processes of government departments. These sorts of meetings may be held instead of, or in addition to, more formal consultation processes. In some cases, they may take place out of office hours or in informal or social settings.

This study found that only four of the 13 jurisdictions surveyed have laws that relate to the documentation of the information that such meetings generate (see Table 5, page 43). These are Poland, Scotland, Slovenia and the United Kingdom. In addition, Ireland, Scotland, the United Kingdom and the European Commission have policy or guidelines in place in relation to this class of information.

When it comes to practice, this research found that these meetings are documented to varying degrees in six jurisdictions – Finland, Ireland, Poland, Scotland, the United Kingdom and the European Commission.

Laws, guidelines and practices – proactive publication

This study identifies laws relating the proactive publication of informal meetings with external actors in four countries – Poland, Scotland, Slovenia and the United Kingdom. In addition, guidelines exist in Scotland, the United Kingdom and the European Commission.

In practice, this class of information may be proactively published in five jurisdictions – Italy, Poland, Scotland, the United Kingdom and the European Commission (in a limited way). Release of information upon request is possible in four countries – Ireland, Poland, Scotland and the United Kingdom.

In relation to this and other specific classes of information, precise answers have not always been possible for every jurisdiction studied. This is because some countries do not categorise official records in terms of the types of decision-making processes that they document.

For example, under Swedish law, the criteria for what constitutes 'public documents' that may be accessible are based on the process of how the documents are created or managed within the public administration system. This means that some categories of information may be both accessible or not accessible, depending on how the documents were created. For this reason, there is not information in relation to Sweden in the table below.

Country findings

In **Hungary**, there is no effective lobbying regulation. Government decree no. 50/2013. (II. 25.) on the integrity management system of the organs of public administration and on the procedural rules applicable to dealing with lobbyists has vague guidelines for the integrity management system. It contains no provisions on establishing an internal lobbying register or documenting or publishing this class of information.

If the details of a given meeting cover elements of Hungary's Standard Disclosure List under its access to information law, they have to be published. Otherwise, this area is unregulated. The regulatory gap has been criticised by anti-corruption NGOs and international organisations.

Table 5: External informal government department meetings: duty to document and proactive publication

Class of Information: *Minutes, agendas and lists of participants of* ***ad hoc meetings with external actors as part of informal decision-making process*** *of government departments (e.g. meetings with lobby groups such as representative bodies, ngos, trade unions, business interests, companies, professional lobbyists etc).*					
Country	**Is there a duty to document?**		**Are there provisions for proactive publication?**		
	Law	**Guidelines**	**Law**	**Guidelines**	**Consistently released under FOI**
Austria	**X**	**NC**	**X**	**X**	**X**
Finland	**X**	**NC**	**X**	**NC**	**NC**
Germany	**X**	**X**	**X**	**X**	**X**
Hungary	**X**	**NC**	**X**	**NC**	**X**
Ireland	**X**	✓ **S**	**X**	**X**	✓ **S**
Italy	**X**	**X**	**X**	**X**	**NC**
Poland	✓	**X**	✓	**X**	✓ **S**
Scotland	✓ **S**	✓ **S**	✓	✓	✓ **S**
Slovenia	✓	**X**	✓	**X**	**NC**
Spain	**X**	**X**	**X**	**X**	**X**
Sweden	-	-	-	-	-
United Kingdom	✓ **S**	✓ **S**	✓	✓	✓ **S**
European Commission	**X**	✓ **S (policy)**	**X**	✓ **S (policy)**	**X**

✓ = Yes **x** = No **NC** = Not clear/no data **S** =Some

Table 5: Duty to document and proactive publication – ad hoc meetings with external actors as part of informal decision-making process.

In **Italy**, there are a few cases of proactive publication of the agenda of meetings which were included in the third Open Government Partnership National Action Plan. These apply at local government level, to the municipalities of Milan and Rome and only one government department – the Ministry of Economic Development (Ministero Sviluppo Economico - MISE). The Minister of Public Administration has also announced her plan to make her agenda of meetings public before summer 2017.

In **Poland**, under the Lobbying in the Law Making Process Act 2005, all contacts with registered lobbyists and the relevant documentation should be released in the Public Information Bulletin. However, very few lobbyists are registered, regardless of the fact that not meeting this duty attracts high fines.

From the experience of the expert, a lot of contacts between civil society groups (and presumably other types of actors) are not documented by government representatives.

In **Slovenia**, under Article 71 of the Integrity and Prevention of Corruption Act 2011, lobbied officials are obliged to report such contacts (referred to in paragraph 4 of Article 58) to the Commission for the Prevention of Corruption in the event that it is made in a non-public manner. The Commission publishes all contacts made by lobbyists and decision makers.

In the **European Union**, there appears to be no legal duty to document minutes of meetings with external actors as part of the formal decision-making process.

However since the adoption of the Commission transparency policy in November 2014, Commissioners, their Cabinets, and Director Generals have proactively published information about which lobbyists they have met with and on which topics, although the information is not always complete.

Furthermore, DG FISMA is the only known Directorate General to also keep a list of meetings between lobbyists and all staff, although this is only available on request.

7.4 Class IV: Legal advice to government departments

Legal advice given to government departments (excluding Attorney General/chief legal adviser advice).

Overview and country findings

Laws, guidelines and practices – duty to document

Government departments routinely seek advice from external or internal legal experts to inform their policy choices and ensure that they are acting within the law.

This study found that in only three jurisdictions have laws requiring this class of information to be documented (see Table 6, page 45). These are Poland, Spain and the European Commission. In addition, guidelines are in place in Ireland, Scotland and the (rest of the) United Kingdom.

This research identifies the practice of documenting such legal advice in five countries – Germany, Ireland, Spain, the United Kingdom and the European Commission.

Table 6: Legal advice to ministry meetings: duty to document and proactive publication

***Class of Information*: *Legal advice* given to government departments (excluding Attorney General/chief legal adviser advice)?**					
Country	**Is there a duty to document?**		**Are there provisions for proactive publication?**		
	Law	**Guidelines**	**Law**	**Guidelines**	**Consistently released under FOI**
Austria	**X**	**NC**	**X**	**X**	**X**
Finland	**X**	**X**	**X**	**X**	**NC**
Germany	**X**	**NC**	**X**	**X**	✓ **S**
Hungary	**NC**	**X**	**NC**	**X**	**X**
Ireland	**X**	✓ **S**	**X**	**X**	**X**
Italy	**X**	**X**	**X**	**X**	**NC**
Poland	✓	**X**	**X**	**X**	**X**
Scotland	**X**	✓	**X**	**X**	**X**
Slovenia	**X**	**X**	**X**	**X**	**NC**
Spain	✓ **S**	**X**	✓ **S**	**X**	**X**
Sweden	–	–	–	–	–
United Kingdom	**X**	✓	**X**	**X**	**X**
European Commission	✓	**X**	**X**	**X**	**X**

✓ = Yes **x** = No **NC** = Not clear/no data **S** =Some

Table 6: Duty to document and proactive publication of legal advice to government departments

Laws, guidelines and practices – proactive publication

This study found laws and guidelines in relation to the proactive publication of legal advice in Spain only. This class of information is proactively published in practice and released in response to requests in only one country – Germany.

Country findings

In **Finland,** legal advice would be treated as any other document. There is no specific duty to document or proactively publish this class of information, but it would be examined as any other document following a request. As with the other categories of information, general obligations and guidelines apply.

In **Germany**, there are usually contracts regarding legal advice to government departments. This is usually formalised and can then be given out upon request.

In **Hungary**, this concept is not regulated directly by the law, therefore no exact information is available. However, if legal advice is provided during the course of a decision-making process (e.g. in the form of a decision supporting preparatory document), public access can be denied on the legal basis of section 27 of the FOI Act, which states that any information compiled or recorded by a body in support of a decision-making process is not available to the public for ten years from the date it was compiled or recorded. Governmental bodies usually rely on this provision, when they reject public data requests for publishing costly preparatory studies.

In **Ireland**, there are no provisions in law or guidelines for the documentation or proactive release of legal advice provided to government departments. In practice, such advice would generally be written, but is not proactively published. Written legal opinions which relate to the deliberative process of a government department can be withheld from release under Section 29 of the Freedom of Information Act 2014, if it is in the public interest to do so.

In **Scotland**, legal advice is generally exempt from release under FOI law, consistent with the convention of professional legal privilege in Scottish law. That is not say authorities must withhold it but in practice disclosure is rare.

In addition, there is also a "neither confirm nor deny" provision in the Scottish Freedom of Information Act 2002 (section 18). This enables a Scottish public authority to neither confirm nor deny whether it even holds information.

While it is rare that legal advice would be disclosed, the Information Commissioner has in the past ordered the Scottish Government to disclose whether the information (i.e. legal advice) was held (Decision 219/2013, Katherine Stihler and Legal Advice about EU membership.).

In **Sweden**, all government departments have their own legal departments. Where they seek external legal advice, the correspondence would be accessible, including from the Attorney General.

In **Poland**, as a result of some court verdicts, legal opinions are not generally released to the public. These verdicts have been criticized by the media and academics. The most

famous case was related to the reform of the pension system. There were doubts whether the reform was constitutional or not. The president of the country signed the law, claiming that his decision was supported by the positive opinions of lawyers. A court ruled that these opinions did not have to be released as "they are not related to the sphere of facts".

However, on occasions it has happened that opinions are published, as in case of the Minister of Justice publishing opinions related to the law on Constitutional Tribunal. There is no clarity as regards this issue, and it seems that whether an opinion is released or not depends largely on political considerations.

In **Spain,** the Royal Decree 997/2003, of 25th of June, "por el que se aprueba el Reglamento del Servicio Jurídico del Estado" (approving the Regulation on the State Legal Service) requires the duty to document legal advice given by the Legal State Service, but do not include other kinds of legal advice to government departments.

Law 19/2013, of 9th December, on Transparency, Access to Public Information and Good Governance provides for proactive publication of "guidelines, instructions, agreements, communications or replies to queries from individuals or other bodies, to the extent that they constitute an interpretation of law or have legal effects" (art. 7.a). In practice, disclosure is rare.

In the **United Kingdom**, legal advice given to government departments is generally exempt from release under the Freedom of Information Act 2000. Section 35 of the act provides an exemption to disclosure of information held by a government department if it relates to "the provision of advice by any of the Law Officers or any request for the provision of such advice". The exemption is qualified however and so a public interest test will apply. Consideration will focus on the extent to which disclosure would undermine the Law Officers' convention of confidentiality.

Legal advice is also generally exempt under section 42 of the act, which provides an exemption for information protected by legal professional privilege. Again, it is a qualified exemption and therefore subject to a public interest test. As in Scottish FOI legislation, there is also a 'neither confirm nor deny' provision in the UK's act.

Whilst rare, the Information Commissioner has in the past required government departments to disclose information where they had relied on section 42 of the FOI Act to withhold it.

Information falling within this category is not included in the definition document for government departments which accompanies the Model Publication Scheme under the FOI Act. This means that there is no requirement to make this information proactively available.

In the **European Union**, Article 4 of Regulation 1049/2001 states that the institutions shall refuse access to a document where disclosure would undermine the protection of legal advice unless there is an overriding public interest in disclosure.

This makes it difficult for the public to access such information proactively, and it is often refused following access to EU documents requests. On at least one occasion, Access Info Europe has been told via a response from the Council of the EU to an access to EU documents request, that legal advice was provided orally and as such not documented formally. On the other hand, the legal advice related to the integration of the Council in the EU lobby register was proactively published by the same institution.

7.5 Class VI: Policy advice to government departments

Policy advice given to government departments (e.g. briefing notes for Ministers from civil servants)

Overview and country findings

Laws, guidelines and practices – duty to document

One of the main responsibilities of senior civil servants within government departments is to advise Ministers on policy options based on their research, evidence-gathering and analysis. Civil servants also routinely prepare briefing notes for Ministers in relation to policy developments or announcements.

This study found that none of the 13 jurisdictions surveyed have laws requiring this class of information be written down. This research identifies guidelines for documenting this class of information in only two countries – Ireland and the United Kingdom. In practice, policy advice tends to be written down in four countries – Germany, Ireland and the United Kingdom.

Laws, guidelines and practices – proactive publication

None of the 13 jurisdictions examined in this research have laws relating to the proactive publication of policy advice given to government departments. While guidelines in relation to proactive publication are identified in the United Kingdom, in practice this class of information is not proactively published elsewhere in Europe. Only in Germany is it released when requested (and sometimes in Scotland if there are strong public interest arguments).

Country findings

In **Finland**, policy advice from civil servants to government departments is treated as any other official document. There is no specific duty to document or proactively publish.

In **Hungary**, while there is some regulation in this area, it is generally either weak or does not cover the main topics.

Table 7: Policy advice to government departments: duty to document and proactive publication

Class of Information: Policy advice *given to government departments (e.g. briefing notes for Ministers from civil servants)*					
Country	**Is there a duty to document?**		**Are there provisions for proactive publication?**		
	Law	**Guidelines**	**Law**	**Guidelines**	**Consistently released under FOI**
Austria	X	NC	X	X	X
Finland	X	NC	X	NC	NC
Germany	X	NC	X	X	✓
Hungary	NC	NC	NC	NC	X
Ireland	X	✓ S	X	X	X
Italy	X	X	X	X	NC
Poland	X	X	X	X	X
Scotland	X	✓ S	X	X	X
Slovenia	X	X	X	X	NC
Spain	X	X	X	X	X
Sweden	–	–	–	–	–
United Kingdom	X	✓	X	✓	X
European Commission	X	X	X	X	X

✓ = Yes X = No **NC** = Not clear/no data **S** =Some

Table 7: Duty to document and proactive disclosure of policy advice within government departments.

In **Ireland,** there are no legal obligations on officials to provide policy advice in writing or to proactively publish it. The practice varies within government departments, and several inquiries have highlighted a lack of written policy advice to Ministers.

While broad guidelines do exist on paper as to the need to record interactions on key matters, it is far from clear that such guidelines are in fact being adhered to or that systematic monitoring with sanctions for noncompliance are in place. Several publicised events in Ireland in recent years suggest that inadequate record keeping with respect to key policy deliberations has been a serious issue. Policy advice is generally exempt from disclosure in response to requests, although this is subject to a public interest test.

In **Scotland**, government policy advice to Ministers is often not disclosed when it is in close proximity to the issue being advised about or being formulated (see section 29 exemption in FOISA), but this is subject to a public interest test. Over time, the position may change as the public interest in withholding diminishes.

In **Spain** (as mentioned previously), the General Administrative Procedure Act 2015 (Law 39/2015 of 1st of October), rules out of record-keeping obligations: "notes, drafts, opinions, summaries, communications and internal reports or between units or administrative bodies, as well as value judgments issued by Public Administrations".

In **Poland**, there is no obligation to document policy advice to the ministers unless it is part of a formal legislative procedure.

In the **United Kingdom**, in terms of proactive release of policy advice, the definition document supporting the UK's Model Publication Scheme includes a class of information 'How we make decisions'. This says that information relating to the decision-making processes should be made proactively available.

This should include information about major policy proposals and related background information. Whilst the Information Commissioner's Office says it would expect that this may include reference to policy advice, it clarifies that it is intended to cover information that can be made available to the public without damaging relations with other governments or the development of government policy.

Section 35 of the **United Kingdom's** FOI Act 2000 provides an exemption in relation to records relating to the formulation or development of government policy.

This exemption reflects and protects some longstanding constitutional conventions of government, and preserves a safe space to consider policy options in private. The exemption is qualified by the public interest test. Even if an exemption is engaged, departments can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure.

The UK's Information Commissioner has found that considerations of sensitivity will generally start to decrease as soon as a policy decision has been taken, but casework experience suggests that there is no fixed time limit. How long information remains sensitive will depend on its specific content, the nature of the particular decision-making

process, and the wider context (e.g. the effect on other live deliberations). It can be many years or a number of months, depending on the context.

The ICO has produced detailed guidance on the operation of the section 35 exemption. The Information Commissioner's response to the Independent Commission on FOI in November 2015 also focused in detail on the operation of section 35.

In the **European Union**, the "Common Commission-Level Retention List For European Commission Files" outlines the number of years during which the Commission is required to keep a file depending on its usefulness for administrative purposes and the relevant statutory and legal obligations. Two out of 33 Commission Directorates General also provide further guidelines.

7.6 Class VII: Justifications for policy decisions

Justifications for policy decisions (e.g. internal government documents evaluating policy decisions following reports of expert groups, public consultations etc., and justification for spending of public funds).

Overview and country findings

Laws, guidelines and practices – duty to document

Government department press offices routinely produce records that include justifications for policy decisions. Often, such justifications form the basis of public announcements such as press releases or speeches and policy papers, and draft laws with explanatory memorandums and even regulatory impact statements.

This study found that only Italy and Sweden have laws relating to the documentation of justifications for policy decisions. As for guidelines, the situation is unclear in five countries, Austria, Finland, Germany, Hungary and Sweden. In practice, this research found that justifications for policy decisions are documented in practice in the six countries of Germany, Ireland, Italy, Poland, Scotland, Sweden and the United Kingdom.

Laws, guidelines and practices – proactive publication

Laws relating to the proactive publication of justifications for policy decisions are in place in Ireland, Italy and Slovenia only. Four countries have guidelines in place - Ireland, Poland, Scotland and the United Kingdom. When it comes to practice, these same three countries proactively publish this class of information. This class of information is routinely released in response to requests only in Germany and Ireland.

Table 8: Justifications for policy decisions: duty to document and proactive publication

Class of Information: Justifications for policy decisions *(e.g. internal government documents evaluating policy decisions following reports of expert groups, public consultations etc., and justification for spending of public funds).*					
Country	**Is there a duty to document?**		**Are there provisions for proactive publication?**		
	Law	**Guidelines**	**Law**	**Guidelines**	**Consistently released under FOI**
Austria	X	NC	X	X	X
Finland	X	NC	X	NC	NC
Germany	X	NC	X	X	✓
Hungary	NC	NC	NC	NC	X
Ireland	X	✓	✓	✓	✓ **S**
Italy	✓	X	✓	X	NC
Poland	X	✓	X	✓	X
Scotland	X	✓	X	✓	X
Slovenia	✓	X	✓	X	NC
Spain	X	X	X	X	X
Sweden	✓	NC	–	–	–
United Kingdom	X	✓	X	✓	X
European Commission	X	X	X	X	X

✓ = Yes x = No **NC** = Not clear/no data **S** =Some

Table 8: Duty to document and proactive disclosure of justifications for policy decisions within government departments.

Country findings

In **Finland**, government proposals set out the most important justifications for a policy decision taken in the form of a law. The proposals also contain a summary of the consultation. A draft proposal is usually published for the consultation round. The comments on the consultation become public when the authority receives them and they are usually published online in the government register.

In **Hungary**, the situation remains unclear, and can vary depending on the context. This is because if the FOI Act's publication list covers the issues and subjects, then regulation, albeit weak, exists. However, most of these areas are lack rules and safeguards (and legal certainty).

In **Ireland**, internal government documents justifying policy decisions may be made proactively available in some circumstances. This class of information is routinely proactively published on government department websites, although the extent of the proactive publication varies between departments. This class of information is likely to come under the exemption for records relating to the 'deliberative process' of a government department. This exemption is discretionary – which means the records can be released unless it would be against the public interest to release them.

In **Poland**, when it comes to government bills, the sponsoring Minister must make an ex-ante and ex-post evaluation on how the law functions (Assessment of Regulation Result – as a rationale and as an evaluation). This is regulated by the Code of Conduct of the Council of Ministers.

The rationale (ex-ante) is the compulsory element of most of the bills prepared by the government. It is a separate part of a new bill's rationale. It documents the following: 1) entities on which the bill will have an impact; 2) information on the consultations made before bill's preparation, and necessary public consultations, as well as legal obligations to consult specific entities; 3) results of an analysis of an impact on entities mentioned in point 1, as well as on other important issues, especially on a) public finances, including state and local governments' budgets b) labour market, c) economy competitiveness and entrepreneurship, including conditions for entrepreneurs; 4 sources of financing, especially if the new law would cause significant financial burden 5) sources of information used in the calculations.

The ex-post evaluation sets out: the entities upon which the law has an impact and the law's scope of interest; a short explanation of the goals of the law and the level of their achievement; a short explanation of the measures used to achieve the goals and assessment of their effectiveness; a short comparison of the socio-economic results of the law along with those that actually took place with reference to the target groups; enlisted problems connected with law functioning along with a given Minister feedback/opinion on the problems and their solution; and conclusions and recommendation of the Minister in relation to amendments to the law. There are exceptions to this rule.

In **Slovenia**, both before and during legislative proceedings, the drafts of laws are regularly published (with the description of the current situation and the reasons for amending or adopting law). All the comments regarding the legislative procedures, made by competent authorities (ministries etc.) are also published on parliament's website.

In **Scotland**, as well as any Cabinet meeting being fully documented, the Ministerial Code is clear that, "any collective Ministerial meeting should be minuted, with decisions and any outstanding issues recorded clearly" (para. 2.16). The Information Commissioner's Model Publication Scheme requires authorities to publish the following information (if held): (1) Decisions taken by the organisation: agendas, reports and papers provided for consideration and minutes of Board (or equivalent) meetings, and (2) public consultation and engagement strategies.

In the **United Kingdom**, some internal government documents evaluating policy decisions may be made proactively available in some circumstances. Government department websites demonstrate that they do routinely publish certain information. However, this varies between departments. The websites of all government departments and many other agencies and public bodies have been merged into the website GOV.UK. This is where all policies, announcements, publications, statistics and consultations are made available. In relation to release following requests, information of this type is likely to come under the section 35 exemptions in relation to the formulation or development of government policy outlined above (see page 50-51).

7.7 Class VIII: Ministerial diaries

Ministerial diaries: Recorded entries, including appointments and meetings, in the official diaries of government ministers.

Overview and country findings

Laws, guidelines and practices – duty to document

Ministerial diaries are routinely kept by government department as a matter of good administrative practice. Sometimes, Ministers may even have two diaries – one for private appointments, another for public appointments. Diaries of course indicate who Ministers are meeting as part of their public office. These appointments can offer insights into the activities of businesses and interest groups or lobbyists in attempting to influence decision-making.

None of the 13 jurisdictions place a legal obligation on officials to document the diary appointments of Ministers. This study only identifies guidelines in relation to this class of information in the United Kingdom and a policy introduced in 2014 by the European Commission. In practice, this study found that Ministerial diaries are completed in only four jurisdictions – Ireland, Scotland, the United Kingdom and the European Commission.

Laws, guidelines and practices – proactive publication

This study found that there are none of the 13 jurisdictions have laws in relation to the proactive publication of Ministerial diaries. In practice, these diaries are published

proactively in Ireland, Scotland, the United Kingdom and the European Commission. They are routinely released when requested in four countries only – Finland, Ireland, Scotland, and the United Kingdom.

Table 9: Ministerial Diaries:
duty to document and proactive publication

Class of Information: Ministerial diaries *- recorded entries, including appointments and meetings, in the official diaries of government ministers.*					
Country	**Is there a duty to document?**		**Are there provisions for proactive publication?**		
	Law	**Guidelines**	**Law**	**Guidelines**	**Consistently released under FOI**
Austria	**X**	**NC**	**X**	**X**	**X**
Finland	**X**	**NC**	**X**	**NC**	✓ **S**
Germany	**X**	**NC**	**X**	**X**	**NC**
Hungary	**X**	**X**	**X**	**X**	**X**
Ireland	**X**	**X**	**X**	**X**	✓
Italy	**X**	**X**	**X**	**X**	**NC**
Poland	**X**	**X**	**X**	**X**	**X**
Scotland	**X**	**X**	**X**	**X**	✓
Slovenia	**X**	**X**	**X**	**X**	**NC**
Spain	**X**	**X**	**X**	**X**	**X**
Sweden	–	–	–	–	–
United Kingdom	**X**	✓	**X**	**X**	✓ **S**
European Commission	**NC**	✓	**NC**	✓	✓

✓ = Yes **x** = No **NC** = Not clear/no data **S** =Some

Table 9: Ministerial diaries: duty to document and proactive publication.

Country findings

In **Finland**, there are no specific obligations in relation to the proactive publication of ministerial diaries. In relation to guidelines, there may be internal ones inside the authorities but this probably varies. When it comes to practice in this area, for example the Ministry of Interior has just changed their practice with regard to the lists of participants of meetings where political party representatives have been invited to dine with the minister. In response to information requests, they will release the information if the exceptions of the access to information law are not applicable.

In **Germany**, the issue of whether official diaries might be subject to the access to information law, has not yet been determined by the courts. In **Hungary**, ministerial diaries are not regulated in law.

In **Poland**, the law says that public information is any information on public matters. Therefore, according to the law, it would appear that ministerial diaries qualify as public information. The courts, however, have denied access to diaries, naming them "internal documents". This term does not exist in Polish law. However, the courts agree that information on past meetings are public information. In practice, while some Ministers voluntarily release their diaries, there is no effective legal way to oblige them to do so.

In **Italy**, as noted in Chapter 7, commitments to the proactive publication of agendas of meetings in the Ministry of Economic Development (Ministero Sviluppo Economico - MISE) were included in the third Open Government Partnership National Action Plan.

In **Scotland**, appeals to the Information Commissioner show that some diaries are published, and the Commissioner has in the past ordered disclosure of further information. Details of Ministerial engagements are published online by the Government on a monthly basis, three months in arrears. There is a Ministerial Code of Practice which makes reference to keeping Parliament and the First Minister informed about availability, but this does not extend to a general expectation that the information would be made public.

In **Sweden**, the openness law is one of three constitutional laws which says that official documents are accessible as a general rule, although these are subject to a very long and growing list of exemptions in the Law on Public Access and Secrecy (Offentlighets- och Sekretesslagen).

This means there is no positive list of what are accessible documents and the outcome of an information request would depend on the content of the document, and not if this or that kind of person took part in a decision.

In the **United Kingdom**, whilst there is no requirement for Ministerial diaries to be made proactively available in full, diary information may be included within the context of government information that is proactively made available.

In relation to their release upon request, it is likely that the section 35 exemption outlined above would apply to information of this type. This means it is not possible to give a definitive response to the extent to which information may be made available. According

to the Information Commissioner's Office, some diaries may be published in response to an information request.

This issue has also been before the First Tier Tribunal, a judicial forum which hears appeals against decisions of the Information Commissioner. In 2014, the tribunal ordered the disclosure, except for some specified information, of the diary of the Secretary of State for Health. This was first time that judicial consideration had been given to the disclosure of a Ministerial diary under the Freedom of Information Act 2000.

In the **European Commission**, the agendas of Commissioners are routinely made available online. This is a policy requirement put in place by the Juncker Commission in November 2014 so it is not clear if this would continue after this Commission's mandate. There has been criticism about the consistency of updates which varies among Commissioners, and the level of detail which is often not very complete, or is quite generic (eg. the Commissioner on Digital Single Market reports that he has meetings on 'Digital Single Market' issues with no further detail).

8. Annex 1

Table 1 Questions: **Duty to Document – Rules, Codes and Practices**

1. Does your country's access to information law, public records law or any other law contain provisions relating to **creating and maintaining records** (the duty to document) by government departments? If so, please cite these and provide a hyperlink to statutes in English, if these exist.

2. Do **guidelines or codes** contain provisions relating to the **creation and maintenance of records** by government departments? If so, please cite these.

3. Regardless of whether there are rules or guidelines in place, **in practice**, do government departments **routinely create and maintain records relating to decision-making**?

4. Where statutory obligations or codes/guidelines exist in relation to the duty to document, is there any provisions **for oversight and monitoring, including sanctions** for non-compliance?

Table 2 Questions: Proactive Publication – Rules, Codes and Practices

1. Does your country's access to information law have any provisions relating to **the proactive publication of records** by government departments?

2. Do **guidelines or codes** contain provisions relating to **the proactive publication of records** by government departments?

3. Regardless of whether there are rules or guidelines in place**, in practice**, do government departments routinely and proactively publish certain records?

4. Where statutory obligations or codes/guidelines exist in relation to proactive publication, is there any provision **for oversight and monitoring, including sanctions** for non-compliance.