



UNIVERSITY OF AMSTERDAM
Amsterdam Law School

Inaugural lecture

The Lure of Open Data

Given 24 May 2013, Mireille van Eechoud (translated from the Dutch)

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THE LURE OF OPEN DATA

English translationⁱ of the inaugural lecture ‘De lokroep van open data’ given at the University of Amsterdam, 23 May 2014.

Mireille van Eechoud, professor of information law.

MADAM RECTOR MAGNIFICUS
MISTER DEAN,

Welcome, family, friends, colleagues.

I have considered giving this lecture in English. Not just to please our daughters and Hans, who hearing English in a formal historic setting like this one might be transported back to their wonderful Cambridge days. I have considered giving this lecture in English, in recognition of the ever increasing international orientation of our research programme. This is visible in our publications, travels and if I may say so impressive global network of excellent scholars we've built. Many of whom will be joining us in July for the 3 day conference we host, celebrating 25 years of IVIR, as I know many of you will be. That's all the advertising I'll do.

The most important reason to give this lecture in English for me would be in recognition of you, colleagues that have come from far-flung places to work at IVIR here in Amsterdam. About a third of our staff that is. English has become the common language of our meetings, English is the language in which you try to educate your 'boterham met kaas kop'- colleagues about the pleasures and cultural significance of eating a decent lunch.

But I have decided against speaking in English. In recognition of the often heard complaint that it is difficult to learn Dutch in The Netherlands because as soon as people discover you are not a native Dutch speaker, they will switch to English. So consider this a free lesson in Dutch or else try to glean what I am talking about from the slides. These are purely decorative by the way, so that may not be easy.

On a more serious note, I expect to be the last professor at IVIR to give her inaugural lecture in Dutch, which is a landmark of sorts. My colleague Natali Helberger will certainly be the first to have it in English this September.

So why Dutch? For one obvious reason – apart from Dutch being by mother tongue, our students our Dutch, most of my colleagues are – law is language and the interpretation of language. And today I will speak about a topic that certainly has a strong European, even global dimension, but I want to examine it from the perspective of Dutch positive law.

What and why open data?

The Act on public access, the Market and Government Act, Competition Act, Copyright Act, Database Act, the Open Government Bill. For the lawyers among you: there you have some pitch lines.

So the lure of open data. What is open data? A phrase of English origin (with Latin roots, of course) that needs no translation into Dutch, but needs some explanation, I think.

And what is the lure? Is it deceptive and destructive, like that of sirens singing, or heavenly? In politics, among consultants and technology gurus, that heavenly image predominates but you also see more attention to the negative effects, or the lack of positive effects, in technology criticism, among governance scholars, political scientists, communication scientists. I return to that.

What does the lure of open data have to do with law? A lot, because there is currently a strong tendency in the European Union, so here in the Netherlands too, and outside it, for that matter, in the US, Australia for example, to capture open data policy in legislation. And it turns out it is not so easy to do that effectively yet. I don't pretend to give bite-sized solutions to that this afternoon – or any other day. But I do want to share with you a few reflections on the role the law can, perhaps should, play.

Open data. What is it? In the most radical definition: data that are available to everyone, digitally, in open formats, without having to pay for use, or having conditions attached. You can do what you want with it. At most, the origin, i.e. the source, must be stated.

For a considerable number of you, associations now spring to mind with open source software, GPL, open content, creative commons, copyleft. And rightly so, of course. Because open data, that is the mindset of open source applied to data, information. For the sharpshooters in information theory: those terms data, information, content are usually used loosely and crosswise in literature and policy papers. And that is what I am doing today.

Open data can come from citizens, eg much of the open street map data is crowdsourced. But it can also come from companies. However, that open data in practice mostly involves government data will not surprise you. After all, how many revenue models are there, besides ad sales, where a company invests in gathering and processing data itself, and then gives it away to whoever wants it? There are undoubtedly conceivable models, but whether they become economically significant remains to be seen. In the big data hype, the message is instead: company, what data you can pull in and already have in-house, is worth its weight in gold once you run sophisticated analytics software on it. You get to know your customers, optimise processes, discover new business opportunities.

How big is the value of open government data? Today, the European Commission claims a potential market of 70 billion in the EU. ⁱⁱ Studies over the past 10 years give varying estimates. McKinsey, the consultants, released a report last year estimating the wealth effects of open data at \$3 trillion, worldwide. Well, all such figures are hard to compare and usually the compilers frankly acknowledge that they involve a lot of assumptions and extrapolations that make the accuracy quite limited. But that there is money in it is clear.

When we look at regulation, we see that economic aspect also prevailing. European Commissioner Kroes, who with her Department CNECT has a big hand in formulating European rules for the information society, is an outspoken advocate of making government data generously available. Data is the new oil of the information society; she says in her speeches.

The power to make European rules also primarily serves an economic purpose: promoting a strong, competitive single market for information services and products. With government data as the raw material. How the Netherlands and other member states regulate access to public sector information from political-democratic objectives –control, accountability, participation– that is primarily their own business. Brussels has limited say on that.

To harness that economic potential, policies have been made for a quarter of a century. It started back then at the insistence of publishers, with the ‘Recommendations for promoting synergy between the private and public sectors in information markets’, in 1989 that was. Then in 2003 came the Directive on re-use of public sector information. That asks member states to make government information (that counts as accessible to the public under local law) available for commercial and non-commercial use, and provides a framework for that. Initially this came without many hard obligations. But the directive was tightened last year. Member states *must* now allow re-use. Public bodies may still attach conditions to this, and charge money, but in principle no more than what it costs to provide the information. Open licences are promoted as the gold standard. Moreover, the scope has been extended to a large number of public organisations in the cultural sector: libraries, museums and archives.

What is sold today as “open data” used to be called commercial exploitation of public sector information. To include non-commercial use as well, exploitation was replaced by the (strange) term “re-use”. And so today, policymakers speak of open data. So that is more or less the same animal but with a different name.

Transparency or commercialization

Not surprisingly, the call for more open data is heard mostly from industry, directed at the government. Not the other way around. The head of Google in the US, for example, called on municipalities to “share” their wealth of data. She envisaged how google apps could become your personal assistant by integrating data from the public sector, anticipating what you need and what you need to do. Ping. You are not on the electoral register, would you like to sort that out now? Ping. These are the political parties that match your usage profile. Ping. Take the bus today, there is a disruption on your regular route. Ping. The neighbourhood association is holding a cleaning Event tomorrow morning, will you join in?

Be sure to read *The Circle* by Dave Eggers, a novel about a powerful corporation that seeks total human transparency, because that makes everyone happy and it’s good for the public good. I still don’t know whether I find that more of a caricature, or an eerily realistic vision of the future. But I digress. Or not. For the call for transparency is also a dominant sound in the whole open data movement. Many extol the blessings of it: governments themselves, businesses, civil society groups.

So-called ‘civil society’ plays an important role as a driver of making government data freely available. This is done through a combination of political action and concrete initiatives: website, apps that show what can already be done, developing tools. Together with government agencies,

hackathons are organised, for example, pressure cooker meetings in which people come together to invent and build apps based on government data. I have the strong impression that the participants are predominantly white young men, with a fascination for ICT, which is unfortunate because not very representative of the general public.

But great things are happening. In all kinds of countries, including the Netherlands, work is being done on, for example, making budgets and spending transparent. You saw an example of an existing English site in the slides: Where does my money go? On this website budget data is displayed in such a way that citizens can see at a glance where their tax money is going.

From the government's perspective, this type of initiative, the wider dissemination of financial data, clearly fits in with the obligation to account for proposed spending and incurred expenditures. Traditionally, the government provides that accountability to parliament. On Princes day, the third Tuesday of September -although incidentally, year after year the proposed budgets are prematurely leaked to the press. And on the third Wednesday of May, 'ground beef day' government presents parliament with justification of actual public spending so far.

New forms of openness, 'open spending', according to civil society groups and also Civil Servants 2.0, have additional advantages over that classic political model: government departments start working more efficiently under pressure from all these extra eyes and analyses, waste and corruption decrease, citizens' trust in government increases. Such positive effects are quite widely attributed to any form of digital openness, in addition to the direct economic benefit for businesses, and the additional tax revenues that should in turn follow.

The National Audit Office also sees the benefit of 'real-time armchair auditors'. Give me the data and I'll tell you where the waste is, or find a hidden pot to tap into. But without feedback loops, feedback mechanisms, actual participation, it remains to be seen whether more information does lead to cost savings, less corruption, greater citizen trust .

Another form of disclosure we are increasingly seeing is the publication of subsidy data and inspection data. Who gets agricultural subsidies? What about the hygiene of sandwich sales at petrol stations, what does an operation in a hospital cost? Sure, this kind of publicity serves accountability in the government-citizen relationship. But just as much, actually more, it is about the disciplinary effect that publicity is supposed to have on the one being monitored: the subsidy recipient, the school, the hospital, the butcher. Publicity, then, not as a means of control over government, but by government. This is called a second-generation control mechanism in public administration jargon. We are all being controlled and are crowdsourced controllers.

What you also see is the active disclosure of information as a run for the front. If there are many or laborious requests for information under the Freedom of Information Act, it may end up being more efficient to just proactively publish the data. That eventually happened with education inspection reports of schools, which the newspaper *Trouw* forced disclosure of. It's about to happen with primary schools' student test scores ('CITO' scores), which news broadcaster *RTL* obtained through massive FOIA requests. Another example are the police, who a few years back

received a flood of information requests on technical reliability of speed measuring devices. These came from motorists who thought it would help them challenge their fines, or ‘take revenge’ on the authority, cause a bit of red tape and collect an administrative penalty if the police were late in responding. So now this information is being put online. Though in pdf format so not as actual open data, but anyway.

Just to recap. We see, then, a multitude of motives, of justifications for making government information public. Let me just list them:

1. Business can use it to create new information services and products, which is good for the economy.
2. The Public sector will work more efficiently
3. It gives citizens more insight into what the government does, can do and how it does it. That creates trust. And that in turn encourages citizens to be more involved in government. Let’s hope that election turnout figures are not a measure of this effect.
4. The sunshine of publicity counteracts abuse of power and corruption. That is the imagery of publicity as a form of public hygiene.

These are quite a few positive effects. Accountability, trust, participation, hygiene: traditionally, these are also values served by disclosure legislation.

Standstill of Freedom of information laws

The promise of open data is enthusiastically embraced by governments around the world. Over 60 states have already joined the 2011 Open Government Partnership. It is an informal network that stands for greater transparency, innovation, participation, efficiency, a lot, in short. But all on a voluntary basis, with soft tools, for uncontroversial data. So whispers the cynic in me.

Because the state of openness, really? If transparency is such a great good, surely we have public access legislation and practice reflecting it? The modernisation of open government regulations just won’t get off the ground. In 2008, the Council of Europe brought about a treaty, the Tromsø Convention on Access to Official Documents (CETS No. 205).. Those who sign, sign for a broad right of public access, to be realised in national legislation. In some respects, the treaty goes further than our Public Access Act. The Netherlands, along with quite a few other EU countries, does not seem intent on ratifying the treaty. So it is still not in force.

And from Council of Europe countries such as Russia, Turkey, Azerbaijan and Ukraine we have nothing to expect either it seems to me.

A little closer to home: The right to access information from EU institutions is now explicitly stated in the Charter of Fundamental Rights of union citizens. But the revision of the EU Regulation that gives that right hands and feet has been dragging on for years. The European Parliament recently passed a motion calling on the Council to finally break the deadlock.

England, shining example on open data policy, belatedly introduced a Freedom of Information Act. Effectively about 10 years back. Before that, it was internationally known as the country of

closed government culture. That Freedom of Information Act, pulled off in Labour's first reign under Blair, elicited a telling *Mea culpa* from the former prime minister. In his autobiography, Tony Blair says of it: ⁱⁱⁱ

“Freedom. Of. Information. Three harmless words. I look at those words as I write them, and feel like shaking my head till it drops off my shoulders. You idiot. You I, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it...”

And further down: “Where was Humphrey when I needed him?”

If that were not regret.

These days, the Cameron government is pursuing more informal avenues; the UK was among the founders of the aforementioned open government partnership. Cameron also, with much fanfare, put the Open Data Charter on the agenda at the G8 summit in Northern Ireland last summer. The EU has since embraced it. The day before the G8 summit, *The Guardian* came out with a Snowden revelation: that the British hosts had previously wiretapped the G20 summit. That news gave the spin doctors stomach cramps, I imagine.

Domestically, the complaining about the Public Access Act is unrelenting. And time and again, it appears from research, but also from cries from the national ombudsman, the Council for Public Administration, from the growing number of court cases, that citizens, civil servants, journalists and administrators are dissatisfied with how the law works.

Former home affairs minister Donner, now vice-president of the Council of State, also spoke heartily about the matter of transparency. On Press Freedom Day in 2011, for instance, he told the assembled press:

“Open government and press freedom have little to do with each other. Of course; openness is easy for the press. The WOB (public access act) provides a nice tool to quickly get information for articles or programmes, or to fish for information that might point to something wrong, or could be interpreted that way. In that sense, open government is a form of state support for the press.”

I love that last bit of the quote, too bad it's not meant as ironic. As a matter of fact, I passionately disagree with its message. After all, the Public Access Act is there for everyone and when seeking information, you don't have to explain to the government why you want the information. The public interest in openness is given. The only question is whether there is another more weighty interest that argues against public accessibility. Like privacy, or security.

And of course, the press has a special role in giving substance to that political and administrative transparency. The European Court of Human Rights emphasised this in 2009 in the *TASZ v. Hungary* case. On that occasion, the ECtHR also recognised that access to public information falls

under the protection of the right to freedom of expression. That was a significant change of direction.

What is striking, building on the idea of disclosure as state aid, is of course that a key idea behind the re-use directive is: let the private sector exploit the economic value of public sector information.

Government data in the marketplace

And that brings me to another complex aspect, namely the relationship between market and government. Because it happens regularly that market players are up in arms against the free provision of public data because it distorts the market. We see this especially in the geographical information domains. There, the state may once have had a natural (sometimes also legal) monopoly, but in many areas this has long since ceased to be the case. meteorological data, cartography, traffic information: private providers compete for the patronage of both public and private sectors, and do not welcome competition from the public sector. Of the €1 billion estimated turnover in the geographic information business, more than half of that revenue is earned from the public sector.

The Competition Act does contain provisions to prevent public bodies from competing unfairly with the private sector; but open data policy does not easily fit into this. After all, giving away data collected in the performance of public duties is not readily considered to be an economic activity, and that is what the Competition Act deals with.

Anyway, in many sectors there is an ongoing process of reflection on the scope and interpretation of public tasks: what is happening in the market, what information still needs to be produced within the government, what can be tendered, procured, shared, or outsourced. Linked to that are funding choices, who pays for what, what exactly do you get in return. Releasing data can be cutting right through all those choices.

Open data and intellectual property

It also leads to thorny rights issues: who can claim intellectual property rights, who exercises them? The model of open data hinges --just like open source and creative commons--, on copyrights. And on sui generis database rights.

This makes the question of who has rights to what information crucial. And paradoxically, an effective open data policy requires public bodies to have a good system of rights management in place. To be able to release data by saying: I do not exercise copyright or database rights, you not only need to know what information you hold (which is often already quite a puzzle). But also whether you have any rights to it. Of course, many institutions have never structurally dealt with their intellectual property portfolio, they never had to.

So those are already two problematic aspects. First, how do you apply open data policies in an environment where the roles of government agencies as suppliers and buyers of information are fluid? Open data licensing models have a basic premise: once you offer data under one of the licences, it is available to everyone, worldwide, indefinitely, without fee. Irrevocable (except against individual licensees that do not respect the license terms). Not really a flexible model.

And a second issue: how to ensure clarity on rights. The current Public Access Act hardly helps with that. It only says: if there are “third party” rights on government information, you can in principle access it, but you don't have a claim to re-use rules. So substandard rights management gives an escape route, so to speak, to escape open data.

And the Copyright Act and Database Act don't help much either. Those only say:

1. There are no rights on the text of laws, case law and decrees . So those are free to use. That is clear.

and

2. Everything else that the public power publishes and to which it has copyrights you may also use freely, unless the right is reserved.

The relationship between FOIA and copyright law has never been settled. So most lawyers assume: the government cannot invoke its own rights to deny access, but it can invoke them to restrict the use of the information. Look, don't touch. In my opinion, this gives copyright too much power. So abolish copyright on government information? I wouldn't go that far.

The private initiative bill for an Open Government Act by the political parties Groenlinks and D66 states that the government may no longer reserve intellectual property rights. At most, a government body may demand that it be cited as source. That is de facto a near abolition of copyright and database rights. Whether the Netherlands can do that without getting into trouble with Brussels I very much doubt. Copyright is regulated almost entirely in an EU context, database law even comes directly from the European cookbook. Individual member states are hardly left with any freedom.

I think the time has now come to also explicitly regulate the copyright status of public sector information at European level. As long as this results in the clear primacy of political-democratic transparency. Given Brussels' compartmentalisation, I am not confident that this will happen. Everyone recognises the need to do so, but no one really owns it.

Open data – a false prophet?

Should open data policy be legislated at all? No, is my belief, and certainly not in generic instruments such as the Directive on Re-use of Public Sector Information, or the Open Government Act.

Indeed, when considered properly, there is not even a real open data policy. Open data is an umbrella under which many hide. It is a concept in which government, citizens and businesses alike with varying goals and ambitions can find themselves. Who is against open data?

Data, that sounds neutral.

And open, always sounds sympathetic.

But value-free, it is not.

That is why it is important that policymakers and legislators-whether local, national or European-do not allow themselves to be blinded by the possibilities of information technology, fall for the idea of government as an open platform. Open data, these are not mountains of gold, or oil reserves.

What is the effect on information markets with powerful players? The ambition is to encourage a multitude of new innovative services by as many providers. But will they materialise, or will mainly established players benefit? Who will soon have the 'biggest' data? Can you hear gigantic hoovers approaching?

I would argue that the goals should be set more modestly and named more precisely. Less reliance on assumed positive effects. More attention to the question of what form of disclosure actually has the intended outcomes. This is something that is being increasingly researched in the fields of public administration and political science. The insights are often downright sobering: more information can lead to less trust, can reinforce information asymmetry and thus foster inequality between citizens. There are even examples where more disclosure led to more corruption. Also, it affects how officials work (record less), increases conformism in decision-making and encourages a focus on processes and on what is measurable. Or so I have learned from spending some time digging through recent literature.

And let's not forget the implications for privacy protection. In an era where, by linking datasets together, it is increasingly easy to uncover personal data, the question arises: the social benefits of open data, how do we weigh them against privacy disadvantages? Can we concretely know and control those disadvantages at all? That government agencies handle personal data carefully is unfortunately not a given. And I am not talking about the large-scale data fishing undertaken in the intelligence apparatus. Recently, the media were again full of reports about privacy protection abuses in healthcare surveillance, for example. Can we trust government agencies to robustly anonymise data before releasing it? In the era of linked open data, is that still sufficient? Important questions, which proponents of open data so far dismiss with a simple: of course privacy laws must be respected.

I conclude.

Maxim Februari^{iv} recently articulated the critique of technology-driven transparency in the context of the annual Kousbroek Lecture thus:

“At the time of the book, man was a knowing and reading being. At the time of the Internet of Things, man is being known and being read

Today the state fills in your tax form for you; tomorrow it fills in your ballot paper; the day after tomorrow it abolishes elections. After all, the state knows your preferences. You yourself do not have to articulate anything, your buying behaviour and location data determine who you are: you are a utility; a source of information; a pot of data.”

I HAVE SPOKEN

ⁱ For ease of reading, Dutch legal terms and names of legislative acts have been translated to an English equivalent, i.e. the Dutch Wet Openbaarheid van Bestuur (literally: the Law on Transparency of Administration) I translated as Public Access Act, which captures better that it is the Dutch equivalent of what in other jurisdictions is called Freedom of Information Act. In the original Dutch version, I use the Dutch verb ‘wobbing’ from time to time, a verb used in the Netherlands to describe the act of using the Wob (acronym of Public Access Act) to gain access to information. I have omitted this in the English translation.

ⁱⁱ http://europa.eu/rapid/press-release_SPEECH-12-149_en.htm

ⁱⁱⁱ Tony Blair, A Journey, Hutchinson, September 2010.

^{iv} NRC 12 april 2014.