



NEJVYŠŠÍ SPRÁVNÍ SOUD



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Supreme administrative courts and evolution of the right to publicity, privacy and information.

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Answers to Questionnaire: Portugal



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Supreme Administrative Courts and evolution of the right to publicity, privacy and information

1. Briefly describe the administrative institutional backing of free access to information and of the protection of personal data. Whenever those agendas are institutionally linked, provide for a brief description of such relations.

1.1) Data protection

1.1.1. In Portugal, the National Data Protection Commission (National Data Protection Commission) is the national authority with powers to control and oversee compliance with the legal provisions and regulations on the protection of personal data, with strict respect for human rights and for the freedoms and guarantees provided for in the Constitution and by law (see section 22(1) of **Act no. 67/98, of 26 October – Protection of Personal Data Act**^{1 2} – which transposed into the Portuguese legal system Directive 95/46/EC of the European Parliament and the Council of 24.10.1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data).

The National Data Protection Commission is an independent administrative body, with powers of authority, which operates under the aegis of the Portuguese Parliament and exercises its powers throughout the national territory (see section 21(1)(2) of the abovementioned Act no. 67/98, and section 2 of **Act no. 43/2004, of 18 August – Organisation and functioning of the National Data Protection Commission Act**).

The National Data Protection Commission is responsible, in particular, among other things, for authorising or registering, as applicable, the processing of personal data; exceptionally authorising the use of personal data for purposes other than those giving rise to their collection; authorising the combination of automated processing of personal data; ensuring the right of access to information, as well as the exercise of the right to rectify and update; acting on requests made by any person or by an association representing that person for the protection of his rights and freedoms with regard to the processing of personal data and inform him of the outcome; checking, at someone's request, the lawfulness of data processing whenever such data processing is subject to restricted access or information, and inform him that a check has taken place; assessing the claims, complaints or applications made by private individuals; apply fines for violation of data protection rules (see section 23 of the aforementioned Act no. 67/98, and sections 17, 19, 23-27 of Act no. 43/2004).

¹ Rectified – Declaration of Rectification no. 22/98, of 28 November.

² The Act applies to video surveillance and other forms of capture, processing and dissemination of sounds and images pursuant to section 4(4).

1.1.2. Specific legislation:

As regards **the processing of personal data and the protection of privacy in the electronic communications sector, Act no. 41/2004, of 18 August** is in force, which transposed into the Portuguese legal system Directive 2002/58/EC of the European Parliament and of the Council, of 12 July, which regulates that matter.

Act no. 41/2004 specifies and complements the provisions set forth in Act no. 67/98, of 26 October and applies to the processing of personal data in the context of publicly accessible electronic communications services and networks (see section 1 of Act no. 41/2004).

Act no. 1/2005, of 10 January regulates the use of video cameras by security forces and services in public areas commonly used, and the use of video surveillance may be authorised to achieve one of the following goals: protection of public premises and buildings and their accesses; protection of premises of interest for defence and security purposes; protection of the safety of public or private individuals and goods, and prevention of criminal offences, in places where there is a reasonable risk of them taking place; prevention and suppression of traffic offences; prevention of acts of terrorism; forest protection e forest fire detection.

The installation of fixed cameras is subject to the authorisation of the member of Government responsible for the requesting security force or service, and such decision to authorise will be preceded by an opinion issued by the National Data Protection Commission.

Act no. 5/2008, of 12 February, on the other hand, **approved the creation of a DNA profiles database for civil and criminal investigation purposes**, and the entity responsible for the DNA profiles database and the applicable operations is the National Institute for Forensic Medicine (see section 16(1) of said Act no. 5/2008), and they must consult with the National Data Protection Commission for clarifications regarding the processing of personal data (see section 17 of the abovementioned Act).

Act no. 32/2008, of 17 July³, also regulates **the storage and transmission of traffic and location data concerning natural and legal persons, as well as the related data needed to identify the registered user or subscriber for purposes of investigation, detection and suppression of serious criminal offences by the competent authorities**, and it transposes into the internal legal system Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.

“Competent authorities” are the criminal police authorities and judicial authorities of the following entities: i) the Criminal Police; ii) the National Republican Guard; iii) the Public Security Police; iv) the Military Criminal Police; v) the Aliens and Borders Service; vi) the Maritime Police; “serious criminal offences” are terrorist offences, violent crime, highly organised crime, illegal restraint, kidnapping and hostage-taking, crimes against cultural identity and personal integrity, offences against State security, counterfeiting of currency or cash equivalents and offences covered by a convention on maritime and air navigation security.

³ Regulated by Ministerial Order no. 469/2009, of 6 May, altered by Ministerial Orders no. 915/2009, of 18 August, and 694/2010, of 16 August.

The storage and transmission of data serve the exclusive purpose of investigation, detection and suppression of serious criminal offences by the competent authorities.

Act no. 34/2009, of 23 January, establishes the legal regime for the processing of data concerning the judicial system.

Act no. 5/2012, of 23 January, regulates the requirements for the processing of personal data for purposes of creating national files containing health-related data, using information technologies and within the framework of the National Health Service.

1.2.) Access to information

1.2.1. As regards information on personal data, when such data are directly collected from their subject, those responsible for their processing shall provide the data subject, except if already known to him, the following information: the identity of the party responsible for the processing and, if applicable, of its representative; the purposes of the processing; other information, such as: the recipients or categories of recipients of the data; whether replying is compulsory or voluntary, as well as possible consequences of failure to reply; the existence and the conditions of the right of access and rectification, provided they are necessary in light of the specific circumstances of the data collection, in order to ensure its subject a fair processing of such data (see section 10(1) of Act no. 67/98 – with the exceptions provided for in subsections 5 and 6 of that same section).

The right of access to data is also provided for - section 11 of Act no. 67/98 – and its subject has the right to obtain, from the party responsible for the processing, freely and without restrictions, at reasonable intervals and without excessive costs and delays:

a) Confirmation regarding whether data relating to him are being processed, as well as information regarding the purposes of such processing, the data categories in question and the recipients or recipient categories to whom the data are disclosed;

b) Communication in an intelligible form of the data undergoing processing and any available information on the source of such data;

c) Knowledge of the logic underlying the automated processing of data related to him;

d) Rectification, erasure or blocking of data, the processing of which doesn't comply with the provisions of this Act, namely due to the incomplete or inexact nature of such data;

e) Notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out under paragraph (d), unless this proves impossible.

1.2.2. Act no. 6/2007, of 24 August regulates matters of access and re-use of administrative documents, and the access to registry and notary documents, civil and criminal identification documents, and documents deposited in historical archives is governed by specific legislation.

That right of access includes the right to consult, copy and obtain information regarding the existence and contents (see section 5 of Act no. 46/2007) of documents (see

section 3) in possession of the Public Administration and other entities listed in section 4 of the aforementioned Act.

The Commission for Access to Administrative Documents (CADA), an independent administrative body operating under the aegis of the Portuguese Parliament, is responsible for overseeing compliance with the provisions set forth by law (section 25).

The Commission for Access to Administrative Documents shall, among other things: assess the complaints submitted pursuant to section 15 (for lack of reply, rejection or other decision limiting the access to administrative documents); issue opinions regarding the access to administrative documents; issue opinions on the communication of documents between Administrative services and bodies, at the request of the interested or requested entity, unless a risk of combining data is foreseen, in which case the issue is submitted to the National Data Protection Commission for assessment; contribute to the clarification and dissemination of the different ways to access administrative documents under the principle of open administration; apply fines in administrative offence proceedings (see section 27).

Non-compliance with obligations related to data protection, undue access, violation or destruction of personal data, aggravated disobedience and violation of the duty of secrecy are criminal offences (see sections 43 et seq. of Act no. 67/98).

1.2.3. Act no. 19/2006 of 12 June is in force regarding matters of information concerning the environment and it regulates access to environmental information in possession of public authorities or held on their behalf, and establishes the conditions for its exercise, as it transposes into the internal legal system Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC of the Council. It aims to guarantee the right of access to environmental information held by or for public authorities; to ensure that environmental information is made available and disseminated to the public; to promote access to information through the use of computer telecommunication or electronic technology.

Pursuant to section 6(1), public authorities are required to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.

It is incumbent upon the Commission for Access to Administrative Documents to oversee compliance with this Act (section 15).

1.2.4. Private individuals have the right to be informed by the Administration, whenever they so request, regarding the progress of procedures of direct interest to them, as well as the right to be informed of final decisions regarding such procedures, pursuant to section 61 of the Code of Administrative Procedure (CPA) – Decree-Law no. 442/91⁴, of 15 November.

This right can be extended to any person who proves to have a legitimate interest in knowing the elements they seek (section 64).

⁴ Meanwhile, a new Code of Administrative Procedure has been approved – Decree-Law no. 4/2015, of 7 January – which maintains the mentioned rights (sections 82 to 85), pondering, additionally, the use of electronic means by the Administration – sections 14 and 82(4)(5) –, which will only come into force on April 2015 (see section 9 of the Decree-Law).

Section 62, on the other hand, establishes the right of the interested parties to consult proceedings which don't contain any classified documents or documents which reveal any trade or industrial secrets or secrets concerning scientific, artistic or literary property. This right includes named documents concerning third parties, provided the personal data which aren't public are excluded, pursuant to the law.

The interested parties have the right, on payment of the corresponding cost, to obtain certified copies, copies or authenticated declarations of documents which are part of the proceedings to which they have access (section 63).

Pursuant to section 65 of the Code of Administrative Procedure, everybody has the right to access administrative archives and records, even if no procedure concerning them directly is ongoing, without prejudice to the legal provisions governing matters of internal and external security, criminal investigation and personal intimacy.

The requests for information shall be submitted to the entities with powers over the matter in question; that is, if it's a tax matter, the request shall be submitted to the tax authority in question; if it's a municipal question, it shall be submitted to the city council or city hall with territorial powers; if the matter concerns the working of courts or judicial proceedings, it shall be submitted to the body which manages and disciplines the jurisdiction in question (the High Council for the Judiciary, the Administrative and Tax Court's High Council, The High Council for the Public Prosecution Service) or the case magistrate, among other examples.

1.2.5. The State and Autonomous Regions bodies which are part of the Public Administration – and the others provided for in section 4 of Act no. 46/2007, like the bodies of public institutes and enterprises and local government bodies – also have the obligation to ensure dissemination, namely in electronic databases easily accessible by the public through public telecommunications networks, of the following administrative information, which should be updated at least every six months: all the documents, namely internal legislative orders, circulars and guidelines, containing the framework for the administrative activity; the reference of any documents containing interpretations of enacted laws or descriptions of the administrative procedure mentioning, in particular, its title, subject matter, date, source and place where they can be consulted (see section 10 of act no. 46/2007).

1.2.6. Limits to the right of information

- Section 268(2) of the Constitution of the Portuguese Republic (CRP - Decree of 10 April 1976) provides that the right of access to administrative archives and records is granted “*without prejudice to the legal provisions governing matters of internal and external security, criminal investigation and personal intimacy*”.

Section 62(1) of the Code of Administrative Procedure establishes the right of the interested parties to consult proceedings which **don't contain classified documents or documents which reveal trade or industrial secrets or secrets concerning scientific, artistic or literary property.**

Section 65(1) of the Code of Administrative Procedure, on the other hand, establishes that everybody has the right to access administrative archives and records, even if no procedure concerning them directly is ongoing, **without prejudice to the legal provisions governing matters of internal and external security, criminal investigation and personal intimacy.**

- State Bodies are bound to the principles of transparency, publicity and open administration, except when, due to the nature of the matter, such matter is expressly classified as State secret.

The State secret regime includes the matters, documents and information, the knowledge of which by unauthorised persons is liable to put fundamental State interests at risk.

Fundamental State interests are those concerning national independence, State unity and integrity or its internal or external security, the preservation of constitutional institutions, as well as the resources allocated to defence and diplomacy, the safeguard of the population in the national territory, the preservation and security of economic and energetic resources and the preservation of the national scientific potential. (see sections 1(1) and 2(1)(2) of Organic Law no. 2/2014 of 6 August; see also section 2(4)).

- The data access provided for in section 11 of Act no. 67/98 is limited or conditioned in the case of processing of personal data related to State security and criminal investigation or prevention (section 11(2)), as well as in the case of processing of data for exclusively journalistic purposes or purposes of artistic or literary expression (sections 10(6) and 11(3)) and that right of access is exercised through the National Data Protection Commission, which, if the communication of the data to their subject is liable to affect State security, criminal investigation or prevention, freedom of expression and information or freedom of the press, merely informs the data subject of the acts carried out (section 11(4)).

The right of access to information concerning health-related data, including genetic data, on the other hand, is exercised through the doctor chosen by the data subject (section 11(5)).

- The right of access to administrative documents is subject to restrictions, like access interdiction, access subject to authorisation, access subject to approval or partial disclosure, namely when such access may put at risk or damage the State's internal and external security, when the secrecy of proceedings is at stake or when it refers to inquiry or inspection proceedings, named documents – administrative documents containing an assessment or value judgement regarding an identified or identifiable natural person or information covered by the right to intimacy – and administrative documents containing trade or industrial secrets, or secrets concerning the internal life of companies (section 6 of Act no. 46/2007).

- The right of access to environmental information may be subject to restrictions, like access subject to approval (section 11(2)), and making information only partially available (section 12) or denial of access when disclosing the information may be detrimental to: the confidentiality of the proceedings, whenever such confidentiality is established by law; international relations, public security or national defence; the secret of the proceedings; confidentiality of trade and industrial information, whenever such confidentiality is established by national or European law for the protection of a legitimate economic interest, as well as the public interest in maintaining statistical confidentiality or tax secrecy; intellectual property rights; confidentiality of personal data or files related to a natural person pursuant to applicable legislation; the interests or the protection of those who voluntarily provided the information without being (now or in the future) legally required to do so, except if such persons have authorised the disclosure of that information; the protection of the environment to which the information refers to, namely the location of protected species (section 11(6)).

2. Describe in general terms the regular administrative and court procedure in a typical disputable case of free access to information. Describe also the procedural role of your supreme administrative instance.

And

3. Describe the procedural role of your supreme administrative instance in the agenda of protection of personal data.

General means of protection:

- As general guarantees of the administered parties who may feel injured by administrative acts, the right to submit a claim or a hierarchical appeal is generally established in the Code of Administrative Procedure (see sections 158 to 165 for claims; sections 158 to 160 and 166 to 175 for hierarchical appeals).

- Private individuals also have the right to request the intervention of the Ombudsman, pursuant to article 23 of the Constitution of the Portuguese Republic and section 3 of Act no. 9/91 of 9 April which, under the title “right to submit a complaint” establishes that “*Citizens, natural and legal persons, may submit complaints against actions or omissions by the public authorities to the Ombudsman, who shall assess them without the power to take decisions and shall send the competent bodies such recommendations as may be necessary in order to prevent and remedy injustices*”.

- Should the right of information be denied or breached by the Administration, they may use a subpoena procedure for the disclosure of information, consultation of proceedings and provision of certified copies as established in sections 104 to 108 of the Code of Procedure in the Administrative Courts, which shall be submitted to the Administrative and Tax Courts.

This subpoena process is the “*adequate legal remedy at the disposal of the administered persons to judicially obtain the fulfilment of their right to information in the presence of a denial or breach of said right by the Administration, either when the sought information is procedural – section 62 of the Code of Administrative Procedure – or non-procedural – section 15(6) of Act no.46/2007 (see Central Administrative Court - South Judgement on case no. 07516/04, of 22.1.2004).*”

The subpoena for the disclosure of information, consultation of proceedings or provision of certified copies is aimed at the behaviour of the administration through which the exercise of the right to information was poorly executed or denied to the interested party.

The subpoena shall be submitted to the competent court within 20 days after any of the following facts: a) lapse of the legally established time for the entity to satisfy the request without it having done so; b) denial of the request; c) partial fulfilment of the request.

The judge is asked to order the Administration to grant access to the requested proceedings, provide a certified copy, a copy or an authenticated declaration of the documents or disclose direct information.

Once the application has been submitted, the judge orders that the requested authority be notified to reply within 10 days; after the reply has been provided or the time has elapsed and the necessary actions have been concluded, the judge renders a decision.

If the judge grants the petition, he determines the time in which the order shall be executed, which will be no more than 10 days.

The decision rendered is of a condemning nature for the administration and orders the consultation, the disclosure of information or the provision of the requested certified copy. The judge may impose periodic pecuniary penalties should the jurisdictional decision not be complied with without an acceptable justification, which means that the existence of guilt regarding non-compliance must be ascertained (see sections 108(2) and 169 of the Code of Procedure in the Administrative Courts).

The decisions rendered in subpoena procedures may be appealed to the Central Administrative Courts and, eventually, to the Supreme Administrative Court, on a question of law, in the general terms established in the Statute of the Administrative and Tax Courts (ETAF – Act no. 13/2002, of 19 February) and in the Code of Procedure in the Administrative Courts (CPTA – Act no. 15/2002, of 22 February).

It should be mentioned that this type of procedure may constitute an indirect form of protection of personal data, since, in many cases, the requested party says that the refusal to provide the information was based on the protection of personal data, a matter which will, therefore, be assessed by the judge.

Legal remedies against National Data Protection Commission decisions:

- In the exercise of its powers, the National Data Protection Commission renders binding decisions which can be challenged and appealed to the Central Administrative Court (see section 23(3) of Act no. 67/98 and section 17 of Act no. 43/2004).

The Central Administrative Court judgement can, in turn, be appealed to the Supreme Administrative Court on a question of law⁵, in the general terms established in the Statute of the Administrative and Tax Courts and in the Code of Procedure in the Administrative Courts (the appeal provided for in section 150 of the Code of Procedure in the Administrative Courts, for instance, is possible for the assessment of a matter which is of fundamental importance due to its legal and social relevance or when the admission of the appeal is clearly necessary for a better application of the law).

- In the case of administrative offences, the National Data Protection Commission decisions can be appealed to the courts of small criminal claims or to the competent judicial courts.

⁵ See Supreme Administrative Court judgement of 9.9.2010, Proceedings no. 076/10, in www.dgsi.pt.

Remedies against the breach of the right of information and the right of access to administrative documents

- In the case of absence of reply, denial or other decisions limiting the right of access to administrative documents, the applicant may submit a complaint to the Commission for Access to Administrative Documents.

The complaint interrupts the deadline for submitting to court a subpoena for the disclosure of information, consultation of proceedings or provision of certified copies, a procedure which is established in the Code of Procedure in the Administrative Courts (see section 15(1)(2) of Act no. 46/2007).

The Commission for Access to Administrative Documents, after hearing the requested entity, drafts a report assessing the situation which is sent, with the pertinent conclusions, to all interested parties. Once the report has been received, the requested entity has 10 days to inform the applicant of its final motivated decision.

Both the decision and the lack of decision may be challenged by the interested party in the administrative courts and the rules for the subpoena proceedings shall apply, with the necessary adaptations (subsections 3 to 6).

- The decisions of the Commission for Access to Administrative Documents in matters of administrative offences for undue re-use of documents may be challenged by submitting a claim, in the presence of which the Commission for Access to Administrative Documents may alter, revoke or maintain its decision. Should it maintain it, the Commission for Access to Administrative Documents sends the claim to the Public Prosecution Service in the Lisbon Administrative and Tax Court (see section 38 of Act no. 46/2007), where the procedure will run its course. The final decision of the judge is liable to be appealed *per saltum* to the Supreme Administrative Court, which will decide on a question of law (see section 39 of Act no. 46/2007; section 151 of the Code of Procedure in the Administrative Courts).

- Regarding the right to environmental information (Act no. 19/2006), section 14 establishes that the requesting party who finds his request for information has been ignored, unduly denied, either totally or partially, that he has obtained an inadequate response or that the present law hasn't been complied with, may challenge the legality of the decision, action or omission in the general terms of the law.

The requesting party may also submit a complaint to the Commission for Access to Administrative Documents pursuant to Act no. 46/2007.

Possibility of appeal to the Constitutional Court

Regarding the appeal to the Constitutional Court of judgements passed within the scope of the matters at hand, such appeal shall be possible – limited to matters of unconstitutionality (specific oversight) and only when the appealed decision can no longer be subject to ordinary appeal to other higher courts -, whenever the constitutionality issue has been submitted to the court *a quo* in terms of binding it to its assessment, and provided

that constitutionality appeal is presented as an instrumental appeal for judging the cause, that is, whenever such assessment may have an impact in judging that decision.

4. Provide for a general overview of historical development of access to information rights in your jurisdiction while focusing on most important legislative and judicial milestones. Also, please try to generally describe the main driving forces behind the development of these rights.

A) Access to information

- The Constitution of the Portuguese Republic, in its initial 1976 version, established in article 269 that “*Citizens have the right to be informed by the administration, whenever they so request, as to the progress of the proceedings of direct interest to them, as well as be made aware of the final decisions taken in relation to them*” (right to procedural information, nowadays established in section 268(1) – subsection 2 further establishes that “*Citizens also have the right of access to administrative archives and records, without prejudice to the legal provisions governing matters of internal and external security, criminal investigation and personal intimacy*” – principle of open administration or open archives).

Article 37(1) also established that everybody has the right to freely express and disseminate their thoughts in words, images or any other means, as well as **the right to be informed** without impediments or discriminations.

- The Code of Administrative Procedure – Decree-Law no. 442/91, of 15 November (repealed by Decree-Law no. 4/2015, of 7 January, in force since April 2015) – developing and regulating the right to procedural information (sections 61 to 64).

- Act no. 65/93, of 26 August, known as the Access to Administrative Documents Act (LADA), later altered by Acts no. 8/95, of 29 March, and 94/99, of 16 July, completed by Decree-Law no. 134/94, of 20 May, and altered again by section 19 of Act no. 18/2006, of 12 June, regulating the access to the Administration’s archives and documents (a principle which was only constitutionally established in the 1989 revision).

- Decree-Law no. 135/99, of 22 April, establishing administrative modernisation measures, namely concerning the reception of and the service provided to citizens and concerning administrative communication.

- Current Act no. 46/2007, of 24 August, which repealed Act no. 65/93.

B) Data protection

- Act no. 2/73, of 10 February, which established the national identification registry.

- Decree-Law no. 555/73, of 26 October - regulated Act 2/73, establishing the object and scope of the national identification registry.

- Act no. 3/73, of 5 April – enacted several measures concerning the protection of intimacy in private life.

- 1976 Constitution of the Portuguese Republic – article 35(1), grants constitutional status to the protection of personal data (“*Every citizen has the right to know what appears in computer records regarding himself and the purpose of the information, and require that they be rectified and updated*”)

- Act no. 10/91, of 29 April - Protection of Personal Data against Computing

- Act no. 28/94, of 29 August – Approved reinforcement measures for the protection of personal data

- Portuguese Parliament Resolution no. 53/94 – National Commission for the Protection of Computerised Personal Data Rules of Procedure

- Act no. 67/98, of 26 October – Personal Data Protection Act

- Act no. 43/04, of 18 August – National Data Protection Commission Organisation and Functioning Act
(and mentioned later legislation)

- Concerning rules of administrative litigation:

- Decree-Law no. 267/85, of 16 July – Procedure in Administrative Courts Act – sections 82 to 85 on the subpoena procedure for the consultation of documents or provision of certified copies

- Act no. 15/2002, of 22 February – Code of Procedure in Administrative Courts

For additional information regarding the essential contents of some of the mentioned acts, see answer to question 1.

In terms of case-law, the right of information on the progress of proceedings in which a party is interested and the right of access to administrative documents are considered fundamental rights analogous in nature to the rights, freedoms and guarantees, sharing, therefore, the regime established for the latter.^{6 7}

⁶ “Supreme Administrative Court (STA) Judgements” of 2-2-1995 (proceedings no. 36 628), in Appendix to the Official Gazette (AP-DR) of 18-7-1997, p. 1202; of 18-4-1996 (proceedings no. 39 788), in AP-DR of 23-10-1998, p. 2696; of 13-2-1997 (proceedings no. 41 495), in AP-DR of 25/11/1999, p. 1144; of 6-5-1997, (proceedings no. 42 046), in AP-DR of 23-3-2001, p. 3466; of 3-7-1997 (proceedings no. 42 447), in AP-DR of 12-6-2001, p. 5515-5516; of 10-7-1997 (proceedings no. 42 448), *ibidem*, p. 5857; of 15-7-1997 (proceedings no. 42 504), *ibidem*, p. 5904; of 23-7-1997 (proceedings no. 42 546), *ibidem*, p. 5932; of 13-8-1997 (proceedings no. 42 754), *ibidem*, p. 6031 and others quoted therein; Constitutional Court Judgements (TC) no. 176/92, of 7 May (proceedings no. 214/90), in Constitutional Court Judgements (ACTC), vol. 22, 1992, p. 382 and 388; no. 231/92, of 30-6 (proceedings no. 34/90), *ibidem*, p. 575; no. 234/92, of 30-6

5. Give basic subjective observation as to the role and importance of free access to information in political system of your country. In particular, focus on how the importance of freedom of information is perceived by general public and by non-governmental sector.

The right to information and access to documents is an essential means of bureaucracy control and good administration and it contributes to ensure compliance with the principles of justice and impartiality on behalf of the Administration.

It is a contribution to the fight against the abuse and misuse of power and corruption, it guarantees transparency in administrative procedures and it reinforces participative democracy, with greater participation of citizens in the decision-making process and greater proximity between citizens and the Administration.

The Administration, aware that it is under scrutiny, will act more cautiously and with greater rigour. In fact, the greater the degree of administrative transparency, the greater the respect for the legal-administrative principles (principles of legality, impartiality, equality, justice, pursuit of public interest, etc.) on behalf of the public officers.

The existence of administrative entities in charge of control and oversight in these areas ensures a greater dissemination and practise of the right to information while safeguarding data protection interests.

6. Give subjective general observation as to whether and eventually how free access to information rights are in practice abused or misused by the petitioners.

The granting of a right isn't immune to its abusive exercise.

In sporadic cases, citizens resort to the right of information and access to documents in an unbalanced manner, but section 14(3) of Act no. 46/2007 establishes that the administration isn't required to satisfy requests which, due to its repetitive and systematic nature or the number of requested documents, are manifestly abusive.

The general notion of abuse of law, provided for in section 334 of the Civil Code (Decree-Law no. 47344, of 25.11.1966) – “*The exercise of a right is illegitimate if its holder*

(proceedings no. 10/91), ibidem, p. 603; no. 237/92, of 30-6 (proceedings no. 327/91), ibidem, p. 617-618; and no. 254/99, of 4-5 (proceedings no. 456/97), in ACTC, vol. 43, 1999, p. 382 et seq., and others quoted therein.”

⁷ Regarding the concept of “directly interested”, the Central Administrative Court considers it refers to “*all the persons whose legal sphere is altered by simply initiating the procedure or those whose legal sphere benefits or ends up disadvantaged (or will probably benefit or end up disadvantaged) by the final decision*” (Judgement of 6 April 2000, P. 4189, in Administrative Justice Notebooks, no. 31, January/February 2002, p. 36), and a legitimate interest is “*an interest worthy of consideration or a specific interest which justifies, following certain and reasonable criteria, assessed case by case, obtaining such information*” (Judgement of 7 June 2001, P. 5461, in Administrative Justice Notebooks, no. 33, May/June 2002, p. 32).

manifestly exceeds the limits imposed by good faith, good morals or the social or economic aim of such right”
– may also serve as a defensive instrument against that type of behaviour.

7. Give a list and brief explanation of security, law enforcement and/or defence institutions that can benefit in your country from the exceptions laid down in Art. 7(e), Art. 8(4) and 8(5) of the Directive 95/46/EC.1.

1. The provision set forth in art. 7 of the Directive, more specifically paragraph (e), is established in Portuguese national legislation as well, more specifically in section 6(d) of Act no. 67/98.

The provision set forth in art. 8(1) of the Directive was implemented in section 7(1) of Act no. 67/98 which establishes that *“the processing of personal data concerning political or philosophical beliefs, party or union affiliation, religious faith, private life and racial or ethnic origin, as well as the processing of data concerning health and sex life, including genetic data, is forbidden.”*

The exceptions established in paragraphs 2 and 3 were, in turn, established in section 7(2-4) of Act no. 67/98.

Regarding the processing of data concerning offences, criminal convictions or security measures (art. 8(5) of the Directive), this matter is also foreseen in section 8 of Act no. 67/98.

2. Regarding the entities whose missions of public interest or exercise of powers of public authority justify the access and processing of personal data, it is important to refer to the contents of the Internal Security Act (Act no. 53/2008, of 29 August), which regulates the activity carried out by the State in order to guarantee public order, safety and tranquillity, protect people and goods, prevent and suppress crime and contribute to ensure the proper functioning of democratic institutions, the regular exercise of fundamental rights, freedoms and guarantees of citizens and respect for democratic legality.

The bodies of the Internal Security System are the High Council for Internal Security⁸, the Secretary-General and the Security Coordinating Office (see section 11 of the Act).

Security forces and services carrying out duties of internal security are the National Republican Guard; the Public Security Police; the Criminal Police; the Aliens and Borders Service; the Security Intelligence Service. The bodies of the National Maritime Authority and the bodies of the Aeronautics Authority System also perform security functions, in the

⁸ The High Council for Internal Security is the inter-ministerial hearing and advisory body in matters of internal security. The High Council for Internal Security is chaired by the Prime Minister and consists of the following members: a) The Vice-Prime Ministers, if any; b) The Ministers of State and Presidency, if any; c) The Ministers of Home Affairs, Justice, National Defence, Finance, as well as Public Works, Transports and Communications; d) The Presidents of the Regional Governments of the Azores and Madeira; e) The Secretary-Generals of the Internal Security System and of the Portuguese Intelligence System; f) The Chief of the General Staff of the Armed Forces; g) Two Members of Parliament appointed by the Portuguese Parliament by a two-thirds majority of the Members of Parliament present, provided that such majority is greater than the absolute majority of Members on effective duty; h) The Commandant-General of the National Republican Guard, the national directors of the Public Security Police, the Criminal Police and the Aliens and Borders Service and the directors of the Defence Strategic Intelligence Service and of the Security Intelligence Service; i) The National Maritime Authority j) The person in charge of the Aeronautics Authority System l) The person in charge of the Integrated System of Protection and Relief Operations; m) The Director-General of the Prison Services (see section 12 of Act no. 53/2008).

cases and in the conditions set forth in the corresponding legislation (see section 25 of Act no. 53/2008).

The Armed Forces collaborate in internal security matters under the Constitution and the law, and the Secretary-General of the Internal Security System and the Chief of the General Staff of the Armed Forces shall ensure operational coordination among themselves(see section 35)⁹.

These entities may, in the exercise of their missions, resort, among other things, to the following police measures: identification of suspect persons found or moving in a space which is public, open to the public or under police surveillance; body searches and searches in vehicles and spaces which are public, open to the public or under police surveillance; monitoring actions in establishments or other places which are public or open to the public; inspections or installation of security equipment (see sections 28 and 29).¹⁰

The Organisation of Criminal Investigation Act also mentions as criminal police bodies with general powers the Criminal Police, the National Republican Guard and the Public Security Police (see section 3 of Act no. 49/2008, of 27 August), with access to an integrated criminal intelligence system (see section 11 of the abovementioned Act no. 49/2008).

Pursuant to section 9 of Act no. 9/2007, of 19 February, which establishes the structure and organisation of the Secretary-General of the Portuguese Intelligence System, of the Defence Strategic Intelligence Service (SIED)¹¹ and of the Security Intelligence Service (SIS)¹², the SIED and SIS officers and agents, provided they are duly identified and on duty, have the right to access all the public areas, even if their access is conditional, and private areas which are publicly accessible considered essential for carrying out their remit, and the SIED and SIS directors, deputy directors and department directors have access to information and records contained in public entity files which are relevant for carrying out their remit.¹³

9 As specific Armed Forces legislation, see Organic Law no. 1-A/2009, of 7 July – Organic Law establishing the Bases for the Organisation of the Armed Forces – and Organic Law no. 1-B/2009, of 7 July – National Defence Act.

10 The Code of Criminal Procedure (Decree-Law no. 78/87, of 17 February) sets forth the possibility to conduct searches and body searches – sections 174 to 177 – and establishes the evidentiary value of mechanical reproductions such as video surveillance recordings – section 167. Again, **Act no. 1/2005, of 10 January, regulating the use of video cameras by security forces** should be mentioned.

11 The Defence Strategic Intelligence Service is the body responsible for producing information contributing to the safeguard of national independence, national interests and the Portuguese State's external security.

12 The Security Intelligence Service is the body responsible for producing information contributing to the safeguard of internal security and the prevention of sabotage, terrorism, espionage and acts which, by their very nature, may alter or destroy constitutional rule of law.

13 According to section 41, each Intelligence Service has a data centre for purposes of carrying out its remit, and such data centres are responsible for processing and storing in magnetic (or other) archives the data and information which are collected and processed.

According to section 43, without prejudice to the provisions of the SIRP [Portuguese Intelligence System] Framework Act on oversight and access by the secretary-general, through the directors of the data centres, no entity apart from the Defence Strategic Intelligence Service or the Security Intelligence Service can have direct access to the data and information stored in the corresponding data centres.

8. Subjectively identify most emerging actual problems that arise from processing of personal data by aforementioned security, law enforcement and/or defence institutions. Whenever appropriate, demonstrate them on particular examples.

Regarding the access to personal data, the most common question is the possible breach of rights of personality, in particular the right to intimacy in private and family life, expressly provided for in article 26(1) of the Constitution of the Portuguese Republic, inserted in the catalogue of personal rights, freedoms and guarantees, as well as in the civil plane (section 70 – general protection of personality – and section 80 – right to intimacy in private life – of the Civil Code).

The Criminal Code, in turn, establishes the offences of “invasion of privacy” – section 192 – and “computer invasion of privacy” – section 193 – as violations of the reserve of private life and intimacy.

Therefore, the discussion of the lawfulness of access to personal data may arise both in a civil and in a criminal context.

Enclosed: Schedule 1 – Most recent case-law of the Supreme Administrative Court

SCHEDULE I

Most recent case-law of the Supreme Administrative Court

A) Right to Information

1. Judgment of 30 September 2009 – Proceedings no. 0493/09

Appealed decision: Judgment of the Central Administrative Court – South, revoking the judgment of the Lisbon Administrative Court and, consequently, ordering the Appellant in these proceedings to provide the Petitioner with full access to the relevant documents within 10 days

Decision of the Supreme Administrative Court: rejected the appeal

Summary: *“I – As set forth in Article 268/2 of the Constitution of the Portuguese Republic, the Administration has to develop its activity according to the principles of transparency and publicity in order that not only its decisions be public and accessible, but also that the procedure preceding them may be subject to consultation and information, as this is the only way to enable the interested parties to know the reasons which determined their acts.*

II – The right of access to administrative records and archives has been being considered a fundamental right, which sacrifice can only be justified when faced with equally or more important constitutional values and rights, like the ones concerning internal and external security, criminal investigation and personal intimacy.

III – The Access to Administrative Documents Act adopted the extended criterion according to which public enterprises, even when governed by private law to accomplish their mission of "contributing to the financial and economic balance of the public sector as a whole and for obtaining adequate satisfaction levels as regards the needs of society" (section 4 DL 558/99), are indirectly developing a materially administrative function or activity and, therefore it is applicable to them.

IV – The general scheme regulating the access to administrative documents stipulates that the interested party has the right to such access, but that it can be restricted or subject to conditions when such access may refer to documents revealing their trade or industrial secrets or the secrets concerning the internal life of a company.

V – The power Administration has to refuse access to their documents is a power bound to the principles and goals established by law, to be exercised according to the principles of transparency and proportionality and should only be invoked when it is indispensable to avoid a damage that could not be avoided in any other way.

VI – Third parties seeking access to administrative documents containing trade or industrial secrets or secrets on the Administration's internal life without the necessary written permission can only see the corresponding right acknowledged if they demonstrate they have a direct, personal and legitimate interest in such access and that such interest is sufficiently relevant according to the principle of proportionality.”

(See in this sense, Judgement of 20.1.2010, Proceedings no. 01110/09)

2. Judgment of 27 April 2011 – Proceedings no. 0605/10

Appealed decision: Judgment of the Central Administrative Court – South, confirming the decision of the Lisbon Administrative and Tax Court as regards the part rejecting the application concerning classified matters of the Ministry of Foreign Affairs, but revoking it as for the rest and deciding to order the Ministry of Foreign Affairs to provide A. with

copies or certified copies of several documents, without the personal data they may contain.

Decision of the Supreme Administrative Court: rejected the appeal

Summary: “I – According to the provisions set forth in sections 37(1), of Decree-Law no. 24/84, of 16 January 1984, and 33(1) of Act no. 58/2008, of 9 November 2008, respectively, the disciplinary proceedings are secret only until charges are brought forward.

II – Thus, the interested parties have the right to obtain, according to section 62(2)(3) of the Code of Administrative Procedure, certified copies of documents of disciplinary proceedings in which charges were already brought forward or which were withdrawn.

III – The integration of documents of such disciplinary proceedings in criminal inquiries which are not subject to secrecy or in judicial proceedings of contentious objection against decisions delivered in the former does not prevent that certified copies of such documents be obtained, without the personal data that, according to the law, are not public.

IV – The right mentioned in 2. above is also applicable to journalists, according to the provisions set forth in section 64 of the Code of Administrative Procedure.

V – The obtaining of the mentioned certified copies by an interested journalist corresponds to exercise the right to procedural information.

VI – According to section 64(2), the fulfilment of this right shall be undertaken by the head of the service holding the administrative procedure to which the requested documents belong and not by the entity responsible for the judicial proceedings possibly including such documents.”

3. Judgment of 16 November 2011 – Proceedings no. 0838/11

Appealed decision: Judgment of the Lisbon Administrative and Tax Court ordering the Ministry of Finance and Public Administration to, «*within 10 (ten) days provide the Applicant with information on who the subjects affected by the tax incidence base of the “derrama” [municipal tax applied to the taxable profits of legal persons] in the Municipality in 2009 are and who saw such tax be settled in 2010*»

Decision of the Supreme Administrative Court: rejected the appeal *per saltum*

Summary: “I – The right to information is established by the Constitution of the Portuguese Republic and was transposed into ordinary law by means of the Code of Administrative Procedure. Nevertheless, due to the also constitutional recognition of the right to privacy, the lawmaker was forced to establish restrictions to the right to information and to create legal instruments that ensure the right to privacy.

II – The establishment of the rule of tax secrecy in section 64 of the General Tax Law, corresponds precisely to the extent and recognition of the right to privacy in the scope of the tax activity; this right comprises both personal data of the taxpayers (natural or legal persons) and data concerning their tax situation, which can only be revealed to third parties – other Administration sectors or private individuals – in the cases expressly provided for by law, in order to respond to an imperative social reason, and only to the extent strictly necessary to meet the balance between the interests in question.

III – Personal data which can be freely known (public data or personal data on an official public document, as it is, for instance, the case of the tax identification number, the identification of property registered in property records or in the land and commercial registry), as well as tax data that do not reflect or show the tax situation of the taxpayers, can however be revealed.

IV – According to the Local Financing Act, Municipalities are entitled to obtain information regarding the settlement and collection of local taxes and information on the transfer of such revenues.

V – Identification, as a whole, of the legal persons subject to such settlements and collections by name and/or tax identification number, without individualisation or particularisation of the settled and collected amount regarding each one of them, is not comprised within the sphere of tax confidentiality.”

This judgment states: “For this reason, all personal data which are not freely known and the disclosure of which is not deemed necessary to achieve to purposes of the rule legitimating the access by the

Municipalities to such information, as well as all data, the dissemination of which, in whole or in part, shows the situation as regards property or tax capacity of the companies subject to settlement and collection of local taxes (knowing that such access rule does not expressly dismiss the right of tax confidentiality in matters concerning the tax situation of the taxpayers), shall continue to have a restricted or confidential nature. (...)

It is not a single piece of tax information that worries the lawmaker when imposing tax confidentiality, but rather tax data of a personal nature showing something about the property situation of legal persons. Now, while there is no question that Municipalities have the right to obtain «information on the settlement and collection of local taxes and transfers of revenues to the municipality», it shall not be the identification of the persons subject to settlements, without specifying the amount settled and collected to each one of them, that shall reveal the property and tax situation of each one of them.

This identification, as whole, by name and/or tax identification number, without individualisation or particularisation of the settled and collected amount regarding each one of the taxable persons, is clearly not comprised in the sphere of tax confidentiality, thus there being no valid reason to refuse providing the Municipality with such information (...)”

4. Judgement of 24 January 2012, Proceedings no. 0668/11

Appealed decision: Judgment of the Central Administrative Court – South “*that, while partially revoking the judgment by which the Lisbon Administrative and Tax Court ordered the Portuguese Institute for Communications – National Authority for Telecommunications to immediately provide A..... with the information on a footnote and in two conclusions of a certain document, postponed to a later moment the access of the appellant in these proceedings to the data inserted in such conclusions.*”

Decision: rejected the appeal

Summary: “*I – The right to access administrative records and archives has been being considered a fundamental right, which sacrifice can only be justified when faced with equally or more important constitutional values and rights, as it is the case concerning internal and external security, criminal investigation and personal intimacy.*

II- The law does not establish that exercising the right of access to administrative records and archives depends on stating an interest, and a written request is sufficient, by means of an application mentioning the essential data for the identification of the data which are sought, as well as the name, address and signature of the applicant (section 13 of the Access to Administrative Documents Act) Judgment of the Central Administrative Court – South of 22 January 2009-Proceedings no. 4527/08.

III- The right of access to named documents will only take place if the person concerned authorises it or the person who intends to exercise such right proves to have a sufficiently relevant – according to the principle of proportionality - direct, personal and legitimate interest in it.

IV - The intimacy of private life comprises aspects concerning the feelings and beliefs of the persons, their intimate and sexual behaviours, physical and psychological characteristics, in a general way, everything happening inside their home and which the persons in question intends to keep secret or restricted to one single person or to a very restricted number of persons.

V – Personal data concerning the reception of representation expenses and residence allowance granted while holding public office, and which the law establishes as being public, are not comprised within the notion of private life of their subjects, and therefore the documents supporting them cannot, as regards that part, be considered named documents.

VI – Both the Resolutions of the Council of Ministers and their legislative orders on matters concerning expenses by Government members are part of exercising their administrative power, as an Administration body, thus being an expression of their regulatory power, typical of the administrative function.

VII- The services holding the administrative documents are the ones required to allow their consultation or to provide copies or certified copies of the administrative documents to the ones seeking them.”

5. Judgment of 5 September 2012, Proceedings no. 0517/12

Appealed decision: Judgment of the Central Administrative Court – South “*that, while partially revoking the judgment by which the Lisbon Administrative and Tax Court ordered the Portuguese Institute for Communications – National Authority for Communications to immediately provide A..... with the information on a footnote and in two conclusions of a certain document, postponed to a later moment the access of the appellant in these proceedings to the data inserted in such conclusions.*”

Decision: rejected the appeal

Summary: “I – *Although physically part of administrative proceedings, a document can, in whole or in part, not belong to the corresponding procedure.*

II – *In this case, the request to access such data, even if submitted by a party with direct interest in the procedure, shall usually be a request for non-procedural information, under the Access to Administrative Documents Act.*

III – *According to section 6(3), of the Access to Administrative Documents Act, there are grounds to postpone the access to data concerning the strategy to be followed by the Administration in a future contract until its completion, as it is the only way to prevent the person requesting the information from having an «ex ante» advantage over the Administration and the other competitors.*”

The court ruling states: “*Thus, and opposite to what seemed «prima facie», the now appellant did not meet the requirements for demanding that the National Authority for Communications provide access to the two conclusions based on the right - legal and constitutional (section 61 et. seq. of the Code of Administrative Procedure and article 268, paragraph 1, of the Constitution of the Portuguese Republic) – to procedural information, not only due to the fact that such conclusions were not part of the administrative procedure where the appellant in these proceedings unarguably intervened, but also because they were not part of another procedure in progress at that time and in which the applicant intervened. From this it is inferred that, despite appearances, the appellant’s request to have access to the mentioned conclusions represented the exercise of a right to non-procedural information, under the Access to Administrative Documents Act. (...) the Central Administrative Court was right to judge that the immediate communication to A..... of such conclusions was not acceptable, not only because it would reveal to a party which was potentially interested in the subsequent contract the negotiation strategy of the Administration, disarming the Administration «ex ante», but also because it would place A..... in a unacceptable advantage position as regards other possible competitors.*

Now, and regarding this matter, section 6(3), of the Access to Administrative Documents Act sets forth that «access to administrative documents which prepare a decision (...) can be postponed until the decision is taken, the proceedings are withdrawn or a lapse of one year after being drawn up». And it was this rule that the «sub censura» court ruling applied (...)

And, in this situation, where there should be reserve regarding the possible negotiation strategy of the Administration for the concession of the Universal Telecommunications System, there are grounds to maintain such reserve until the contract is concluded, as the Central Administrative Court cautiously decided.

Besides, the mere existence of the pre-contractual procedure does not ensure, by any means, it will fructify, and there may be the case that it will become extinct and replaced by another one. And, in that case, immediately providing the appellant with the content of the conclusions would give the appellant an advantage over the Administration and the other competitors in that possible replacing procedure.”

6. Judgment of 10 September 2014, Proceedings no. 0410/14

Appealed decision: Judgment of the Central Administrative Court – South revoking the judgment of the Lisbon Administrative and Tax Court, judging groundless the request for ordering information to be provided, consultation of the proceedings and the provision of certified copies

Decision: rejected the appeal

Summary: “I- Under the combined provisions of sections 3 and 4 of Act no. 46/2007 (Access to Administrative Documents Act), an “administrative document” is “any information medium in written, visual, audio or electronic form or in other material form” – except for “personal notes, sketches, annotations and other records of a similar nature” and “documents which are not drawn up as a result of administrative activity, namely concerning the meetings of the Council of Ministers and State secretaries, as well as regarding the preparation of such meetings” [section 3(1)(a) and (2)(a)] – and that is in possession of or held on behalf of one of the entities specified in section 4 of the mentioned Act.

II – This definition combines the criteria of origin/function and possession, confining the scope of protection of the fundamental right to the information content of a medium which is drawn up as a result of “administrative activity” and that, additionally, is in possession of an entity specified in the aforementioned section 4 of the Access to Administrative Documents Act.

III – Information mediums mainly produced or gathered by performing political and legislative functions, given that there is no functional connection between the document and the “administrative activity”, shall not be considered “administrative documents”.

IV – The qualification/classification of a certain information medium as “administrative document” or as a document part of the legislative procedure does not depend on the product of the latter procedure, namely if the parliamentary bill contains any rule based on the mentioned medium, as such qualification/classification does not oscillate or change according to the final outcome of the procedure where the medium is inserted or to whether or not it is finished, but rather depends on it having been produced and considered as a result and in the scope of a legislative procedure.”

B) Protection of personal data

1. Judgment of 29 March 2006 – Proceedings no. 0857/02

Appealed decision: Judgment of the Central Administrative Court, rejecting the judicial appeal submitted by the National Association of Pharmacies against the decision of the National Data Protection Commission rejecting the authorisation application for computer processing of personal data

Decision of the Supreme Administrative Court: rejected the appeal

Summary: “(...) II – According to section 7(4), of Act no. 67/98, of 26 October 1998, the processing of personal data concerning health and sex life, even when carried out by a health professional bound to secrecy or by another person also bound to professional secrecy and for purposes of preventive medicine, medical diagnosis, providing medical care or treatments or of the management of health services, with proper measures for security of the information also ensured, can only be authorised when proved that they contribute in a sufficiently important manner to achieve such purposes, even if carried out by other persons or entities different from the one processing the data.

III - A concrete existence of such requirement (need), in view of the wide margin of technical freedom acknowledged to the entities pursuing such purposes to assess the need for the processing of the data in question, does not allow the Court to conclude that the situation is characterised in the same terms as in the rule in question as regards the definition of the purposes of the processing of the data.

IV – The person applying for the data processing authorisation, according to the mentioned section 7(2), shall have to submit to the procedure all available information in order to convince the National Data Protection Commission that it is specifically important for public interest to process the data and that such processing is indispensable for exercising the applicant’s legal and statutory tasks.

V - The permission of the data subject mentioned in section 7(2), shall be given before the authorisation of the National Data Protection Commission.”

2. Judgment of 18 April 2007 – Proceedings no. 0242/07

Appealed decision: Judgment of the Almada Administrative and Tax Court, ordering the Tax Authority to remove the name of the Applicant from the list of tax debtors on the Tax Authority's website

Decision of the Supreme Administrative Court: Rejected the appeal

Summary: *“While opposition to the tax foreclosure is pending, where it is discussed if the conditions for reversion against the person with subsidiary responsibility are met, the Administration cannot insert his name in the list of taxpayers whose tax situation is not in order, according to section 6(5)(a), of the General Tax Law, in the version of Act no. 60-A/2005, of 30 December 2005.”*

The Judgment states:

“On the contrary, it seems to us that the expression used by the lawmaker in section 64 of the General Tax Law comprises and protects all tax debtors, regardless of whether the fact has emerged in their legal sphere or not; whether they are main debtors, first line responsible persons, or second line subsidiaries; or substitutes.

All data collected by the Administration on the tax situation of any person, for any reason, and the personal data gathered in the procedure, are comprised within the matters under the obligation of secrecy and under the duty of confidentiality. And, therefore, only the disclosure of taxpayer lists in the precise terms of the provisions set forth in section 64(5)(a), of the General Tax Law «does not oppose the duty of confidentiality».

We see no reason for the law to protect confidentiality more or less intensely depending on whether the persons responsible for paying taxes are in the first line or the second line. Such discrimination could even affront the principle of equality established in article 13 of the Constitution. (...)

To conclude:

*“In this line of thought, it can be stated that **the disclosure of the names of defaulting taxpayers, with the purpose of compelling them to fulfil their duties, thus avoiding the social criticism which supposedly affects those who do not fulfil their tax obligations, is a tool that, because it restricts the rights set forth in article 26, paragraph 1, of the Constitution, should be used only to the limited extent to which the sacrifice of such rights is grounded on collective interests – the right to collect taxes –, and that the cautions should be intensified when the target is not the main debtor.** The same level of pressure to pay one's own taxes, which reveal one's own tax capacity rendering it legitimate to be subject to tax, or the taxes of another person is hard to justify. All the more so because the supposed debtor (second line) does not accept responsibility for the payment which is required of him and can still use the procedural means granted by law to convince about the lack of such responsibility.*

If no one can be compelled to pay taxes which are not collected pursuant to the law (article 103, paragraph 3, of the Constitution), the exercise, by the Administration, of means tending to constrain someone to pay taxes for which such person is not originally liable, shall also not be legitimate, when such obligation is still being discussed in court.”

3. Judgment of 24 February 2010 – Proceedings no. 01171/09

Appealed decision: Judgment of the Central Administrative Court - South, refusing the special administrative action challenging the decision of the National Data Protection Commission, in the part where it refused *“the collection and viewing of images in the canteen, in the entertainment / activity room, in the corridor of the inside garden and in the corridors giving access to the bedrooms”* and ordered the removal of the cameras directed to such spaces.

Decision of the Supreme Administrative Court: Rejected the appeal

Summary: “I - *The use of video surveillance equipment constitutes a limitation /restriction of the fundamental right to intimacy in private life.*

II – *The surveillance of citizens, by means of video cameras, should be carried out in a transparent way and with strict respect for private life (section 2 of Act no. 67/98, of 26 October 1998), unless such right has to be compressed, according to the principle of proportionality, in order to safeguard other rights or interests protected by the Constitution (article 18/2 of the Constitution of the Portuguese Republic).*

III – *When this is the case, such measure has to be adequate to achieve the proposed goal (principle of adequacy), necessary, as there is no other means able to achieve such goal, less burdensome for the fundamental right (principle of necessity or indispensability) and balanced, i.e. a degree of sacrifice which is not excessive, as regards the purpose in question (the principle of proportionality per se).”*

4. Judgment of 12 May 2010 – Proceedings no. 0169/10

Appealed decision: Judgment of the Central Administrative Court - South, confirming the judgment of the Lisbon Administrative and Tax Court, that granted the request for ordering the provision of information in environmental matters

Decision of the Supreme Administrative Court: Rejected the appeal

Summary: “I – *The fact that the law establishes that a certain entity carries out the reception, record and dissemination of data regarding the cultivation of genetically modified varieties does not render other public services incompetent to provide information based on data they have in their documentary archives.*

II – *The public dissemination of information, imposed by section 6(3)(b), of Decree-Law no. 160/2005, of 21 September 2005, to the Regional Directorates for Agriculture, does not exclude the generic possibility for any citizen to individually have access to such administrative documents.*

III – *Although the name and the address are personal data, the administrative documents containing them are not «named documents» for the purposes of section 3(1)(b), and 6(5), of Act no. 46/2007, of 24 August 2007, and for this reason access to documents containing such data is allowed.*

IV – *The fact that knowing the names and addresses of the farmers and of the places where they cultivate genetically modified varieties may give rise to actions detrimental to them and their property is not enough to refuse the right to access such data, if the statement of such hypothetical risks has no solid support.”*

(Note: this judgment relates to the two matters – right to information and data protection)

5. Judgment of 9 September 2010 – Proceedings no. 076/10

Appealed decision: Judgment of the Central Administrative Court - North, refusing the special administrative action against the National Data Protection Commission, requesting the annulment of the decision that did not authorise the processing of personal data concerning the carrying out of alcohol level tests according to the internal rules of procedure submitted for assessment, as well as the conviction of the National Data Protection Commission to carry out the due act – authorisation to process data concerning the mentioned alcohol level tests, according to the provisions of the mentioned internal rules of procedure

Decision of the Supreme Administrative Court: Rejected the appeal

Summary: “I – *The flaw of misappropriation of powers happens when an Administration body carries out an act which decides a matter, the assessment of which is reserved to the courts or to the legislative power, thus consisting in a form of incompetence, which is aggravated by lack of task assignment.*

II – *No such flaw affects the decision of the National Data Protection Commission, which, regardless of the reasoning submitted, assessed the request for authorisation to process personal data concerning the carrying out of alcohol level tests by the Municipality workers, according to the internal rules of procedure submitted for assessment, and decided to not authorise the processing of such personal data, by using the powers and*

assignments granted by law (section 2 of Act no. 43/04, of 18 August 2004, and sections 21 to 23 of Act no. 67/98, of 26 October 1998).(…)”

This court ruling states:

“(…) there are no doubts that we are faced with the collection of information concerning the private life of the Municipality workers (…)

It is also clear that this concerns data related to the health of citizens, as alcohol addiction is considered, in terms of pathology, an illness, i.e. a lack or disturbance of health.

And, as such, such data refer, without a doubt, to the processing of sensitive data, since, as the Commission highlights, carrying out alcohol level tests according to the terms proposed in the rules in question “allows the drawing up of behaviour profiles and data on the health condition of the examined person”.

Article 18, paragraph 2, of the Constitution of the Portuguese Republic establishes that the restrictions to the rights, liberties and guarantees shall be limited to those necessary to safeguard other constitutionally protected interests. (…)

In this case, and regarding the decision of not authorising it, the Commission considered that the processing of such kind of data could be admissible when concerning certain categories of workers (giving as example the drivers and others), that require a particular and enhanced set of performance skills and involve, due to their very nature, considerable risks not only for the workers themselves but for third parties as well.

This will not be the case if generally referring to all Municipality workers. Such is due, as stated by the Public Prosecution Service, to the simple reason that, faced with the compression of a fundamental right, “it shall be inadequate to subject the whole of the workers to the possibility of carrying out alcohol level tests, carrying out the processing of the corresponding data, if the purpose of preventing problems resulting from such consumption is achieved by means of measures affecting certain categories whose consumption involves higher risks for third parties and for themselves”; we are, therefore, faced with different situations that also need to be handled differently by the Administration.”

6. Judgment of 11 January 2011 – Proceedings no. 0724/10

Appealed decision: Judgment of the Central Administrative Court - South, refusing the special administrative action against the National Data Protection Commission, requesting the revocation of its decision regarding the part where the Commission did not authorise the collection and viewing of the cameras capturing the main entrance of the building, the reception, the common parts of the building and the elevators giving access to the floors where the premises of the hotel unit are, as well as the conviction to carry out the due act of granting full authorisation for the requested collection of data

Decision of the Supreme Administrative Court: Rejected the appeal

Summary: *“(…) IV – Not being faced with a situation within the framework of the provisions set forth in section 6 or in the first part of subsection 2 of section 7 of Act no. 67/98, of 26 October 1998, only with the permission of all tenants of the building where one of them wishes to install a video surveillance system could he be authorised to capture images of the other tenants, even in an area of common access.”*

The judgment states:

“Since the possibility of considering the situation within the provisions of section 7(2), of Act no. 67/98 has been excluded and faced with the lack of permission of all the persons whose personal data are subject to processing, such processing could only be carried out if any of the situations set forth in section 6 of the same Act were in place. (…) After reaching the conclusion that we are not faced with any of the situations set forth in these provisions, we must conclude that there is no legal support for the installation of the video surveillance system in places where the processing of personal data of those who did not give their permission for it may be carried out.

(…)

On the other hand, as mentioned, the violation of the principle of equality shall only take place when in the presence of discrimination faced with similar situations, and, in the case being assessed, there are obstacles to the installation of cameras in some areas resulting from the need to ensure the right to intimacy in private life of persons who are not users of the hotel establishment of the Appellant, who did not prove the same happens in other hotel units.”

7. Judgment of 19 April 2012 – Proceedings no. 0402/11

Appealed decision: Judgment of the Central Administrative Court - South, rejecting the restraining order for the suspension of effectiveness of the decision of the National Data Protection Commission according to which the National Data Protection Commission decided to (i) not authorise the use of a video surveillance system for traffic control by the Lisbon Municipality, according to the provisions set forth in sections 7(2), 23(1)(b), 27, 28(1)(a), and 30 of Act no. 67/98, of 26 October 1998; and (ii) order that the person responsible for the processing immediately stopped the processing carried out in the Traffic Control Centre, pursuant to section 22(3)(b) of Act no. 67/98, since the conditions needed to ensure the lawfulness of the processing of personal data were not met, under penalty of committing an aggravated disobedience offence.

Decision of the Supreme Administrative Court: Rejected the appeal

Summary: “(...) III – *The use of video surveillance systems causes, in principle, a conflict of fundamental rights or interests that shall be solved according to the concrete case;*

IV – The decision of the National Data Protection Commission ordering the cessation of a certain video surveillance system for traffic control is not considered manifestly illegal, based on the fact that the conditions to ensure the lawfulness of the data processing are not met, if this assumption is not immediately deflected by the data in the proceedings.”