



NEJVYŠŠÍ SPRÁVNÍ SOUD



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Provide or Protect? Administrative courts between Scylla of freedom of information and Charybdis of protection of privacy.

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Answers to Questionnaire: Germany



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GERMANY

Part I

1. Is the central administrative supervision over providing information and protection of personal data carried out by one administrative authority or are there specialized authorities for each of these fields or is there an absence of such an authority in any of these areas? Does the chosen model cause any application problems?

Due to Germany's federal structure the access to official information is regulated on the one hand by federal law with regard to informations of the federal authorities and on the other hand by the Federal States ("Länder") concerning the access to information of States authorities. The following remarks refer first to German Federal law.

Federal Law does not know specialized authorities. According to Section 12 Subsection 2 of the Federal Freedom of Information Act the function of Federal Commissioner for Freedom of Information shall be performed by the Federal Commissioner for Data Protection. Consequently the authority is called the Federal Commissioner for Data Protection and Freedom of Information (below: Federal Commissioner). The Federal Administrative Court of Germany is not aware of any problems in the application of this model.

With regard to the case-law of the CJEU (Judgment of 9th March 2010 - C-518/07 - European Commission ./ Federal Republic of Germany) the Federal Data Protection Act has recently been amended to further strengthen the independence of the Federal Commissioner. The institution has been altered into an independent supreme federal agency („oberste Bundesbehörde“), which is neither personnel-wise nor organisationally linked to other governmental institutions. In addition, it is no longer subject to any legal or functional supervision by the Federal Government. The Federal Commissioner is elected by parliament and appointed by the Federal President. Against his or her will the Federal Commissioner can be dismissed only by the Federal President for reasons that justify the dismissal of a judge appointed for life.

Anyone considering their right to access to information to have been violated may appeal to the Federal Commissioner. Public bodies of the Federation are obliged to support the Federal Commissioner and his assistants in the performance of their duties, especially by granting information in reply to their questions, the opportunity to inspect all documents connected with the monitoring and access to all official premises at any time.

Should the Federal Commissioner discover infringements of the respective provisions or other irregularities, he shall lodge a complaint with the competent supreme federal authority or the relevant representative body and – if applicable – inform the competent supervisory authority. Additionally, he requests a statement by a date which he determines. The statement to be delivered is also supposed to describe the measures taken as a result of the Federal Commissioner's complaint.

The Federal Commissioner submits an activity report to the Bundestag every two years. This report informs the Bundestag and the public on key developments in the field of data protection and freedom of information.

Each Federal State has its own Data Protection Commissioner who also performs the function of Commissioner for Freedom of Information if a State law on freedom of information has been passed. Since the CJEU released its mentioned judgment of 9th March 2010, legislation has changed. State Data Protection Commissioners are now competent to monitor and to control both public and private sector and their institutional and personal independence applies in both areas. State Data Protection Commissioners are elected by parliament, partly by a qualified majority. In most cases legal supervision rests in the hands of parliament.

Competences and functional responsibilities in monitoring data protection compliance are divided between the Federal Commissioner and sixteen State Data Protection Commissioners. The Federal Commissioner shall monitor compliance by federal public agencies. Its control also covers personal data obtained by federal public agencies concerning content and specific circumstances of correspondence, postal communication and telecommunication as well as personal data subject to professional or official secrecy, especially tax secrecy. State Commissioners shall monitor compliance with data protection laws of the states by public agencies of the states (including municipal and other institutions under public law on the state level) and the data processing by private bodies and public enterprises.

State Commissioners for Data Protection are not subject to any form of supervision by the Federal Commissioner for Data Protection. However, conferences of both state and federal actors are held periodically to coordinate interests and to exchange experiences. These conferences have an advisory status only – similar to the working party due to Art. 29 Data Protection Directive. Participation is optional. They have no legal basis in the Code of Data Protection or other laws.

The Data Protection Officials (Datenschutzbeauftragte) play a special and – de facto – important role in securing data protection compliance. They are part of an additional means of self-regulation of the private data processing sector. Data Protection Officials shall – roughly described – be appointed by all public and private institutions which process personal data automatically (with an exception for small units). Only people with specialized knowledge and who have demonstrated the required reliability for performing the duties concerned may be appointed. Data Protection Officials shall be directly subordinate to the head of the institution. He or she is not independent in a strict sense, however he or she shall be free to use his or her specialized knowledge in the area of data protection and shall not suffer any disadvantages by performing his or her duties. Data Protection Officials shall ensure compliance with the data protection provisions. For this purpose, Data Protection Officials may consult the competent authority responsible for data protection control. Data Protection Officials are neither administrative officials nor otherwise linked to the Data Protection Commissioner. In particular, Data Protection Officials are by no means subject to any kind of directives or at least supervision by the Data Protection Commissioner. However, in practice there is a chance of cooperation between Data Protection Officers and the Commissioner for Data Protection, which might promote the idea of data protection in both public and private institutions dealing with personal data.

2. What types of information are excluded from providing? Is there one regime regarding all exclusions or is there any differentiation – e.g. absolute exclusion and relative exclusion?

The Federal Freedom of Information Act distinguishes between absolute and relative exclusions.

The reasons for absolute exclusion are laid down in Section 3 of the Federal Freedom of Information Act, that stipulates with regard to the protection of special public interests that the entitlement to access to information shall not apply

1. where disclosure of the information may have detrimental effects on
 - a) international relations,
 - b) military and other security-critical interests of the Federal Armed Forces,
 - c) internal or external security interests,
 - d) monitoring or supervisory tasks of the financial, competition and regulatory authorities,
 - e) matters of external financial control,
 - f) measures to prevent illicit foreign trade,
 - g) the course of current judicial proceedings, a person's entitlement to a fair trial or the pursuit of investigations into criminal, administrative or disciplinary offences,
2. where disclosure of the information may endanger public safety,
3. where and for as long as
 - a) the necessary confidentiality of international negotiations or
 - b) consultations between authorities are compromised,
4. where the information is subject to an obligation to observe secrecy or confidentiality by virtue of a statutory regulation or the general administrative regulation on the material and organisational protection of classified information, or where the information is subject to professional or special official secrecy,
5. with regard to information obtained on a temporary basis from another public body which is not intended to form part of the authority's own files,
6. where disclosure of the information would be capable of compromising fiscal interests of the Federal Government in trade and commerce or economic interests of the social insurance institutions,
7. in the case of information obtained or transferred in confidence, where the third party's interest in confidential treatment still applies at the time of the application for access to the information,
8. with regard to the intelligence services and the authorities and other public bodies of the Federal Government, where these perform duties pursuant to Section 10, no. 3 of the Security Clearance Check Act (SÜG).

In contrast, relative exclusions are laid down in Sections 5 and 6 of the the Federal Freedom of Information Act. These provisions require with regard to the protection of the third party's interests that the applicants's interest in accessing information predominates or the third party has provided his or her consent.

For the particular case of protection of personal data Section 5 of the the Federal Freedom of Information Act provides, that the access to personal data may only be granted where the applicant's interest in obtaining the information outweighs the third party's interests warranting exclusion of access to the information or where the third party has provided his consent. The applicant's interest in accessing information shall not predominate in the case of information from records relating to the third party's service or official capacity or a mandate held by the third party or in the case of information which is subject to professional or official secrecy. The applicant's interest in accessing information shall generally outweigh the third party's interests warranting exclusion of access to the information where the information is limited to the third party's name, title, university degree, designation of profession and function, official address and official telecommunications number and the third party has submitted a statement in proceedings in the capacity of a consultant or expert or in a comparable capacity. Names, titles, university degrees, designations of professions and functions, official addresses and official telecommunication numbers of desk officers shall not be excluded from the scope of access to information where they are an expression and consequence of official activities and no exceptional circumstances apply.

Section 6 of the the Federal Freedom of Information Act stipulates that the entitlement to access to information shall not apply where such access compromises the protection of intellectual property. Access to business or trade secrets may only be granted subject to the data subject's consent.

Finally Section 4 of the Federal Freedom of Information Act regulates that applications for access to information should be rejected for drafts relating to rulings and studies and decisions relating directly to the preparation of rulings, insofar as and for as long as premature disclosure of the information would obstruct the success of the ruling or impending official measures. The applicant should be notified of the conclusion of the proceedings concerned.

3. Are there any types of subjects governed by private law that have duty to provide information? If the answer is affirmative, what kind of subjects and what kind of information?

Section 1 of the Federal Freedom of Information Act stipulates that for the purposes of these provisions a natural or legal person shall be treated as equivalent to an authority where an authority avails itself of such a person in discharging its duties under public law.

4. Are the salaries of the employees of the public sector subject to the right to free access to information as well? Does this cause any application problems regarding the personal data protection?

To answer this question one must differentiate: Taking into account that the salary of public servants is regulated by law, the salary regulations are published like any other law. Therefore the salaries of the officials are subject to free access. In contrast the individual salary of a particular employee of the public sector is a personal data in the sense of Section 5 Subsection 2 of the Federal Freedom of Information Act, providing that the applicant's interest in accessing information shall not predominate in the case of information from records relating to the third party's

service or official capacity or a mandate held by the third party or in the case of information which is subject to professional or official secrecy.

5. Is the trade secret excluded from the free access to information?

Section 6 of the Federal Freedom of Information Act stipulates that the access to business or trade secrets may only be granted subject to the data subject's consent.

6. Are documents that are subject of intellectual property excluded from the free access to information?

Section 6 of the Federal Freedom of Information Act provides that no entitlement to access to information shall apply where such access compromises the protection of intellectual property.

7. Does the right to free access to information cover as well the parts of an administrative file that contain data related to individuals or are these data protected? In which areas of public administration does this cause problems ?

Section 5 of the Federal Freedom of Information Act stipulates with regard to the protection of personal data:

(1) Access to personal data may only be granted where the applicant's interest in obtaining the information outweighs the third party's interests warranting exclusion of access to the information or where the third party has provided his or her consent. Special types of personal data within the meaning of Section 3 (9) of the Federal Data Protection Act (BDSG) may only be transferred subject to the express consent of the third party concerned.

(2) The applicant's interest in accessing information shall not predominate in the case of information from records relating to the third party's service or official capacity or a mandate held by the third party or in the case of information which is subject to professional or official secrecy.

(3) The applicant's interest in accessing information shall generally outweigh the third party's interests warranting exclusion of access to the information where the information is limited to the third party's name, title, university degree, designation of profession and function, official address and official telecommunications number and the third party has submitted a statement in proceedings in the capacity of a consultant or expert or in a comparable capacity.

(4) Names, titles, university degrees, designations of professions and functions, official addresses and official telecommunications numbers of desk officers shall not be excluded from the scope of access to information where they are an expression and consequence of official activities and no exceptional circumstances apply.

Concerning the application of Section 5 of the Federal Freedom of Information Act at the moment the problem of a free access to the telephone directories of authorities is discussed. A leading decision of the Federal Administrative Court of Germany is still to be taken.

8. Are data related to criminal proceedings or administrative delict proceedings or any data of quasi-criminal nature (typically files of secret police departments from the times of anti-democratic past) excluded from the right to free access to information?

If the mentioned data are part of a criminal or administrative delict record, the Federal Freedom of Information Act does not apply. This follows from Section 1 Subsection 3 of the Federal Freedom of Information Act, which stipulates that provisions in other legislation on access to official information shall take precedence. Data to criminal proceedings are subject of the German Code of Criminal Procedure (eg. Section 475 StPO) and the Act on Regulatory Offences (Sections 46, 110d OWiG). Further examples for preceding regulations are the Federal Archives Act (Section 5 Subsection 6) and the Federal Act regarding the Records of the former East German secret police (Stasi Records Act).

On the other hand the Federal Freedom of Information Act does apply, if administrative files contain the mentioned data. Then, data related to criminal proceedings or administrative delict proceedings or any data of quasi-criminal nature are excluded from the right to free access to information according to Sections 3 and 5 of the Federal Freedom of Information Act. Section 3 stipulates that the entitlement to access to information shall not apply where disclosure of the information may have detrimental effects on the course of current judicial proceedings, a person's entitlement to a fair trial or the pursuit of investigations into criminal, administrative or disciplinary offences (Nr. 1 lit. g), or where the information is subject to an obligation to observe secrecy or confidentiality by virtue of a statutory regulation or the general administrative regulation on the material and organisational protection of classified information, or where the information is subject to professional or special official secrecy (Nr. 4). The data mentioned by the question are usually also personal data. Therefore furthermore the regulations of Section 5 of the Federal Freedom of Information Act have to be observed (cf. Question I. 7.).

Part II

9. Public availability of decisions

9.1 Are there any sorts of decisions in your jurisdiction that are not published at all (e.g. decisions with classified status or other decisions with restricted access)? If so, please describe typical cases and give indicative statistic that can illustrate the frequency and relevance of such cases.

Since 1 January 2002 all decisions of the Federal Administrative Court are published on the website of the Court anonymously. Only formal decisions like decisions on the value of a claim, on costs and expenses or settlements are excluded (see below No. 11).

9.2 If a third person (not a party of respective case) wants to obtain your decision, what is the procedure? On-line availability of decisions is to be discussed below, so kindly describe here only other options (e.g. whether it is possible to ask for a decision by snail-mail, whether any fee apply etc.)

A print or pdf version of all decisions can be ordered from the Court administration. A fee will be charged depending on the format of the decision:

- 1,50 € per pdf but no more than 5 € per request (if several decisions are ordered at one time) or

- 50 Cent per printed page up to 50 pages and after that 15 Cent per page. If several decisions are ordered the number of pages will be added up.

9.3 Is there any official collection of selected decisions of you instance (apart on-line publication of decisions – see below)? If so, please describe in detail the procedure of its issue. In particular, please focus on the selection process of decisions that are to be published, the frequency of publication and the form of publication. Indicate, whether the collection is published directly by your instance, by some other public body or by an independent publisher. If the collection is published by an independent publisher, please describe the form of cooperation (i.e. whether the publisher has exclusive rights to publish the collection, whether the publisher does any editing of published decisions etc.) Are decisions that are chosen for the publication regarded more relevant by your instance or by general public?

In cooperation with a publishing company, the Federal Administrative Court issues a collection of its important decisions in print. About 80 decisions are published annually therein in chronological sequence. The judges of each chamber decide whether they consider a particular judgment worth being published with regard to the professional public's interest. The editing is done by the judges themselves and the publisher is responsible only for proofs and printing.

10. Editing and anonymization of decisions

10.1 Do you anonymize published decisions? If so, please describe in detail the procedure. In particular, please describe who is in charge of anonymization, whether there are any particular statutory or other rules governing anonymization (apart general privacy/data protection rules) and what data are anonymized.

The reporting judge, having written the judgment, anonymizes the text, i.e. that he or she replaces all full names by initials in a separate document. The judicial officers and clerks carry out the anonymization of the text. The regulations for anonymization are contained in a guideline issued by the President of the Federal Administrative Court.

10.2 If anonymization practice changes, does it affect already published decisions (i.e. are past decisions subsequently anonymized/de-anonymized with every change of anonymization rules)?

No.

10.3 Describe any subsequent problematic issues that you noted in your jurisdiction regarding the anonymization (e.g. different practices of different supreme instances, strong public debates, impact of de-anonymization of decisions by media etc.)

10.4 Do you edit published decisions? If so, please describe in detail the procedure. In particular, please describe who is in charge of editing, what information is added/removed in the process of editing (incl. metadata).

Important judgments are provided by the judges of the particular Chamber with one or several headnote(s). These headnotes include significant results of the judgment in an extremely compressed form in one or two sentences, in particular the headnotes reflect new jurisprudence. When publishing the judgment, these preceding headnotes are added both in the collection of the court and in the journals of law. E.g. the headnote of the Bundesverwaltungsgericht's judgment of 19th November 2013 - 10 C 26.12:

1. Even under the lowered standard of proof under Section 3 (2) sentence 1 of the Asylum Procedure Act, an exclusion from refugee status under Section 3 (2) of the Asylum Procedure Act because of a foreigner's participation in certain crimes or acts can be assumed only if a linkage to individual events can be established for the necessary principal act.
2. Important ideological and propagandistic activities in favour of a terrorist organisation can still come under consideration as participation in acts in violation of the aims and principles of the United Nations under Section 3 (2) sentence 1 no. 3 in conjunction with (2) of the Asylum Procedure Act even if the applicant for asylum had neither an actual possibility of influencing the committing of terrorist acts, nor publicly approved of or incited such acts.

10.5 Has the development of the right to be forgotten affected in any way the anonymization or publication of your decisions? If not, is it a topic that is being considered in your jurisdiction with regards to the publication of court decisions?

11. On-line publication of decisions

11.1 Are decisions of your instance available on-line? If so, please indicate whether on-line all or only selected decisions are published on-line (if only selected decisions are published, please describe the procedure of their selection).

Decisions of the Federal Administrative Court are available on-line. There is an in-house policy, that all decisions are published on the court's website except if they are by their type not at all of interest to the public. The following types of decisions are not published, because the individual document does not hold any relevant legal information: decisions on the amount involved in the case; decisions on the assessment of costs of the law suit; additional summons; dismissals; settlements of a law suit, rejected appeals on formal reasons and decisions on granting or rejecting legal aid.

11.2 Describe the form of on-line publication of you decisions. In particular, indicate whether your decisions are published through your own website or whether it is done through some different on-line service (e.g. through a common platform operated by a ministry of justice, by a judicial council etc.) Kindly add also sample screenshot(s) or link(s).

The decisions of the Federal Administrative Court are published on the court's own website for free (and on a number of other public or private websites either for free or for a fixed charge or flat rate). For the court's website they are recorded in a database which is administrated solely by the court (www.bverwg.de/entscheidungen/entscheidungen.php). This database is hosted by a private company.

11.3 What are available file formats in which your decisions are available on-line? Apart enumerating particular file formats, kindly indicate whether your instance systematically sticks to any commonly accepted open data policy. Also, please indicate whether your instance publishes on-line only individual decisions or whether whole datasets are available to the public for further re-use. If datasets are available for further re-use but not publically, please describe to whom and under what conditions such datasets are made available.

The decisions of the Federal Administrative Court are available in HTML and PDF-format on it's own website.

The court does not stick to any commonly accepted open data policy, because such a policy framework does not yet exist on a national level in Germany.

However, on 26 January 2016 the Ministry of Justice together with the partly state-owned database provider juris GmbH (www.juris.de) started a webservice called "Rechtsprechung-im-Internet" (<http://www.rechtsprechung-im-internet.de>) which publishes selected judgments by Federal Courts dating from 2010 up to the present in full text. These publications are intended for further re-use by the public and are published in HTML, PDF and XML-format.

There are no whole datasets available on "Rechtsprechung-im-Internet" for further re-use, but datasets (selected by special criteria like for instance headnotes) can be ordered by firms or individuals at each of the Federal Courts stating the intended use. This service is not provided for free.

12. Public availability of other documents

12.1 Are there published on-line personal information about members of your instance? In particular, please describe whether there are CVs available, in which length and form (e.g. on a court website) and eventually what information is regularly published (e.g. education, memberships, political beliefs, marital status etc.) Also, please indicate whether the publication of information about members of your instance is compulsory, whether the members of your instance are free to decide about the structure and content of such information and whether you noted any issues in that regards (e.g. there was a big debate in the Czech Republic over the publication of past membership of the judges in the communist party). Please add a sample link or a screenshot of how such personal information about a member of your instance looks like.

Whenever a judge joins or leaves (i.e. retirement or death) the Federal Administrative Court a press released is published giving a brief description of the judge's background. Usually this will include the year of birth, the legal education including doctoral and postdoctoral qualifications where applicable as well as the main stages of the judge's professional career. It will also announce the court chamber of which the new judge will become a member or was a member up to his or her leaving the Court. A press release is also published when a current judge becomes President of the Court, President of a chamber or takes up position as spokesperson of the Court. Press releases remains available on the court's website.

All press releases concerning the joining, leaving or changes in position of judges are drafted by the service personal and approved by the spokesperson of the court before they are published (example see below). Only in case of a new judge joining the Court the press release is drafted by the service staff of the court and then sent to the joining judge in advance for his or her approval in order to correct mistakes such as false dates or facts while the structure and main content of the press release will usually not be changed.

The screenshot shows the website of the Bundesverwaltungsgericht (Federal Administrative Court) at www.bverwg.de. The page is titled "Pressemitteilung" (Press Release) and is dated 03.03.2016. The main headline is "Dr. Peter Martini neuer Richter am Bundesverwaltungsgericht" (Dr. Peter Martini new judge at the Federal Administrative Court). The text states that Dr. Martini has taken office as a judge at the Administrative Court of Bayreuth. It provides a brief biography of Dr. Martini, mentioning his birth in Bamberg in 1965, his legal education, and his previous positions as a judge and scientific employee. The press release is numbered "Nr. 15/2016".

Besides, an organization chart of the court is published on the website which reveals the composition of each chamber of the court by listing all judges with their academic title and family name only.

12.2 Which case-related documents other than decisions of your instance are published on-line (e.g. dissenting opinions, advocate general submissions, submissions of parties, records of chamber deliberations etc.)? Please, describe how these documents are published, i.e. where and in which format (e.g. on a website through a search form, in open data formats, etc.). If your instance publishes these documents in open formats, kindly provide a sample link to a particular dataset.

The German administrative procedural law does not know dissenting opinions or advocate general submissions, as an advocate general does not exist. Besides the decision no documents are published on the court's website. A press release may be published due to either an expected or proven great public interest or the particular importance of the case and the decision.

12.3 Are the members of your instance allowed to publically comment or annotate on their own decisions or other decisions of your instance? If so, please describe common forms in which this is done (e.g. in law journal articles, in public debates on case-law organized by the respective instance etc.).

Although there is no statutory prohibition, it is still good practice in Germany that a judge does not comment on his own judgments. Judges present and explain their jurisprudence in training-meetings for judges and lawyers, but written comments in journals to their own judgments are frowned upon.

Part III

13. What trends, threats and challenges do you foresee to come in the field of freedom of information and protection of privacy during the next decade? What should be the role of supreme administrative jurisdictions in facing these trends, threats and challenges?

This kind of question seems to be too broad for answering it with concrete data. Therefore our aim is not to pursue you to fill it with some concrete and clear statement but what we intend is to know your opinion on what trends could or will influence this scope of decision-making of your jurisdiction. Your answer will serve as the basics for further discussion during the third part of the Colloquium and we hope that this “look into the future” will be pleasant and useful ending of the meeting. We would very appreciate if the presidents of the Supreme Administrative Courts/Councils of States could provide us with answers to this question.

Particularly concerning the legislation of the Federal States (“Länder”) a certain change of paradigm can be observed. The individual right to free access to information is expanded and a general principle of transparency and Open Government is introduced.