NEJVYŠŠÍ SPRAVNI 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: Austria

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Austria

(Questionnaire)

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.

Free access to information

According to Art 20 Para 4 of the Federal Constitutional Law (below: B-VG) all executive officers entrusted with Federation, provinces and municipal administrative duties as well as the executive officers of other public law corporate bodies shall impart information about matters pertaining to their sphere of competence insofar as this does not conflict with a legal obligation to maintain confidentiality.

Therefore, there is no single authority established especially for granting information in Austria, but any institution has to comply with the obligation to provide information within its scope of activities.

If the information is not granted, the applicant can request a ruling on the matter. Against such a ruling a complaint can be lodged with the competent administrative court (of the Federation or of the provinces, depending on what kind of authority has issued the contested ruling). So there are no specialised courts either.

Against such a court decision a final complaint can be lodged with the Austrian Supreme Administrative Court and the Austrian Constitutional Court.

Protection of personal data

Other than in the field of free access to information, regarding the protection of personal data a specialised authority, namely the Data Protection Authority, has been established, which decides on complaints of persons, who allege to have been infringed in their right to be informed (as to who processes what data concerning him/her), their right to secrecy, their right to correction (of incorrect data) or to deletion (of illegally processed data) pursuant to the Federal Act concerning the Protection of Personal Data (below: DSG). The Data Protection Authority is an administrative authority, but its head is independent and not bound by instructions in the exercise of its office. The Data Protection Authority is competent only for data protection as far as authorities are concerned that act in the execution of laws (public sector), with the exception of acts of legislation and the jurisdiction of the Courts of Justice.

If the complaint is found to be justified, an infringement is to be stated, otherwise the complaint is to be rejected. The Data Protection Authority decides by ruling, against which – in this respect the situation is comparable to the situation regarding free access to information – a complaint

with the federal administrative court and – subsequently – a final complaint with the Supreme Administrative Court and the Constitutional Court can be lodged (dependant on the outcome of the proceedings by the complainant or by the controller).

The Data Protection Authority also operates a register of controllers and their data applications for the purpose of information of the data subjects.

The competence to impose administrative penalties rests with the (regular) district administrative authorities (dependant on the controller's seat).

To ensure the right to data protection (except the right to information) against organisations, that are established according to private law and that do not act in execution of laws (so called private sector), a civil court action has to be taken.

In addition to the Data Protection Authority there is also the Data Protection Council, which advises the federal government and the provincial governments in political matters of data protection.

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.

According to the Duty to grant Information Act information shall be given without undue delay, at the latest however within 8 weeks after the receipt of the request for information. If the authority provides the requested information, no (formal) ruling is issued. If the request is complied with entirely, there are no further procedural steps to be taken.

If the authority denies the requested information (at least partially), it has to issue a ruling on this, if the applicant requests so.

Against such a ruling a complaint can be lodged within 4 weeks from its rendering. It has to be lodged with the authority itself, which has the possibility to issue a so called preliminary decision on a complaint (whereby it can set aside or modify the contested ruling or dismiss the complaint). If no such preliminary decision is issued or the complainant is not satisfied with this ruling either, the complaint has to be submitted to the competent administrative court.

If the authority neither grants the requested information nor issues a ruling on the denial of the information, the applicant can file a complaint alleging a breach of the duty to reach a timely decision. In this case the authority can issue an administrative ruling within a period of up to three months, otherwise it has to submit the complaint to the administrative court.

If the complaint is admissible, the administrative court will either dismiss the complaint or – if it recognises a duty to provide the requested information – set aside the contested ruling.

If the authority has based its decision on insufficient fact finding, the administrative court can set aside the contested administrative ruling by means of an order and remand the matter to the authority for the issuing of a new administrative ruling. In doing so, the authority shall be bound by the legal evaluation on which the administrative court based its order.

As a rule the administrative court is obliged to decide on complaints without undue delay, however, at the latest within six months after the receipt of the complaint.

Against a decision of an administrative court a final complaint with the Supreme Administrative Court can be lodged within 6 weeks from its rendering (either by the applicant, if his/her complaint has been dismissed, or by the authority, if the court has set aside its ruling on denying the information).

However, a final complaint against the ruling of an administrative court is only admissible, if the solution depends on a legal question of essential importance, mainly because the ruling deviates from the established court practise of the Supreme Administrative Court, such established court practise does not exist or the legal question to be solved has not been answered in uniform manner by the previously established court practise of the Supreme Administrative Court.

If the final complaint is admissible and the Supreme Administrative Court terminates the legal matter by means of a decision, the decision shall either dismiss the final complaint for being unfounded, repeal the contested decision or (as an exception) decide on the merits of the matter. If the Supreme Administrative Court has granted a final complaint, the administrative courts and authorities are obliged to immediately establish the legal situation corresponding to the legal opinion of the Supreme Administrative Court in the relevant legal matter with all legal means available to them. There are no specific procedural regulations regarding disputes on the free access to information.

There is also the possibility to lodge a complaint against the decision of an administrative court with the Constitutional Court within 6 weeks of the rendering of the decision. The Constitutional Court has to decide whether the decision of the administrative court has violated constitutionally guaranteed rights ("fundamental rights"), for instance if the decision has been arbitrary and therefore has violated the principle of equality. In case the Constitutional Court finds that the decision of the administrative court has violated such a right, it has to quash the decision of the administrative court.

Against the decisions of the Supreme Administrative Court an appeal to the Constitutional Court is not possible. Decisions of the Supreme Administrative Court are final.

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

Regarding the regulation of the procedure and the decisions of the Supreme Administrative Court there are no differences between proceedings that deal with the protection of personal data and those concerning the free access to information. Whereas all final complaints regarding data protection are assigned to one specific – specialised – panel, the assignment of final complaints regarding the alleged infringement of the duty to grant information follows the competence for the legal matter, to which the request for information refers.

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.

Until well into the 19th century public administration was perceived solely as an instrument for the monarch to execute his decisions as fast and effective as possible. The citizen was considered the object of that instrument and hence had no subjective rights to enforce against the state. Slowly and influenced by the constitutionalism movement, the principle that the authority of government derives from and is limited by a body of fundamental rights began to gain more ground. As a consequence, provisions of substantive administrative law improved and in 1926 – after several attempts to reform the administrative procedure regulations and to enact a relevant law – the General Administrative Procedural Law came into force.

Whereas the duty to respect official confidentiality (*Amtsverschwiegenheit*) has long been a crucial and somehow characteristic legal provision of the Austrian Constitution (now: Art 20 Para 3 B-VG), it took rather long until the duty to grant information (*Auskunftspflicht*) was explicitly stipulated. Furthermore it has to be added, that the phrasing of the relevant provision on official confidentiality before 1987 was very vague stating that all executive officers entrusted with federal, provinces and municipal administrative duties as well as the executive officers of other public law corporate bodies are pledged to confidentiality about all facts of which they have obtained knowledge exclusively from their official activity and which have to be kept confidential in the interest of a public law corporate body or in the preponderant interest of the parties involved.

The first regulation on the duty to grant information worth mentioning was to be found in the Federal Ministries Act from 1973 (Art 3 No 5), which provided for a duty to grant access to information of ministries (and only for ministries) as long as there was no obligation of confidentiality given. Based on this provision, the Supreme Administrative Court had to deal with questions regarding free access to information. In its decision of 14 October 1976, No 0772/76, the Supreme Administrative Court stated, that the duty to grant information imposed on the ministries was laid down in the interest of those, who ask for the information, which is why the provision in question contains not only an obligation for certain authorities, but also a right for the citizens. It was also stated, that if the right to get the information is to be denied, this has to be done by a ruling (this judicial statement was later on laid down in Art 4 of the Duty to grant Information Act).

In the 1980s (especially in connection with the massive demonstration against the planned construction of the Hainburg hydro-electric power plant in 1984) the public opinion and the media pressured the government (not only into abandoning the construction plans for the power plant but also) into reforms towards a more transparent and more public participation based administration.

The mentioned clamour for a more transparent and civic participation based administration by the Austrian population forced the legislator to propose new regulations regarding information rights at constitutional and sub-constitutional level. The proposed draft became – after numerous

negotiations and consultations – subject to additional amendments, some of those again as a consequence of public pressure.

Finally, by amendment of the Federal Constitutional Law 1987, the official confidentiality provision was formulated more precisely (and thereby limited in its scope) and a new paragraph on the duty to grant information was added at constitutional level. The explanations to this amendment not only refer to the increasing need for information of the citizens, but also to the decision of the Constitutional Court of 16 October 1970, No G 5/70, dealing with the tension between the duty to respect official confidentiality and the Freedom of Expression according to Art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Art 20 Para 3 and 4 B-VG in its current wording reads as follows:

"Para 3 All executive officers entrusted with federal, provinces and municipal administrative duties as well as the executive officers of other public law corporate bodies are, save as otherwise provided by law, pledged to confidentiality about all facts of which they have obtained knowledge exclusively from their official activity and which have to be kept confidential in the interest of the maintenance of public peace, order and security, of comprehensive national defence, of external relations, in the economic interest of a public law corporate body, for the preparation of a ruling or in the preponderant interest of the parties involved (official confidentiality). Official secrecy does not exist for executive officers appointed by a popular representative body if it expressly asks for such information.

Para 4 All executive officers entrusted with federal, provinces and municipal administrative duties as well as the executive officers of other public law corporate bodies shall impart information about matters pertaining to their sphere of competence insofar as this does not conflict with a legal obligation to maintain confidentiality; an onus on professional associations to supply information extends only to members of their respective organizations and this inasmuch as fulfilment of their statutory functions is not impeded. The detailed regulations are, as regards the federal authorities and the self-administration to be settled by federal law in respect of legislation and execution, the business of the Federation; as regards the provinces and municipal authorities and the self-administration to be settled by provincial legislation in respect of framework legislation, they are the business of the Federation while the implemental legislation and execution are provincial business."

In its decision of 3 October 1991, No B 4/91, the Constitutional Court ruled, that Art 20 Para 4 B-VG does not grant a constitutionally guaranteed right.

The more detailed rules were laid down regarding the institutions of the Federation and the self-administrating bodies settled by federal law in the federal "Duty to grant Information Act" and for the provinces, the municipalities and self-administrating bodies settled by provincial law in the "Fundamental Act on the Duty to grant Information" (a federal law containing principles in this field) and nine provincial implementing laws on the duty to grant information, which lay down – basically in the same manner – the procedures and the limits of the duty to grant information. They only provide for a duty to grant information if and to the extent that its exercise does not jeopardise the fulfilment of the administrative body`s other tasks.

The Supreme Administrative Court stated in its jurisdiction, that information according to the Duty to grant Information Act concerns only the declaration of knowledge, hence facts that are already known to the authority, not those, that have to be established or gathered to be able to

correspond with the request for information; legal interpretation or judgements are not subject of the duty to grant information (see e.g. the decision of 25 March 2010, No 2010/04/0019).

The duty to respect official confidentiality can also arise out of the duty of secrecy of personal data. Overriding interests in confidentiality of a third party can preclude the provision of information (see the decision of 23 October 2013, No 2013/03/0109).

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.

Regarding the role of free access to information many stakeholders still see the current wording of the relevant provisions not to be very concrete and leaving too much room for interpretation (and restrictions). A prevailing problem is constituted by the difficult relationship between Art 20 Para 3 (official confidentiality) and Art 20 Para 4 B-VG (duty to grant access to information). Because a breach of Art 20 Para 3 B-VG is considered a serious offence, administrative authorities allegedly tend to interpret the broad official confidentiality regulation in favour of refusing to grant the requested information on the grounds of official secrecy reasons.

A recent government bill aims at improving the information rights in Austria and at implementing a more modern legal frame in that matter. Pressured by European Union Law, the fact that 90 other States already have implemented Transparency and Information Acts and last but not least also by the public opinion in general, the government has stated in the notes to the mentioned bill, that a legal framework such as expressed by Art 20 Para 3 and 4 B-VG is no longer compatible with the needs and challenges of our time.

Therefore, those provisions are planned to be set aside and replaced by provisions declaring the obligation of the whole administration to make all information of general interest public as well as by provisions that strengthen the right to free access to information for everyone.

The wording of this draft reads as follows:

"Art 22a. (1) The authorities of the legislature, all executive officers entrusted with federal and provinces administrative duties, the courts of justice, the Court of Audit, the provincial courts of Audit, the administrative courts, the Supreme Administrative Court, the Constitutional Court, the Ombudsman and the institutions entrusted with similar duties as the Ombudsman in the provinces shall publish all information of general interest in such manner, that they are accessible to everyone insofar as this does not conflict with a legal obligation to maintain confidentiality as provided by Para 2.

(2) Everyone has the right to be granted access to information by the authorities of the legislature, all executive officers entrusted with federal and provinces administrative duties, the Court of Audit, the provincial courts of Audit, the Ombudsman and the institutions entrusted with similar duties as the Ombudsman in the provinces, unless it is necessary that the information has to be kept confidential in the interest of compelling external relations and integration reasons, in the interest of national security, of comprehensive national defence or the maintenance of public peace, order and security, for the preparation of a ruling, in the economic or financial interest of a public law corporate body or any other self-administrating body, or in the preponderant and justified interest of others or,

insofar as it is explicitly ordered by law, for the safeguarding of equally important general interests; professional associations are obliged to supply information only to their members.

(3) Everyone has the right to be granted access to information by undertakings subject to the control of the Court of Audit or the provincial courts of Audit, insofar as this does not conflict with a legal obligation to maintain confidentiality in analogous application of Para 2 or insofar as it is not necessary to maintain confidentiality in order to avoid jeopardising the competitiveness of the undertakings or if the law does not provide otherwise, as long as there is a comparable access to information given.

…"

However, neither transparency nor information duties shall exist, if there is an obligation to confidentiality explicitly ordered by law.

Even though once the government bill should be implemented the new provisions are going to constitute a major change – mainly by dropping the constitutional provision on official confidentiality – media and human rights organisations view the bill quite critical. As the new provisions on information rights define the areas where confidentiality might be given, the new regulations are regarded as open to interpretation and therefore as easily allowing the denial of requested information as the current one.

So even if the free access to information gains in significance in the public debate, it is too early to judge, whether and to what extent its importance will gain in weight in the political and legal system in the near future.

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 Duty to grant Information Act foresees, that information shall not be given, if it is obviously requested in a frivolous way. According to the jurisdiction of the Supreme Administrative Court, a request is considered to be frivolous, if the petitioner is aware of the forlornness, the unfoundedness and the futility of his/her request; the purpose of the request has to be the reception of information, that is not at his/her disposal and that is of a concrete interest to him/her (see e.g. the decision of 18 November 2014, No 2013/05/0026, or fundamentally the decision of 23 March 1999, No 97/19/0022).

All in all the number of cases at the Supreme Administrative Court dealing with the potential misuse of the right to get access to information is rather low. Many more final complaints regarding information rights – as these often collide with the obligation to respect official confidentiality – refer to cases where the free access to information has been refused because of the obligation to keep information confidential.

Whether this allows any conclusions – hence whether there are hardly any petitioners that try to abuse or misuse their right to get access to information or whether such persons refrain from lodging a final complaint with the Supreme Administrative Court – cannot be evaluated.

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.

According to the constitutional provision in Art 1 Para 2 DSG restrictions of the right to secrecy by an intervention of an administrative authority (insofar personal data is not used in the vital interest of the data subject or with his/her consent) are only permitted based on laws necessary for the reasons stated in Art 8 Para 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (these are national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others). Such laws may provide for the use of data that deserve special protection only in order to safeguard substantial public interests and shall provide suitable safeguards for the protection of the data subjects' interest in secrecy. Even in the case of permitted restrictions the intervention with the fundamental right shall be carried out using only the least intrusive of all effective methods.

Regarding so called sensitive data (data relating to natural persons concerning their racial or ethnic origin, political opinion, trade-union membership, religious or philosophical beliefs, and data concerning health or sex life) Art 9 Para 1 DSG orders, that the use of such data does not infringe interests in secrecy deserving protection if – amongst other exceptions – the obligation or authorisation to use the data is stipulated by law, insofar as this serves an important public interest.

Examples for important public interests (there: related to the right to information) are to be found in Art 26 Para 2 DSG (to protect the constitutional institutions of the Republic of Austria, to safeguard the operational readiness of the federal army, to safeguard the interests of comprehensive national defence, to protect important foreign policy, economic or financial interests of the Republic of Austria or the European Union, to prevent and prosecute crimes).

Regarding the use of data concerning suspected criminal offences as well as data concerning criminal convictions and preventive measures Art 8 Para 4 DSG stipulates, that such a use does not infringe interests in secrecy deserving protection, if an explicit legal obligation or authorisation to use the data exists or the use of such data is an essential requirement for a controller of the public sector to exercise a legally assigned function or follows from legitimate interests of the controller that override the data subjects' interests in secrecy.

Such rules (substantiating the purposes, for which personal data may be collected and processed, and the permitted scope) are stipulated e.g. in the Security Police Act (Art 51 et seq.) for the security authorities (the Federal Minister of the Interior, the police directorates of the provinces and the district administrative authorities), the Military Competence Act (esp. Art 22 et seq.) for military bodies and agencies, that are entrusted with the task of intelligence services, various aliens' and immigration laws for the aliens' police authorities as well as the Code of Criminal Procedure for the criminal police, the public prosecutors and the criminal courts; for further rules see e.g. the Telecommunications Act (Art 92 et seq.), Art 83 et seq. of the Court Organisation Act (for the jurisdiction) or the law on criminal records.

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.

The number of decisions of the Supreme Administrative Court on final complaints directly related to the protection of personal data is rather low (2014: 7; 2013: 11; 2012: 5).

In contrast, the number of rulings of the Data Protection Commission (which was the predecessor of the Data Protection authority until end of 2013) on individual complaints in the years 2012 and 2013 was between about 110 and 150. So the (vast) majority of rulings of the Data Protection Commission remained uncontested.

Several of the final complaints in this field (regarding the procession of personal data by security authorities as controllers) are related to the right to deletion of data, which have been processed in the course of criminal investigations (most of them were dismissed as unfounded).

In terms of legal policy, the main focus in Austria in the last years was on data retention (and the data retention directive), as the Constitutional Courts repealed various provisions in federal laws in connection with the data retention as unconstitutional, and on the provisions on the so called section control (a speed measuring system).