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: Czech Republic

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

Czech Republic

(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

In the Czech Republic, there is not an administrative authority that would be responsible for this agenda (a regulator like an "information ombudsman"), and this is the reason why the requests for information are being dealt with by the addressed authorities themselves. For example, if a citizen asked the local municipality for certain information, the legally bound person in this case would be the municipality itself; if he asked the tax authority, it would be the tax authority that has to answer etc. This is the first instance.

The second instance is addressed in case, when the applicant does not receive the requested information, or when he is not satisfied with the obtained answer in a different way. Again, even on this level there is not a unified regulator, so the potential remedy is being dealt with by the authority superior to the first instance authority.

Only after none of these authorities satisfied the applicant's request, the administrative courts can be addressed with an action (for more information about the procedure see question 2).

This organization of the agenda (without a regulator) might be regarded as suffering from a systemic deficiency that weakens the effect of otherwise well-functioning law (Act on the free access to information[1]).

Protection of personal data

Regarding the agenda of protection of personal data, the situation is quite different. In the Czech Republic, there is an administrative authority protecting personal data and fulfilling conditions of the directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and this is *The Office for Personal Data Protection* (hereinafter „the Office") – a central and independent body set up to: supervise observance of the legal obligations laid down for processing of personal data, maintain the register of notified data processing operations, deal with initiatives and complaints from citizens concerning breach of law, provide consultancy in personal data protection etc.

[1] In Czech: zákon č. 106/1999 Sb., o svobodném přístupu k informacím.

The activities of this Office are mainly based on the Act on the protection of personal data[2].

Criminal law

The Czech Criminal code in Article 178[3] defines the merits of a criminal offense consisting in an unauthorised disposal with personal data. This provision enables the bodies active in criminal proceedings to prosecute the most serious cases of unauthorized use of personal data even in criminal proceedings.

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.

Free access to information

At first it needs to be stressed that when requesting the information the applicant always addresses their request directly to the legally bound person that is in the possession of this information. If all conditions anticipated by the law are fulfilled, the legally bound person provides the information - this does *not* happen by issuing a decision, but only by the mere act of sending the information to the applicant. On the contrary, if the legally bound person comes to conclusion *not to provide* the information, it delivers *a decision denying (part of) the request*.

If the applicant is not provided with requested information there are two main administrative instruments he can use:

a) an appeal against the decision of the legally bound person;

b) a complaint against the course of complying with the request.

Decision on the denial of a request

According to the Act on free access to information, if the legally bound person does not comply with the request or even just a part of it, it shall, within the time for compliance, *issue a decision on the denial of the request or a part of it*, with the exception of cases, where the request has been deferred.

In this case the applicant may file an appeal against the decision of the legally bound person to deny information. The appeal is delivered to the legally bound person who consequently submits the appeal to *their superior authority* within 15 days from the receipt of the appeal.

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[2] In Czech: zákon č. 101/2000 Sb., o ochraně osobních údajů.

[3] Article 178: Unauthorised Disposal of Personal Data

(1) Whoever, even through negligence, communicates or allows access to data gathered in connection with the performance of public administration shall be punished by imprisonment for a term of up to three years, or to prohibition of a specific activity or a pecuniary penalty.

(2) A person who acquires data on another person in connection with his profession, employment or office and who, even through negligence, communicates the data to another person, or allows access to such data by another person, thus breaching a duty of confidentiality stipulated by law, shall be liable to a sentence under sub-provision (1).

(3) An offender shall be punished by imprisonment for a term of from one to five years, or to prohibition of a specific activity or a pecuniary penalty if: (a) by his act under sub-provision (1) or (2) he causes a serious detriment to the rights and justified interests of the person whom such data relates; (b) he commits an act under sub-provision (1) or (2) through the press, film, radio or TV broadcasting or in another similarly effective manner; (c) he commits an act under sub-provision (1) or (2) by breaching duties arising from his profession, employment or office.

The superior authority shall issue a decision on the appeal within 15 days from the day the appeal was submitted (note: the period for making the decision on the *remonstrance* shall be 15 working days from the delivery of the remonstrance to the legally bound person). *The period cannot be extended.*

It is possible to challenge the decision on the appeal before the administrative courts (see below).

Complaint against the course of complying with the request

A complaint may be filed regarding following situations:

a) applicant does not agree with handling the request in a manner of providing data that enables the applicant to search and obtain the already published information;

b) applicant, after the expiration of the deadline under the Act on free access to information has not been provided with information or presented with a final license bid and the notification of the decision on the denial of the request has not been issued;

c) applicant has been given a partial information without the decision on the denial of the rest of the request being issued;

d) applicant does not agree with the fee or remuneration required in connection with the disclosure of information.

The complaint shall be filed with the legally bound person and it is decided by their superior authority, which shall decide within 15 days from the day the complaint was submitted to them.

Court procedure – general introduction

There is an opportunity for the applicant to challenge the administrative decision according to the Code of Administrative Justice[4] (CAJ), before the administrative courts, or more precisely before *the special administrative departments of the regional courts*. However, exhaustion of all ordinary remedies in the proceeding before the administrative authority is an obligatory general precondition.

Finally a decision of the administrative chamber of the regional court can be challenged before the Supreme Administrative Court by a cassation complaint. Regarding the right of free access to information, several kinds of situations in which an applicant may seek for protection are possible. According to these the applicant can file:

a) an action against the decision of the legally bound person, or more precisely against the decision on appeal issued by its superior authority; the action may be aimed either against the way in which the decision has been handled [such as denial of the legally bound person to provide (part of) the requested information], or against the calculation of fees/costs;

b) an action against a failure of the legally bound person to act.

Dealing with quite specific situation a recent decision[5] of the Supreme Administrative Court (SAC) should be mentioned as well. In this case the administrative authority of the *second instance* (the superior authority) quashed the decision of the legally bound person (by which the request

[4] In Czech: zákon č. 150/2002 Sb., soudní řád správní.
[5] Judgement of the Supreme Administrative Court of the 28th January 2015, No. 6 As 113/2014-35.

for information had been refused) and returned the case back to this subject. Such action of the second instance authority was then challenged by the applicant who claimed that the described process of the second instance authority was contrary to the meaning and purpose of the Act on free access to information. In this context the SAC decided that if the reason provided by the applicant in his legal action corresponds with the reality, then there is *no reason* for the administrative court *to reject such legal action as inadmissible* for the reason that the complainant (aforementioned applicant) has not exhausted ordinary remedies in the procedure before administrative authorities. The SAC provided as well some clues indicating when the second instance authority and the legally bound person are likely to proceed contrary to the Act on free access to information in the meaning of the previous lines, e.g. *repeatedly quashing* the decision of the legally bound person refusing the request for information and *returning* the case back to the first instance, especially when such decision solves the factual and legal issues which have been dealt with in the previous quashing decision of the second instance authority.

Role of the Supreme Administrative Court – the cassation complaint

Generally the system of (administrative) judicial review in the Czech Republic only has one instance. As mentioned above there are regional courts acting as courts of first and last instance with no appeal or other ordinary judicial remedy being permissible.

The exception represents the cassation complaint, an *extraordinary* remedy[6], which is handled before the SAC. There is not, however, any special kind of the cassation complaint that would be specifically aimed at the free access to information disputes (or rather there are *no specific types of cassation complaint at all*).

The cassation complaint as such can be in general challenge both errors in the assessment of substantive legal provisions as well as errors in the procedure before the court of first instance. However, the cassation complaint can be submitted only because of the grounds of cassation explicitly listed in Article 103 of the CAJ:

a) unlawfulness consisting in incorrect consideration of a legal issue before the court in the previous proceedings,

b) fault of proceedings consisting in that the merits of the matter from which the administrative authority proceeded in the contested decision had no support in the documents or is in contradiction with them, or in that in determining the merits of the matter the law was violated in provisions on proceedings before the administrative authority in a way that could have affected its lawfulness, and for this justly claimed fault the court deciding on the matter should have quashed the contested decision of the administrative authority; such procedural faults include non-reviewability of the administrative authority's decision on grounds of its incomprehensibility,

c) irregularity of proceedings before the court consisting in the absence of conditions for the proceedings, in the decision being made by an excluded judge, in the court being

[6] The cassation complaint is called *extraordinary* only from the perspective of the CAJ, or Czech legal order in general, so even if we say this is an extraordinary remedy, it is a remedy that is used quite widely, and apart from the reopening of the proceedings (another extraordinary remedy,, which is used only rarely).it is the only remedy available in the administrative judicial review.

incorrectly staffed, or in the decision being made to the detriment of the party as a consequence of the judge's criminal act,

d) non-reviewability consisting in incomprehensibility or lack of causes for a decision, or in some other procedural fault before the court, if such a fault could result in an unlawful decision on the matter itself,

e) unlawfulness of the decision on rejection of the petition or on discontinuation of the proceedings.

The cassation complaint must be filed within two weeks of the regional court's decision becoming final.

There are several conclusions of the proceeding upon the cassation complaint:

a) the cassation complaint is rejected;

b) the decision of the regional court is dismissed and the proceeding is returned back to that court. Simultaneously the law opinion the SAC is binding for the regional court;

c) apart of dismissal of the regional court's decision [letter b)] there is also eventuality that the decision of the *administrative authority* (second instance, or possibly even first instance) might be dismissed as well.

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

As already mentioned above, the Office is the central public authority dealing with the agenda of protection of personal data. According to the Act on the protection of personal data this subject is empowered to fine legal and natural persons that committed administrative delict regarding the personal data.

From the point of view of the conduct of the procedure, the regular administrative and court procedure in a typical dispute is the same as the procedure described in question 2 regarding the free access to information disputes. It means that the first instance decision (in this case a decision of the Office) can be challenged by a remonstrance before the superior/second instance authority, then this second instance decision can be challenged by an action before regional court and finally there is a possibility to file a cassation complaint before the SAC.

Although there is no difference between this type of proceedings and the free access to information proceedings from the procedural point of view (in both cases it is the administrative decision that is being challenged), in merits these proceedings are different. While the free access to information disputes (and consequently the proceedings) are based on a first instance decision by which the public authority refused to provide the requested information, the protection of personal data disputes originate from the Office's first instance decision imposing a fine.

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.

First legislative act dealing with the providing of the information within the Czech law order was the constitution law introducing the Charter of fundamental rights and freedoms[7]. **Article 17 of the Charter of fundamental rights and freedoms grants the right to information:**

(1) Freedom of expression and the right to information are guaranteed.
(2) Everybody has the right to express freely his or her opinion by word, in writing, in the press, in pictures or in any other form, as well as freely to seek, receive and disseminate ideas and information irrespective of the frontiers of the State.
(3) Censorship is not permitted.
(4) The freedom of expression and the right to seek and disseminate information may be limited by law in the case of measures essential in a democratic society for protecting the rights and freedoms of others, the security of the State, public security, public health, and morality.
(5) Organs of the State and of local self-government shall provide in an appropriate manner information on their activity. The conditions and the form of implementation of this duty shall be set by law.

The right to information has been a part of the Czech constitutional order since 1992 (introduction of the Charter of fundamental rights and freedoms)**, however, there was no related implementation law.** As a result of this the Czech law order did not include complex legislation of the right to information as well as of the duty of the state and self-governing authorities to provide the information.

There were several laws adjusting only some aspects of the providing of information in relation to some specific (law) fields [in particular Act on right to environmental information[8] that came into force on 1st July 1998 and that implemented two directives: 1) the directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC and 2) the directive 2007/2/EC of the European Parliament and of the Council establishing an Infrastructure for Spatial Information in the European Community (INSPIRE)].

It was only on the 11th May 1999 when the **Act on free access to information** was introduced (in force since 1st January 2000). As a **general legislation** this Act is applied whenever the special laws do not state otherwise (an example could be the tax code that limits the extent of providing information via the tax administrator's duty of confidentiality). According to the explanatory note attached to this Act the right to information gathered by the state and self-governing authorities as well as by the others subjects with capacity to decide upon individual's rights and obligations is **the key element in relationship between the state and its citizen(s)**.

[7] In Czech: ústavní zákon č.23/1991 Sb., kterým se uvozuje Listina základních práv a svobod jako ústavní zákon Federálního shromáždění České a Slovenské Federativní Republiky.
[8] In Czech: zákon č. 123/1998 Sb., o právu na informace o životním prostředí.

The case-law of the Constitutional Court and the Supreme Administrative Court also represent an essential. Decisions of these courts have specified i.e. the term "*legally bound person*" in the context of the Act on free access to information. This Act[9] declares that "*the legally bound persons that, under this Act, are under a duty to provide information related to their powers are state agencies, territorial self-governing units and their bodies, and public institutions. The legally bound persons are also such entities that have been entrusted by law with decisions on the rights, legally protected interests or duties of individuals or legal entities in the area of public administration, only to the extent of their decision-making activity.*"

Serious interpretation difficulties are caused by the term "*public institution*"[10]. The Constitutional Court declared that common characteristics of the public institutions are public purpose, being established by the state, creation of their bodies by the state and state's supervision of their activities. It is not however relevant whether a certain entity is a legal person or not[11]. The Constitutional Court found that it is possible to classify as "public institution" e.g. General health insurance company (Všeobecná zdravotní pojišťovna) created by Law[12], or former stateowned enterprise Airport Prague (státní podnik Letiště Praha[13]). The administrative courts specified as the legally bound persons also e.g. Road and Motorway Directorate of the Czech Republic[14], semi-budgetary organization[15] (Ředitelství silnic a dálnic)) established by the Ministry of Transport, National memorial preservation agency - state semi-budgetary organization established by the Ministry of culture[16] (Národní památkový ústav), joint-stock limited company ČEZ (70% shareholder is Czech Republic)[17], joint-stock company Czech Railways (České dráhy; 100% shareholder is Czech Republic)[18], Teaching hospital Motol (state semi-budgetary organization established by the Ministry of Health)[19], joint-stock company Prague Public Transit (100% shareholder is capital city Prague)[20] or joint-stock company Football Club Hradec Králové (100% shareholder is city Hradec Králové)[21].

Other important area of the case-law is associated with the question of the amount of fee charged by the legally bound person for communicating the requested information. The Article 17 para. 1 of the Act on free access to information states that "*the legally bound person is entitled to charge a fee for the communication of information in an amount which must not exceed the costs on making copies, obtaining technical data medium and sending the information to the applicant. The legally bound person may also charge for*

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9 Article 2, para. 1 and 2 of the Act on free access to information.
10 Before 22nd March 2006 there had been used the term "*public institution administrating public funds*".
11 Judgements of the Constitutional Court of 27th February 2003, case No. III. ÚS 686/02, and of 24th January 2007, case No. I. ÚS 260/06.
12 Judgement of the Constitutional Court of 16th January 2003, case No. III. ÚS 671/02.
13 Judgement of the Constitutional Court of 24th January 2007, case No. I. ÚS 260/06; nowadays public (limited) company Airport Prague (akciová společnost Letiště Praha).
14 Judgement of the Prague Metropolitan Court of 31st May 2007, case No. 9 Ca 186/2005-40.
15 A type of legal person established by the state or municipality for activities within its competence that are more likely unprofitable and by their extent, structure and complexity they require their own legal subjectivity.
16 Judgment of the Supreme Administration Court of 20th September 2007, case No. 9 As 28/2007-77.
17 *ČEZ* is dominant producer of electric energy in the Czech Republic; judgement of the Supreme Administrative Court of 6th October 2009, case No. 2 Ans 4/2009-93.
18 Judgement of the Supreme Administrative Court of 8th September 2011, case No. 9 As 48/2011-129.
19 Judgement of the Prague Metropolitan Court of 27th September 2011, case No. 10 Ca 402/2009-34.
20 Judgement of the Supreme Administrative Court of 19th October 2011, case No. 1 As 114/2011-121.
21 Judgement of the Supreme Administrative Court of 29th May 2008, case No. 8 As 57/2006-67.

an extensively big search for information."[22]. According to the judgment of the Supreme Administrative Court[23] the fee charged for communicating the information cannot be considered as administrative fee in the meaning of a charge set in advance which has no connection to actual costs related to administration of specific application, but it has private law character while it represents compensation of cost which the legally bound person had to spend in relation to communicating the information. It is therefore *a cost of rendered service* (in particular of obtaining of photocopies). The legally bound person is entitled, but *not required*, to ask the applicant for compensation of the costs. The Act on free access to information further states that "*a legally bound person may also charge for an extensively big search for information*"[24]. The Supreme Administrative Court[25] has specified for instance which activities may be regarded as "*search for information*".

The Act on free access to information states as well (Article 17 para. 3) that "*in case the legally bound person charges a fee for the communication of information, it shall notify the applicant about this fact along with the amount of the fee before the information is disclosed. The notification must clearly state based on which facts and how the legally bound person specified the amount of the fee.*" The Supreme Administrative Courts confirms in its judgments mentioned above that the applicant has an option to decide whether they want to pay the fee and receive the information or not (payment in such situation is a lawful precondition of communicating the information).

Other court judgments have dealt with reasons for denial of a request that are specified in several provisions of the Act on free access to information. The group of the judgments is extensive, therefore here are few examples of cases relating to the protection of **trade secret**. The Article 9 para. 1 of the Act on free access to information states that "*if the requested information represents a trade secret, a legally bound person shall not provide it*". In this context the case-law concluded that only such facts (information) that show the conceptual characteristics of the trade secret (as defined by the Article 504 of the Civil code[26]) may be treated as the trade secret. This means that the object of the protection of trade secret is not a specific document (e.g. contract) as whole, but only the facts (information) mentioned in the contract (provided that these fulfil the conceptual characteristics stated by the law[27]). The Supreme Administrative Court also declared[28] that the legally bound person has to [in its decision by which it (partially) refuses to provide the information] properly justify which information included in the requested document it considers as trade secret. According to the Act on free access to information it is not possible to consider the communicating of the information indicating amount and identifying the receiver of the

[22] For more specific principles regarding the charge for providing the information see government regulation No. 173/2006 Sb.
[23] Judgment of the Supreme Administrative Court of 13th December 2007, case No. 6 As 12/2006-64; decision of the Supreme Administrative Court of 15th September 2010, case No. Konf 115/2009-34; judgment of the Supreme Administrative Court of 21st October 2010, case No. 2 As 34/2008-90.
[24] The article 17 paragraph 1 *in fine* of the Act on free access to information
[25] Judgments of the Supreme Administrative Court of 13. 10. 2004, case No. 6 A 83/2001, and of 10. 10. 2003, case No. 5 A 119/2001.
[26] In Czech: zákon č. 89/2012 Sb., občanský zákoník.
[27] E.g. judgments of the Supreme Administrative Court of 23rd October 2007, case No. 2 As 27/2007-87; of 31st July 2006, case No. A 2/2003-73; judgment of the Regional Court of Hradec Králové of 25th May 2001, case No. 31 Ca 189/2000-27, or judgment of the Regional Court of Prague of 14th March 2006, case No. 44 Ca 82/2005.
[28] E.g. judgments of the Supreme Administrative Court of 23rd October 2007, case No. 2 As 27/2007-87, or of 27th March 2008, case No. 7 As 24/2007-106.

public funds as the breach of the trade secret, even if such information fulfils the characteristics of the trade secret[29].

In general it can be stated that the Czech administrative authorities have a tendency to impede the development of the right to information while the case-law on the contrary tends to a more extensive interpretation of the Act on free access to information.

The Act on free access to information **has been amended several times**. Via one of these amendments[30] the EU directive 2003/98/EC on the re-use of public sector information was implemented.

As a part of the mentioned amendment the Article **8b** has been incorporated into the Act **dealing with the communicating of information related to the recipients of public funds.** This Article should have been part of the amendment in 2002, however, it was not adopted. The explanatory note to the unrealized amendment states that "*amendments that have been carried out enable access to information on how the public funds are distributed to business legal persons, including limited breaking of the business secret protection. Since the recipients of such funds are often natural persons as well, who are not protected by the trade secret but through the protection of the private data, it is proposed to newly adjust access to the same limited range of information regarding the natural persons as well – recipients of the public funds. It is based on the principle that public has the right to information on how the public funds have been distributed. The protection of personality is preserved while only the minimum scale of information is required. Another relevant principle/argument is that those who apply for assignment of the public funds of their own (free) will, i.e. they request certain advantage, they must at the same time suffer that it will be publicly known. Such legislation however explicitly does not relate to the area, where natural persons are receivers of the public funds not* 'of their own free will'*, but because of their social and similar situations. In relation to the Act on the protection of personal data, it cannot be considered as an indirect amendment since the Act on the protection of personal data itself anticipates such approach, where special law determines ways of the processing of the private information (including providing and publishing), which do not require the consent of the touched person."*

The Article **8b** of the Act on free access to information (current wording):
"*Recipients of Public Funds*
(1) The legally bound person shall communicate basic personal data about the person it has provided with public funds.
(2) Subsection 1 shall not apply to providing public funds under the laws in the social area and healthcare, unemployment benefits, state benefits for savings in a building society and state subsidies to territorial regeneration.
(3) The basic personal data under the subsection (1) shall be communicated to the following extend only: name, surname, a year of birth, community, permanent address of the recipient, the amount, purpose and conditions for the providing of public funds."

The Article 8b can be understood as a *general clause* regarding communicating of personal data related to the persons to whom parts of the public funds have been granted and it is questionable what could be subsumed to it. The abovementioned amendment has also opened a discussion on the question **whether the employees of the legally bound persons could be also considered as the recipients of public funds (within the meaning of the Article 8b)** or whether the

[29] See i.a. judgment of the Supreme Administrative Court of 9th December 2004, case No. 7 A 118/2002-37.
[30] By Act No. 61/2006 Coll.; in force since 23rd March 2006.

recipients are only those subjects to which the public funds are granted on the basis of their requests in form of subsidies or public financial aid, or under the contracts concluded between the subjects and the third persons in order to ensure services and property treatment. Communicating the information on remuneration of employees of the public authorities gives an opportunity to illustrate the restrictive tendencies of the executive power regarding the free access to information.

In 2011 the Supreme Administrative Court concluded[31] that the employee who is remunerated from the public funds is the receiver of public funds in the meaning of the Act on free access to information. The legally bound person is therefore obliged to provide the information regarding the specific remuneration of (such) particular employee including the amount of the pay/remuneration. This legal opinion has been consequently accepted by the executive practice although with certain modifications – Ministry of the Interior together with the Office accepted the conclusion of the Supreme Administrative Court regarding the fact that the Article 8b of the Act is applied in relation with providing information about pays and remunerations of employees working for public authorities. However in the context of the case-law of the Constitutional Court regarding the conflicts of two constitutional rights (the right to free access the information and the right to protection of personal data), bearing in mind the case-law of the European Court of Justice relating to the protection of personal data as well, the authorities mentioned (in their common recommendation) that regarding certain groups of employees it would be necessary to consider specific circumstances of the case and when reasonable *not* to provide the information on remuneration. Immediately after the Supreme Administrative Court had clearly stated that the Article 8b is applicable on the information on remunerations provided from the public funds, the Government proposed to accept a new provision of the Act which would have the capacity to prevent providing of such information. This proposition was however never accepted by the House of Deputies of the Parliament[32].

Currently there is a new discussion over the **following amendment** of the Act on free access to information. The amendment should reflect the directive 2013/37/EU amending Directive 2003/98/EC on the re-use of public sector information (Public Sector Information Directive). The final date for implementation of the new European legislative act is set on 18th July 2015. Even though the intended changes have mostly technical character, they should help to improve effectiveness of the publication of the information regarding public sector and their re-use (information from public sector is further re-used in both commercial and non-commercial ways by subjects situated outside the public sector) mostly via **the duty to publish information in opened mechanical legible formats**. It should lead to qualitative shift regarding the possibilities of using the information. The implementation of the requirements of the directive 2013/37/EU to the Czech legal order should, as given in the explanatory note, bring the improvement of the possibility of using the open data in entrepreneur sphere, non-profit sector and in academic researches as well as the quality improvement of the public services. The

[31] Judgment of the Supreme Administrative Court of 27th May 2011, case No. 5 As 57/2010-79.
[32] The Supreme Administrative Court currently stated in its judgment of 22nd October 2014, No. 8 As 55/2012-62, that the information regarding the salaries of the employees who are paid from the public funds according to the Article 8b is generally communicated. The information is not communicated only exceptionally if this person contributes to substantial activities of the legally bound person only *indirectly* and *insignificantly* and at the same time there are no doubts whether the public funds are spent economically in relation to the remuneration of the person.

Directive 2013/37/EU aims also to some modifications in relation to the payments of costs arising from the providing of information.

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 most important mission of the free access to information is that it represents a tool for an effective control of public authorities through the possibility to obtain information on various circumstances of their functioning. Besides the control executed by various public authorities that are specifically designed for this purpose, a possibility of direct control by individuals based on their interest in various issues related to the functioning of public authorities is an essential to ensure a functioning democratic system.

History provides numerous examples for the proposition that all power, even democratic, corrupts, and the less it is controlled, the greater is the risk of abuse. The control of public authorities through institutes like the direct possibility of individuals to ask for information has many advantages, which significantly hinder the abuse of public authority and strengthen the democratic legitimacy of the political system.

Thanks to this institute, everyone who wants to can participate on the control of the public authorities, precisely in the extent to which they decide to be proactive. No one is excluded, everyone has the opportunity to ask questions and get answers, and this genuinely strengthens the relationship between public authorities and citizens, prevents division between "us" and "them", and also strengthens public awareness that the public authority itself is not the aim or a tool for the powerful to maintain their privileges, but it should be a tool for the citizens, to form a democratic community and to advocate general, shared common interests and goals.

Another purpose is that the findings obtained via the Act on free access to information can be used for an effective self-reflection of the public authorities. If these findings indicate, that the public authority behaves in a way that is inappropriate, it can cause a reaction of the public and the relevant authorities, and consequently an appropriate correction in the invalid behaviour of public authorities.

The preventive effect of the Act should not be underestimated either. The mere fact that a public authority may be exposed to questions from citizens will generally lead to more proper behaviour than if they would have nothing to worry about.

Without a doubt, this control can temporarily and under specific circumstances have certain negative impacts, especially because the possibility of being asked about the purposes and effectiveness of their activities may lead to formalism and action that would not be for the common good but only for the effect, that something is being done.

Considering the eventuality of mass abuse of the institutes provided by the Act on free access to information, it has to be admitted that this can happen and cause temporary paralysis of the compulsory subjects (certain public authorities). But on the other hand, according to the general historical knowledge about the functioning of the constitutional and political systems and the general human experience it should be safe to say, that the advantages of the public control greatly outweigh the negatives.

In other words, this kind of control, the control provided by individuals, is crucial, especially in terms of young democracies of central-east Europe, where the confidence in political parties is dramatically weakened as a result of various corruption scandals. In cases like this the possibility to directly control public authorities is essential for the reestablishment of the faith in democracy.
Considering the perception by general public and non-governmental sector, it is important to say, that historically the bureaucratic system in the Czech Republic is close to the classical Austrian model, which means that it is not very "open". If we could draw a line, where there would be the Scandinavian model on one end and the French at the other end, the Czech Republic would be somewhere in the middle with the tendency more towards the south. That said, our Act on free access to information is quite enlightened and liberal, and broke this tendency together with the case law of the Supreme Administrative Court, which is actually inspired by the Scandinavian model and aspires to "open" the public authorities.

The case law is generally well perceived by the public as well as by the non-governmental organisations, but at the same time they both sometimes come up against the traditional, more reserved attitude of the public authorities. Good example may be one of the authors of the Act on free access to information, who is now a coordinator of an interesting project, who not only organizes specialized seminars, but also shares his experiences together with experiences of other individuals, which provides an excellent feedback for the public authorities.
All in all, it can be concluded that even though the central-eastern model following up the Austrian tradition still prevails in the Czech Republic, recently the general practice is being slowly modified by the case law more towards the Scandinavian model.

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.

First, it is worth noting that the decision-making practice captures only a narrow section of the reality, which of course may not reflect reality as such.

That said, from the point of view of potential abuse or misuse of the free access to information rights there are two groups of petitioners.

The overwhelming majority of them ask standard questions that do not show any signs of abusive behaviour. On the other hand, we do encounter several petitioners (insignificant percentage) whose behaviour does show these signs. It has to be mentioned though, that these are generally people, who do not misuse only the right to the free access to information, but they are chronic complainers, who usually address several courts with a large-scale variety of actions –

in this case we cannot talk about an abuse of rights in the true sense of the word, especially when the courts are capable of dealing with this small percentage of abnormal behaviour quite easily.

Not all of these petitioners can be lumped together though, as it can never be averred, that 100% of them address the public authorities and courts with the abusive intentions. In practice we have encountered an example of a petitioner who did address several public authorities and courts repeatedly and continuously, but only because she was not able to obtain justice. Eventually the SAC ruled that the information she requested at the very beginning should have been given to her; so if the public authorities and courts had satisfied her claims earlier, she would not have had the need to behave in a manner that might have shown the signs of abusive behaviour.

Other than this we cannot say that the Act on free access to information would be an effective tool for bullying the public authorities.

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.

The exceptions laid down in Article 7(e), Article 8(4) and 8(5) of the Directive 95/46/EC were implemented mainly in Article 3 para. 6 of the Act on the protection of personal data. This Article excludes the applicability of basic duties prescribed by this Act (duties of the controller related to processing of personal data, particularly duty to inform the data subject and to provide access of the data subject to the information) if personal data is used for several enumerated purposes: security and defence of the Czech Republic, public order and internal security, prevention, investigation, detection and prosecution of criminal offences,[33] important economic or financial interest of the Czech Republic or of the European Union and exercise of control, supervision, surveillance and regulation related to exercise of public authority in some of the aforementioned cases. Specific post-communist exception includes "*activities related to disclosure of files of the former State Security*", i.e. the intelligence service of the former communist regime. This last exception is peculiar to the Czech Republic as a former socialist country and is one of the steps of reckoning with its totalitarian past.

This provision also includes several footnotes that indicate the relevant state bodies covered by these exceptions: armed forces including Military Office of the President of the Republic; bodies of the Integrated Rescue System (Fire rescue service of the Czech Republic, units of the fire protection, Medical rescue service); emergency services; Czech National Bank (i.e. the central bank of the Czech Republic); Supreme Audit Office (i.e. the audit office controlling how the public financial resources are spent); Public Prosecutor's Office (its basic competence is to represent the state in criminal proceedings); National Security Council (which is convened in

[33] According to the explanatory note the term "*detection of criminal offences*" includes also investigation and prevention of the criminal offences.

situations of public emergency[34]); and National Security Authority (responsible mainly for personnel and facility security clearance procedures). Last but not least, the most important bodies covered by this exception are the armed security forces and the intelligence services.

The intelligence services include Military Intelligence (military secret service which is a part of the Ministry of Defence), Office for Foreign Relations and Information (external civil secret service) and Security Information Service (internal civil secret service). The first is controlled by the Ministry of Defence, the other two by the government, particularly by Ministry of Interior, and by the House of Deputies of the Parliament, which means that there is almost no judicial control of these services. The most important and therefore potentially most dangerous for the data protection is the Security Information Service which can use several means of surveillance and intelligence methods on the Czech territory: seeking, opening, inspecting or evaluating of shipments; interception and recording of the telecommunication, radio communication or other similar forms of operation; taking video, sound or other kinds of records; seeking for the application of the technical means that could prevent or impede the fulfilling of the tasks of the Security Information Service; identification of persons or objects or tracking of their movement through the "*trap and alarm technology*".[35]

The armed security forces include Police of the Czech Republic, Prison service of the Czech Republic[36] and Customs Administration of the Czech Republic.[37] The biggest controversies are connected with the police, furnished by the Criminal Procedure Code (CPC)[38] with several data sensitive competences: search at premises, personal body search, search of other premises and lands, entrance into dwellings, entrance into other premises and onto lands (Article 82 and following of the CPC), detention and opening of dispatches, their exchange and surveillance (Article 86 of the CPC), interception and recording of telecommunication activities (Article 88 of the CPC), operative investigative means – in particular personal surveillance (Article 158b of the CPC). The most discussed of these competences appeared to be the competence to request for traffic and location data according to Article 88a of the CPC which implemented the Data Retention Directive.[39] This competence was often criticized because the conditions for a request for traffic and location data were looser than conditions for a request for traditional monitoring of telecommunication set out in Article 88 of the CPC. Therefore, the Article 88a of the CPC was strongly criticized by the Constitutional Court in its decision of 22nd March 2011, Pl. ÚS 24/10, and then annulled by its decision of 20th December 2011, Pl. ÚS 24/11.[40] The new version

[34] The Constitutional Act on the Security of the Czech Republic (in Czech: ústavní zákon č. 110/1998 Sb., o bezpečnosti České republiky.

[35] Act on the Security Information Service (in Czech: zákon č. 154/1994 Sb., o Bezpečnostní informační službě).

[36] Competences specified in the Act on Prison service (in Czech: zákon č. 555/1992 Sb., o Vězeňské službě a justiční stráži České republiky).

[37] Competences specified in Act on the Customs Administration of the Czech Republic (in Czech: zákon č. 17/2012 Sb., o Celní správě České republiky).

[38] In Czech: zákon č. 141/1961 Sb., o trestním řízení soudním (trestní řád).

[39] 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 and amending Directive 2002/58/EC.

[40] For more details of these decisions see MOLEK, P. Czech Constitutional Court: Unconstitutionality of the Czech Implementation of the Data Retention Directive, Decision of 22 March 2011, Pl. ÚS 24/10. European Constitutional law Review, Cambridge: Cambridge University Press, Vol 2/2012, pgs. 338-353.

of this provision, adopted in 2012, is much more precise, especially regarding the enumeration of offences whose prosecution can justify use of traffic and location data.

Nevertheless, these limits and judicial control of requests for interception and recording of telecommunication activities and for traffic and location data does not apply to Military Intelligence and Office for Foreign Relations and Information when they operate from abroad or when they use data acquired from abroad, which can be perceived as a gap in data protection.

Another deficiency of the current legislation on data protection is missing instrument for taking and securing data by the police. This gap has to be circumvented by using other instruments that are far from appropriate.

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

The fact that the Czech administrative courts do not encounter the cases arising from disputes over the processing of personal data very often (in fact these are only marginal questions) is a direct consequence of the malfunction of the Office for personal data protection.

This is not due to any deficiencies in the legislation, but due to the practice of the Office, which often causes that the cases do not even reach the administrative courts, but they are rather redirected to the civil proceedings regarding the protection of the personality rights. Good example of this practice would be the case of taking DNA samples from people in detention even in cases (for crimes such as tax fraud or non-payment of alimony etc.) where it was not necessary to record their personal data, because there was not a threat that they would commit violent crimes in future. In this case the Office remained passive, so the issue could have been solved only by the civil proceedings brought by individuals.

Another problem of the Office is the fact that it mostly imposes *extremely low fines*. As a result of this, only a fraction of its decisions is then challenged in front of the administrative courts since the fined persons usually have no general need to react or protest against these fines. Therefore the Czech Republic misses adequate case-law background that would have the potential to improve the system of the protection of personal data. In addition to this, the Office issues the so-called Positions on various subjects connected to the agenda of protection of personal data, and if the decisions of the Office (usually imposing fines for not complying with the positions) are not challenged before courts, the courts have practically no chance to actually examine the nature of these positions.

The non-functional Office would therefore have to be identified as the most emerging problem in Czech Republic, because a functioning regulator with a high-quality staff is essential for good functioning of the whole agenda.

Another issue is that we do not even have a separate authority responsible for the free access of information (sort of an "information ombudsman"), not even a joint regulator who would be responsible for both (as it is the case in some other countries) – so the cases emerging from this agenda go directly to the courts.

As a result, in the Czech Republic one agenda is not regulated at all, and even though the other one has a regulator, this does not work properly, which has a crucial influence on the (mal)functioning of the whole practice.