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

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Answers to Questionnaire: Finland

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Finland

Supreme Administrative Courts and Evolution of Right to Publicity, Privacy and Information

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

In Finland there is no specific administrative organ that is responsible for *right of access to information*.

Right of access to information is based on Section 12 para. 2 of the Constitution of Finland where it is stipulated as follows:"Documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings."

The principle of right of access to information is further enshrined in the Act on the Openness of Government Activities (621/1999 as amended). According to the said Act, official documents shall be in the public domain, unless specifically otherwise provided in the said Act or another Act. Each administrative body – be it governmental or municipal or an emanation of such a body – is obliged to give right of access to information in its possession.

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 is transposed into national legislation by Personal Data Act (523/1999 as amended). According to Personal Data Act *the Data Protection Ombudsman* provides direction and guidance on the processing of personal data and supervises the processing of such data in order to achieve the objectives of the said Act. The Data Protection Ombudsman is appointed by the Council of State for a renewable term of five years. The Office of the Data Protection Ombudsman[1] is an independent authority operating in connection with the Ministry of Justice. The total number of staff is 20.

The Data Protection Board may grant a permission for the processing of personal data or sensitive data if the conditions stipulated in Personal Data Act are fulfilled. The Data Protection Board has the competence to file orders at the request of the Data Protection Ombudsman. Such orders may concern for instance the prohibition to process of personal data or compelling the person concerned to remedy an instance of unlawful conduct or neglect. Both the Data Protection Ombudsman and the Data Protection Board may impose a threat of fine, in accordance with the Act of Threats of Fine (1113/1990), in order to reinforce the duty to provide access to data.

The penalty for a personal data offence, breaking into a personal data file and violation of the secrecy obligation is provided for in [chapter 38 of] the Penal Code (39/1889).

1 http://www.tietosuoja.fi/en/index.html

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.

The decision on the right of access to information of any administrative body may be appealed against (*administrative appeal*) in accordance with the provisions of the Administrative Judicial Procedure Act (586/1996). The judgement of the regional Administrative Court may be appealed against should the Supreme Administrative Court grant a leave to appeal.

The decisions of the Data Protection Ombudsman and the Data Protection Board concerning e.g. rectifying an error in personal data or revoking a permission for the processing of personal data are also subject to administrative appeal in accordance with the Administrative Judicial Procedure Act. The Data Protection Ombudsman may appeal against the decisions of the Data Protection Board. Appeal against judgement of the regional Administrative Court is subject to leave to appeal of the Supreme Administrative Court.

As noted above administrative procedure is applied in both cases concerning the right of access to information and the protection of personal data. Officiality principle is applied in administrative procedure. Therefore, the Court scrutinizes within the grounds on which the appeal is based *ex officio* the legal and factual circumstances of the case at hand and is thus not strictly bound by the argumentation of the appellant. The Court appreciates the legality of the decision of the administrative body on the basis of those legal and factual circumstances that were in place when the decision was initially made.

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

According to Personal Data Act, the controller[2] shall, on its own initiative or at the request of the data subject, without undue delay rectify, erase or supplement personal data contained in its personal data file being erroneous, unnecessary, incomplete or obsolete as regards the purpose of the processing.

If the controller refuses the request of a data subject of the rectification of an error, it shall issue a written reasoned certificate to this effect. The data subject may bring the matter to the attention of the Data Protection Ombudsman. The Data Protection Ombudsman may order a controller to rectify an error.

The data subject may make an administrative appeal to regional Administrative Court against the decision of the Data Protection Ombudsman refusing to rectify an error. The controller on its part may appeal against (*administrative appeal*) the decision of the Ombudsman rectifying an error. The judgement of the Administrative Court may be appealed against should the Supreme Administrative Court grant a leave to appeal.

2 According to Personal Data Act *controller* means a person, corporation, institution or foundation, or a number of them, for the use of whom a personal data file is set up and who is entitled to determine the use of the file, or who has been designated as a controller by an Act.

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.

The first piece of legislation concerning the right of access to information i.e. the Act on the Publicity of Official Documents (83/1951) was enacted in 1951. On the basis of this Act access to all public documents was guaranteed. However, internal reports of an authority were not public. Other exceptions to the publicity of official documents were based on a specific governmental Decree as well as on around 400 specific Acts and Decrees ordering documents to be secret.

Provisions on the rights of a party to have access to information were added in the Act on the Publicity of Official Documents in 1982 (682/1982). On the basis of these provisions a party was given the right to have access to internal reports of an authority and limited rights of access to secret documents. The sphere of application of the Act was extended to electronic documents in 1987 (472/1987).

The above mentioned provision (Section 12 para. 2) of the Constitution was enacted in 1995 as part of the constitutional reform of fundamental rights in Finland.

In 1999 a new piece of legislation, the Act on the Openness of Government Activities (621/1999), was enacted. Both the organizational and the instrumental sphere of application of the Act is wide. Along with authorities the Act applies to corporations, institutions, foundations and private individuals appointed for the performance of a public task when they exercise public power.

On the basis of the Act, official documents shall be in the public domain unless specifically otherwise provided in this Act or another Act. The Act thus gives right of access to information irrespective of the status of the person making the request for information. Access applies to documents that are described as being written or visual presentation and messages consisting of signs which are decipherable only by means of a computer, an audio or video recorder or some other technical device. Internal memos of an authority and such documents that are intended solely for the internal use of an authority as well as private messages are excluded from the sphere of application of the Act.

The Act contains a provision on secret official documents to which access shall not be granted. This provision contains altogether 32 subpoints including for instance the documents of the Government Foreign Affairs Committee, documents concerning military intelligence, documents containing information on decisions, measures or preparations in monetary policy, documents containing information on a private business or professional secret and documents containing information on the state of health or handicap of a person, the medical care or treatment given to him/her or information on his/her sexual behaviour or preferences. When only part of the document is secret, access shall be granted to the public part of the document if this is possible without disclosing the secret part of it.

A petitioner, an appellant and any other person whose right, interest or obligation in a matter is concerned (i.e. a party) shall have the right of access to the contents of a document which is not in the public domain provided that the contents of the document may influence or may have influenced the consideration of his matter.

According to the Act on the Publicity of Administrative Court Proceedings (381/2007), court proceedings and trial documents are public unless provided otherwise in the said Act. Information entered into cause book of the court that is necessary to identify a party or other participants in the case shall be kept secret if this is necessary because the information, together with other information of the case reveal secret information.

The Supreme Administrative Court has deliberated in hard demarcation line cases where it has been necessary to define whether a body that is not a public authority nevertheless exercises public power, in which case the Act granting access to public information applies. It has also occasionally proved difficult to define what is being meant by a document covered by the Act. The interpretation of the contents of the provision of the Act on secret documents has also been subject to a plentiful jurisprudence.

At times, the governmental level of public power has whilst striving for politically appropriate solutions refused to give access to documents that are public on the basis of the Act on the Openness of Government Activities. Such was the case regarding documents that were linked to the Greek government debt crisis. The Ministry of Finances refused to give access to those documents, but the Supreme Administrative Court quashed the decision of the Ministry and gave access to information contained in those documents with the exception of the names of certain private banks.

On the other hand, there has not been major difficulties of intepretation concerning Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and its predecessor (Council Directive 90/313/EEC). This is due to the fact that the national legislation already guaranteed and still does so similar rights of access as these directives. Demarcation line cases have occured regarding the application of either national legislation or the Council Regulation EC N:o 1999/1049.

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.

Extensive rights of access to information carry great significance for public debate and for the provision of information to the media. Such rights also guarantee that political parties whose members are not part of the Government have access to documentation that is at the disposal of those parties that hold the reigns of governmental power.

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.

There has basically not been cases where access to information has been abused or misused by the petitioners. Abuse or misuse of access to information is largely prevented by the national legislation. For instance, a bidder does not have access to information concerning the offer of his competitioner during public procurement process. A party to a proceedings does not have the right to access to the part of the documents which secrecy is at stake.

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 (5) of the Directive 95/46/EC.

- 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 has been transposed into national legislation by Personal Data Act (523/1999) among others. The defined purpose and prerequisites for processing personal data are stipulated in the said Act. The exercise of public power is not mentioned in this perspective. On the basis of the Act, the data subject has the right of access to data concerning him-/herself provided this is not restricted on the grounds similar to those of Article 13 of the Directive. Regarding such secret information, the data subject has the right to ask the Data Protection Ombudsman to verify the data contained in the personal data file. The decision of the Data Protection Ombudsman may be appealed against. Appeal against judgement of the Administrative Court is subject to leave to appeal of the Supreme Administrative Court.

  Processing of personal data is also covered by the Act on processing of personal data by the police. The right of access to personal data is restricted in a similar way as is explained in the paragraph above. The legal remedies are also alike.

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.

There has not been striking cases where actual problems from processing of personal data has arisen lately.

However, quite recently there has been two cases where data protection concerning internal e-mails has failed. The first case concerned the Ministry for Foreign Affairs and the second the Council of State. In the case concerning the Ministry for Foreign Affairs the governmental authorities found out that internal e-mail messages of civil servants of the Ministry had been pried for several years by a representative of foreign power. In the second case secret, politically sensitive information contained in private e-mail messages of among others the Prime Minister were leaked to the press.