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: Latvia

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

(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.

Right to information are mainly protected by the Constitution of the Republic of Latvia and the Freedom of Information Law, and norms of international law and human rights.

Information is provided by a public or municipal institution (tax administration, social service, construction department, court, etc.), to which an individual has addresses the information request. The institution may provide information also by its own initiative.

If the addressee does not receive necessary information at all or believes that it was not provided in full, the individual may submit a complaint to the superior institution of particular institution. If the superior institution rejects the complaint or does not respond at all, the individual may submit an application to the administrative court. If the particular institution, in accordance with legal provisions, does not have superior institution, the individual must submit the complaint (application) directly to the administrative court.

Thus, there is no single supervisory institution in Latvia, which would deal with issues related to accessibility of information. It is carried out by each particular institution information is requested from.

Protection of personal data is mainly guaranteed by the Constitution of the Republic of Latvia, Personal Data Protection Law (further in text – PDPL) and other national legal provisions, and norms of international law and human rights.

Comparing to field of accessibility of information, there is an institution in field of personal data protection, which supervises protection of personal data. It is Data State Inspectorate, which is direct administration institution supervised by the Ministry of Justice.

The foregoing Inspectorate:

1) Supervises processing and protection of personal data in accordance with legal provisions concerning protection of personal data, processing of biometrical data, research of human genome and extrajudicial recovery of debts;

2) If data subject requests information about him/her, to ensure transfer of the request to the European Union's Judicial Cooperation Unit (*Eurojust*);

3) To represent the Republic of Latvia in unified supervisory institution of the Schengen Information System, unified supervisory institution of the Europol, in the Board of Appeal of the Europol, and in the unified supervisory institution of the Customs Information System, in the

work group on Article 29 of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and in the Consultative Committee and the Convention of the European Council For The Protection Of Individuals With Regard To Automatic Processing of Personal Data

The Data State Inspectorate may issue administrative acts or to perform factual action. Initially, individuals may challenge administrative acts issued by or factual action performed by officials of the Inspectorate by submitting an application of challenge to the director of the Inspectorate as to the superior instance. Administrative act issued by or factual action performed by, or decision on challenged administrative act or factual action adopted by the director of the Inspectorate, in turn, may be appealed in the administrative court.

The Inspectorate may also impose administrative fine in accordance with the Latvian Code of Administrative Violations, for issues falling under its competence, for example, for processing of personal data without registration stipulated by the law or without registration of the personal data protection specialist in the Inspectorate, or for non-accreditation individuals subjected to such registration in accordance with the law, in the Inspectorate, etc..

Individuals may appeal against decisions of the Data State Inspectorate adopted in cases on administrative violations in the court of general jurisdiction, and not in the administrative court. Foregoing separation of court competences is justified by the fact that cases on administrative violations, in their essence, are more similar to criminal cases rather than cases on administrative procedure, thus cases on administrative violations are more likely to be reviewed by courts of general jurisdiction, which also review criminal cases.

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.

In accordance with provisions of the Freedom of Information Law, observing the principle of good governance, the institution ensures access to unclassified information of certain type. Unclassified information is also provided upon request of an individual. Such information is provided to anyone, who wishes to receive it, observing equality of individuals in acquisition of information. The demander does not have to justify his or her interest in unclassified information in some particular way, and he or she may not be prohibited such information because it does not concern him or her.

The person addresses information request to the institution, which possesses particular information. The person may request information in writing, orally or by electronic means. In information request filed by the individual complies with requirements of the law, the institution provides information. If the institution refuses to provide information requested in writing, it must point out in its written refusal, what is the reason request is refused fully or in part, and where and in what period of time it is possible to challenge or to appeal against this refusal.

If requested information is not at disposal of the institution, the institution gives reference on location of the information and, if it is known to the institution, it indicates procedure of access to this information.

If information, which is requested from the institution, is available on the Internet free of charge, the institution may refuse to issue requested information, pointing out address of the web page, where this information is available, except for cases, when the demander has pointed out that there is no opportunity to obtain this information on the Internet, due to his or her legal status, state of health or other justified reasons.

The institution provides information in 7-30 days, depending on complexity or necessity for additional processing of information.

The individual may appeal against refusal of the institution to provide information or to execute information request, and factual action, which was expressed as non-provision or inadequate provision of information, to superior institution under procedure stipulated in the Administrative Procedure Law, namely, in one month. The superior institution reviews complaint of the individual and adopts decision in one month.

The person may address the administrative court on decision of the institution challenged or if the institution does not provide response to challenging application of the individual.

Thus, only when extrajudicial procedure of review is passed, the individual may submit an application to the administrative court.

Administrative courts are not kind of courts of general jurisdictions; those are specialised courts. Administrative courts consist of 5 regional court houses in largest cities (the first instance), one regional court (the appellate instance), and the Department of Administrative Cases of the Supreme Court (the cassation instance).

Ordinary applications have been reviewed in a court in all three instances. In cases on right to information, the Freedom of Information Law, in turn, includes two-level system of appeal (the first instance and the cassation instance). Historically, general procedure of appeal in three instances was determined to these cases; however, the legislator recognised that cases of this category usually are not complex. So, in 2009, litigation procedure in two instances was determined in the Freedom of Information Law.

Thus, currently applications in these cases are heard on the merits by the Administrative district court. The judgement of the district court may be appealed under cassation procedure to the Department of Administrative Cases of the Supreme Court. The cassation instance court does not review the case once more on the merits, as the appellate instance court, but verifies whether the first instance court has not breached norms of substantive or procedural law. In the cassation instance court, unlike in the first instance court, review of cases is mainly held under written procedure. However, at the discretion of the court, which is founded on objective circumstances in the case, the court may also determine review of the case in court hearing.

State fee of 28 *Euros* must be paid for submission of application to the Administrative district court, same as in other cases. Security deposit of 71 *Euros* must be paid for submission of

cassation complaint. If a person is granted status of a low-income person or there are other reasons, why the individual is unable to pay state fee/security deposit, the court may release the person from the obligation to pay the fee or the deposit.

In cases on accessibility of information to persons, individuals, same as in other administrative cases, may claim reimbursement of pecuniary losses and non-pecuniary (personal, moral) injury, if it is recognised that the institution acted unlawfully.

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

The Supreme Court reviews cases as the cassation instance court, verifies lawfulness and justification of judgement of the appellate instance court, namely, whether the appellate instance court observed provisions of substantive and procedural law.

Having received the cassation complaint, the Supreme Court initially assesses whether cassation proceedings must be initiated at all. Reasons for refusal to initiate cassation proceedings are stipulated in the Administrative Procedure Law. The Supreme Court refuses to initiate cassation proceedings if the cassation complaint does not comply with formal requirements stipulated by the law, and if:

1) In the issue on violations of particular provisions of substantive or procedural law regarding application and interpretation of these legal provisions, case-law has been developed in judgements of the Department of Administrative Cases of the Supreme Court in similar cases, and judgement appealed complies with it;

2) There are no doubts regarding lawfulness of judgement appealed, and case being tried has no importance in development of case-law.

When refusing to initiate cassation proceedings, the Supreme Court provides sufficiently expanded justification.

Rulings (decisions and judgements) of the highest court instance are final and may not be appealed. Individuals have no right following from the law, for example, to submit constitutional complaint to the Constitutional Court against the ruling of the Administrative Court.

If,, when reviewing the case, the Supreme Court believes that the legal provision does not comply with the Constitution or provision (act) of international law, it stays proceedings in the case and submits justified application to the Constitutional Court. After decision or judgement of the Constitutional Court becomes effective, the court resumes proceedings in the case, and grounds on opinion of the Constitutional Court in further proceedings. Thus, the Supreme Court has mechanisms to verify constitutionality of particular legal norms, inter alia, in field of data protection, thus ensuring effective protection of individual's rights.

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.

Constitutional consolidation of right to information had begun in the Declaration of Independence of 4 May 1990 already, which guaranteed rights and freedoms conforming to generally recognised norms of international human rights to individuals. Foregoing regulation must be reviewed in connection with the second declaration on accession of Latvia to documents of international law in human rights issues, which was adopted on the same day. The range of documents, succeeded by Latvia, comprised also International Covenant on Civil and Political Rights, which included guarantees concerning freedom of speech, and the European Convention on Human Rights. These two legal acts determined standard of human rights binding to Latvian institutions and courts. Later it was supplemented by the constitutional law "On Rights and Obligations of a Person and a Citizen" of 10 December 1991. At the same time, it must be pointed out that, being aware of important significance of these rights in democratic society, discussions on necessity to ensure foregoing rights to population of Latvia arouse in the Supreme Council (i.e., the Parliament) of Latvia on the eve of restoration of independence in May 1990 already.

On 15 October 1998, the Constitution of the Republic of Latvia, in turn, was supplemented by new chapter – Fundamental human rights. This supplementation was particularly important event from the point of view of constitutional law, as regulations on fundamental human rights as from that moment were included in hierarchically superior normative act – the State Constitution.

Immediately after that, on 29 October 1998, Freedom of Information Law was adopted, which is effective currently. Initial wording of the law already ensured rights of individuals to submit a complaint to the head of an institution or to the superior institution on refusal to provide information, on amount of payment requested or on any other decision, including refusal to execute the request grounded by incorrect description of requested information. The person might, in turn, to submit application to a court regarding action of an institution.

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.

Importance of free access to information is expressed in different ways. First, access of information to society, inter alia, non-governmental organisations (further - NGOs) gives an opportunity to control public administration, inter alia, application of finances and procedure of decision-making. Second, state of awareness, which may be achieved by free access to information, creates motivation amongst the society to co-operate in state administration. Third, free access to information, inter alia, opportunity to make information requests, is important additional tool for students in their study processes, in particular, to students of law and political sciences, who use this information for elaboration of scientific research or as supplement to fundamental information acquired in studies.

Within framework of this questionnaire, the Supreme Court has contacted NGOs in Latvia. It follows from information provided that access to information is topical and socially important to population of Latvia. For example, the association filed collective petition to the Parliament, asking to make information on real owners of offshore companies available, or signatures are collected among people for the document, which approves correctness of expenditures of the Parliament, regular publishing thereof, and transparency (open procedure) of privatisation of state companies of strategic importance. By implementing different projects, NGOs actively work on strengthening of transparency in public administration, inter alia, there are projects, which:

1) Urge the legislator to disclose lobbyists of draft laws, inter alia, individuals or organisations, which helped to elaborate draft laws,

2) Urge to publish agreements concluded in public sector and list of documents granted status of classified information by institution, on web sites of institutions,

3) Urge not to anonymize names of persons convicted for corruption etc., in judgements, which are published on the Internet.

Latvia perceives free access to information just the same as any other democratic state.

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.

Free access to information rights are mainly used in good faith. There are only few exceptions – for example, in relation to the State Police one can mention two persons, who constantly and repeatedly addressed both the Ministry of Interior and the State Police with information requests regarding work of the State Police. Malice existing in actions of these two individuals is approved by number and frequency of requests filed – since 1 January 2012 until today 62 information requests filed by these individuals have been registered in the Ministry of Interior, 154 requests – in the State Police, and 128 requests – in Regional Department of the State Police.

The Ministry of Justice pointed out that there are cases, when a person addresses the Ministry, submitting a request, which, in fact, is not related to essence of the Freedom of Information Law. For example, the individual asks for legal advice, inter alia, how an application to the court should be written, or where one may find an interpreter, or how is it possible to express no-confidence to the municipality council, etc. There are also cases, when the person submits information request to the Ministry, to obtain information regarding documents of a case the person is a party to, although the individual may him or herself to get acquainted with the case file in accordance with particular procedural law. There are cases, when the person repeatedly addresses the ministry (initiates voluminous correspondence), thus wishing to commence a discussion regarding previously provided information or explanation, although his or her request, in fact, is executed. There were also cases, when institutions refused information request, as it demands performing of disproportionately voluminous work, for example, to process voluminous information and to make summaries thereof. In this case, there is an alternative – the individual is entitled to get acquainted with this information on the spot in the institution.

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.

Article 7(e) is enveloped in Section 7(5) of the PDPL, which stipulates that processing of personal data is permitted, if the processing of data is necessary in order to ensure that the public interest is complied with, or to exercise functions of public authority for whose performance the personal data have been transferred to an administrator or transmitted to a third party.

Section 7(5) of the PDPL comprises two situations, and those refer both to public and private field. First, it comprises situations, when the administrator is public data subject or he/she/it is obliged to implement public interest, and processing of personal data is necessary to exercise functions of public authority or public interest. For example, an institution, which ensures registration of tax payments and tax payers, collection of taxes, fees and other mandatory payments stipulated by the state, or professional association, such as Latvian Council of Sworn Advocates (its institution), which reviews disciplinary cases of advocates, and municipal institution, which takes care of education of population. Second, it comprises situations, when the administrator is not public law subject, but the administrator discloses (upon request or by his/her/its own initiative) personal data to a third party, which is public law subject. For example, an institution, which is authorised to investigate criminal offences, asks the administrator to cooperate in current investigation, and, if the administrator, knowing that the crime was committed, by his/her/its own initiative discloses personal data to the institution, which carries out investigation of the crime.

Legal ground of processing of sensitive personal data is stated in Section 11 of the PDPL (Article 8(4) of the Directive), which envisages cases, when processing of sensitive personal data is allowed. PDPL does not provide that processing of sensitive personal data may be permitted upon decision of supervisory institution (the Data State Inspectorate), as it is mentioned in Article 8(4) of the Directive.

Article 8(5) of the Directive is enveloped in Section 12 of the PDPL, which stipulates that personal data, which relate to the criminal offences, convictions in criminal cases and cases on administrative violations, as well as to court ruling or case file materials, may be processed only by persons laid down in the law and in the cases stipulated by the law. Thus, such information may be processed by institutions, which are instructed to perform this task by the law, for example, the State Police, the Prosecutor's Office.

In accordance with the Punishment Register Law, the Punishment Register is a state information system, in the use of which the circulation of the information necessary for the determination of administrative liability and for criminal proceedings is ensured. The administrator of the Register is the Information Centre of the Ministry of the Interior (Sentence Two Article 8(5) of the Directive).

The Data State Inspectorate responded that it did not possess list of institutions, which benefit from the exceptions laid down in Art. 7(e), Art. 8(4) and 8(5) of the Directive 95/46/EC, at its disposal. The Supreme Court also does not have such list.

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.

When contacting the Data State Inspectorate, it was specified that the most important problems include:

1. Supervision of personal data processing and protection, i.e., mutual competence of institutions and interaction thereof (i.e., Data State Inspectorate (Section 29(1) of the PDPL), the Prosecutor's Office (Section 2(1) of the Law on the Prosecutor's Office));

2. Development of different unified large-scale state information systems in the foregoing fields;

3. Informing data subjects on personal data processing performed;

4. Period of storing of personal data, assessment and regular control of corresponding period of storing of personal data;

5. Observance of principle of necessity and proportionality in law enforcement;

6. Transfer of personal data outside the EU and EEA;

7. Lack of definition of the term "national security", which is necessary to precisely ensure implementation of requirements stipulated by the Directive, or to precisely ensure implementation of principles of personal data processing and protection;

8. Disclosure of personal data related to foregoing fields, especially on the Internet.