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## Seminar organized by Supreme Administrative Court of the Czech Republic and ACA-Europe

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

Brno, 18 May 2015

## Answers to Questionnaire: Spain

Seminar co-funded by the “Justice” programme of the European Union

# 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.**

**This question is aimed to provide for a general overview of institutions that are directly involved in the protection of personal data and free access to information. In particular, we are interested to learn about the nature of such institutions (whether they are administrative, judicial or other bodies), about their roles and also about eventual concentrations of their competences. This is namely to distinguish between countries where powers in both areas are jointly administered by institutions such as information commissioners and countries where they are treated distinctively.**

Answer:

**a) Free access to information.**

Free access of citizens to public information is regulated in Spain, as a general rule, by the Law 19/2013 of December 9th (see the response to the fourth question).
Access to the information contained in the documents of administrative proceedings that are being conducted is regulated by the Administrative Procedure Act and the information can only be requested by the parties in the procedure.

There are also special regulations for electronic access of citizens to public services (Law 11/2007); access to information on environmental matters (Law 27/2006 of July 18); in local government (Law 27/2013, of December 27th, rationalization and sustainability of local government), and a special publicity and access to information regime in judicial proceedings.

An individual who requests information must address the administrative body that has that information and, in order to appeal against the decision of the administrative body, he may lodge a direct appeal before the Court or he can claim administrative review before the "Council of Transparency and Good Governance".

The Council of Transparency and Good Governance is a public administrative body with legal personality having "autonomy and independence". It is under the Ministry of Finance and Public Administration.

It consists of a Deputy, a Senator, a representative of the Court of Auditors, a representative of the Ombudsman, a representative of the Data Protection Agency, a representative of the Ministry and a representative of the independent authority on fiscal responsibility.

The Chairman is appointed by the Government for a period of five years. He is proposed by the Ministry of Finance and Public Administration, after succeeding in a hearing before the Committee of the House of Representatives. His appointment must be ratified by Congress.

The Transparency Council has the primary role in ensuring the right of access to information hears claims presented and answers queries. It may adopt criteria of uniform interpretation.

Appeals against the Transparency Council resolutions can be brought before the administrative courts.

**b) Protection of Personal Data**

Individuals who consider violated their right to privacy can request protection before the Data Protection Agency.
There is a Data Protection Agency at a national level and there may be others in the Autonomous Communities.
The Data Protection Agency is a public entity with legal personality, which acts independently of the government and has its own budget.
It consists of a Director appointed by the Government for a period of four years which acts independently and does not receive instruction from the Government. There is a consultative body which advises the Director. It comprises a Deputy, a Senator, and a government representative, a representative of the Local Government, a representative of consumers and several experts more.

The functions of the Agency are, among others, to deal with complaints filed by citizens, require responsible and processors of personal data to take corrective action and impose sanctions for breach of data protection legislation.

The resolutions of the Data Protection Agency may be appealed to the administrative courts; also the National High Court is competent and responsible for examining and initiating judicial procedures.

**c) Relations between the two.**

There is a close relationship between the two subjects, as one of the limits to the right to information is the protection of personal data.

The Transparency Council and the Spanish Data Protection Agency act independently and their decisions are based on different criteria.

But, since the decision to grant or deny access to information may be challenged (in its sole discretion) in administrative proceedings, conflicts may occur between the Board of Transparency and the data protection safeguarding of the Spanish Data Protection Agency because of differences in interpretation of both agencies to ponder from different perspectives, transparency and data protection. To try to solve this problem, it is stated that one of the members of the Board of Transparency is a representative of the Data Protection Agency, but it does not seem that this measure is sufficient to avoid that conflicts may occur.

On the other hand, the decisions of both bodies may be appealed before the administrative courts but when the proceedings of these claims correspond to different jurisdictional courts, conflicting interpretations may occur.

**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 is (apart from INSPIRE Directive, access to environmental information and re-use of public sector information) not harmonised among the EU Member States, so the answer to this question should give basic information on the very nature and functioning of the administrative and court procedure. Answers provided upon this question will be used for very general comparison of what we expect can be of highly diverse nature among the respective jurisdictions.**

Answer:

1. Administrative procedure.

The general scheme is regulated by Act 19/2013.
The citizen who requests information should be addressed to the administrative body or entity holding the information.

The application must identify the applicant, the information requested and a contact address (preferably electronic). The applicant is not required to justify he/she requests it but will state the reasons why he/she requests it.

The administrative body will process the request. If the information concerns identified third parties, they will be granted a period of 15 days to make submissions.
The right of access may be limited. The Act lays down general limits and other particularly relating to data protection.

General Limits: Access to information may be limited when it causes harm to national security, defense, foreign affairs, public security, the prevention, investigation and punishment of criminal or administrative illicit, privilege or property intellectual, confidentiality or secrecy in decision-making procedures, etc.
Limits relating to the protection of personal data: If the requested information contains personal data, it will be possible to deny or limit the information with the following criteria:

a) In the case that the requested information contains sensitive data (relating to ideology, union affiliation, religion and belief), access to this information will only be granted with the express written consent of the subject concerned, unless the person affected has published his/her assent.

b) If the information contains data relating to racial origin, sexual health or relating to the commission of criminal or administrative offences, access can only be authorized when there is a normative or ruling so providing or else there is written express consent the affected.

c)When the data are merely identifying, related to the organization, operation or public activity of the organ, access to information will be granted.

d) If the information does not contain sensitive data, it will be granted by weighing the public interest in disclosure of information access and the rights of those affected whose data appears in the requested information, including the fundamental right to personal nature data protection.

The application of these limits must be justified by the administrative body and must be proportionate in relation to the object and purpose of protection, considering the circumstances and interests at stake, so a balance of interests is required at stake. Thus requires what called "test of harm" (harm test) is aiming at verifying the public interest in disclosure and the possible damage it can cause publicity to the

rights and interests protected by such materials. To reconcile these interests it is possible to grant partial access with dissociation of existing data (not allow the identification of an affected or interested).

The decision on granting or denying the requested information and, therefore, the trial weighting belongs not to the organism having the information in its possession but to the organism that created the information or generated as a whole or a major part of it (art. 19.4 of LT).

The administrative body shall decide whether to grant or deny the requested information. Decisions denying access to information, or to grant partial access shall be justified.
There will be a term of one month to resolve the request, which can be extended to another month in exceptional cases (volume or complexity of information). If it is not resolved within that period, it means request is rejected.

2º Judicial Proceedings.

The resolutions of the administrative body can be appealed to the administrative courts.

If the city decides to complain to the "Transparency Council", the decision of this body may be appealed to the administrative courts.

The proceedings before administrative tribunals present no specialty when compared with the remaining judicial proceedings in any other matter. Precautionary measures can be requested in order to guarantee the result of the final decision taken.

The court to hear the appeal will be different depending on the administrative body that issued the decision appealed. In some cases, the ruling will take place in Unipersonal Courts, other in High Courts of Justice of the Autonomous Communities (Provincial Courts).

Decisions of Unipersonal Courts may be appealed to the High Court.

The Supreme Court only hears appeals of the High Courts of the Autonomous Provincial Communities.

It is not possible to appeal the decisions to the Constitutional Court, as the right of access to information is not regulated as a fundamental right.

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

**Unlike the previous question, the protection of personal data is to a large extent harmonised by the EU law. Consequently, the answer to this question should particularly explain the procedural options in this agenda that are available at your instance. Apart from explaining the procedure, please give also eventual note as to whether and eventually which of decisions of your instance in this agenda are final (i.e. whether it is possible to appeal them further or to challenge them in your jurisdiction by e.g. a constitutional complaint or a similar instrument).**

Answer:

Individuals who believe that another person or entity (including administrations and public authorities) has violated their right to privacy can seek assistance from the Data Protection Agency in two different ways:

- Infringement Procedure. The Agency is requested to start disciplinary proceedings and impose a sanction for the subject responsible, usually a fine (normally of very high amount). If the author is a public administration, no penalty will be imposed but measures will be taken to cease the infringement and its effects are corrected.

- Procedure for protection. The Agency is requested to star this procedure that will safeguard the individual's rights. This procedure applies when individuals are denied the right to oppose, access or deletion of personal data. The Agency shall adopt the necessary corrective measures or may reject the request.

  The deadline to solve is 6 months from the entry in the Data Protection Agency of the claim, if within that period estimated resolution is not issued, the complaint shall be deemed to have been accepted. If the claim is sustained, the interested party will be requested to comply with his/her petition.

  The decisions of the Data Protection Agency, in both procedures, can be appealed to the court within two months. The competence to solve these cases corresponds to the Audiencia Nacional (Collegiate court which has jurisdiction throughout the national territory, National High Court).
  Judgments of the National High Court, in cases for "Procedure for Protection" should be brought to appeal before the Supreme Court. No appeal is allowed in disciplinary proceedings because sanctions do not exceed the quantitative limit fixed for access to the Supreme Court (the maximum penalty is 600,000 €).
  Judgments of the Courts, including the Supreme Court, should be appealed to the Constitutional Court because data protection is a fundamental right.

**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 main aim of this question is to compare the historical development of free access to information with regards to the key actors. In particular, we would like to compare the participating jurisdictions namely as to what extent the progress was driven rather by proactive approach of administrative bodies, by legislative changes, by the activity of courts or by other factors (e.g. by the pressure of NGOs, international organisations etc.)**

Answer:

1 The Spanish Constitution establishes in the art. 105. b) that the law will regulate "access of citizens to administrative files and records, except as it affects the security and defense of the State, the investigation of crimes and the privacy of individuals" ("The Law shall regulate: The access of citizens to administrative files and records, excepts as they may concern the security and defense of the State, the investigation of crimes and the privacy of individuals ").

Access to information is a fundamental right but a right whose regulation rests with the legislature. This means that the legislator has a wide margin for regulation and the injury of this right can not be tutored before the Constitutional Court but only before the ordinary, except that the denial of information affects other fundamental rights.

2 For a long time the general regulation on access of citizens to information was limited, and the Administrative Procedure Act (art. 37 of Law 30/1992) was regulated. It was only allowed

to request information from one or more documents regarding administrative and administrative procedures completed at the date of the application dossier.
There were many other specific regulation and public information procedures (public works contracts etc) but not a general normative regulating the free access of citizens to public information.

3º The recently approved Law 19/2013 of December 9 entitled "Transparency, access to public information and good government" establishes a new, much larger regulation of the right of citizens to public information. This Law came into force on December 10, 2014.
This Law is based on two pillars: to increase transparency of public activity (active advertising) and to ensure access of citizens to information.
It affects all public authorities and public bodies (autonomous agencies, state agencies, public entities etc.) is also imposed to universities, corporations with public participation in the share capital exceeding 50% and foundations of the public sector. This obligation applies, with certain limitations, to political parties, trade unions and employers organizations and private entities that receive certain public assistance.

The Monarchy, the Congress, the Senate, the Constitutional Court, the Bank of Spain, the State Council, the Ombudsman, the Court of Auditors and the General Council of the Judiciary subject only "in relation to their activities subject to administrative law ". The judiciary and, therefore, the judicial activity is excluded from the provisions of this Act and is governed by its own provisions.
a) Transparency in government activity. In applying the principles "Open Data" and "Open Government", the rule imposes duties of publicity, without prior request of the citizen, (which is called "active advertising")

b) The right of access to information.

This right is regulated more broadly allowing the right of access to public information to "everyone", whether or not they are interested and for all information in its possession, including not only the information that has been prepared by that organism but also "the information acquired in the exercise of their functions".
The access to public information becomes thus the general rule and, in principle, operates on all administrative documents, limiting such access to protect the exercise of public functions or the rights or interests more worthy of protection.

Current regulation in Spain is the result of greater social and political awareness of the importance of public transparency and citizen access to information, motivated by corruption cases that have transcended the public. The legal change has occurred in the adoption of Law 19/2013 of December 9 but possibly it will take longer for it to be reflected in the functioning of the government. However, some institutions (ex. the Monarchy, the General Council of the Judiciary and some ministries) are creating websites reporting on its activities, expenses etc...

It is too early to assess the real scope of the right of access to information and the degree of compliance or resistance of the government.

**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.**
**This question is not aimed to provide for any precise or structured analysis. Its purpose is rather to give basic orientation as to how free access to information is perceived in different**

**jurisdictions. Extreme positions between which we expect to receive most of answers might include utter unimportance of legal backing of free access to information (e.g. due to the fact that public sector bodies act totally transparently even without any legal need or other incentives). Another extreme might include jurisdictions where the judicial enforcement of access rights acts as most important defence against corruption, inactivity, discrimination etc.**

Answer:

The increased transparency of public authorities and the possibility of citizens to access information allows greater control of public activity and greater citizen participation in public affairs and, therefore, more democratic and better informed society.
The Spanish society perceives transparency as a positive step, especially in recent years that have experienced different cases of misuse of public funds. These scandals have generated significant social unrest; social perception of the political class is not good and aroused new political parties attempting to exploit this discontent to introduce institutional and social changes. This situation has prompted the two main political parties and many public institutions (including the Crown) have realized the importance of transparency of public action and the need for greater control, including citizens, which has allowed the adoption of the Law 19/2013 of December 9 and continuing reference to transparency in their political speeches.

There is a major concern of the government to be transparent but possibly it requires longer time and the intervention of the courts to make this right be consolidated in Spain. The involvement of both criminal and administrative courts in Spain has been decisive in the fight against corruption

**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.**
**Similarly to the previous case, this answer should not provide for any detailed empirical analysis, but rather just for basic orientation as to whether and to what extent free access rights can be understood obtrusive by public sector bodies. This question is based on the assumption that some legal instruments that provide for free access to information might also represent a useful tool for notorious (or even pathological) petitioners.**

Answer:

At the level of doctrine, many questions have been raised discussing whether it is good an excessively wide transparency in public life, as it is understood that there is always a risk challengin the proper functioning of such agencies or institutions. It will be necessary therefore to find a balance between the rights and interests involved.
From another perspective, abuse in the exercise of this right by a citizen or associations can pose problems and eventually become a mechanism for obstructing the proper functioning of the public service.

The Law 19/2013 of December 9 allows the rejection of the request for access to information in certain circumstances, including when and after the request is manifestly unfair repetitive or is not justified by the purpose of transparency.
The question that arises is: In which situations can we determine abuse is produced? Should we consider all number of applications even when it could collapse the normal functioning of the administration? Should requests that require a disproportionate effort to search taken into consideration ?.

**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.**

**Armed forces as well as intelligence agencies are among institutions that can benefit from the above exceptions, whereas the extent and regime of their powers to process personal data are not harmonised by the EU legislation. The question uses the indication "security institutions" namely in the sense of intelligence and secret services or various security agencies and authorities (e.g. those that administer the agenda of classified information). "Law enforcement" might include institutions that, apart from protection of general public order act in criminal or similar proceedings such as police forces (federal, local, municipal etc.), gendarmerie or public prosecution services. Defence institutions shall include the armed forces whose primary aim is to defend the sovereignty of respective jurisdictions (e.g. the army, air force, navy etc.) The purpose of this question is not to provide for any comprehensive or exhaustive structure of aforementioned institutions but rather to generally compare national rules that outline their most important powers to gather and process personal data.**

Answer:

The Spanish Data Protection Act (Organic Law 15/1999 of 13 December) regulates various exceptional cases related to the Security Forces of the State.

Primarily, this Law does not apply to files relating to classified materials or files for the investigation of terrorism and serious forms of organized crime (art. 2. 2. b and c)

The art. 22 provides that the collection and processing of data by the Security Forces of the State can be done without the consent of affected in case it is necessary to prevent a real danger to public safety or by reasons of prosecution of criminal offences. They will collect the required data which will be cancelled when they are no longer needed.

The art. 23 that the access can be declined, rectification or cancellation of the data contained in the files of the police and security forces of the State, when there is danger for State defence or public safety.

Exceptions to the exercise of these rights are also established in relation to the files of the Treasury, in order not to hinder actions for compliance with tax obligations.

And finally the affected will not need to be informed of his/her data collection when this privacy prevents or substantially restricts the control functions of National Defence.

**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.**

**This question aims to point to particular problematic issues that arise in your jurisdiction from processing of personal data by security, law enforcement and/or defence institutions, such as data retention, wiretapping, profiling etc. Examples might include cases decided by your**

**supreme administrative instance or by other judicial bodies as well as issues raised in political discourse.**

Answer:

Most problems related to the protection of personal data and State security have been raised concerning the right of access and deletion of personal data contained in police records and the opposition to the use of images captured by cameras installed on public roads.

The Spanish Constitutional Court in the judgement STC 292/2000, of 30 November, stated that the restriction of rights to access and cancellation of existing personal data in administrative files can not be limited arguing public interest in sanctioning administrative violations.

In the judgment of the National High Court of 26 June 2012 (Appeal: 1/2011), concerning the cancellation of existing police records in different police files, it was considered that those affected are entitled, with certain limits, to know the data contained about them in the police files, the origin and purpose for what the files are kept, and to request their cancellation, which must be exercised in relation to specific records that meet certain conditions (archived, or criminal judgment of not guilty etc. .), and to know which specific data exist and where they have been sent. These rights cannot be unreasonable withheld or denied using generic application forms or printed documents which do not make guarantee to assess the reasons supporting the possible limitations.

In the judgment of the National High Court of 20 April 2012 (Appeal: 791/2010) the court raised the problem of the use of the image recorded by surveillance cameras from a gas station in a disciplinary administrative record. The judgment found that surveillance cameras were installed at a gas station to prevent the commission of crimes or violations and to be able to identify those responsible subjects. There were advertising signs indicating that so capturing images of people passing through the place was appropriate and proportionate to the aim pursued. And it was possible to use these images as evidence of an administrative offence.

The judgment of the National High Court of 28 March 2011 (Appeal: 21/2010) stated that the right to access and cancel personal data that is in the files of the Security Forces of the State can be denied when they are related with the investigation of alleged crimes, but this limitation for safety reasons needs to be clearly specified, a refusal not justified to provide this information will not suffice to limit access. But if the data have already been sent to the judicial authority, and are part of criminal proceedings, it is the responsibility of the trial judge to determine the right to access or to deny the access to particular documents comprising the judicial investigation of certain facts and the form and the precautions to be adopted