

Working group meeting « Independence and Efficiency »

**“Access to information held by public institutions
and processing of (secret) informations in administrative
courts procedure”**

QUESTIONNAIRE

15 and 16 June, 2017

Bundesverwaltungsgericht - Federal Administrative Court,

Simsonplatz 1, 04107 Leipzig, Germany

A. Access to information held by public authorities :

The law of the European Union has a twofold approach with regard to access to public sector information: addressees are the Member States on the one and the EU institutions on the other hand. The later are addressed by art. 42 of the Fundamental Rights Charter and art. 15 par. 3 TFEU, which establish a right to access to documents of the European Parliament, the Council and the Commission as well as of Union's institutions, bodies, offices and agencies subject to the principles and the conditions defined in accordance with this paragraph. Hence regulation 1049/2001/EC of 30 May 2001 provides for public access to European Parliament, Council and Commission documents.

In the law of the administration of the EU (by Member State institutions) only sectorial limited provisions exist. The principle of conferral under art. 5 par. 1 and 2 TEU prohibits to establish a comprehensive and coherent legal framework for the national right to freedom of information. Hence secondary law provides only for public access to environmental information under directive 2003/4/EC and for the re-use of public sector information under directive 2003/98/EC of 17 November 2003, amended by directive 2013/37/EU of 26 June 2013. Both are implemented under the framework of the directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Moreover Directive 2007/2/EC of 14 March 2007 establishes an Infrastructure for Spatial Information in the EU (INSPIRE).

QUESTIONS

1. **Whether the Members States exceed the minimum standard of the right of freedom of information under the secondary EU law ? If so, to what extend? In which fields?**

There are no major differences.

2. **How broad is an access to information held by public authorities under national law established by national law?**

1. **Who can apply for an access to information (only natural or also judicial persons, private or also public – e. g. municipalities when performing matters of self-administration?)**

All natural and legal persons, private and public if they state and prove that they have an interest. For environmental information there is no need to state an interest.

2. **Does everybody has access to any kind of information?**

i) The principle of transparency of the public administration is protected by the Constitution (combined interpretation of various articles).

ii) According to article 5 of the Code of Administrative Procedure (law 2960/1999), everybody has the right of access to public documents. Moreover, everybody who can prove a specific legitimate interest has access to private documents held by public authorities. The provisions of the law 2472/1997 «Protection of Individuals with regard to the Processing of Personal Data » must be respected. Presidential Decree

28/2015 codifies all existing legislation concerning access to public documents and elements and expands this right to documents and elements held by all entities that constitute public sector. Most of the existing legislation consists of legal texts that implement EC directives but also pre-existing national provisions (e.g. law 2960/1999). The above P.D. states that this right is exercised by filling a written application (directive 2003/98/EC). Also, it refines the concepts of public document and public element.

3. Which institutions, authorities and legal bodies are obliged to provide access ?

All authorities that constitute the public sector.

4. What are the limits and exceptions?

Exceptions :

- i. *P.D. 25/2015 art. 7 (codifies art. 3 law 3448/2006, as it was amended by art. 11 par. 1 law 3613/2007 and art. 3 law 4305/2014). Same (with some adjustments) as art. 1 of the directive 2003/98/EC. Excludes documents protected by tax privacy. Laws on security and privacy must be respected.*
- ii. *According to art. 1 par. 3 of the same P.D., there is no right of access when the document concerns the private or family life of a third person or in case security and privacy rights protected by law are being infringed. Also the public authority can deny access to documents concerning discussions of the Council of Ministers or when the fulfilment of the right can hinder considerably the investigation of judicial, administrative, police and military authorities in case of a crime or an administrative offence. According to par. 4 the right is exercised in accordance with property or intellectual rights of third parties.*
- iii. *According to art. 21 of the above P.D. (codifies ar. 2 law 2472/1997 «Protection of Individuals with regard to the Processing of Personal Data »)*

“Personal Data” shall mean every information referring to the subject of the data. Statistical or generic data from which the subjects cannot be identified are considered “personal data”

"Sensitive data" shall mean the data referring to racial or ethnic origin, political opinions, religious or philosophical beliefs, membership to a trade-union, health, social welfare and sexual life, criminal charges or convictions as well as membership to societies dealing with the aforementioned areas.

Sensitive data can be disclosed after an order of the Public Prosecutor.

5. Can one claim for an access before the court?

Yes, an Application for annulment before the Council of State.

6. Depending on the state of implementation, which are the main topics on access to public sector information discussed in the jurisprudence of the respective Member State's courts?

Council of State (CoS) 2862/2016

A citizen filled a report to the Lawyer's Bar of Thessaloniki against an employee of the Hellenic Society for the Protection of Intellectual Property (AEPI) concerning the behaviour of this employee during an inspection of a person who sold illegal cd's. The Lawyer's Bars Board issued a resolution that AEPI's employees do not have the right to perform such inspections. Those documents were communicated to AEPI which requested the full text of the resolution, the proposal to the Board, the name of the rapporteur, the names of the members of the Board, the record of the meeting etc. AEPI it was denied access based on a standard practice of the Lawyer's Bar. This decision was annulled.

CoS 4154/2015

A citizen has filed an accusation addressed to the Municipality regarding illegal building activities in its area without disclosing the name of the buildings owner. The Municipality verified those accusations and the Public Prosecutor started a penal procedure against the owner. The owner received a copy of the accusation and the citizen was defamed in various TV shows. The Hellenic Data Protection Authority issued a decision imposing a fine of 10.000 euros to the Municipality because of illegal processing of the citizens personal data. The Court dismissed the application for annulment and upheld the Authority's decision

CoS 2854/2015

A lawyer asked from tax authorities to be informed on whether he has signed any guarantee agreement regarding taxation issues on behalf of any person during his 40 years of professional practice and if so, to be given a copy of this agreement. This was deemed an abuse of the right to information access.

CoS 4006/2005

Expulsion of a Palestinian citizen. The Court can ask for all kinds of documents needed for the investigation of a case even those that are classified on the grounds of state safety and public order. The Court will judge if there is a valid reason to classify them and in that case the content of those documents cannot be disclosed to the parties and won't be described in of the Court Decision.

Opinion of the Public Prosecutor of Arios Pagos 1/2005

-The Public Prosecutor can ask all public services and all public legal persons for all kinds of documents, unless they are classified as state, military or diplomatic secret or linked to State Security or have to do with professional secrets. Personal Data laws are not applicable.

-The applicant must have an interest for public documents or specific legal interest for private documents

-the request must not constitute an abuse of the right to information or impair significantly the functioning of the public service

-third parties have access to public and private documents held by a public authority according to the specific laws governing the subject (eg. tax privacy, intellectual property, documents concerning family or private life etc.).

B. Processing of informations in administrative courts procedure :

According to article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms about the right to a fair trial : « *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice* ».

These principles determine the fundamental rules applicable to proceedings before the administrative courts in Europe. How these principles are applied for the instruction and the judgment of cases brought before these jurisdictions? Are there any special rules or exemptions for cases relating to the protection of public order and public safety? What is happening when "a state of emergency" is implemented?

1. THE INSTRUCTION OF THE CASE

1.1. GENERAL DATA

1.1.1. Preamble: the system of evidence

Are all kinds of evidence admissible? Are the testimonies (opinions of witnesses) admissible?

Yes, unless they were unlawfully obtained.

The burden of proof: who must prove: the claimant, the administration or the judge?

Generally speaking, the administration must prove the facts that justify the issuing of the administrative act. The claimant must prove his allegations-arguments. The judge can ask for all evidence needed for the investigation of the case with a preliminary decision. In cases that there is a judge rapporteur he has the responsibility to collect all the evidence needed for the investigation of the case.

1.1.2. The role of the parties :

The content of the file and the debate: can the parties freely define what they communicate to the judge?

Yes. Also the administration has the obligation provide the administrative file.

Can the parties, at any time, introduce new elements into the debate?

Generally speaking (with the exception of special procedures e.g. for public works etc)

First Instance:

i) Claimant -Yes, unless there was a special administrative procedure of second degree in which the claimant took part

ii) Authorities- The legal and factual grounds of the administrative act must exist at the time when it was issued. The authorities can provide new evidence if the judge asks for it or in order to rebut the allegations-arguments of the claimant.

Second Instance:

No new evidence. Only the subsequent evidence or came to the knowledge of the party after the conclusion of the hearing before the Court of the First Instance.

Council of State- application for annulment: *The judge rapporteur is responsible to collect all the evidence needed for the investigation of the case.*

Is a replica always possible? Has the opposing party a minimum duration to answer?

The parties must provide their evidence in a specific time frame, in most cases until the hearing.

1.1.3. The role of the judge :

Some parties are weak, others are powerful : is this issue taken into account in defining the applicable rules?

The judge adjusts the burden of proof accordingly

Does the judge have a purely passive role or can he/she (or should he/she) require the production of information to a party to the dispute?

In the procedure where there is a judge rapporteur he has a very active role in collecting all the evidence needed. In most of the other cases the judge can ask for additional evidence with a preliminary decision.

Can the judge involve third parties in the debate? Do these third parties have the same rights in this debate?

The judge can ask everybody to provide the evidence needed for the investigation of the case

Can the judge freely decide to ask opinion to an expert?

Yes.

1.2. THE PRINCIPLE OF CONTRADICTION AND ITS LIMITS

Can the judge ask to a public authority to provide a secret information ?

Yes, see above CoS 1116/2009 4600/2005 etc.

These secret informations provided to a court by public authorities has to be communicated to the parties or not? Can the judge supply documents or other materials produced by a party (or a third party) to the opposing party? How does this mechanism apply ?

They are not provided, see above CoS 1116/2009 4600/2005 etc and also the Opinion of the Public Prosecutor of Arios Pagos 1/2005

Is the principle of the adversarial specially adapted in certain areas?

In administrative courts there is a combination of the adversarial and inquisitive systems. The characteristics of the inquisitive system clearly prevail.

Must the judge respect secrets? What are these secrets? The secret of privacy? The secret of business? The secret of defence and public safety?

Only state secrets are excluded from the content of the court decision. The parties identities are protected by the procedure of anonymization of the decision when it is published in legal magazines, public or commercial legal data bases etc. (see 2/2006 decision of the Hellenic Data Protection Authority).No case came to my knowledge concerning a complaint about a disclosure of a secret of business or privacy etc. within an administrative court procedure.

2. THE CLOSURE OF THE INSTRUCTION

2.1. How and when does the closing of the instruction of a case takes place: before the hearing, at the time of the hearing or after the hearing?

One day before the hearing but it can be at the time of the hearing if the parties don't object.

2.2. Can the judge reopen the investigations or the debate between parties about a case at any time?

The judge can issue a preliminary decision asking for additional evidence

3. THE HEARING

3.1. Possibility of a judicial decision without a hearing?

Only in provisional judicial protection and when a case is obviously unfounded and thus terminated by a speed procedure.

3.2. Possibility of an hearing without the presence of the parties?

Yes, if the parties were legally invited to participate in the procedure and chose not to, either by not appearing or by making a declaration that they want to be considered as present without really appearing at the hearing.

3.3. Possibility of an in camera hearing?

There is no such provision

3.4. Possibility of a hearing in a closed court ?

Only in provisional judicial protection. Theoretically there is the possibility to apply the rules concerning the Civil Courts but I've never heard anything like this in my career.

4. THE JUDICIAL DECISION AND THE CONTENT OF THE REQUIREMENT OF MOTIVATION

4.1. To what extent is it possible to use a secret / not public information in the reasoning of a judgment?

According to the art. 3 of the Law 2472/1997 «Protection of Individuals with regard to the Processing of Personal Data » the law doesn't apply to judicial authorities when they exercise their judicial authority.

C. MANAGEMENT OF INFORMATIONS AND SECRET / OR NOT PUBLIC INFORMATIONS BY ADMINISTRATIVE COURTS DURING THE STATE OF EMERGENCY

Is there a specific national regulation about that?

No

For further and more detailed information on the subject of the right of access to public documents refer to the following.

1. P.D. 28/2015

Part A

-Chapter A

Access to public documents

-Chapter B

On the re-use of public sector information

Directive 2003/98/EC and directive 2013/37/ EC

-Chapter Γ

Access to Private Data

Part B

-Chapter A

Access to the Government Gazette

-Chapter B

Access to the General Records of the State

-Chapter Γ

Access to the records of the Prime Minister, the Ministers and the Deputy Ministers

-Chapter Δ

Access to the records of the Municipal and Regional Councils

-Chapter E

Access to public environmental information

Directive 2003/4/EC, directive 90/313/EEC

-Chapter Z

Access to geospatial information

Directive 2007/2 EC

-Chapter H

Access to HELLENIC MILITARY GEOGRAPHICAL SERVICE data

-Chapter Θ

Access to cadastral data

-Chapter I

Access to the National Statistic System Data

In accordance to the regulation 223/2009 EC

-Chapter IA

Access to tax and customs data

-Chapter IB

Access to the Hellenic Single Public Procurement Authority Registry

-Chapter II

Access to medical records

2. Law 2472/1997 «Protection of Individuals with regard to the Processing of Personal Data » as amended with law 3471/2006

Directive 2002/58 EC