

ASSOCIATION OF EUROPEAN ADMINISTRATIVE JUDGES (AEAJ)

Working group meeting „Independence and Efficiency“ on June 15 - 16, 2017, in the premises of the Bundesverwaltungsgericht - Federal Administrative Court, Simsonplatz 1, 04107 Leipzig, Germany

QUESTIONNAIRE:

„Access to information held by public institutions and processing of (secret) informations in administrative courts procedure“ - **A View from the Slovenian Perspective**

ANSWERS:

A. Access to information held by public authorities

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

As for Republic of Slovenia is concerned it might be stated, that the minimum standard of the right of freedom of information under the secondary EU law is exceeded in all different areas of law.

According to Article 1, Paragraph 1 of the Access to Public Information Act everyone is ensured the free access to and re-use of public information held by state bodies, local government bodies, public agencies, public funds and other entities of public law, public power holders and public service contractors, which means all public institutions as well as self-governing local communities and even liable business entities subject to dominant influence of entities of public law in the legal framework of Slovenian Constitution, Information Commissioner Act, Access to Public Information Act, Personal Data Protection Act and Classified Information Act.

According to the Constitution, Slovenia is a democratic republic and a social state governed by law. The state's authority is based on the principle of the separation of legislative, executive and judicial powers, with a parliamentary system of government. Power is held by the people, and they exercise this power directly through referendums and popular initiatives and through elections.

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

The Slovenian Access to Public Information Act ensures everyone, which means not only natural, but also legal persons, the free access to and re-use of public information held by state bodies, local government bodies, public agencies, public funds and other entities of public law, public powers holders and public service contracts (hereinafter referred to as „the bodies“).

Information Commissioner is an autonomous and independent body, established on 31. December 2005 with the Information Commissioner Act, which as the highest administrative authority supervises the protection of personal data and the access to public information.

Information Commissioner is appointed at the proposal of the President of the Republic of Slovenia by the National Assembly as the highest legislative authority, which has the right to enact the laws.

With the view to achieve the aim of this Act (i.e. Access to Public Information Act), the bodies shall endeavor to inform the public on their work to the greatest extent possible according to Article 2, Paragraph 2 of the Access to Public Information Act.

A bank is also considered to be subject to dominant influence according to Article 2, Paragraph 1 of the Access to Public Information Act, if subject to legal measures under the law governing the measures of the Republic of Slovenia to strengthen banking stability.

According to Article 2, Paragraph 1 of the Access to Public Information Act, the aim of this Act is to ensure that the work of the bodies is public and open, and to enable natural and legal entities to exercise their rights to acquire information held by public authorities.

2.1. Who can apply for an access to information?

Constitution by the wording of the Article 39, Paragraph 2, regulates freedom of expression, according to which „everyone has the right to obtain information of a public nature in which he has a well founded legal interest under the law“.

In distinction to this constitutional provision the legislator, when passing the Access to Public Information Act in the year 2003 didn't put up any condition of having well founded legal interest under the law to obtain the information of a public nature by the wording of the Access to Public Information Act.

It should be stressed that the actual Slovenian jurisprudence on the access to public information does not require any condition of a special legal interest to be fulfilled by the claimant as well, which means that the concept of legal interest in Slovenian law does not exist, nevertheless it is written by the wording of the Article 39, Paragraph 2 of the Constitution, as in fact it is not explicitly written by the wording of the Access to Public Information Act.

The position of the Slovenian judiciary, and Information Commissioner as well, as for the question of having „well founded legal interest under the law“ to access the public information, is that the legal condition of having „well founded legal interest under the law“ to access the public information has been already fulfilled by the legislator (once for all) when passing the Access to Public Information Act in the year 2003, which doesn't contain any condition of this nature.

2.2. Does everybody has access to any kind of information?

Everybody has access to any kind of information, with exceptions listed in the Article 5a) and Article 6 of the Access to Public Information Act.

Most of these exceptions are not of absolute nature.

On the contrary, it should be stressed that only a few exceptions for granting access to public information exist, listed in Article 6, Paragraph 2 of the Access to Public Information Act, which stipulates:

„Without prejudice to the provisions in the preceding paragraph, the access to the requested information is sustained, if public interest for disclosure prevails over public interest or interest of other persons not to disclose the requested information, except in the next cases“:

- for information which, pursuant to the Act governing classified data, is denoted with one of the two highest levels of secrecy;
- for information which contain or are prepared based on classified information of other country or international organisation, with which the Republic of Slovenia concluded an international agreement on the exchange or transmitting classified information;
- for information which contain or are prepared based on tax procedures, transmitted to the bodies of the Republic of Slovenia by a body of a foreign country;
- for information of individual statistical reporting units under the Act governing Government statistics activities;
- for information of which disclosure would constitute an infringement of the tax procedure confidentiality or the tax secret in accordance with the Act governing tax procedure, unless the tax procedure is final or the person liable for tax discovered the liability in the tax return and did not pay the tax in the prescribed time.

Administrative Court of Republic of Slovenia, when deciding the case in administrative dispute on the access to public information in the panel of three judges, tests case by case if it is appropriate, necessary and proportionate.

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

According to Slovenian Access to Public Information Act the institutions, authorities and legal bodies, obliged to provide access are listed in the Register of legal persons liable for public information, which is according to Article 3b) of the Access to Public Information Act established and kept by the organisation, competent for public and legal records and services incorporated under the law governing payment transactions (herinafter: AJPES).

4. What are the limits and exceptions?

The limits and exceptions are listed under the Article 5a and Article 6 of the Access to Public Information Act.

For example, if the request refers to information, access to which is forbidden or restricted under law even to parties, participants or victims in legal or administrative proceedings, or inspection procedure as governed by the law; as well as if the request refers to information on which the law stipulates protection of confidential source, in addition to Information, which pursuant to the Act governing classified data, is defined as classified; Information which is defined as business secret in accordance with the Act governing companies; Personal data the disclosure of which constitute an infringement of the protection of personal data in accordance with the Act governing the protection of personal data; Information the disclosure of which constitute an infringement of the confidentiality of individual information on reporting units, in accordance with the Act governing Government statistics activities; Information the disclosure of which would constitute an infringement of the tax procedure

confidentiality or of tax secret in accordance with the Act governing tax procedure; Information acquired or drawn up for the purposes of criminal prosecution or in relation to criminal prosecution, or misdemeanors procedure, and the disclosure of which would prejudice the implementation of such procedure; Information acquired or drawn up for the purposes of administrative procedure, and the disclosure of which would prejudice the implementation of such procedure; Information acquired or drawn up for the purposes of civil, non-litigious civil procedure or other court proceedings, and the disclosure of which would prejudice the implementation of such procedure; Information from the document that is in the process of being drawn up and is still subject to consultation by the body, and the disclosure of which would lead to misunderstanding of its contents; Information on natural or cultural value which, in accordance with the Act governing the conservation of nature or cultural heritage, is not accessible to public for the purpose of protection of (that) natural or cultural value; Information from the document drawn up in connection with internal operations or activities of bodies, and the disclosure of which would cause disturbances in operations or activities of the body.

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

Everyone can claim for the access before the court as well.

Traditionally the Administrative Court of Republic of Slovenia performs a judicial review of administrative acts and decisions. Nevertheless, it has a legal power to conduct a full review of law and facts, and may also adjudicate on the merits of the case in so called full jurisdiction dispute, which means that it may, for example, grant an access to information of public nature as well, not only quash the administrative decision on the claim of an individual.

Most of the decisions of the Administrative Court are final, which means, that in those cases only so called extraordinary legal remedy is possible against the decision, reached by the Administrative Court.

An appeal against a judgement of the Administrative Court to the Supreme Court of Republic of Slovenia has some limitations, such as for example a time limit and that the errors in assessment of facts in the judgement at the Administrative Court can be subject of review of the Supreme Court, only if those facts were established in the procedure before the Administrative Court. The grounds of appeal to the Supreme Court are therefore limited to issues of substantive law and the most severe breaches of procedure.

The Constitution, based on the principle of dividing authorities into branches with legislative, executive and judicial powers defines the task of the judicial branch generally as being to decide upon every person's rights and obligations. Such decisions are entrusted to independent, neutral courts established by law. The establishment of extraordinary courts, and in peacetime of courts martial, is forbidden.

Constitution determines that judges are independent and shall exercise their duties in accordance with Constitution and with the law. Judges hold lifetime appointments. In addition of these basic provision, the Constitution lays out the basic principles on the organisation and jurisdiction of the courts with the exception of the Constitutional Court, which is separately outlined in a special chapter of the Constitution, in the Articles 160 to 167. The Constitutional Court Act, which establishes the Constitutional Court, regulates not only the procedure, but

also some administrative, technical and organisational matters. The Constitutional Court is the highest body of judicial authority, for the protection of constitutionality, legality, human rights and basic freedoms (The Constitutional Court Act, Article 1).

In general the position of the judiciary is regulated by two major laws and several other regulations. The Law on Courts institutes all of the so called regular courts of the Republic of Slovenia. Among other regulations, particularly worth mentioning are the Law on Administrative Dispute, which establishes the Administrative Court of the Republic of Slovenia and the Court Procedural Code with detailed provisions for administrative, technical and organisational matters of the courts in general.

The Supreme Court of the Republic of Slovenia functions primarily as a court of cassation reviewing cases in its jurisdiction. The grounds of appeal to the Supreme Court generally defined as extraordinary legal remedies in Slovenian procedural laws are therefore limited to issues of substantive law and to the most severe breaches of procedure. This general rule has only a few exceptions. Apart from administering justice the Supreme Court can exercise inside inspection of lower instance courts activities which are not related to the administration of justice. These inspections are focused on gathering information about practice in the application of legislation and the problems which arise during the proceedings.

The Administrative Court deals with all sorts of administrative disputes. An appeal against a judgement of the Administrative Court to the Supreme Court has some limitations such as for example a time limit and that errors in assessment of facts in the judgement of the Administrative Court can be subject of review of the Supreme Court only if those facts were established in the procedure at the Administrative Court.

The last possible legal remedy in Slovenia is a constitutional complaint to the Constitutional Court in the case of human rights violation in a procedure before the Administrative or before the Supreme Court.

The general provision of Article 8 of the Constitution states that statutes and other legislative measures shall comply with generally accepted principles of international law and shall be in accordance with international agreements that bind Slovenia. Ratified and proclaimed international agreements shall take immediate effect. Judges, including administrative judges may apply statutory provisions of national legislation insofar as they are consistent with the relevant international agreements. Otherwise, they must stop proceeding and refer the issue of the constitutional validity of the statute to the Constitutional Court (Article 156 of the Constitution). On accession to the European Union, parliament amended the Constitution with the so-called »European Article«. The provision in Article 3 (a) (3) states that legal acts and decisions adopted within the international organisations to which Slovenia transferred part of its sovereign rights must be applied in Slovenia in accordance with the law of those organisations.

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?

The main topics in Slovenian administrative jurisprudence are concerning the relationship between business and bank confidential informations as well as information, acquired or

drawn up for the purposes of criminal prosecution or in relation to criminal prosecution, and public interest to disclose all those requested information.

B. Processing of informations in administrative courts procedure:

1.1. Are all kind of evidence admissible? Are the testimonies (opinions of witnesses) admissible?

According to the Article 51 of the Administrative Dispute Act all kinds of evidence are admissible in Administrative Court procedure, as well as testimonies of the witnesses.

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?

According to the Article 22 of the Administrative Dispute Act in connection to the Articles 4 and 5 of the Civil Procedure Act the parties can freely decide on what they communicate to the judge.

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

According to the Article 20, Paragraph 3, in connection with the Article 52 of the Administrative Dispute Act, the parties can not at any time introduce new evidence without any time limits.

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

According to Article 22 of the Administrative Dispute Act in connection with the Article 5, Paragraph 1 of the Civil Procedure Act the replica is generally possible (with only one exception in case, if it is prescribed by the law).

The judges of the Administrative Court make decisions on the time limits for the parties to prepare their statements i.e. replicas bearing in mind the individual circumstances of a case at hand. According to the provisions of the Act on Administrative Dispute in connection with the Civil Procedure Act the minimum time limit to file the replica is generally 8 days, but it might be prolonged by the decision of the court, on a special demand of the party. According to the Article 38, Paragraph 2 of the Administrative Dispute Act the maximum time limit for the replica of the opposite party is 30 days.

1.3. The role of the judge:

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

According to Article 22 of the Administrative Dispute Act in connection with the Article 12, of the Civil Procedure Act it is taken into account not only by the legislator, but by the court as well.

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

According to Article 22 of the Administrative Dispute Act in connection with the Article 285, Paragraph 1 of the Civil Procedure Act, the judge has an active role.

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

According to Article 19 of the Administrative Dispute Act the judge might involve third parties in the debate, if the condition of law is fulfilled, prescribed by the law governing the administrative dispute.

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

According to Article 20, Paragraph 2 of the Administrative Dispute Act the judge might freely decide to ask opinion to an expert.

1.2. The principle of contradiction and its limits:

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

According to Article 38, Paragraph 3 of the Administrative Dispute Act the judge might demand the secret informations to be provided by the public authority, if it is relevant for the case at hand.

-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?

It is up to the judge to decide, whether or not those confidential informations would be communicated to all of the parties (or any of them), if by itself it is (not) relevant for the case.

The judge must respect all kind of secret information.

In doing so, he might decide to keep it secret, if it is by itself not relevant for the case.

If any kind of confidential information is relevant for a case at hand, the judge share it with all of the parties concerned in a way, that they are, as confidential, communicated only with the parties, not with the general public. Which also means that the judge has full access to the files of the case.

-Is the principle of the adversial specially adapted in certain areas?

According to the Administrative Dispute Act the principal of adversial proceeding is not specially adapted in any certain area of law.

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

The judge must respect all kind of secret information. In doing so, he might decide to keep it secret, if by itself it is not relevant for the case.

If any kind of confidential information is relevant for a case at hand the judge share it with all of the parties concerned in a way, that they are communicated as confidential only with the parties, not with the general public.

2. The closure of the instruction:

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

According to the Article 59, Paragraph 1 of the Administrative Dispute Act the oral hearing in administrative dispute is not mandatory, which means that the closing of the instruction of a case take place before the hearing i.e. after the parties in adversial procedure file as much replicas, as it is needed for the case at hand to be solved.

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

According to the Article 22 of the Administrative Dispute Act in connection with the Article 325, Paragraph 1 of the Civil Procedure Act it is possible for the court to reopen the investigation or the debate between the parties about a case in the time limit of 15 days after the judgement has already been served to the parties.

3. The hearing:

3.1. Possibility of a judicial decision without a hearing?

According to the Article 59 of the Administrative Dispute Act and according to the Article 326, Paragraph 2 of the Civil Procedure Act it is possible for the court to decide even without an oral hearing.

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

According to Article 58, Paragraph 2 of the Administrative Dispute Act, the possibility of an hearing without the presence of the opposing party exists under the law.

According to the Article 58, Paragraph 3 of the Administrative Dispute Act it is possible for the court to conduct the hearing without the presence of both of the parties as well.

3.3. Possibility of an in camera hearing?

According to the Article 45, Paragraph 1 of the Administrative Dispute Act, the possibility of an in camera hearing also exists.

3.4. Possibility of a hearing in a closed court?

According to Article 22 of the Administrative Dispute Act in connection with the Article 230 and Article 294 of the Civil Procedure Act the possibility of a hearing in a closed court exists, under certain conditions, prescribed by the law, because of the military, bussines or personal reasons of confidentiality or because of the reason of moral or public order.

4. The judicial decision and the content of these requirement of the motivation:

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

The reasoning of the judicial decision of these requirements might be more abstract in a way, that makes impossible the disclosure of confidential information of which disclosure constitutes an infringement of the any kind of confidentiality of individual personal data (or a person).

4.2. Are all judgements pronounced publicly published? Are there some exceptions?

All of the judgements, pronounced publically are published as well, without any exceptions.

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?

As for the state of emergency is concerned it might be stated that the competent Slovenian state authorities may declare that their area is a state of emergency.

This means that some functions of the executive and the legislative power can be suspended during a certain period of time.

It should be stressed, that the establishment of extraordinary courts, and in peace time of courts martial, is forbidden.

According to the Article 16 of Slovenian Constitution the derogation of most, but not all of the constitutional rights is possible during the time of war or during the time of natural or human-made disaster.

According to the Article 92 of the Constitution the state of emergency might be declared by the National Assembly on the initiative of the Government when an immense and general danger is threatening to the existence of the state. National Assembly decides upon using the national armed forces. If the session of the National Assembly is not possible, it is upon the President of the State the competence of issuing the regulations with the powers of the law and to decide upon the use of military and declaration of state of emergency.

Darinka Dekleva Marguč, M. Sc., Senior High Court Judge
Administrative Court of Republic of Slovenia