Access to Public Sector Information

A view from the European and the German perspective

by

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1. Introduction: role of information in modern society

Information in modern society can be seen as a resource. Access to and the possession of information means power, economically, politically and societally in the widest sense. All actors are in a way dependent on information: the state, economy, society and – to varying extend – each individual. The use of information is multi-purpose, it is a mandatory requirement for the functioning of a democratic state and a production factor for the economy. We can talk about an information society. In many sectors the state has an information monopoly, where information is exclusively (factually or legally) held by public institutions.

The German Federal Constitutional Court established early in 1969, that there is a basic need for the individual to be able to inform oneself from as many sources as possible. The same time a democratic state cannot exist without a freely and well informed public opinion (BVerfGE 27, 71 <81 f.>). The principle of democracy requires publicity of information for the sake of transparency in the performance of public duties to some extent. Freedom of information is also an aspect of modern administration. Here the EU legislation comes into play: publicity of administration can meanwhile be seen as a legal principle of European Administrative Law. Art. 1 par. 2 of the Treaty on the European Union (TEU) enshrines the concept of openness, stating that the treaty marks a new stage in the process of creating an ever closer union among peoples of Europe, in which decisions are taken openly as possible and as closely as possible to the citizens. The idea of transparency and public control must be established in public administration. The importance of information and the need for access is displayed by figures: in 2015 the German federal public authorities received nearly 10.000 applications for access to information.

On the other hand there is a legitimate interest of public authorities and individuals concerned to limit – or in some cases completely deny – access to specific information. For public authorities it can for example be the functioning of state organization or the protection of constitutional rights and principles like due course of political process or rights of citizens. For persons concerned it can be privacy rights, data protection or business secrecy. Hence freedom of information always has to go along within its necessary limits.

If information plays such an important role in modern society, there is obviously a need to set access to and the handling of information into a legal framework with rights, responsibilities and limits.

2. European Union

a. primary law

The Charter of Fundamental Rights of the European Union (FRC) in Art. 11 par. 1 sent. 2 provides for the right to freedom of expression which includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The provision has its equivalent in Art. 10 par. 1 sent. 2 of the European Convention of Human Rights (ECHR). But as we will see later, this right does not include access to non-public official information and no obligation for the state to actively distribute information.

Beside this fundamental right for everyone primary EU law has a twofold approach regarding access to public sector information: addressees are the Member States on the one and the EU institutions on the other hand.

The EU institutions are addressed by Art. 42 of the Fundamental Rights Charter (FRC) and Art. 15 par. 3 of the Treaty on the Functioning of the EU (TFEU), which establish a right to access to documents of the European Parliament, the Council and the Commission as well as of the Union's institutions, bodies, offices and agencies subject to the principles and the conditions defined in accordance with this paragraph.

In the law of the administration of the EU (performed by Member State's national authorities and institutions) only sectorial limited provisions exist. The principle of conferral under Art. 5 par. 1 and 2 of the Treaty of the European Union (TEU) prohibits the establishment of a comprehensive and coherent legal framework for the national right to freedom of information.

b. legislation (secondary law)

The history of the development of freedom of information in secondary EU law in a way started with declaration no. 17 on the Maastricht-treaty (declaration on the right of access to information). The Conference considered that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommended that the Commission submits to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions. Hence, Council and Commission submitted a compliance code in the end of 1993. On its basis ECJ dismissed decisions of the Commission for the refusal of access.

Under the authorization in Art. 15 TFEU (or ex Art. 255 TEC) the union legislator issued e.g. the following legislation:

Regulation 1049/2001/EC of 30 May 2001, so called transparency regulation, provides for access to European Parliament, Council and Commission documents. The concept of the regulation foresees access without presuppositions or preconditions. Eligible are Union citizens and all natural and judicial persons residing in the EU. Documents of the Member States may only be disclosed by EU institutions with the consent of the relevant Member State. However, exceptions of two categories are established by Art. 4: absolute reasons for denial in par. 1 (public security, defense and military

matters etc.) and exceptions in par. 2 which have to be assessed against an overriding public interest in disclosure (relative protection of personal interests, e.g. commercial, intellectual property). The denial of access must be proportional (in quantity –e.g. limited access, and time -as long as necessary).

Although the list of reasons for exclusion in Art. 4 of the regulation is exclusive, disproportionate administrative effort in the fulfillment of the claim is recognized as an unwritten reason for refusal of access.

The general right on access to public sector information is not established by EU law. It does not demand from the Members States the issuance of general laws on freedom of information. Here the EU lacks legislative power.

Regulation 1049/2001/EC has been declared applicable by **Regulation 1367/2006/EC** of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

In the environmental sector the starting point was already **Council Directive 90/313/EEC** of 7 June 1990 on the freedom of access to information on the environment. The adoption of the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters) by the EU on 25 June 1998, which contains much more far reaching rights and has - by new definitions - a wider scope of application compared to the 1990 regulation, required a recast. Hence, the purpose of **Directive 2003/4/EC** of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC is the consistency of EU law with the Convention in the field of access to information. Under the directive a wide definition of the term 'environmental information' is necessary. Also the definition of public authorities had to be extended. Both directives 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. Like the Convention the Directive allows exceptions (art.4) which have to be interpreted in a restrictive way. In every particular case the public interest served by disclosure shall be weighed against the interest served by the refusal.

The re-use of public sector information (e.g. in economy, tourism, geography, weather, education services) was first ruled by **Directive 2003/98/EC** of the Parliament and of the Council of 17 November 2003, amended by directive 2013/37/EU of 26 June 2013. After an evaluation the directive was amended by **Directive 2013/37/EU** of 26 June 2013. While based on Art. 114 TFEU (harmonization of legislation in the internal market) the directive recognizes that the state possesses the highest amount of information which is of high, but to a wide extend unused economic value. Statistics, economic and environmental data, information on science, art and culture are the basis for products and services with digital content like navigation and traffic services, weather forecasts, credit rating services etc. The idea was to harmonize the conditions and procedures for the re-use of information. Under the amended directive the scope of application now exceeds to libraries, museums and archives. While the former directive only an obligation established for equal treatment in case the re-use was permitted once, the recast establishes an obligation for a first permission. It is important to note that the directive rules only access to existing information held by public sector bodies of the Member States and builds on the existing access regimes of the Member States. The directive does not establish an obligation on re-use of information. If a re-use is permitted is up to

the national legislator. If it is permitted by national law, the re-use must follow the requirements of the directive. Remarkable is the restriction of the scope of application on the other side by the list of sectorial exceptions.

Finally **Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an infrastructure for Spatial Information in the European Community** (INSPIRE-directive) has to be mentioned, which aims not only in the establishment of the infrastructure but also on access to it. Different to the other directives here Members States actively have to provide for access by the public authorities.

jurisprudence

ECtHR on Art. 10 ECHR:

Judgment of 26 March 1987, appl. no. 9248/81, Leander vs. Sweden: Article 10 (art. 10) does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.

Judgement of 19 October 2005, appl. no. 32555/96, Roche vs. UK: The Court reiterates its conclusion in Leander v. Sweden (judgment of 26 March 1987, Series A no. 116, p. 29, § 74) and in Gaskin (cited above, p. 21, § 52) and, more recently, confirmed in Guerra and Others (cited above, p. 226, § 53), that the freedom to receive information "prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him" and that that freedom "cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to ... disseminate information of its own motion".

In the more recent **judgment of 14 April 2009, appl. no. 37374/05, Tarasag and Szabadsajogokert vs. Hungary** the Court seems to get closer to the idea to a wider right of access to information: "The Court recalls at the outset that "Article 10 does not ... confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual" (Leander v. Sweden) and that "it is difficult to derive from the Convention a general right of access to administrative data and documents". Nevertheless, the Court has recently advanced towards a broader interpretation of the notion of "freedom to receive information" and thereby towards the recognition of a right of access to information."

Judgment of 25 June 2013, appl. no. 48135/06, Youth Initiative for Human Rights vs. Serbia: As the applicant was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, there has been an interference with its right to freedom of expression (Társaság a Szabadságjogokért). The exercise of freedom of expression may be subject to restrictions, but any such restrictions ought to be in accordance with domestic law. The Court finds that the restrictions imposed by the intelligence agency in the present case did not meet that criterion. The domestic body set up precisely to ensure the observance of the Freedom of Information Act 2004 examined the case and decided that the information sought had to be provided to the applicant. It is true that the intelligence agency eventually responded that it did not hold that information, but that response

is unpersuasive in view of the nature of that information (the number of people subjected to electronic surveillance by that agency in 2005) and the agency's initial response. The Court concludes that the obstinate reluctance of the intelligence agency of Serbia to comply with the order of the Information Commissioner was in defiance of domestic law and tantamount to arbitrariness. There has accordingly been a violation of Article 10 of the Convention.

Judgment of 28 November 2013, appl. no. 39534/07, Österr. Vereinigung vs. Austria: The Court has consistently recognised that the public has a right to receive information of general interest. Its case-law in this field has been developed in relation to press freedom, the purpose of which is to impart information and ideas on such matters. The Court has emphasised that the most careful scrutiny on its part is called for when measures taken by the national authorities may potentially discourage the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern. Furthermore, the Court has held that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press. However, the function of creating forums for public debate is *not limited to the press*. That function may also be exercised by non-governmental organisations, the activities of which are an essential element of informed public debate. The Court has therefore accepted that non-governmental organisations, like the press, may be characterised as social "watchdogs". In that connection their activities warrant similar Convention protection to that afforded to the press.

ECJ:

Reg. 1049/2001/EC

Judgment of 1 February 2007 – C-266/05P – ECLI:EU:C:2007:75: The purpose of the transparency regulation is to give the fullest possible effect to the right of public access to documents held by the institutions (r. 61). As they derogate from the principle of the widest possible public access to documents, such exceptions must be interpreted and applied strictly. Such a principle of strict construction does not, in respect of the public-interest exceptions provided for in Article 4(1)(a) of Regulation No 1049/2001, preclude the Council from enjoying a wide discretion for the purpose of determining whether disclosure of a document to the public would undermine the interests protected by that provision (r. 63 f.).

Judgment of 2 October 2014 – C 127/13P - **ECLI:EU:C:2014:2250:** Pursuant to Art. 8(1) and (3) of Regulation No 1049/2001 any refusal of access to the documents requested from the administration may be subject to challenge by way of court proceedings. That is so whatever the reason relied on to refuse access. Thus, it is irrelevant to the right of challenge of the parties concerned that it is argued that access to a document must be refused for one of the reasons laid down in Art. 4 of the Regulation or that it is argued that the document requested does not exist. Therefore, it must be stated that the fact that a document to which access has been requested does not exist or the fact that it is not in the possession of the institution concerned does not make Regulation inapplicable. Neither Art. 11 of the Regulation nor the obligation of assistance in Art. 6(2) thereof, can oblige an institution to create a document for which it has been asked to grant access but which does not exist.

Judgment of 3 July 2014 – C 350/12P - ECLI:EU:C:2014:2039: Moreover, if the institution applies one of the exceptions provided for in Art. 4(2) and (3) of Regulation No 1049/2001, it is for that institution to weigh the particular interest to be protected through non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible, having

regard to the advantages of increased openness, as described in recital 2 to the Regulation, in that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.

Treaty violation proceedings

Some jurisprudence of the ECJ is dedicated to access to information resulting from treaty violation proceedings under Art. 258 TFEU e.g. under the exception of negative effects on international relations according to Art. 4 (2) environmental information directive:

Judgment of 14 April 2011 – C-522/09, Com. vs. Romania, ECLI:EU:C:2011:251: It is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under European Union law and, on the other, to avail itself of its right to defend itself against the complaints formulated by the Commission.

Judgment of 14 November 2013 – C-514/11P and C-605/11P, LPN, ECLI:EU:C:2013:738: protection of investigations in pre-litigation phase

environmental information directive

Judgment of 14 February 2012 – C-204/09 – Flachglas Torgau - ECLI:EU:C:2012:71: Delimitation between puplic authority and bodies or institutions when acting in legislative capacity, right of the Member States to exclude the later; exception on confidentiality of proceedings

The first sentence of the second subparagraph of Art. 2(2) of Directive 2003/4/EC must be interpreted as meaning that the option given to Member States by that provision of not regarding 'bodies or institutions acting in a … legislative capacity' as public authorities may be applied to ministries to the extent that they participate in the legislative process, in particular by tabling draft laws or giving opinions, and that option is not subject to the conditions set out in the second sentence of the second subparagraph of Art. 2(2) of that directive.

The first sentence of the second subparagraph of Art. 2(2) of the directive must be interpreted as meaning that the option given to Member States by that provision of not regarding bodies or institutions acting in a legislative capacity as public authorities can no longer be exercised where the legislative process in question has ended.

Indent (a) of the first subparagraph of Art. 4(2) of Directive 2003/4 must be interpreted as meaning that the condition that the confidentiality of the proceedings of public authorities must be provided for by law can be regarded as fulfilled by the existence, in the national law of the Member State concerned, of a rule which provides, generally, that the confidentiality of the proceedings of public authorities is a ground for refusing access to environmental information held by those authorities, in so far as national law clearly defines the concept of 'proceedings', which is for the national court to determine.

Judgment of 18 July 2013 – C-515/11, Deutsche Umwelthilfe, ECLI:EU:C:2013:523: The first sentence of the second subparagraph of Art. 2(2) of Directive 2003/4/EC (restrictive interpretation) must be interpreted as meaning that the option given to Member States by that provision of not regarding 'bodies or institutions acting in a … legislative capacity' as public authorities, required to allow access to the environmental information which they hold, may not be applied to ministries when they prepare and adopt normative regulations which are of a lower rank than a law.

Judgment of 19 December 2013 – C-279/12 – fish legal- ECLI:EU:C:2013:853: In order to determine whether entities can be classified as legal persons which perform 'public administrative functions' under national law, within the meaning of Art. 2(2)(b) of Directive 2003/4/EC, it should be examined whether those entities are vested, under the national law which is applicable to them, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

Undertakings, which provide public services relating to the environment are under the control of a body or person falling within Art. 2(2)(a) or (b) of Directive 2003/4, and should therefore be classified as 'public authorities' by virtue of Art. 2(2)(c) of that directive, if they do not determine in a genuinely autonomous manner the way in which they provide those services since a public authority covered by Art. 2(2)(a) or (b) of the directive is in a position to exert decisive influence on their action in the environmental field.

Art. 2(2)(b) of Directive 2003/4 must be interpreted as meaning that a person falling within that provision constitutes a public authority in respect of all the environmental information which it holds. Commercial companies, which are capable of being a public authority by virtue of Article 2(2)(c) of the directive only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Article 2(2)(a) or (b) of the directive are not required to provide environmental information if it is not disputed that the information does not relate to the provision of such services.

Judgment of 16 July 2015 – C-612/13P – Client Earth – ECLI:EU:C:2015:486: There are 5 categories of documents where the Court has recognized a general presumption of confidentiality (…). But this presumption is rebuttable. It is up to the applicant to provide for circumstances which establish a public interest in the dissemination of documents.

Judgment of 22. December 2010 – C-524/09, Ville de Lyon, ECLI:EU:C:2010:822: The judgment rules the relation between Dir. 2003/04 and provisions on confidentiality in other Regulations in stating that a request for the reporting of trading data such as that requested in the main proceedings, relating to the names of holders of the transferring accounts and acquiring accounts of the emission allowances (…) involved in those transactions and the date and time of those transactions, comes exclusively under the specific rules governing public reporting and confidentiality contained in Directive 2003/87 and in Regulation No 2216/2004.

There more interesting point of this decision is that the Court of Justice assumes the eligibility of the municipality for access as a public authority itself.

FAC, judgment of 21 February 2008 - 4 C 13.07 - BVerwGE 130, 223: The term ‚environmental information' has to be interpreted widely (while reason for exclusion have to be interpreted restrictively)

FAC, judgment of 28 July 2016 – 7 C 7.14 -: Under Art. 4 (1) Directive 2003/4/EC on public access to environmental information the national legislator has discretion on the limitation of reasons for exclusion of access (in a more favorable sense pro access).

2. German situation

Compared to other countries Germany is late in the adoption of legislation on freedom of information. Some European states have a longstanding tradition for a rather unlimited access to information. In Sweden already since 1766 each person has a right to inspect official (means registered) files. For the protection of state concerns and private interests a catalogue establishes the conditions for exceptions from access. The example has been followed by other Scandinavian states like Finland in 1951 as well as Norway and Denmark in 1970. In France until 1978 the "secret of administration" was in force. From July 1978 on a general right to access was implemented by which personal data is accessible only for the person concerned while non-personal documents are accessible for everybody. In the UK for long time the secrecy of the office was in force until in 2000 the Freedom of Information Act was adopted and entered into force in 2005. Systematically like in the other examples a principle of access limited by exceptions was established.

Before the comparably new legislation in German administrative law access to public information, or better to information held by public authorities, was dominated by the principle of limited file publicity, and before this by the principle of secrecy of files. In the (general) Administrative Procedure Code and in the procedural parts of the specific administrative laws access to files (and information included in there) was only possible for the parties of the procedure. Third persons only have access when they establish a well-founded or legal interest in access. In deciding on the well-founded interest public authorities have a margin of discretion; they must weigh the public interest of the secrecy of the information against the individual interest for disclosure. Some laws contain a "science privilege"; if it is not expressively contained, scientists are treated like usual third parties.

The legislation on freedom of information in Germany started in the Länder (federal states) in 1998 (access to information is not in the catalogue of exclusive legislation competences in art. 73 and 74 of the Basic Law (Grundgesetz, GG), so it's Länder competence under the general rule of art. 70 par. 1 GG). The federal Freedom of Information Act entered into force on 1 January 2006. It was a political decision to introduce a right on access to information without presuppositions.

There is an ongoing discussion whether freedom of information is a constitutional principle, freedom of speech Art. 5 Abs. 1 S. 1 Alt. 1 GG has a link to principle of democracy in Art. 20 Abs. 1 und 2 GG, no democratic state without well informed public opinion, enables citizens to perform their democratic rights and duties. The majority denies a fundamental or basic right on access to information on the federal level because Art. 5 Abs. 1 S. 1 Alt. 2 GG provides only for the right to inform oneself from publicly accessible sources, it does not establish which sources must be publically accessible. Basic rights are established to protect citizens against undue influence by the state, they do not impose a claim for benefits.

a. legislation

aa. The federal **Freedom of Information Act (Informationsfreiheitsgesetz, IFG)** entered into force on 01.01.2006. The legislator opened access without presuppositions for everyone. The applicant does not have to be concerned by the information. Other provisions in more specific laws (such as UIG) prevail (sec. 1 par. 3 IFG). The law follows the known system of open access with exceptions, in the public (sec. 3) and the private interest (sec. 4). It is a rule-exception relation between access and restriction, where the list of reasons for exclusion is final. It contains rules of procedure, costs and fees and establishes the office or institution of the Federal Commissioner for Freedom of Information (personally identical with the Federal Commissioner for Data Protection). There must be a narrow interpretation of reasons for exception and they must be justified by the public authority referring to it.

Critics say the lacks of regulation by the law are remarkable. Nor the purpose of the law neither the scope of application is explicitly defined and there is no obligation for the production of statistics (like it is introduced by some Länder laws). The federal law also does not establish an obligation for separation of information (on protected personal data) for the sake of an ease access to clearly disclosable information. The legislator has limited itself to public information only and there is no obligation for private persons.

bb. The **Law on Re-Use of Information (Informationsweiterverwendungsgesetz, IWG)** entered into force on 19 December 2006. Its sole purpose was the parallel implementation of the re-use directive.

cc. The **Law on Consumer Information (Verbraucherinformationsgesetz, VIG)** which entered into force on 17 October 2012 in its amended version, is not a freedom of information law in the narrow sense. One purpose of the law is to provide access for consumers to information on food, animal feed and wine held by public authorities. Moreover the purpose is the information of the public on initiative of the surveillance authorities, which is not possible under the Freedom of Information Act. After the amendment of the law in 2012 in the same way information on products is possible.

dd. The first federal **Law on Environmental Information (Umweltinformationsgesetz, UIG)** was passed to implement Directive 90/313/ECC and entered into force in July 1994. Because of changes in the legislation on Environmental Impact Assessment and other directives a change of the law in 2001 was necessary. Also ECJ established that the directive was not satisfactory transferred into national law. The new law entered into force by 14 February 2005.

From the figures on applications the UIG is beside the IFG of most importance. The exception for business and company secrets plays an important role both under the IFG and the UIG. It is important to note that the concept in both laws is different. While they are according to sec. 6 of the IFG under full protection (display only with the consent of the person concerned), under sec. 9 of the UIG (in line with art. 4 of the environmental information directive) there has to be an appreciation of values between the interest in disclosure and the interest in keeping information secret. The UIG is more information friendly.

Some voices call for a unification of the IFG and the UIG to harmonize the standards. The domination of the environmental information access by Union law speaks for a separation.

ee. The **Law on access to spatial information (Geodatenzugangsgesetz, GeoZG)** entered into force on 10 February 2009 and implements Directive 2007/2/EC of the European Parliament and of the

Council of 14 March 2007 establishing an infrastructure for Spatial Information in the European Community into national law.

ff. **Länder legislation**

The Federation has no legislative power to rule access to consumer information on the level of the municipalities; this is up to the Länder legislation. As the Federation only ruled access to environmental information held by federal public authorities and institutions, the Länder have to pass their own legislation under the obligation of the environmental information directive (2003/4/EC). There is no obligation for the states to issue laws on freedom of general information.

From 1998 to 2000 the first laws in freedom of information were passed. Only after the adoption of the federal Freedom of Information Act (applicable only for public authorities and institutions of the Federation) on 1 January 2006 four more Länder passed their laws in 2007 and 2008. Some Länder still do not have general laws on access to information, but they have integrated a right on access to information into other laws like the data protection law (e.g. Art. 36 of the Bavarian Data Protection law from 2015). The principal structure of the (formal) laws is the same. The concept is to produce a higher transparency of administration by stating a rule-exception relation between freedom of access and limitations because of private interests and public concerns.

In general one can say that the southern Länder are more reluctant in the implementation of the right to access on information.

gg. Finally it has to be mentioned that some municipalities have issued **statutes on access to information** referring to their right on self-administration as provided by Art. 28 par. 2 GG. In a very recent decision the Bavarian High Administrative Court has raised doubt whether the Länder-law prevails such statutes so that the municipalities no longer have legislative power (BayVGH, decision of 27 February 2017 – 4 N 16.461 -).

hh. Excursus: **in camera procedure**

As we will see from the jurisprudence presented hereafter it can be disputable which part or content of information has to be provided for the establishment an exception from access or disclosure. The problem is that if one party submits information (e.g. documents) to the court, the other parties have the right to inspect the files, so the information is finally disclosed and accessible for all parties. Here (theoretically) German Law on Administrative Court Procedure provides for an interim procedure on the treatment of secret information within the court procedure. The public authority (as defendant) may not follow its general obligation for submission of all relevant files to the court under sec. 99 par. 1 sent. 1 of the Code of Administrative Court Procedure, if this information would prove disadvantageous to the interests of the Federation or of a Land, or if the events must be kept strictly secret in accordance with a statute or due to their essence of the information (sec. 99 par. 1 sent. 2). According to sec. 99 par. 2 the High Administrative Courts decide on the justification for refusal of submission. If the refusal is from the highest federal authority the federal Administrative Court decides. There is an appeal against the decisions of the High Courts to the FAC. The idea is that the information is submitted only to the court and another section of the court (means body or chamber, judge personally) decides only on the question if the non-disclosure is justified. If the non-disclosure is justified, the (main) court has to decide without the information. If it is not justified the information is inserted to court procedure.

but:

FAC, judgment of 25 June 2010 – 20 F 1.10 -: In disputes on access to information there is no general obligation for an in-camera procedure and the main procedure is not automatically turned into the interim procedure. Before the issuance of a decision for interim procedure the court is obliged to use all means ex officio to explore the facts and establish, if reasons for secrecy of the information exist without looking into the documents themselves.

but (under Reg. 1049/2001/EC):

ECJ, judgment of 28 November 2013 – C-576/12P - ECLI:EU:C:2013:777: It is true that, when an applicant challenges the lawfulness of a decision refusing him access to a document on the basis of one of the exceptions provided for by Art. 4 of Regulation No 1049/2001, claiming that the exception relied on by the institution concerned was not applicable to the document requested, the General Court is obliged to order production of the document and to examine it, if it is to ensure the applicant's judicial protection. Indeed, if it has not itself consulted the document concerned, the General Court will not be in a position to assess in the specific case whether access to the document could validly be refused by that institution on the basis of the exception relied on or, consequently, to assess the lawfulness of a decision refusing access to that document.

Where an institution refuses to grant access to a document and does so in reliance on reasons which are based on an exception whose applicability is not disputed, there is no ground for maintaining that, in order to assess the lawfulness of those reasons, the General Court is obliged to order, as a matter of course, production of the whole of the document in respect of which access is sought.

The General Court may decide, acting within the margin of discretion it enjoys in the assessment of evidence, whether, in a specific case, it is necessary, for the purpose of examining the merits of the reasons on the basis of which an institution has refused access to the document concerned, for that document to be produced before it.

b. jurisprudence of the FAC (BVerwG):

IFG:

Access to information on the legislation process, held by the **parliament**

FAC, judgment of 3 November 2011 – 7 C 3.11 – BVerwGE 141, 122: federal ministries (here: of Justice) in general are public authorities obliged under the law. The preparation of laws as part of governmental activity is not excluded (sec. 1 par. 1 sent. 2, law only applicable for administrative tasks)

Access to information on material supplies for members of parliament (i-pods, pencils and cameras)

FAC, judgments of 27 November 2014 – 7 C 20.12 – BVerwGE 151, 1 und 7 C 19.12 -: The information on how many items each MP is under personal data protection, the information on the total figure and the budget is legitimate.

Documents from the scientific service of parliament

FAC, judgments of 25 June 2015 – 7 C 1.14 – BVerwGE 152, 241: the scientific service has to be seen as public authority under IFG (functional view). The fact that the information is connected with the mandate (and therefore excluded by sec. 5 par. 2) does not exclude it. Scientific information is issued in a preparatory phase and the MP only uses it for his or her decision. There is also no copyright for public servants; they ow their works to the employer.

General:

FAC, judgment of 27 November 2014 – 7 C 18.12 -: If a public authority wants to deny access to information, it has to provide for facts which display in a comprehensible way that the requirements for an exception are fulfilled.

FAC, judgement of 25 June 2015 – 7 C 1.14 – BVerwGE 152, 241 n. 41: The processing of requests for access to information is an original task of the public authority.

FAC, judgment of 17 March 2016 – 7 C 2.15 – BVerwGE 154, 231: an unproportioned effort (sec. 7 par. 2 sent. 1 IFG) is established if the (partial) grant of access would lead to an unproportioned effort in financial means (costs) and personnel in relation to the gain of cognition for the applicant or the public (more than 4.000 folders): claim unfounded, high court did not establish facts on the interest of the applicant for the information.

FAC, judgment of 20 October 2016 – 7 C 20.15 -: The right to access to information to official telephone numbers of personnel of a Job Center (public labor administration employment agency) is excluded (by sec. 3 no. 2 IFG), when the emerge of the information can endanger public security - operational capability and effective accomplishment of a tasks by state institutions.

FAC, judgment of 20 October 2016 – 7 C 6.15 -: If an application for access to information is directed to homogeneous circumstances the decision of the public authority is – irrespective of the number of administrative acts issued – a unitary official act.

UIG:

FAC, judgment of 29. June 2016 – 7 C 32.15 - : Art. 10 par. 1 sent. 2 ECHR does not establish a duty of the state to provide for information. Even if the state is with regard to the possession of information in a monopoly position, the provision proscribes only the arbitrary or censorship like denial of access to information, which particularly eliminates appropriate press coverage. Limitation of access to information by art. 8 par. 1 sent. 1 no. 1 of the German law on environmental information (UIG, negative effects on international relations) is in accordance with art. 10 par. 2 ECHR because it is established by a (formal) law and the necessity is founded by the prevention of the distribution of confidential information necessary for unobstructed international relations.

The public authority has a margin of discretion in establishing whether there are negative effects on international relations.

FAC, judgment of 23 February 2017 – 7 C 31.15 -: municipalities can have access to information when they are in the same position like everybody who claims for information and if they perform self-administration; a civil legal person held in majority by the state and performing public duties or services can refer to the secrecy of business even if it is does not fall under fundamental rights protection.