

Answers LITHUANIA



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?

The implementation of the Directive 2003/4/EC and Directive 2003/35/EC – Resolution No 1175 on the Approval of the Procedure for the Provision of Environmental Information of the Republic of Lithuania to the Public.

The implementation of the Directive 2003/98/EC –

Law of the Republic of Lithuania on the Right to Obtain Information From State and Municipal Institutions and Agencies.

The standard which is guaranteed by EC Directives is implemented into national law.

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

Law of the Republic of Lithuania on the Right to Obtain Information From State and Municipal Institutions and Agencies ensure the right of persons to obtain information from state and municipal institutions and agencies, define the procedure for the implementation of the right and regulate actions of state and municipal institutions and agencies in relation to the provision of information to persons.

2.1. 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?)

Applicant shall mean a citizen of the Republic of Lithuania, a citizen of the state which is a party to the Agreement on the European Economic Area, an alien holding a permit for residence in the Republic of Lithuania or a group of such aliens, a legal person of the Republic of Lithuania, legal persons or other organisations registered in a state which is a party to the Agreement on the European Economic Area or their representative offices and branches established in the Republic of Lithuania. (Art. 2 (6)). The information can be provided for other applicants if it is not against the international and national law.

In order to obtain information from an institution, an applicant shall submit a request. The request shall indicate the type of information or document requested by the applicant, the applicant's name, surname, place of residence (where the applicant is a natural person) or the name, company number, head office address (where the applicant is a legal person) and contact details. If information is requested by the representative of the applicant, the request shall indicate the name, surname and address of the representative, the document confirming representation and the applicant for whom the request is made. The request form shall be published on the website of the institution. (Art. 12).

The Law on Environmental Protection states that one or more natural or legal persons and the public concerned shall the right to obtain information on the environment in accordance with the established procedure (Art. 7).

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

Every person shall have the right to obtain from state and municipal institutions and agencies as well as other budgetary institutions public information relating to their activities, their official documents (copies) as well as information held by the aforementioned institutions about the requesting person.

State and municipal institutions and agencies must inform the public about their activities (Art. 6 Law on on the Provision of Information to the Public).

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

State and municipal institutions and agencies (hereinafter ‘institutions’) shall mean representative, executive and judiciary authorities as well as the institution of the Head of the State, law enforcement institutions and agencies, institutions and agencies exercising audit and control (supervision), and other state and municipal institutions and agencies financed from the state or municipal budgets and state monetary funds, upon which public administrative powers are conferred in accordance with the procedure laid down by the Law on Public Administration, enterprises and agencies providing public services to persons; as well as state and municipal undertakings, public institutions the owner or at least one of the stakeholders of which is the state or municipality, public limited liability companies and private limited liability companies in which the state or municipality has more than 50 per cent of votes at a general meeting of shareholders, where information about salaries of their employees is provided according to the procedure established by this Law.

4. What are the limits and exceptions?

Art. 1 (2) Law of the Republic of Lithuania on the Right to Obtain Information From State and Municipal Institutions and Agencies:

Except where the provision of private information and the exercise of public administration functions laid down in Article 7 of this Act are concerned, this Act shall not apply to:

- (1) information, the management of which is not an activity connected with the exercise of functions entrusted to State and local authority bodies by legal acts;*
- (2) information in respect of which State and local authority bodies hold industrial property rights or third parties hold copyright or related rights or database producer (sui generis) rights;*
- (3) information held by Lithuanian national radio and television or other broadcasters funded by the State budget;*
- (4) information held by schools, libraries or scientific research bodies;*
- (5) information held by museums, theatres or concert venues, or bodies of the Lithuanian Archives Department attached to the Government of the Republic of Lithuania;*
- (6) information which by law is not to be provided for reasons of national or public security, national defence interests or owing to a restriction on the use of statistical data, or which constitute a State, official, commercial, professional or banking secret in other cases specified by law;*
- (7) information the provision of which is governed by other acts;*
- (8) where a person is obliged, in accordance with the procedure laid down in legal acts, to justify the purpose for which the information requested is to be used;*

(9) where public administration bodies exchange information amongst themselves in the context of official assistance.

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

If the access is denied or the public authority does not answer within 2 months the applicant has an access to the court. The rules of Law on Administrative Proceeding are applicable.

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 are the exceptions, using of the not public / secret information for the decision making, which courts (administrative or general jurisdiction) are competent for the case (in these cases the main question is if the body which was asked to provide the information is the public authority).

In 2013 the Constitutional Court of Lithuania stated that a court (judge) that considers a case has the right in all cases to become familiarised with the case material and/or material significant to the case constituting a state secret (or other classified information) irrespective of the fact whether he has the permission to handle or become familiar with the classified information which is issued under the Law on State Secrets and Official Secrets (decision of 3.7.2013).

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?

All kinds of evidence are admissible, including testimonies (opinions of witnesses).

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

The burden of proof belongs both to the applicant and the public administration. The applicant has to provide evidence with the complaint and lately during the hearing of the case, if there is a need. The court has a right to put public administration under an obligation to present evidence that the administrative act was legitimate.

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?

Parties to the proceedings shall have the right to challenge and file motions, make submissions and make explanations of the arguments during the hearing of the case.

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

Parties to the proceedings shall not change the merits of the proceedings at any time. The claimant has the right to change the complaint 14 days after receiving opinions of the other parties, lately the complaint can be changed only if the need to change it arose later and if the respondent does not object and the court considers that it will not unreasonably delay the proceeding.

During the closing statements parties to the proceedings shall rely only on the facts that were examined during the hearing of the case.

During the appeal proceedings parties to the proceedings shall not change the appeal.

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

Parties to the proceedings shall have the right of access to the documents of the case and other material and the right to object to the motions, arguments and pleas of other participants in the proceedings until the final decision. It is stated that the respondent has to present to the court the opinion on the complaint within the specified time limit set by the court (usually not less than within fourteen days).

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 Law on Administrative Proceedings states that, if it is needed for the proper execution of justice, the court can investigate the facts ex officio even if the applicant doesn't ask for this or formulate the requirements incorrectly.

The evidence shall be submitted by the parties to the proceedings and other participants in the proceedings. As necessary, the court may advise the said persons to submit additional evidence or upon the request of these persons or on its own initiative compel the production

of the required documents, demand that the officers give explanations. This is regulated by the Articles 10 and 80 of The Law on Administrative Proceedings of Lithuania.

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?

When hearing administrative cases, judges must actively participate in the collection of evidence, in the establishment of all significant circumstances of the case and must make a comprehensive and objective examination thereof. The judge can request information from the public administration and make a suggestion for the applicant to present additional information.

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

The judge can identify third interested parties on its own initiative and involve them in the debate. Third interested parties have the same rights as the parties to the administrative case except the right to change or withdraw the complaint.

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

If questions arise in the administrative case which require special knowledge in the sphere of science, art, technology and crafts, the court or the judge shall appoint an expert or charge an appropriate expert institution to carry out the expert examination. However, the judge often consults with the parties to the proceedings, as the amounts payable to the witnesses, specialists, experts and organisations of experts shall be paid in advance by the party which made an appropriate request.

1.2. THE PRINCIPLE OF CONTRADICTION AND ITS LIMITS

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

As a rule, the factual data which constitutes a state or official secret may not be evidence in an administrative case, until the data have been declassified in the manner prescribed by law. The judge can ask to a public authority to provide a secret information.

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?

The judge cannot communicate secret information to the parties. The judge cannot communicate secret information to anyone only access it himself/herself and take into account when making a final decision. But, as a rule, the factual data which constitutes a state or official secret may not be evidence in an administrative case.

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

The principle of adversarial is used in the process of proof. The parties to the proceedings shall have the right to submit evidence, take part in the examination of evidence, present

explanations, present their arguments and reasoning, object to the petition, arguments and reasoning of other parties to the proceedings.

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

According to the separate law the judge, as well as other persons who have access to such information, should keep a state or official secret information. In the procedural law, as well as other laws, there is no rules how to keep such secrets as, for example, private life or commercial secrets. The obligation not to reveal such secrets is only stated in the Ethic Code of Judges.

The judge can determine by a reasoned order that the case material or part thereof is not of public character, provided this is necessary for the protection of the person's personal identity, private life and property, also for preserving confidentiality of the information relating to the person's health, also where there is a good ground to believe that a state, official, professional or commercial secret will be disclosed.

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?

The Law on Administrative Proceedings states that the court asks the parties for evidence before the hearing during the period of the preparation for the case (Art. 67). The judge has an active role (Art 80). If necessary, the court may advise the parties to submit additional evidence or upon the request of these persons or on its own initiative compel the production of the required evidences, demand that the officers give explanations.

It is possible to provide evidence during all period before the final part of the hearing – „closing speeches of the parties“. After that the providing of new evidence is not possible.

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

The examination of evidence and the debate between parties is the part of the oral hearing. The debate is possible before till the final part of the hearing - „closing speeches of the parties“.

The reopening of the case is possible if after the closing speeches of the parties the court decides that some additional evidence is necessary (Art. 81).

3. THE HEARING

3.1. Possibility of a judicial decision without a hearing?

A judicial decision can be taken after an oral hearing or after the written procedure session.

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

If the parties do not come to the oral hearing the court can decide for the written procedure (Art. 78).

3.3. Possibility of an in camera hearing?

There is one possibility to have an in camera hearing at the moment - in the cases where one of the party is the prisoner.

3.4. Possibility of a hearing in a closed court ?

The court can decide for the hearing in a closed court if it is necessary to protect the private or family life of the person, the secrets of the state or authority, business or professional secrets.

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 ?

Art. 56 of the Law on Administrative Proceedings states that the data which are state secrets or official secrets usually can not be evidence if they are not disclosed.

According the jurisprudence of the Supreme Administrative Court of Lithuania if in the files are only secret data and they are not disclosed the court can not confirm the legality of an administrative act using only the secret data.

4.2. Are all judgments pronounced publically published ? Are there some exceptions ?

The pronouncement of the judgments is the part of the hearing. All judgments are pronounced publically exceptionally the judgments in the cases which were heard in the closed court. Before the publishing the judgment the private data in the judgment shall be depersonalized.

The judgments in the cases which were heard in the closed court or judgements in the cases which all files are not public are not publically published. This is regulated by the Regulation of the Lithuanian Council of Judges of 27 November 2015.

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?

The Seimas (Parliament) shall impose the state of emergency (Art. 67 of the Constitution). After imposition of martial law or a state of emergency, the rights and freedoms specified in Articles 22, 24, 25, 32, 35, and 36 of the Constitution (right to private life, right to inviolability of the home, freedom of expression, freedom to choose the residence, freedom of association, right to hold peaceful meetings) may be temporarily limited (Art. 145 of the Constitution).

The special law – the Law on State of Emergency - regulates the conditions when the state of emergency can be imposed and the limitation of the rights and freedoms. Art. 21 states that the right for access to information can be limited ; it can be prohibited to get and to spread the information about the state of emergency and the actions of the public authorities and officers. Art. 32 states that during the period of the state of emergency the actions of the public authorities and officers can be appealed to the court.

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