NEJVYŠŠÍ SPRAVNI SOUD

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Provide or Protect? Administrative courts between Scylla of freedom of information and Charybdis of protection of privacy.

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Answers to Questionnaire: Austria

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Provide or Protect? Administrative courts between Scylla of freedom of information and Charybdis of protection of privacy

(questionnaire)

Part I

1. Is the central administrative supervision over providing information and protection of personal data carried out by one administrative authority or are there specialized authorities for each of these fields or is there an absence of such an authority in any of these areas? Does the chosen model cause any application problems?

In Austria, the central administrative supervision over providing information and protection of personal data is not carried out by one administrative authority.

As to providing information, according to Art 20 Para 4 of the Federal Constitutional Law (below: B-VG) all executive officers entrusted with Federation, provinces and municipal administrative duties as well as the executive officers of other public law corporate bodies shall impart information about matters pertaining to their sphere of competence insofar as this does not conflict with a legal obligation to maintain confidentiality.

Hence, there is no single authority established especially for granting information in Austria, but any institution has to comply with the obligation to provide information within its scope of activities.

If the information is not granted, the applicant can request a ruling on the matter. Against such a ruling a complaint can be lodged with the competent administrative court (of the Federation or of the Provinces, depending on what kind of authority has issued the contested ruling).

Against such a court decision a final complaint can be lodged with the Austrian Supreme Administrative Court (below: SAC) and the Austrian Constitutional Court.

Concerning the protection of personal data a specialised authority, namely the Data Protection Authority, has been established, deciding on complaints of persons, who allege to have been infringed in their right to be informed (as to who processes what data concerning him/her), their right to secrecy, their right to correction (of incorrect data) or to deletion (of illegally processed data) pursuant to the Federal Act concerning the Protection of Personal Data (below: DSG). The Data Protection Authority is an administrative authority, but its head is independent and not bound by instructions in the exercise of its office. The Data Protection Authority is competent only for data protection as far as authorities are concerned that act in the execution of laws (public sector), with the exception of acts of legislation and the jurisdiction of the Courts of Justice.

If the complaint is found to be justified, an infringement is to be stated; otherwise the complaint is to be rejected. The Data Protection Authority decides by ruling, against which - in this respect the situation is comparable to the situation regarding free access to information - a complaint

with the federal administrative court and - subsequently - a final complaint with the SAC and the Constitutional Court can be lodged.

The competence to impose administrative penalties rests with the (regular) district administrative authorities.

To ensure the right to data protection (except the right to information) against organisations, that are established according to private law and that do not act in execution of laws (so called private sector), a civil court action has to be taken.

In addition to the Data Protection Authority there is also the Data Protection Council, which advises the federal government and the provincial governments in political matters of data protection.

2. What types of information are excluded from providing? Is there one regime regarding all exclusions or is there any differentiation – e.g. absolute exclusion and relative exclusion?

As a preliminary remark, based on Art 20 Para 4 B-VG, Duty to Grant Information Acts on a federal level as well as on provincial level have been issued. The Duty to Grant Information Acts of the Provinces comply with the (Federal) Duty to Grant Information Act (below: APG).

a) According to Art 20 Para 4 B-VG and § 1 Para 1 APG, executive bodies shall impart **information about matters pertaining to their sphere of competence**. Hence, the duty to provide information covers administrative duties regardless of whether these are matters of sovereign or non-sovereign administration.

b) Art 20 Para 4 B-VG and § 1 Para 1 APG oblige executive bodies to provide information insofar as this does not conflict with a legal obligation to maintain confidentiality. The main case concerning the legal obligation to maintain confidentiality is the **official confidentiality**. Art 20 Para 3 B-VG states that all executive officers entrusted with federal, provinces and municipal administrative duties as well as the executive officers of other public law corporate bodies are, save as otherwise provided by law, pledged to confidentiality about all facts of which they have obtained knowledge exclusively from their official activity and which have to be kept confidential in the interest of the maintenance of public peace, order and security, of comprehensive national defence, of external relations, in the interest of a public law corporate body, for the preparation of a ruling or in the preponderant interest of the parties involved.

Another case of the legal obligation to maintain confidentiality constitutes the **fundamental right to data protection** according to § 1 Para 1 and 2 DSG. According to this right, everybody shall have the right to secrecy for the personal data concerning him, especially with regard to his private and family life, insofar as he has an interest deserving such protection. Such an interest is precluded when data cannot be subject to the right to secrecy due to their general availability or because they cannot be traced back to the data subject.

Examples for legal obligations to maintain confidentiality based on ordinary laws are the duty to confidential treatment of application documents (§ 14 Law concerning positions in the public

sector), the obligation of secrecy in tax matters (§ 48a of the Federal Fiscal Code) or the consultation and voting secrecy pursuant to § 124 Para 4 of the Law of the Civil Servants.

c) According to § 1 Para 2 APG, information shall be given only or to an extent which does **not substantially impair compliance with the other duties of the administration**. The following elements can be deducted from the jurisprudence of the SAC: no duty to acquire information, which is unknown to the administrative unit; no duty to extensive preparation and to prepare expert opinions or to acquire information that is available in another way; a general subordination of the provision of information to other duties of the administration.

d) Pursuant to § 1 Para 2 APG, information shall not be given if it is obviously requested in a **frivolous way**. The existence of such obvious frivolity must be reasoned by the authority in the decision denying information.

e) According to Art 20 Para 4 B-VG, an onus on professional associations to supply information extends only to members of their respective organisations and this inasmuch as fulfilment of their statutory functions is not impeded.

3. Are there any types of subjects governed by private law that have duty to provide information? If the answer is affirmative, what kind of subjects and what kind of information?

Various relevant laws foresee the obligation of subjects governed by private law to provide information. For example:

a) According to § 26 Para 1 DSG, a controller shall provide any person or group of persons with information about the data being processed about the person or the group of persons who so request in writing and prove his/her identity in an appropriate manner. Subject to the agreement of the controller, the request for information can be made orally. The information shall contain the processed data, the information about their origin, the recipients or categories of recipients of transmissions, the purpose of the use of data as well as its legal basis in intelligible form. Upon request of a data subject, the names and addresses of processors shall be disclosed in case they are charged with processing data relating to him. If not data of the person requesting information exist it is sufficient to disclose this fact (negative information). With the consent of the person requesting information, the information may be provided orally alongside with the possibility to inspect and make duplicates or photocopies instead of being provided in writing.

Regarding videosurveillance, the person requesting information, after having indicated the timeframe during which he/she might have been captured by the surveillance and after having indicated the location as precisely as possible and after having proven his/her identity in adequate manner, is to be granted information on the data processed on his/her person, by sending of a copy on the data processed to his/her person in a common technical format. Alternately, the person requesting information may request inspection on a reading device of the controller and is also entitled to be handed over a copy in such case. The other elements of the information (available data on the origin, recipient or circles of recipients of data transmitted, purpose, legal

basis and eventually service providers) are to be given in writing also in case of surveillance, unless the person requesting information agrees to oral information (§ 50e Para 1 DSG).

b) According to § 3 Para 1 Environmental Information Law (below: UIG), authorities which are required to provide information are - insofar as the environmental information concerns matters, which are in respect of legislation the business of the Federation - inter alia natural or legal persons under private law, that fulfil in connection with the environment public duties and public services under the control of (i) authorities, (ii) organs of regional authorities, insofar as they fulfil duties of the private-sector administration activities of the Federation, (iii) legal persons under public law, insofar as they fulfil duties of the public administration - conferred by statute - including various duties, activities or services in connection with the environment.

Pursuant to § 4 Para 1 UIG, the right to free access to environmental information, that exist with the authorities which are required to provide information or are held ready for them, is granted to every natural or legal person without the proof of legal claim or of legal interest in accordance with the UIG. § 4 Para 2 UIG states that free access includes information on (i) the state of the elements of the environment, such as water, air and atmosphere, soil, biodiversity and their elements involving genetically modified organisms and natural habitats, as well as the interactions between these elements; (ii) noise pollution or pollution by waves including those created by radioactive waste; (iii) emissions into the environment in aggregated or statistically presented form; (iv) violations of emission threshold values; (v) the consumption of natural resources such as water, air and soil in aggregated or statistically presented form.

c) According to § 90 of the Telecommunications Act (below: TKG 2003) operators of communications networks or services as well as holders of rights of use for frequencies or communications parameters shall be obliged to provide, upon written request, to the Federal Minister of Transport, Innovation and Technology and the regulatory authority the information that is required for the execution of this Act and the relevant international regulations, for example information in procedures for the licensing of frequencies or communications parameters.

Providers of communications services shall be obliged to provide information to administrative authorities, at their written and substantiated request, on master data of subscribers who are suspected of having committed an administrative offence by an act using a public telecommunications network to the extent that such provision is possible without processing traffic data (§ 90 Para 6 TKG 2003).

At the written request of the competent courts, public prosecutor's offices or the police responsible for criminal investigations, providers of communications services are obliged to provide those authorities with information on master data on subscribers for the investigation and prosecution of actual suspicions of a criminal offence. This shall apply according to requests from law enforcement authorities. In urgent cases, such requests may be conveyed orally on a preliminary basis (§ 90 Para 7 TKG 2003).

Operators of communications networks or services shall provide information to operators of emergency services, at their request, on master data as well as on location data under certain conditions (§ 98 Para 1 TKG 2003).

4. Are the salaries of the employees of the public sector subject to the right to free access to information as well? Does this cause any application problems regarding the personal data protection?

As a preliminary remark, salaries of civil servants and contractual employees of the Federation are regulated by law, namely the Law on Salaries (Gehaltsgesetz), the Law on Contractual Employees (Vertragsbedienstetengesetz) as well as the Judges' and Prosecutors' Service Law (Richter- und Staatsanwaltschaftsdienstgesetz). (See therefore question 9.1.: All applicable laws can be accessed via www.ris.bka.gv.at).

However, the information on how much a specific civil servant earns is subject to data protection.

5. Is the trade secret excluded from the free access to information?

Generally, according to the jurisprudence of the SAC, the authority, which is asked to provide information, is obliged to assess whether an obligation to maintain confidentiality opposes the information request; hence, the authority must take into account the interests of the parties, including the trade secret. However, according to § 90 Para 1 TKG 2003, concerning operators of communications networks or services as well as holders of rights of use for frequencies or communications parameters, the refusal to provide information with reference to contractually agreed company and trade secrets shall not be permissible.

6. Are documents that are subject of intellectual property excluded from the free access to information?

a) According to § 7 Para 1 Copyright Act (below: UrhG), laws, regulations, official bulletins, announcements and decisions as well as official works predominantly created for official use do not enjoy copyright protection.

b) If a work is not (yet) in the public domain, it is excluded from the free access to information.

7. Does the right to free access to information cover as well the parts of an administrative file that contain data related to individuals or are these data protected? In which areas of public administration does this cause problems?

a) As a preliminary remark, pursuant to case law of the SAC (see No. 2011/03/0093), the duty to provide information pursuant to Art 20 Para 4 B-VG (and § 1 Para 1 APG) does not include the duty to grant the inspection of files but to grant information on parts of the file. This information must not be as detailed as an inspection of files would be.

b) Generally, pursuant to § 17 Para 1 General Administrative Procedure Act 1991 (below: AVG), the parties can inspect the files concerning their case at the authority and make or have made copies or printouts of the files or parts of the files. To the extent the authority processes the files

in the case electronically the parties may be granted inspection of the files in any technically feasible form upon request. Excluded from the right to inspection are parts of files whose disclosure would result in damage to justified interests of either party or third parties or jeopardize the work of the authority or impair the objective of the proceeding (§ 17 Para 3 AVG).

Referring to the judgment of the Court of the European Union from 14. February 2008, C-450/06, Varec SA, the SAC states that § 23 of the Federal Procurement Act obliges all parties to the proceedings to maintain secrecy over information worth protecting. According to the SAC, this does not create a basis to deny a bidder access to information relevant for the proceeding, on which the authority backs its decision fundamentally. The benchmark for the exception of the inspection of files is § 17 Para 3 (see No. 2009/04/0187).

8. Are data related to criminal proceedings or administrative delict proceedings or any data of quasi-criminal nature (typically files of secret police departments from the times of anti-democratic past) excluded from the right to free access to information?

The general provisions are applicable.

Part II

9. Public availability of decisions

9.1 Are there any sorts of decisions in your jurisdiction that are not published at all (e.g. decisions with classified status or other decisions with restricted access)? If so, please describe typical cases and give indicative statistic that can illustrate the frequency and relevance of such cases.

In general, all decisions of the SAC are published online and can be accessed on: www.ris.bka.gv.at. All decisions are previously anonymised. The only decisions, which are not published are decisions which contain no further content than the general form.

9.2 If a third person (not a party of respective case) wants to obtain your decision, what is the procedure? On-line availability of decisions is to be discussed below, so kindly describe here only other options (e.g. whether it is possible to ask for a decision by snail-mail, whether any fee apply etc.)

Any person can obtain a decision of the SAC online, see above 9.1.

Anyone can also come in person to the service centre of the SAC and request a copy of a decision. The cost amounts to 0,50 EURO per page.

9.3 Is there any official collection of selected decisions of you instance (apart on-line publication of decisions – see below)? If so, please describe in detail the procedure of its issue. In particular, please focus on the selection process of decisions that are to be published, the frequency of publication and the form of publication. Indicate, whether the collection is published directly by your instance, by some other public body or by an independent publisher. If the collection is published by an independent publisher, please describe the form of cooperation (i.e. whether the publisher has exclusive rights to publish the collection, whether the publisher does any editing of published decisions

etc.) Are decisions that are chosen for the publication regarded more relevant by your instance or by general public?

Yes, there are two official collections of selected decisions, which would be namely the official collection regarding general administrative law and the official collection regarding financial law. The editors of these two official collections are judges at the SAC (see Art 7 of the internal regulation of the SAC). The judges select the decisions upon their discretion. Decisions published in these collections are usually novel and of general importance.

The collection is published once a year by an independent publisher, Verlag Österreich.

10. Editing and anonymization of decisions

10.1 Do you anonymize published decisions? If so, please describe in detail the procedure. In particular, please describe who is in charge of anonymization, whether there are any particular statutory or other rules governing anonymization (apart general privacy/data protection rules) and what data are anonymized.

All published decisions of the SAC are anonymised according to § 43 of the SAC Act and the internal regulation of the SAC.[1]

After the session of a chamber the clerk anonymises all decisions. Names, birthdates, addresses of the parties have to be removed leaving only the initials of the name or XYZ and an initial for the place of residence. Names of expert witnesses are reduced to their initials as are names of associations.

The name and address of the lawyer representing a party is not anonymised.

An exception of this rule concerns decisions, where the Austrian public broadcasting (ORF (Österreichischer Rundfunk) is concerned. This party is not anonymised.

10.2 If anonymization practice changes, does it affect already published decisions (i.e. are past decisions subsequently anonymized/de-anonymized with every change of anonymization rules)?

Once a decision has been anonymised it remains this way, no changes are done ex post.

10.3 Describe any subsequent problematic issues that you noted in your jurisdiction regarding the anonymization (e.g. different practices of different supreme instances, strong public debates, impact of de-anonymization of decisions by media etc.)

No problematic issues have arisen so far.

10.4 Do you edit published decisions? If so, please describe in detail the procedure. In particular, please describe who is in charge of editing, what information is added/removed in the process of editing (incl. metadata).

[1] see also the judgment of the ECtHR, Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden Land- und Forst-wirtschaftlichen Grundbesitzes v. Austria, Application no. 39534/07 of 28 November 2013.

No.

10.5 Has the development of the right to be forgotten affected in any way the anonymization or publication of your decisions? If not, is it a topic that is being considered in your jurisdiction with regards to the publication of court decisions?

No.

11. On-line publication of decisions

11.1 Are decisions of your instance available on-line? If so, please indicate whether on-line all or only selected decisions are published on-line (if only selected decisions are published, please describe the procedure of their selection).

See question 9.1 above

11.2 Describe the form of on-line publication of you decisions. In particular, indicate whether your decisions are published through your own website or whether it is done through some different on-line service (e.g. through a common platform operated by a ministry of justice, by a judicial council etc.) Kindly add also sample screenshot(s) or link(s).

Press releases containing summaries of important decisions for media and general use, as well as the full text can be found on the website of the SAC: https://www.vwgh.gv.at/news/index.html

All decisions are published on the official website of the legal information system of the Republic of Austria: https://www.ris.bka.gv.at/Vwgh/

The Legal Information System of the Republic of Austria (RIS) is a computer-assisted information system on Austrian law, which is coordinated and operated by the Austrian Federal Chancellery. The RIS was launched in 1983, the essential features of the system were designed then. After federal legislation had been incorporated, court decisions were included as well. Since June 1997 the RIS, which previously had been accessible only to the public administration, has been available on the Internet free of charge to all public.

11.3 What are available file formats in which your decisions are available on-line? Apart enumerating particular file formats, kindly indicate whether your instance systematically sticks to any commonly accepted open data policy. Also, please indicate whether your instance publishes on-line only individual decisions or whether whole datasets are available to the public for further re-use. If datasets are available for further re-use but not publically, please describe to whom and under what conditions such datasets are made available.

Decisions are available in the following formats: html, pdf or as rtf document on the official website of the legal information system (https://www.ris.bka.gv.at/Vwgh/).

On the website of the SAC selected decisions (see question 11.2) are available as pdf documents.

12. Public availability of other documents

12.1 Are there published on-line personal information about members of your instance? In particular, please describe whether there are CVs available, in which length and form (e.g. on a court website) and eventually what information is regularly published (e.g. education, memberships, political beliefs, marital status etc.) Also, please indicate whether the publication of information about members of your instance is compulsory, whether the members of your instance are free to decide about the structure and content of such information and whether you noted any issues in that regards (e.g. there was a big debate in the Czech Republic over the publication of past membership of the judges in the communist party). Please add a sample link or a screenshot of how such personal information about a member of your instance looks like.

No CVs of judges are published on the website of the SAC. Their names can be found on the official website of the SAC. The CV of the president of the SAC and of the Vice-President are available on the website

(see: https://www.vwgh.gv.at/gerichtshof/richterinnen_und_richter.html)

Decisions on the appointment of a new judge or the appointment of a new president of a chamber are published on the official website of the SAC. See for example here: https://www.vwgh.gv.at/medien/ernennung_senatspraesident.html

12.2 Which case-related documents other than decisions of your instance are published on-line (e.g. dissenting opinions, advocate general submissions, submissions of parties, records of chamber deliberations etc.)? Please, describe how these documents are published, i.e. where and in which format (e.g. on a website through a search form, in open data formats, etc.). If your instance publishes these documents in open formats, kindly provide a sample link to a particular dataset.

No other case related documents are published.

12.3 Are the members of your instance allowed to publically comment or annotate on their own decisions or other decisions of your instance? If so, please describe common forms in which this is done (e.g. in law journal articles, in public debates on case-law organized by the respective instance etc.)

There is no general rule allowing judges to publically comment or not on their own decisions, usually judges do not comment or annotate publically on their own decisions.

Part III

13. What trends, threats and challenges do you foresee to come in the field of freedom of information and protection of privacy during the next decade? What should be the role of supreme administrative jurisdictions in facing these trends, threats and challenges?

[This kind of question seems to be too broad for answering it with concrete data. Therefore our aim is not to pursue you to fill it with some concrete and clear statement but what we intend is to know your opinion on what trends could or will influence this scope of decision-making of your jurisdiction. Your answer will serve as the basics for further discussion during the third part of

the Colloquium and we hope that this "look into the future" will be pleasant and useful ending of the meeting.

We would very appreciate if the presidents of the SACs/Councils of States could provide us with answers to this question.]

In Austria, the prevailing problem of the difficult relationship between Art 20 Para 3 (official confidentiality) and Art 20 Para 4 B-VG (duty to grant access to information) will (probably) be tackled. Since a breach of Art 20 Para 3 B-VG is considered a serious offence, administrative authorities allegedly tend to interpret the broad official confidentiality regulation in favour of refusing to grant the requested information on the grounds of official secrecy reasons.

A recent government bill aims at improving the information rights in Austria and at implementing a more modern legal frame in that matter. Pressured by European Union Law, the fact that 90 other States already have implemented Transparency and Information Acts and last but not least also by the public opinion in general, the government has stated in the notes to the mentioned bill, that a legal framework such as expressed by Art 20 Para 3 and 4 B-VG is no longer compatible with the needs and challenges of our time.

Therefore, those provisions are planned to be set aside and replaced by provisions declaring the obligation of the whole administration to make all information of general interest public as well as by provisions that strengthen the right to free access to information for everyone.

The wording of this draft reads as follows:

"Art 22a. (1) The authorities of the legislature, all executive officers entrusted with federal and provinces administrative duties, the courts of justice, the Court of Audit, the provincial courts of Audit, the administrative courts, the SAC, the Constitutional Court, the Ombudsman and the institutions entrusted with similar duties as the Ombudsman in the provinces shall publish all information of general interest in such manner, that they are accessible to everyone insofar as this does not conflict with a legal obligation to maintain confidentiality as provided by Para 2.

(2) Everyone has the right to be granted access to information by the authorities of the legislature, all executive officers entrusted with federal and provinces administrative duties, the Court of Audit, the provincial courts of Audit, the Ombudsman and the institutions entrusted with similar duties as the Ombudsman in the provinces, unless it is necessary that the information has to be kept confidential in the interest of compelling external relations and integration reasons, in the interest of national security, of comprehensive national defence or the maintenance of public peace, order and security, for the preparation of a ruling, in the economic or financial interest of a public law corporate body or any other self-administrating body, or in the preponderant and justified interest of others or, insofar as it is explicitly ordered by law, for the safeguarding of equally important general interests; professional associations are obliged to supply information only to their members.

(3) Everyone has the right to be granted access to information by undertakings subject to the control of the Court of Audit or the provincial courts of Audit, insofar as this does not conflict with a legal obligation to maintain confidentiality in analogous application of Para 2 or insofar as it is not necessary to maintain confidentiality in order to avoid jeopardising the competitiveness of the undertakings or if the law does not provide otherwise, as long as there is a comparable access to information given.

…"

However, neither transparency nor information duties shall exist, if there is an obligation to confidentiality explicitly ordered by law.

The SAC has delivered a statement to the government bill and has expressed its opinion to § 4 Para 1 of the draft of the mentioned government, whereupon inter alia the SAC shall publish information of general interest in a manner accessible for everyone, and according to the technical possibilities, in a barrier-free manner in the internet, as long as these information are not subject of secrecy. The SAC assumes, that it complies with the legal requirements of the draft (i) by publishing all judgments and the most important rulings of the SAC as well as the rules of procedure of the SAC in the legal information system of the Federation, (ii) by publishing selected judgements of special interest on the homepage of the SAC, (iii) as well as by publishing the annual activity report.