NEJVYŠŠÍ SPRAVNI SOUD

Colloquium organized by Supreme Administrative Court of the Czech Republic and ACA-Europe

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

Prague, 29-31 May 2016

Answers to Questionnaire: Czech Republic

Colloquium co-funded by the “Justice” programme of the European Union

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

(questionnaire)

Czech Republic

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 applied system cause any application problems?

In the Czech Republic, there is currently no central administrative authority supervising provision of information, thus there is no authority under which both areas would fall. In case of providing information requests are addressed directly to obliged entities (e.g. to financial authority, municipal authority etc., depending on the kind of requested information, or on the kind of its holder). If the applicant is not satisfied with the answer, or was given no answer, they can have recourse to the superior instance of the obliged entity. Naturally, the absence of a central authority implies some systemic deficiencies (see below).

In the field of personal data protection there is an independent body, The Office for Personal Data Protection (hereinafter referred to as "the Office") that meets conditions of the directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and supervises the observance of legal obligations resulting from the data processing (which is, under Czech law, primarily regulated by the Act No. 101/2000 Coll., on Personal Data Protection). As for other roles of the Office, it maintains a register of data processing[1], treats complaints and suggestions of citizens relating to the violation of the abovementioned act, or it gives advice in the field of personal data protection. When it comes to the practice of the Office, in the past some deficiencies could be traced in its activity, for instance too low fines imposed by the Office, nevertheless, with regard to its new management improvement is expected.

In the light of the described situation some partial problems emerge as the first area does not have any regulatory body and the second although has one but with some flaws in its activity. The main weakness is the absence of one central authority common to both areas which results in a certain lack of cohesion. In fact, there is no public body that would react to the "interaction" between both areas. As a result, possible conflicts, be it inside of both areas or between them, are not solved sooner than before administrative courts when the final "unifying body" is the Supreme Administrative Court (hereinafter referred to as "SAC"). It is a question whether this was a purpose of the legislator. Moreover, cases of personal data protection are often heard before civil law courts as violation of personality rights and not before administrative courts.

[1] Notification of personal data processing recorded into the register contains: identification of controller, purpose of processing, categories of data subjects and personal data relating to these data subjects, sources of personal data, place of personal data processing, receivers, supposed transmission of personal data to other States. See https://www.uoou.cz/verejny-registr-zpracovani-osobnich-udaju/ds-1513/archiv=0&p1=1511.

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

A) The Act No. 106/1999 Coll., on Free Access to Information, does not cover, as it results from its wording, **requests for opinions, future decisions and/or creation of new pieces of information.**

Pursuant to the case-law of the SAC: obliged entities do not have to provide information on their opinions not yet formed, but they have this duty when it comes to opinions already expressed and materialized [judgment from 19th October 2011, No. 1 As 107/2011-70, No. 2493/2012 Court Reports of the SAC (hereinafter only "SAC Reports")].

B) In view of particular exclusions from the free access to information, the Act on Free Access to Information as well as the case-law of the SAC stipulate these exclusions:

- providing information being subject to **industrial property rights** and other information **if a special law regulates their disclosure** [§ 2(3) of the Act on Free Access to Information]
- information designated as **classified** under special laws[2] where the applicant is not entitled to the access to it (§ 7)
- **background materials for decisions** – § 11(4)(b) of the Act on Free Access to Information excluded also judgments that were not final as they were considered as "*decision-making activity of the court*"; the legislator chose final judgments as the only subtype of these pieces of information that has to be provided (judgment of 29th April 2009, No. 8 As 50/2008-75, No. 1880/2009 SAC Reports)[3]
- personal data of the person to whom the obliged entity supplied **public funds except cases** concerning social security, health care, unemployment benefit, state support of construction savings and state support in the renewal of territory [§ 8b(2)]
- **trade secret**[4], whereas "*providing information* ***related to the use of public funds (supplied amount and receiver)*** *does not represent violation of trade secret*" [§ 9(2)]
  - SAC: with regard to § 9 of the Act on Free Access to Information disclosure of *all* the parts of a contract for work – public procurement – including the price paid *from public budgets* cannot be denied (judgment of 9th December 2004, No. 7 A 118/2002-37, No. 654/2005 SAC Reports)
- **personal data** – it is not possible not to provide decisions addressed to a legal person arguing with the personal data protection pursuant to the Act on Free Access to Information, this kind of protection belongs to natural persons *only* (judgment of 13th October 2004, No. 6 A 83/2001-39, No. 651/2005 SAC Reports)
- information about the **financial situation of a person who is not an obliged entity**, obtained on the basis of acts governing taxes, fees, pension or health insurance, or social security shall not be provided by the obliged entity (§ 10)

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[2] Act No. 412/2005 Coll., on Protection of Classified Information and Security Capacity

[3] This legal provision has been amended. Now all the judgments, final or not, have to be provided.

[4] See § 504 of the Act No. 89/2012 Coll., Civil Code.

- information generated **without use of public funds** that was provided by a person on whom the law does not impose that obligation, **unless the person had approved** the information be provided [§ 11(2)(a)]
- **recipients of public funds** – persons to whom a tax or its accessions have been remitted pursuant to § 55a of the Act No. 337/1992 Coll., on Tax Procedure, are recipients of public funds in the sense of § 8b of the Act on Free Access to Information
- information the obliged entity **publishes on the basis of a Special Act** (e. g. Act No. 89/1995 Coll., on National Statistical Service, Act no. 6/1993 Coll., on Czech National Bank) and at regular intervals set in advance, and until the next interval [§ 11(2)(b)]
- by providing the information the **protection of third party rights to an object subject to copyright or related rights would be breached** [§ 11(2)(c)]
- information concerning the **stability of the financial system** [§ 11(2)(d)]
- information the obliged entity has obtained from a third person **in fulfilling its tasks in control, oversight, supervision, or similar activities undertaken on the basis of a special legal regulation**[5], according to which the information is subject to confidentiality or another process protecting it from publication or abuse. The obliged entity shall only provide information that arose from its activity in performing these tasks [§ 11(3)]
- information about **criminal proceedings** that are in process [§ 11(4)(a)]
- **service of a sentence** – information about service of a sentence does not *automatically* fall within the exemption according to § 11(4)(a) of the Act on Free Access to Information, because service of a term of imprisonment does not come under the term "*criminal procedure*" in a narrow sense (judgment of the SAC from 16th March 2010, No. 1 As 97/2009-119, No. 2166/2011 SAC Reports).
- information about **decision-making of courts**, except for final judgments [§ 11(4)(b)]
- information about performance of the tasks of **intelligence services** (e. g. information about intelligence services of foreign authority concerning organized crime and terrorism etc. [6])[§ 11(4)(c)]
- information about preparation, course, and discussions about the **outcomes of checks by bodies of the Auditor General's Office** [§ 11(4)(d)]
- information about activities of the Ministry of Finance pursuant to Act No. 253/2008 Coll., **on Certain Measures against Money-laundering and Financing Terrorism**, or pursuant to Act No. 69/2006 Coll., **on Implementation of International Sanctions** [§ 11(4)(e)]
- information about data kept in evidence of incidents (pursuant to the Act No. 181/2014 Coll., **on Cyber Safety**) from which it would be possible to **identify a body or a person that announced a cyber attack**, or whose providing would jeopardize the efficiency of a reactive or protective measure pursuant to the Act on Cyber Safety [§ 11(4)(f)]
- **session of the community board** – non-public nature of the session of the community board does not imply the exclusion of the right to access a record from that session under the Act on Free Access to Information (judgment of the SAC from 25th August 2005, No. 6 As 40/2004-62, No. 711/2005 SAC Reports).
- **session of the community/regional council** – request for records from sessions of the community council filed according to the Act on Free Access to Information cannot be

[5] Act No. 552/1991 Coll., on State Controlling, Act No. 15/1998 Coll., on Commission for Securities, Act No. 64/1986 Coll., on Czech Trade Inspection and Act No. 133/1985 Coll., on Fire Protection.
[6] cf. § 5 of the Act No. 153/1994 Coll., o Intelligence Services

rejected because of the fact these records are regularly published; the exemption of § 11(2)(b) of the Act on Free Access to Information cannot be applied (judgment of the SAC from 27th June 2007, No. 6 As 79/2006-58, No. 1342/2007 SAC Reports).

C) The Act on Free Access to Information also provides for **restrictions of the scope** of the information provided by the obliged entity. These situations are as follows:

- the information pertains **solely to the internal guidelines and personnel regulations** of the obliged entity,
- it is **new information** which arose in the preparation of a decision of the obliged entity, unless the law stipulates otherwise; this **only applies until the preparation is concluded by a decision**, or
- it is **information** provided by the North Atlantic Treaty Organization or European Union **that is in the interest of the state security, public safety or protection of rights of the third persons protected by** the aforesaid originators by the **designation** „*NATO UNCLASSIFIED*" or „*LIMITE*" and in the Czech Republic the designation is accepted on grounds of performing duties arising for the Czech Republic from its membership in NATO or European Union, **as long as the originator did not approve it be provided**.

By the abovementioned list of exemptions pursuant to the Act on Free Access to Information it is to be mentioned that this regulation must be understood as *lex generali* (see § 11(4) of the cited Act: "*the provisions of special laws on providing with information in the said areas shall not be prejudiced.*"

In the context of criminal proceedings the Act on Free Access to Information adds a substantial condition for non-providing information namely that by providing the information *"the rights of third persons or ability of the law enforcement and judicial authorities to prevent, search or detect criminality, prosecute crimes or safeguard security of the Czech republic would be jeopardized*" .

As a general rule it may be laid down that the right to deny providing information **persists only for duration of the grounds for its denial**.

3) Are there any types of subjects governed by private law that have duty to provide information? If the answer is positive what are these subjects and what kind of information are they related to?

The provision of § 2 of the Act on Free Access to Information defines "*obliged entities*" either as state authorities, territorial self-governing units and their bodies, and public institutions [§2**(1)**] or as "*those entities to which the* ***law has entrusted decision-making about the rights, legally protected interests, or obligations of natural persons or legal entities in public administration, solely within the scope of this decision-making activity***" [§2**(2)**].

Amongst obliged entities can be therefore put some "*public institutions*" which were found as **subjects of private law** and also **private subjects** that were entrusted with the powers according to the §2(2) of the Act on Free Access to Information. Specific examples of such obliged entities of private-law nature can be found **in case-law**:

- **General Health Insurance Agency** is obliged entity according to the § 2 of the Act on Free Access to Information that has duty to provide information regarding payments

provided to individual contractual health facilities (judgment of 16th May 2007, No. 3 Ads 33/2006-57, No. 1272/2007 of the SAC Reports).

- **Public limited company:**
  - **Football club FC Hradec Králové, PLC**, which has been found by the self-government community that at the same time *established its bodies* as the only shareholder and *carries out supervision* over its activities, is public institution obliged to provide information according to the § 2(1) of the Act on Free Access to Information in wording before the amendment No. 61/2006 Coll. (judgment of 29th May 2008, No. 8 As 57/2006-67, No. 1688/2008 of the SAC Reports).
  - **ČEZ, PLC** (public limited company that has major share at Czech market with energies; its main activities consist in production and sale of electricity and heat) is public institution obliged to provide information related to its competency (judgment of 6th October 2009, No. 2 Ans 4/2009-93, No. 1972/2010 of the SAC Reports).
  - **The Prague Public Transit Company, PLC** is obliged entity according to the Act on Free Access to Information since it *fulfils attributes of public institution as were set in the judgment of the Constitutional Court* of 24th January 2007, No. I. ÚS 260/06, in case of national enterprise Prague Airport. Specifically there have been found these (five) conditions:
    - the way of establishment (termination) of an institution (**in the meaning of presence or absence of private law act / action**),
    - character of the promoter (**from the point of view whether promoter of institution itself is state or not**; if so than it is an attribute characteristic of public institution),
    - subject that establishes individual bodies of an institution (**from the point of view whether they are created by the state or not;** if so than it is an attribute characteristic of public institution)
    - **existence or non-existence of the state supervision over activities of an institution** (existence of such supervision is characteristic to public institution)
    - **private or public purpose of an institution** (public purpose is characteristic to public institution)
- **National enterprise –** national enterprise that has been found according to the act No. 77/1997 Coll., on national enterprise, is public institution in the meaning of § 2(1) of the Act on Free Access to Information (judgment of the Constitutional Court of 24th January 2007, No. I. ÚS 260/06).

4) Are the salaries of 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?

Regarding the salaries of public employees in the context of the right to free access to information and right to protection of private data the extended chamber of the SAC expressed itself in judgment on 22nd October 2014, No. 8 As 55/2012-62, No. 3155/2015 of the SAC Reports):

Municipal authority dismissed request of the plaintiff because of protection of personal data and privacy. The Plaintiff had requested information regarding the amount of rewards of the director of specific primary and nursery school. Regional Authority upheld the decision. When doing so it took into consideration the conflict of the right to privacy and the right to free access to information from the point of view of *proportionality*. It deduced that Art. 10(3) of the Czech Charter of fundamental rights and basic freedoms (hereinafter referred to as "the Czech Charter"; "*right to be protected from the unauthorized gathering, public revelation, or other misuse of his personal data*") is *lex specialis* in relation to the Art. 17 of the Czech Charter (the right to free access to information in general). It concluded that by granting the information the *negative impact* towards the subject of information and his relationships to persons of kin and subordinate employees would have prevailed. The Regional authority therefore gave preference to the protection of the subject of information. The Plaintiff challenged the decision and the Regional Court quashed it. The defendant (hereinafter referred to as "Complainant") consequently challenged the judgment and filed cassation complaint. The Complainant objected that the Regional Court, contrary to the Complainant, *did not* carry out the proportionality test of the opposing basic rights.

The case was solved by the extended chamber of the SAC since there had been conflict of two lines of the case-law. The first one – previous judgment of the extended chamber of 1st June 2010, No. 5 As 64/2008-155, No. 2109/2010 of the SAC Reports – held the view that in relation to the conflict of mentioned rights the test of proportionality had been carried out by the **legislator itself** and it had been resolved (regarding **public fund recipients**) in favor of the **right to free access to information**. As a result of this there is **no space to individual assessment** whether the information should be provided or not. The second line of the case-law was represented by the opinion that the "*test of the rights*" should be carried out in each individual case. The basic criterion of the assessment should be the intensity of public interest to control management of public funds.

Regarding the judgment of the extended chamber No. 8 As 55/2012-62 itself, we would like to stress several thoughts. The first one should be the declaration that "***the wording and the systematic of the Act gives no option to carry out individual assessment, when providing information on public funds recipients,*** *whether and in which extent should prevail the interest to provide information or the right to protection of privacy. The consideration of the interests and basic rights in conflict has been solved* ***by the legislator itself*** *while (in general) giving preference to the right to free access to information on public funds recipients, though* ***the interest to protect privacy of the subjects of information had been taken into account (by the legislator) through exclusion of certain spheres of information from providing*** *and determination of the* ***range*** *of information in cases the information are supposed to be provided*"[7].

Towards the § 8b of the Act on Free Access to Information the SAC added that its purpose was primarily to control a public authority through the possibility to obtain information regarding various aspects of its functioning in the area of management of the public funds. The SAC stated that "*the inclusion of employees amongst recipients of public funds, about whom the information must be provided,*

[7] Judgement of the Supreme Administrative Court of 22nd October 2014, No. 8 As 55/2012-62, No. 3155/2015 of the SAC Reports, section 52.

is legitimated by ***the intensive public interest to control public authority*** *and economy and effectiveness of its functionality in the area of employment and rewarding*"[8].

The SAC solved as well the question whether the legislator, while considering the conflict of the right to free access to information and the right to protection of privacy, had fulfilled its duty "*to attempt to do some kind of optimization*"[9]. It concluded that § 8b did not suffer from the constitutional deficiency under the condition that **exceptionally** when the public interest on transparency of the management in public sphere was quite marginal in comparison with the interest of the subject of the information, who could be potentially affected by the provision of the information, **the right of an applicant to be provided with information had to "*have stepped aside*"** in favor of the right to protection of privacy (of the subject of information).

Regarding the obliged entities defined by the Act on Free Access to Information, the SAC stated that "*obliged entities according to § 2(1)* [of the Act on Free Access to Information – i.e. state authorities, territorial self-governing units and their bodies, and public institutions] *provide information on salaries of their employees* ***if these are paid from public funds*** […] *and as such they are recipients of public funds. The obliged entities according to the § 2(2)* [i.e. entities to which the law has entrusted decision-making about the rights, legally protected interests, or obligations of natural persons or legal entities in public administration, solely within the scope of this decision-making activity] *are obliged to provide information* ***only*** *in relation to such of their employees,* ***who participate in decision-making activities entrusted to the entities by the law*** *and surely* ***also only under the condition that the employees are recipients of public funds.*** *In relation to other employees the entities* ***have no such duty***"[10].

In general it could be said that the Supreme Administrative Court deduced following conclusions:

- "*Information on salaries of the employees paid from the public funds are (according to the § 8b of the Act on Free Access to Information)* ***generally provided***
- *The obliged entity does not provide information on salary of its employee paid from public funds only* ***exceptionally*** *when such person participate on the essence of activities of the obliged entity* ***only indirectly and insignificantly*** *and at the same time* ***there are not concrete doubts*** *in relation to the remuneration of such employee whether the public funds are spend economically.*"[11]

5) Is the trade secret excluded / protected regarding the free access to information?

The provision of § 9(1) of the Act on Free Access to Information generally states that "*If the requested information constitutes a trade secret, the obliged entity shall not provide it.*" The term "*trade secret*" itself is defined in § 504 of the Act 89/2012 Coll., civil code, as follows - "*Trade secret involves competitively significant, identifiable, valuable and in relevant business circles normally unavailable facts related to the enterprise, whose confidentiality is ensured by the owner in his own interest.*"

The Act on Free Access to Information provides for an exemption from this rule stating that "*When providing information concerning the use of public funds, providing with* ***information concerning***

[8] Judgement No. 8 As 55/2012-62, section 81.
[9] Judgement No. 8 As 55/2012-62, section 76.
[10] Judgement No. 8 As 55/2012-62, section 105.
[11] Judgement No. 8 As 55/2012-62, section 112 and 113.

the scope and the recipient of those funds shall not be considered a breach of trade secret".

Despite its legal definition a problem if a certain fact constitutes a trade secret may arise. The Supreme administrative Court gave its standpoint to this issue as well as to the conditions for granting the status of trade secret in a number of its decisions.

In the judgment from 27th February, No. 6 A 136/2002-35, no. 768/2006 SAC Reports, the SAC noted that "*if a negative decision of an administrative body on a request for information according to the Act on Free Access to Information is founded on protection of a trade secret, however, the court from the administrative file finds out, that* ***at the time of deliberation of the administrative body there was nothing in the file indicating that the entrepreneur had labeled the requested information as a trade secret*** *in the sense of § 17 of the Commercial Code [today § 504 of the Civil Code; for the differences between the wordings of these provisions see below],* ***then the court annuls such an administrative decision***". The court added, that the existence of a trade secret could not be inferred from an implied act of the entrepreneur, because the Act on Free Access to Information in § 9(1) requires certain information to be **labeled as a trade secret before the delivery of the request for information**[12]. Finally the SAC ruled that even though all data were to be considered trade secret according to the Commercial Code (today § 504 of the Civil Code from 2012), the provision of § 9(2) cannot be omitted, as it states that **it is not possible to reject providing information concerning the scope of use of public funds and their recipient**[13].

The question whether data concerning payments provided by the General Health Insurance Agency to the individual health care institutions shall be considered trade secret for the sake of rejecting disclosure of the information referring to § 9 of the Act on Free Access to Information, solved the SAC in the judgment of 16th May 2007, No. 3 Ads 33/2006-57, no. 1272/2007 SAC Reports. Here it emphasized again that **simple labeling as a trade secret does not suffice**, but it is necessary to fulfill the legal defining features. The said conclusion the SAC later confirmed also in the judgment of 27th March 2008, No. 7 As 24/2007-106.

Returning to the abovementioned amendment of § 9(1) of the Act on Free Access to Information, as well as to the transformation of the civil law, where the trade secret has been transferred from the Commercial Code to the Civil Code from 2012 and amended, it is to be noted that in both the Act on Free Access to Information and the Civil Code the **explicit requirement of express labeling certain facts (information) as a trade secret by the entrepreneur / their owner has been removed**.

6) Are documents that are subject to intellectual property excluded / protected regarding the free access to information?

At this point it should be mentioned that the Act on Free Access to Information "*does not apply to providing information that is* ***subject to industrial property rights*** *and other information, if* ***its provision is governed by a special act***" [§ 2(3) of the Act on Free Access to Information]. Furthermore, "*the obliged entity shall not provide the information if it would breach the protection of third party*

[12] Judgment of the Supreme Administrative Court of 9th December 2004, No. 7 A 118/2002-37, no. 654/2005 SAC Reports
[13] ibidem.

rights to an object ***subject to copyright or rights related to copyright****"* [§ 11(2)(c) of the Act on Free Access to Information].

In this context we point out to the recent judgment of the Supreme Administrative Court of 28th May 2015, No. 1 As 162/2014-63. The complainant had according to the Act on Free Access to Information asked the Czech Office for Standards, Metrology and Testing for the full text of technical standards (ČSN, ČSN EN) in construction. The Office did not provide him with it and argued that the law (act no. 22/1997 Coll., on Technical Requirements on Products and ministerial decree no. 486/2008 Coll.) did not allow an exemption to be granted in a way that the technical standards could be provided free of charge on request for information. According to the SAC, however, these standards too represent information under the Act on Free Access to Information, and the respective law the Office argued with does not exclude application of the cited Act. In addition even the § 196(2) of the Building Act requires these standards to be publicly accessible free of charge, whereas this requirement is apparently not met when the standards are accessible free of charge only in the National Library of Technology in Prague.

The case illustrates that, where in specific cases the Act on Free Access to Information excludes its application (i. a. § 2(3) - information subject to industrial property), it has no exactly imposed limits. This was **in general** adjudicated by the SAC in the judgment from 22nd January 2014, No.7 As 61/2013-40, No. 3064/2014 SAC Reports, where the SAC stated that by assessing the relation between the Act on Free Access to Information and another law, which regulates provision of information in a certain aspect of social life, **in every single case the nature of information requested by the applicant should be assessed** with respect to the subject matter of the given special law, its scope and nature, so as to avoid a situation, when the information is not provided to the applicant at all, or on the other hand only a part of it in the scope of the special law is provided; which in both cases would cause unreasonable diminishing of usability of the information for the applicant.

Another provision of the Act on Free Access to Information that touches upon the issue of intellectual property is § 11(5), which reads as follows: "*The obliged entity shall not provide information that is subject to copyright protection or the protection of rights related to copyright*[14]*, if it is in the possession of:*

a) Operators of radio and television broadcasting, who are operating this broadcasting on the basis of special legal regulations[15]*,*

b) Schools and educational facilities that constitute a part of the educational system under the School Act[16] *and the Act on Institutions of Higher Education*[17]*,*

c) The Czech Academy of Sciences and other public institutions that are the recipients or co-recipients of support for research and development from public funds, under the Act on Research and Development Support[18] *or*

d) Cultural institutions disposing of public funds, such as theatres, orchestras and other artistic ensembles with the exception of libraries providing public librarian and information services under the Library Act[19] *and museums and galleries providing standardized public services*[20].

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[14] Act No. 121/2000 Coll., on copyright
[15] Act No. 483/1991 Coll., on Czech television
[16] Act No. 561/2004 Coll., School Act
[17] Act No. 111/1998 Coll., on Institutions of Higher Education.
[18] See §2(2)(b) and (c) of the Act No. 130/2002 Coll., on Research and Development Support.

Providing with that information in accordance with special regulations shall not be thereby prejudiced."

7) Does the free access to information cover as well data related to individuals that constitute part of an administrative file or are these data excluded / protected? Does it constitute any problems in some areas of public administration?

As a base for the answer it could be taken § 38 of the Act No. 500/2004 Coll., Administrative Procedure. This provision regulates the inspection of the file. The relation between the right to inspect files under the cited act and the right to information under the Act on Free Access to Information appears to be problematic, as § 2(3) of the latter stipulates that "*the Act does not apply to providing information that is subject to industrial property rights and other information, if* ***its provision is governed by a special act,*** *namely the processing of requests, including the particulars of those requests and the way of their submission, time-limits, appellation options, and the way of the provision of the information".*

The SAC addressed the relation of the aforesaid regulations in the judgment of 13th August 2008, No. 2 As 38/2007-78, in which the plaintiff demanded information about **contents of the whole file and asked a copy of that file**; this file concerned processing of his complaint on unlawful behavior of the police officer. The SAC emphasized that crucial is answering the question, **whether by means of the Act on Free Access to Information it is possible to inspect an administrative file**. It pointed out the plaintiff had asked "*to be acquainted with the* ***whole*** *content of the file concerning the processing of the complaint and had demanded a copy of that file*". The SAC therefore stated that *§ 2(3) of the Act on Free Access to Information is to be applied in such a case when the applicant demands the* ***complete*** *administrative file* ***in their case***".

It must be added that the wording of the Act on Free Access to Information effective in the relevant time listed the inspection of files as one of the ways to provide information (deleted by amendment effective as from 23th March 2006). Concerning this possibility the SAC noted that "*it would in particular come into account where the information is requested from a file which the applicant does not have a right to inspect (****because this is not a file in his own suit****) in terms of the Administrative Procedure (naturally with respect to protection of personal data etc.).*" Moreover the SAC deduced that its conclusions are confirmed by the aforementioned amendment.

At the same time it is necessary to stress that the regulation in a special law must be comprehensive, otherwise the § 2(3) of the Act on Free Access to Information cannot be applied. In the opinion of the SAC § 38 of the Administrative Procedure (inspection of files) fulfills this condition. Notwithstanding the fact that **§ 38** of the Administrative Procedure stands for the **special regulation** to the Act on Free Access to Information [e. g. § 2(3)], the Administrative Procedure **as a whole represents no special regulation** to the Act on Free Access to Information.

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 regarding the right to access information?

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[19] Act No. 257/2001 Coll., Library Act

[20] Act No. 122/2000 Coll., on protection of collections of museum character

Pursuant to § 11(4)(a) of the Act on Free Access to Information "*obliged entities shall not provide information about criminal proceedings that are in process*," and § 11(6): "*The obliged entity shall not provide information about* **activities of the law enforcement and judicial authorities including** *information from files, and even from* **those in which no criminal proceedings has been initiated**, *from documents, materials and reports on progress by examining received information resulting from activities of these authorities while protecting safety of persons, property and public peace, prevention of criminality and by performance of duties pursuant to Criminal Procedure,* **if** *the rights of third persons or ability of the law enforcement and judicial authorities to prevent, search or detect criminality, prosecute crimes or safeguard security of the Czech republic* **would be jeopardized. Provisions of other laws concerning provision of information shall not be thereby prejudiced.** [21]"

Concerning the limitations stipulated in § 11(4)(a) of the Act on Free Access to Information it is worth mentioning the judgment of the SAC from 1st December 2010, No. 1 As 44/2010-103, No. 2241/2011 SAC Reports, where the SAC ruled that "*the obliged entities shall not provide the information about ongoing criminal proceedings* **only after they assess to what extent the reason for not providing the information is in fact justified by urgent social need.** *This usually means the interest of the state that the provided information will not jeopardize clearing up facts important for the criminal proceedings, publicize data that does not directly relate to the criminal activity about persons involved in criminal proceedings, and that the information will not breach the principle that a person against whom a criminal proceeding has been brought shall be considered innocent until his guilt is declared in a court's final judgment of conviction.* **The obliged entity shall also take into account protection of rights and freedoms of others**."

Finally we can mention the judgment of the Regional Court in Ústí nad Labem from 31st August 2006, No. 15 Ca 189/2005-28. The court stated "*the Criminal Procedure* **does not contain such a comprehensive regulation considering providing information** *so as to be referred to as a special law* **in terms of § 2(3)** *of the Act on Free Access to Information, which would* **exclude the possibility to request information according to the Act on Free Access to Information**."

In the context of files of secret police departments (in the Czech Republic it was the State security) we remind the Act No. 140/1996 Coll., on Declassifying Files Resulting from the Activity of the Former State Security. The aim of the act is to reveal to the largest possible extent the practice of the communist regime. It enables the persecuted persons to access the documents about their persecution and to disclose data about the executors of such persecution and their activity.

In relation to the abovementioned act the SAC stated that "**under the Act on Declassifying Files Resulting from the Activity of the Former State Security** *only certain information that may indicate activities of the security forces at a specific time are made accessible to the applicant. The Act on Declassifying Files Resulting from the Activity of the Former State Security therefore, with regard to the general regulation of providing information in the Act on Free Access to Information,* **represents a special law only to the extent of providing that information on which it applies**. *Hence in case of a request for*

[21] Act No. 141/1961 Coll., Criminal Procedure, Act No. 218/2003 Coll., on liability of the juveniles for unlawful acts and on youth justice.

any other information about activities of the former State Security it is possible to proceed according to the Act on Free Access to Information[22]."

Part II

9) Public access to decisions

9.1. Are there certain types of court decisions that are never disclosed (e.g. classified decisions or any other decisions with restricted access)? If so, describe typical examples and provide statistics (frequency and relevance of cases).

In the Czech Republic all court decisions are declared orally and publicly – at that moment it is usually an abridged version without full justification. Full written version of the decision, including complete justification, is mostly finished after the announcement of the decision within standard period of 30 days. The full version is always delivered to parties of the proceedings.

Provision of the full text of a court decision to public is at discretion of individual courts. The Supreme Administrative Court, the Supreme Court and the Constitutional court publish all their decisions on their websites. On the contrary decisions of the lower instance courts are published by the Ministry of Justice, however it is only selection of case-law of the District courts, the Regional Courts and the High Courts in civil and criminal matters (proposal to publish a decision is made by presiding judge with respect to importance of that decision in relation the decision-making process of courts).

The decisions of the administrative chambers of regional courts are published through the website of the Supreme Administrative Court since 1st July 2010. Since this date the administrative chambers have decided over 40.000 cases. More than 22.000 of them were published on the SAC's website.

There are no particular categories of the court decisions in the Czech Republic that would be generally (i.e. in advance) excluded from publishing. If any proceeding is connected with classified information then this is carefully protected in the court file. The principle of fair trial is fulfilled through the institute of inspection of a court file while the public nature of the proceedings or rather publication of decisions is restricted in favor of the protection of classified information (the law does not allow using it in justification without any exception for courts).

9.2. If a third person (i.e. not a participant of a proceeding) wants any of your decisions, what is the procedure? On-line access will be discussed below, at this point please focus on other form of access (e.g. is there possibility to request decision through the post service? Is there any charge for it? etc.).

The Supreme Administrative Court publishes all of its decisions on-line. Nevertheless if anyone is looking for other options to obtain SAC's decisions there is possibility to address the SAC through the request according to the Act. No. 106/1999 Coll., on Free Access to Information. Such request could be very informal, sent by mail or e-mail, delivered personally or through a phone call.

[22] Judgment of the SAC from 22nd January 2014, No. 7 As 61/2013-40, No. 3064/2014 SAC Reports

A request for provision of information shall be submitted orally or in writing, even through an electronic communication network or service [§ 13(1) of the Act on Free Access to Information].

If a request for provision of information concerns provision of publicized information, the obliged entity may only provide reference to such information. If the request is delivered through electronic communication network or service, the reference to information is sufficient, however if it was delivered by mail and the applicant insisted on direct provision (i.e. information itself) then the information would be provided in form of a paper document.

The Supreme Administrative Court may therefore provide the information (§ 4a of the Act on Free Access to Information):

a) in electronic or paper version
b) by providing a copy of the document that includes requested information
c) by providing a data file that includes requested information
d) by inspection of a document which includes requested information
e) through sharing of data via interface of information system or
f) by providing remote access to the information, which (understand information) is continuously modified, renewed, supplemented or repeatedly created, or through its regular providing in another way

The Supreme Administrative Court, as obliged entity, is most often requested through electronic communication network or service, while applicants ask most frequently for either specific decision, or datasets of decisions fulfilling certain criteria.

If exceptional effort is needed to look the information up than the applicant can be requested for payment *in advance* for such searching. The amount of payment depends on hourly wage of the employee appointed to the searching and of course on length of his / her work [e.g. if employee of (our) Department of Research and Documentation Service (hereinafter referred to as "DRDS") would be asked for such searching it would cost about 8 euro per hour]. However as mentioned above the applicant must be informed on requested payment *in advance*.

9.3. Is there any Official Collection / journal of decisions of your court (not the online publishing of your decision – see below)? If so, describe in detail the process of its publication. In particular focus on the procedure of selection of the decisions that should be published in it, on frequency and form of publication. Explain whether such collection is published by your court itself, by another public / administrative authority or by private publisher; describe the form of cooperation (e.g. whether such publisher has exclusive right to publish the collection or whether the publisher modifies decisions before they are published etc.). Does your court or public consider such (selected) decisions as having special or added importance / relevance?

The Supreme Administrative Court publishes the Collection called "the SAC Reports" (hereinafter referred to as "the SAC Reports") that includes selected decisions of all administrative courts (i.e. the SAC and the administrative chambers of Regional courts). The SAC Reports are published once a month. There is only one publisher of the SAC Reports and that is Wolters Kluwer, PLC . The cooperation is based on a contract between the SAC and Wolters Kluwer, PLC.

The process of selection of judgments to be published in the SAC Reports is following. When the case has been decided the judge-reporter creates its so-called registration sheet of the case-law for the purpose of the internal database. In this registration sheet the judge can either refer to the legal opinion that has been already registered and which he / she took as a base of the decision, or the judge transforms new legal thought (of the case) into so-called "*legal sentence*"[23].
The DRDS gathers all legal sentences into one data file each month which is consequently put forward to the Editorial Council. The Editorial Council consists of seven judges of the SAC, who choose the most interesting legal sentences. These legal sentences, together with related decisions, are then advanced to further proceeding.

As a next step the employees of DRDS process full texts (e.i. including justifications) of the selected decisions (see below) and the output data file is then (with sufficient time reserve for *comments*) sent to all judges.
Then the plenary meeting consisting of all judges of the SAC is held. The session is moderated by the President of the SAC. Each of the decisions is discussed and consequently there is a vote whether it should be published in the SAC Reports. There are also decisions that do not undergo voting but they are automatically approved (decisions of the extended chamber of the SAC). However the plenary may discuss them.
Regarding the criterions according to which the judges vote for publication we could say that they vary, nevertheless probably the most important is the importance of the decision for the administrative practice. It is not possible to evaluate the inner motivation of individual judges regarding voting aye whichever decision, but the important point is that the SAC Reports serve as a *tool for unification of the case-law* both towards the public and within the SAC itself.
The decisions that have been selected by the plenary are then transformed into new file by an employee of the DRDS and sent to the publisher, who edits the text only from the point of graphic appearance a linguistic correction.

10) Editing and anonymisation of decisions

10.1. Do you make the decisions anonymous before they are published? If so, describe the process of anonymisation. In particular focus on facts like who is assigned to carry out anonymisation, whether there are any internal rules regarding anonymisation (except of general regulations on protection of personal data) and what kinds of information is subject of the anonymisation.

Since all decisions of the SAC are provided to public, all of them must undergo the process of anonymisation. The anonymisation is carried out by administrative employees of the particular (court) chamber after the original decision has been prepared. The Original decision is sent to the parties, while a prepared anonymous version is advanced to a supervisor office worker, who checks the anonymisation up and then publishes it on the website.

The extent of the anonymisation is set by the internal regulation – "Office and file order" in its § 39 as follows:

Anonymisation of the published decisions

(1) The decisions are published on the website in anonymous version.

[23] Legal sentence therefore expresses legal opinion pronounced by a court.

(2) The Anonymisation includes:

a. regarding natural persons – first name, family name, residence, date of birth, birth certificate number, sensitive data according to the Act n. 101/2000 Coll., on the protection of personal data, as well as other data that could lead to identification of a natural person,
b. classified information and trade secret
c. other data according to instructions of judge-reporter

(3) The anonymisation in particular does *not* include:

a. names of administrative authorities
b. data related to legal persons of private or public law; first names and family names of the members of their statutory bodies (possibly only data of private character related to such persons are removed),
c. first names and family names of judges and lay judges *if they are not parties to the proceedings*
d. first names and family names of *representatives* of the parties and persons participating in the proceeding except for first names and family names of legal representatives and general representatives
e. first names and family names of attorneys at law, state prosecutors, notaries, bailiffs, expert witnesses, interpreters, tax advisors *if they are not parties to the proceedings* and
f. trade marks

10.2. If there is a change of the rules of anonymisation does it impliy any consequences regarding the previously published decisions (in other words are published decisions retrospectively revised to be in conformity with new rules of anonymisation)?

The current rules of anonymisation are applied since 1st January 2012 when the Office and File Order came into force. Since the date there have been only changes in the meaning of the extent of the anonymisation (e.g. it was decided last year that also e-mail address of party / participant, certificate of roadworthiness or number of identity card would be anonymised) and these have no impact on the decisions already published.

Until 31st December 2011 the rules were stricter as anonymisation included as well legal persons or trademarks. Regarding previous decisions only those dealing with trademarks were consequently revised in such a way that the trademarks were added.

If any significant change in the rules realized in future it would very likely have no impact on previously published decisions especially with respect of the amount of documents (over 90.000).

10.3. Name any problem that occurred in your country in connection with anonymisation of the court decisions (e. g. different way of anonymisation at the supreme courts, intensive public discourse, impact of de-anonymisation of decisions by media etc.)

Recently the SAC found themselves in an extraordinary position of defendant right in the context of protection of personal data. In compliance with the abovementioned regular procedure the SAC after delivery of the judgment displayed the non-anonymised abridged version on the board of the court (online and physical), subsequently it took it off in this form and after dispatching its written full text the SAC published the full text on its web site but already anonymised.

Certain server that specializes inter alia in collecting judicial decisions had first downloaded the displayed abridged version and after that also the full text of the decision. Subsequently it

published on its web site the full text, which however, contained personal data of the parties to the proceedings from the abridged version.

The parties to the proceedings complained about this practice at SAC, who after figuring out how this had happened, contacted directly the server and this one after the notice has taken the decision off.

Nevertheless the aggravated party insisted that the SAC interfered with their right to protection of personal data, and therefore they brought a lawsuit. The regional court found in favor of the SAC as the error had not come about by our fault or procedure.

10.4. Do you edit decisions designated to publication? If yes, describe please in detail this process. In particular please define who edits, what information is added/deleted (including metadata).

As for the decisions published online the court offices only anonymise them, no other changes are made. Metadata that display with every online search result (e. g. type of decision, date, result of the proceedings etc.) is being entered in the internal database of judgments by the assistant judge or directly by the judge-reporter who is responsible for the evidence of their decisions. From the internal database the metadata are reflected to the external web site at the time of publishing of the full text of the decision.

The decisions published in the printed Court Reports of the SAC are edited by the DRDS according to internal guidelines. A heading is added to the decision. The heading comprises a legal sentence, title relating to the legal sentence (the title must express the area of law subject to the decision) and respective laws (key provisions that relate to the legal sentence, and on which the decision is based). The names of the judges are deleted and the names of the parties are simplified. The cited earlier case law is being listed too.

Example of the heading:

Ej 384/2014

Právo na informace: informace o platech zaměstnanců placených z veřejných prostředků

k § 8b zákona č. 106/1999 Sb., o svobodném přístupu k informacím, ve znění zákona č. 61/2006 Sb.*)

I. Informace o platech zaměstnanců placených z veřejných prostředků se podle § 8b zákona č. 106/1999 Sb., o svobodném přístupu k informacím, zásadně poskytují.

II. Povinný subjekt neposkytne informace o platu zaměstnance poskytovaném z veřejných prostředků (§ 8b zákona č. 106/1999 Sb., o svobodném přístupu k informacím) jen výjimečně, pokud se tato osoba na podstatě vlastní činnosti povinného subjektu podílí jen nepřímo a nevýznamným způsobem a zároveň nevyvstávají konkrétní pochybnosti o tom, zda v souvislosti s odměňováním této osoby jsou veřejné prostředky vynakládány hospodárně.

(Podle rozsudku rozšířeného senátu Nejvyššího správního soudu ze dne 22. 10. 2014, čj. 8 As 55/2012-62)

Prejudikatura: č. 2099/2010 Sb. NSS, č. 2109/2010 Sb. NSS a č. 2201/2011 Sb. NSS; nálezy Ústavního soudu č. 214/1994 Sb., č. 405/2002 Sb., č. 123/2010 Sb., č. 17/1998 Sb. ÚS (sp. zn. IV. ÚS 154/97), č. 37/2002 Sb. ÚS (sp. zn. III. ÚS 256/01), č. 143/2002 Sb. ÚS (sp. zn. I. ÚS 512/02), č. 10/2003 Sb. ÚS (sp. zn. III. ÚS 671/02), č. 124/2005 Sb. ÚS (sp. zn. I. ÚS 353/04) a č. 223/2010 Sb. ÚS (sp. zn. I. ÚS 517/10); rozsudky Soudního dvora ze dne 6. 10. 1982, CILFIT proti Ministerstvu zdravotnictví (č. 283/81, Recueil, s. 3415), ze dne 20. 5. 2003, Österreichischer Rundfunk a další (C-465/00, C-138/01 a C-139/01, Recueil, s. I-4989), a ze dne 9. 11. 2010, Volker und Markus Schecke a Eifert (C-92/09 a C-93/09, Sb. rozh., s. I-11063).

Věc: Jan T. proti Krajskému úřadu Zlínského kraje o poskytnutí informace, o kasační stížnosti žalovaného.

In the text of the decision the narration is simplified (so it contained only basic facts), and from the reasoning of the deciding court only paragraphs relating to the legal sentence are left, the rest is deleted. Hence in the SAC Reports there are only parts of the selected decisions. The citations of laws are edited according to the internal guidelines in the whole text.

10.5. Has development of the right to be forgotten had any impact regarding the process of anonymisation or publication of your decisions? If not, is it at least taken into account regarding the publication of the court decisions in your country?

We have not had experience with the problem in the Czech Republic so far.

11) On-line publishing of the decisions

11.1. Are the decisions of your court accessible online? If so, does it include all decisions or just some part of them (if the second option is true please describe the process of the selection of such decisions).

All decisions of the SAC are available on-line approximately 10 days after their announcement. The law set period of 30 days to draw up a *written* version of decision.

11.2. Describe the way your decisions are published online. In particular please state whether the decisions are published on your website or through other website or on-line service (e.g. platform administrated by the Ministry of Justice or the Judicial Council etc.). Please add screenshot or link.

All decisions of the SAC and *some* of anonymised decisions of the administrative chambers of the Regional Courts are published directly on the website of the SAC – www.nssoud.cz – through basic, extended or full form. The decisions may be looked up through the various characteristics

(court, date of decision, case number, type of proceeding etc.). The search engine provides full text searching and all published decisions might be referred to through permalink.

11.3. In what formats do you (on-line) provide your decisions? Besides enumeration of formats please state as well whether your court has any systematic policy of open data. Declare whether your court publishes only individual decisions or also datasets[24] are available to public for further use. If datasets are not available to "wide public", state to whom and under what conditions they are accessible.

The decisions available at the website of the SAC are in "*PDF*" format and through (available) converter they can be transformed to "*.doc*" format. Decisions are supplemented with timelines of the court proceedings (date of the beginning of the proceeding before the administrative chamber of the Regional Court, date of delivery of the cassation complaint to the SAC etc.). The Supreme Administrative Court does not provide datasets.

12) public access to other documents

12.1. Is personal information about your employees published online? Are their curricula available? In what extent, what form (e. g. on the web site of the court) and what information is normally made available (e. g. education, membership, political opinions, family status etc.)? Is this obligatory, can your employees decide on the content and structure of the information about their person? Have you encountered any problems with this issue (e. g. in the Czech Republic intensive discussion about disclosure of information about membership of judges in the Communist Party)? Please, attach a screenshot or link for illustration.

The SAC publishes on its web site only brief profiles of the judges in office. These contain a photo of the judge, year of birth, legal education and an overview of work experience. The profile is about 100 words long and it is available in Czech, English and German language. The judges create the text of the profile themselves.

Example of the profile:

[24] Datasets – large file having character of database.

JUDR. JAN M. PASSER, PH.D., LL.M. (* 1974)

He holds a law degree from the Faculty of Law, Charles University, Praha and a Master of European Law degree (LL.M) from Stockholm University. From 2001 until 2005 he served as a judge of the Circuit Court for Praha 2. From September 2004 till August 2005 he was temporarily assigned to the Supreme Administrative Court, thereafter (in September 2005) he became one of its permanent judges. From 2001 till 2003 he was active as an external lecturer at the Faculty of Social Science, Charles University, Praha, and currently, he is an external lecturer at the Faculty of Law, Masaryk University, Brno, and at the Judicial Academy, both in the area of European law. He has completed several long-term work and study stays abroad. Furthermore, he represents the SAC in the EU Forum of Judges for the Environment (EUFJE) and belongs among the founding members of the Czech Society for European and Comparative Law. Finally, he has authored several articles and co-authored a monography.

The SAC itself has not encountered any problems or disagreement with publishing information about its judges. Six years ago in the Czech Republic, however, there was a dispute, whether the courts are obliged to disclose who of their judges had been members of the Communist Party. The regional court and the SAC had ruled that data on membership were confidential and it was not possible to disclose them neither on the basis of the Act on Free Access to Information. The Constitutional Court nevertheless overruled the judgments and decided that the right to information about partisan past of judges prevails over the interest in protection of these personal data; therefore it ordered the courts provided this information.

12.2. What other documents from the court file, except decisions, are made available on your court´s web site (e. g. dissents, submissions of advocates general, submissions of the parties, record of voting of judges on the bench etc.)? Please describe how these documents are disclosed, where and in what form (e. g. on the web site of the court through search form, in the form of open data etc.) If in the form of open data please attach a link to the respective dataset.

The SAC publishes only decisions, no other parts of a court file are publicly accessible.

Members of the chamber can present their dissents only in electoral cases and in decisions of the extended chamber (specialized chamber of 7 judges whose task is to ensure unity of judicial decision-making). As it was mentioned above decisions of the SAC are available at the web site of the SAC in PDF format with the link to a converter to .doc format.

12.3. Can your employees / judges publicly comment decisions of their own or of their colleagues? If so, in what way this usually happens (e. g. articles in legal journals, public discussions on judicial decision-making organized by the respective court)?

Judges express their opinions to the decision-making particularly at the Plenary held to select judgments for the SAC Reports. Here they can defend their decisions or assess decisions of their colleagues. The Plenary is closed to public, the President of the SAC may, however, allow access to other persons. In the past the Plenary was open only to the judges, these days the President regularly invites assistant judges and representatives of the external institutions that submit their remarks to the judgments (representatives of faculties of law, Ombudsman´s office, regional courts, Supreme Court and Constitutional Court).

As for commenting judicial decisions outside the SAC, the judges often publish commentaries to laws where they i. a. refer to judgments of the SAC (own or of colleagues), they comment their decisions for media or expert journals. The Act on Courts and Judges implies the duty of a judge to maintain appropriate respect to other judges, persons executing other legal professions and to other employees of the court and to the participants and parties to the proceedings. Because no case of breaching this duty has been subject to proceedings before the disciplinary chamber, no limits of this duty have been set so far.