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: Norway

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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. Access to information

   We do not have any paramount administrative institutions in Norway responsible for administrative agencies' compliance with the Freedom of Information Act ("FIA"). The different agencies are themselves responsible for giving the public access to information, subject to the terms and conditions of FIA. If a request for information is denied, the applicant may complain to the authority superior of the agency that possesses the requested information. Should the superior authority uphold the refusal, the matter may be brought before the ordinary courts.

   Protection of personal data

   Norway has, on the other hand, an independent administrative authority for the protection of personal data. The Norwegian Data Protection Authority was established before Directive 95/46/EC, and was already performing most of the tasks the directive required.

   The main tasks of the Data Protection Authority are to keep a public record of all processing of personal data that is reported, or for which a licence has been granted, deal with applications for licences, receive notifications and assess whether orders shall be made in cases where this is authorised by law, verify that statutes and regulations which apply to the processing of personal data are complied with, and that errors or deficiencies are rectified. The Authority also identifies risks and provides advice and guidance for issues regarding personal data.

   Application problems?

   The fact that there is no authority in Norway responsible for a unified practice in respect of the public's right to information may lead to variations in the different agencies' practices. The risk of variations is, however, to some extent mitigated by the Parliamentary Ombudsman's more general supervision of public agencies. The supervision is carried out on the basis of complaints from citizens concerning any maladministration or injustice on the part of a public agency. The Ombudsman may also address issues on his own initiative. The Ombudsman does not make legally binding decisions, but the relevant authorities would usually follow his recommendations.

2. The case documents of administrative agencies are public insofar as no exception is made by or pursuant to statute, cf. FIA Section 3. Most of the exclusions in effect are *relative*. They give the agency *an option* to deny disclosure, and in the event that the information falls within the scope of such exclusion, the agency is obliged to consider whether the document nevertheless should be made public in whole or in parts, cf. FIA Section 11.

The main exceptions in FIA are as follows (the list is not exclusive):

- ***Deferred public disclosure in special cases:*** The agency may under certain conditions postpone public disclosure of documents in an ongoing case if it finds that the currently available documents give a directly misleading impression of the case and that public disclosure therefore could be detrimental to obvious public or private interests (FIA Section 5).
- ***Exemptions in respect of information subject to a statutory duty of secrecy*** Information that is subject to a duty of secrecy imposed by or pursuant to statute is exempted from public disclosure; cf. FIA Section 13.
- ***Exemptions in respect of internal documents:*** Most of the documents drawn up by an administrative agency for its internal preparation of a case may be exempted from public disclosure; cf. FIA Section 14.
- ***Exemptions on the basis of the documents' content:*** The following documents may, subject to further specified conditions, be exempted:
  a) Documents containing information which, if it were to be disclosed, could be detrimental to the security of the realm, national defence or relations with foreign states or international organisations; cf. FIA Section 20–21.
  b) Documents relating to budgetary discussions, the administration of the agency or financial negotiations etc.; cf. FIA Section 22–23.
  c) Documents for which exemption is necessary because public disclosure would counteract public regulatory or control measures or other necessary administrative orders or prohibitions, or endanger their implementation; cf. FIA Section 24.
  d) Information that needs to be exempted because public disclosure would facilitate the commission of criminal acts. The same applies to information that needs to be exempted because public disclosure would facilitate the commission of acts that may put private individuals in danger or harm parts of the environment that are particularly vulnerable or threatened with extinction; cf. FIA Section 24.
  e) Documents in cases concerning appointments or promotions in the civil service. This exemption does not apply to lists of applicants. Information concerning an applicant may, however, be exempted if the person requests secrecy; cf. FIA Section 25.
  f) Answers to examinations or similar tests and entries submitted in connection with competitions etc.; cf. FIA Section 26.
  g) Photographs of persons entered in a personal data register and/or documents containing information obtained by continual or regularly repeated personal surveillance; cf. FIA Section 26.

  We also have statutory provisions on the access to information on more specific areas of law, such as in the Product Control Act (cf. our answer to Q5), the Gene Technology Act and the Environmental Information Act. We would be happy to outline the details of these special rules if that is considered necessary.

3. A private legal person is considered to be an administrative agency within the meaning of the Act in cases where such person makes individual decisions or issues regulations. As a

main rule, the Act also applies to associations where the state, the county authority or the municipality controls more than half of the votes in the board, or directly or indirectly elects the majority of the directors, cf. FIA Section 2.

4. Public employees' salary details are in principle public in accordance with FIA Section 3, cf. the answer to Q2. By an amendment of FIA Section 25 in 2012, administrative agencies were nevertheless given an option to deny access to written statements on the method used for calculating the payments, the basis on which the holiday allowance is calculated and any deductions made, cf. also Section 14-15 of the Working Environment Act. It is expressly stated in FIA Section 25 that the exemption does not include information concerning gross salary payments. An agency is therefore, upon a direct request, obliged to provide a list of its gross salary payouts. This does not cause any legal difficulties regarding the protection of personal data, as the gross salaries are not subject to a statutory duty of secrecy, cf. FIA Section 13.

5. Trade secrets are to a great extent subject to a duty of secrecy and thus exempted from public disclosure; cf. FIA Section 13. The main provision is Section 13 of the Public Administration Act ("PAA"), which gives any person rendering services to, or working for, an administrative agency, a duty of secrecy in respect of information concerning "*technical devices and procedures, as well as operational or business matters which for competition reasons it is important to keep secret in the interests of the person whom the information concerns*."

   PAA Section 13 a and Section 13 b provide certain limitations to the duty of secrecy on the basis that there is no need for protection or reasons of private or public interests require disclosure.

   Also on more special areas of law we have examples of situations were the duty of secrecy yields for the right to information. The Product Control Act is illustrative. Section 9 gives everyone the right to require information from a public authority about products that have or may have caused damages to people's health or the environment, provided that the information is held by the relevant authority and no exemption has been made from the right to receive information pursuant to the Act. Section 10 gives a comparable right to information from the producer, importer, processor, distributor and/or user. Section 11 provides a duty of secrecy in respect of trade secrets, but it is in the second subsection specified that the duty does not preclude the disclosure of information on the effects of the product, or when necessary an explanation of the causes of such effects, or information on precautionary measures to prevent or reduce the effects; cf. Section 1.

6. Documents subject of intellectual property are not excluded from the right to access information under FIA, but the Act regulates how such documents are to be disclosed. It follows from the third subsection of Section 10, cf. Section 7 of the accompanying administrative regulations of 17 October 2008, that documents a third person has

intellectual property to, can only be made available online if the rights' holder agrees or the disclosure is confined to applications, discussing papers, written submissions or other similar materials that have been submitted in connection with a case. FIA Section 30, cf. Section 5 of the same administrative regulation, provides that the agency cannot give out electronic copies of documents a third person has intellectual property to, insofar the material is of economical value and the disclosure of the electronic copy will entail a risk of commercial abuse.

7. The Personal Data Act ("PDA") does not limit the right of access to information pursuant to FIA, PAA or any other statutory right of access to personal data, cf. PDA Section 6. Also the parts of an administrative file that contain personal data are thus in principle public to the extent the information is not subject to a duty of secrecy, cf. FIA Section 13.

   The most relevant duty of secrecy is the obligation in PAA Section 13 to prevent others from gaining access to, or obtaining knowledge of, any matter involving "*an individual's personal affairs*". According to the second subparagraph, the term "*personal affairs*" does not include place of birth, date of birth, national registration number, nationality, marital status, occupation or place of residence or employment, unless such information discloses a client relationship or other matters that must be considered personal. As for the national registration number, the legislator has in the last subsection of FIA Section 26 given the relevant agency an *option* to exclude the number from public disclosure. Similar options do not exist for the other types of data listed in PAA Section 13 second subparagraph.

   PAA does not provide any further guidelines as to what information that is considered *"personal"* and thus subject to secrecy. The lack of specific guidelines may lead to certain variations in practice; cf. our comment in the answer in Q1 about not having an administrative authority responsible for a unified practice.

   The limitations to the duty of secrecy in PAA Section 13 a and Section 13 b also applies to personal data. Data that is *"personal"* within the meaning of PAA Section 13, may therefore still be public in certain cases where there is no need for protection or reasons of private or public interests require disclosure.

   In any event, sensitive personal data cannot be made available online, cf. FIA Section 10, Section 7 of the accompanying administrative regulations of 17 October 2008 and PDA Section 2 number 8. The prohibition concerns information relating to:
   "a) racial or ethnic origin, or political opinions, philosophical or religious beliefs,
   b) the fact that a person has been suspected of, charged with, indicted for or convicted of a criminal act,
   c) health,
   d) sex life,
   e) trade-union membership."

8. Pursuant to the second subparagraph of FIA Section 24, the agency *may* exempt from public disclosure notifications, tips or similar documents concerning criminal acts committed by private persons. The disclosure of other documents relating to criminal offences may be postponed until the case is decided.

   The agency may be *obliged* to hold back the information of criminal nature if it is considered "*personal"* within the meaning of PAA Section 13, cf. FIA Section 3 and our answer to Q7. The duty of secrecy does not, however, prevent the administrative agency from reporting or providing information concerning violations of the law to the prosecuting authorities or the supervising authority concerned if this is deemed desirable in the public interest or if prosecution of the offence falls naturally within the scope of the functions of the said agency, cf. PAA Section 13 b nr. 6.

Part II

9. Public availability of decisions

9.1. Pursuant to the first subsection of Section 130 of the Courts of Justice Act, the court may prohibit public disclose of a judicial decision, in whole or in part, if (a) protection of privacy or the aggrieved person's posthumous reputation necessitates it, or (b) considerations in respect of an investigation demand that a decision or a ruling handed down in a criminal proceeding, outside the main proceedings, is not publicly disclosed. Option (a) is not applicable insofar as the decision may be disclosed without divulging the identity of the parties.

We have no statistics on how often the courts take its competence to fully prohibit public disclosure into use, but we assume this only happens in exceptional cases. The Appeals Selection Committee of the Supreme Court has in its practice stressed that the threshold for absolute prohibition should be *"very high*", cf. Rt. 2007 p. 17 paragraph 12.

9.2. A third person may ask the relevant Court to forward a copy of the decision. Such request could be informal, sent by mail or e-mail, delivered personally or through a phone call. The decision will be sent over free of charge, provided that public disclosure is not prohibited.

9.3. Until 1. January 2016, the judicial decisions of the Supreme Court and of the Appeals Selection Committee of the Supreme Court were published in the Norwegian Law Gazette (Norsk Retstidende). The decisions are now only published online.

The Supreme Court does, however, send quarterly updates to the Venice Commission about developments within constitutional law. The reports do, inter alia, include English summaries of new important Supreme Court decisions. These summaries are published in the Commission's quarterly bulletin.

10. Editing and anonymisation of decisions

10.1. All decisions undergo the process of anonymisation. The court that has delivered the decision is responsible for compliance.

Judicial decisions cannot be published if publication is prohibited, or to the extent public disclosure is prohibited, cf. Section 11 of the Regulation on Public Access to the Administration of Justice and Section 130 of the Courts of Justice Act. As outlined above (Q9), the first subsection of the latter provision allows the court to prohibit public disclosure of the decision to the extent required due to privacy, the aggrieved person's posthumous reputation or an ongoing investigation. The two last subsections of Section 130 list different types of decisions that can *only* be publicly disclosed in an anonymous manner. This is cases relating to the Marriage Act or the Children Act, proceedings between spouses or divorced parties regarding the division or allocation of assets, equivalent cases involving previously or currently cohabiting parties, and also certain rulings on the use of communication surveillance as evidence in criminal cases.

Publications on open internet sites are subject to some *additional* limitations set out in the third subsection of Section 11 of the Regulation on Public Access to the Administration of Justice. The section reads as follows:

"On open internet sites the following additional limitations apply:

a) In criminal cases where the indictment is not publicly known, the judicial decision shall be anonymised insofar it is necessary to prevent identification of the accused. Information that may identify the aggrieved person, can only be disclosed if it is considered unproblematic.

b) Judicial decisions in civil cases of particularly sensitive nature can only be disclosed in an anonymous form."

The notes to subsection 11 elaborate on the term "particularly sensitive nature":

"The provision has practical importance to the extent public disclosure is not prohibited. Sensitive medical data and information about sexual relations may fall within the term particularly sensitive nature. When considering whether something is of particular sensitive nature, both the factual details of the case and the general nature of the matter should be taken into account".

10.2. No, changes in practice will not be given retrospective effect

10.3. We have not identified any special problems that emerge from this in our jurisdiction.

10.4. Apart from anonymisation, no other changes are made to the content of the decision before publication. The metadata displayed on our webpage (e.g type of decision, date,

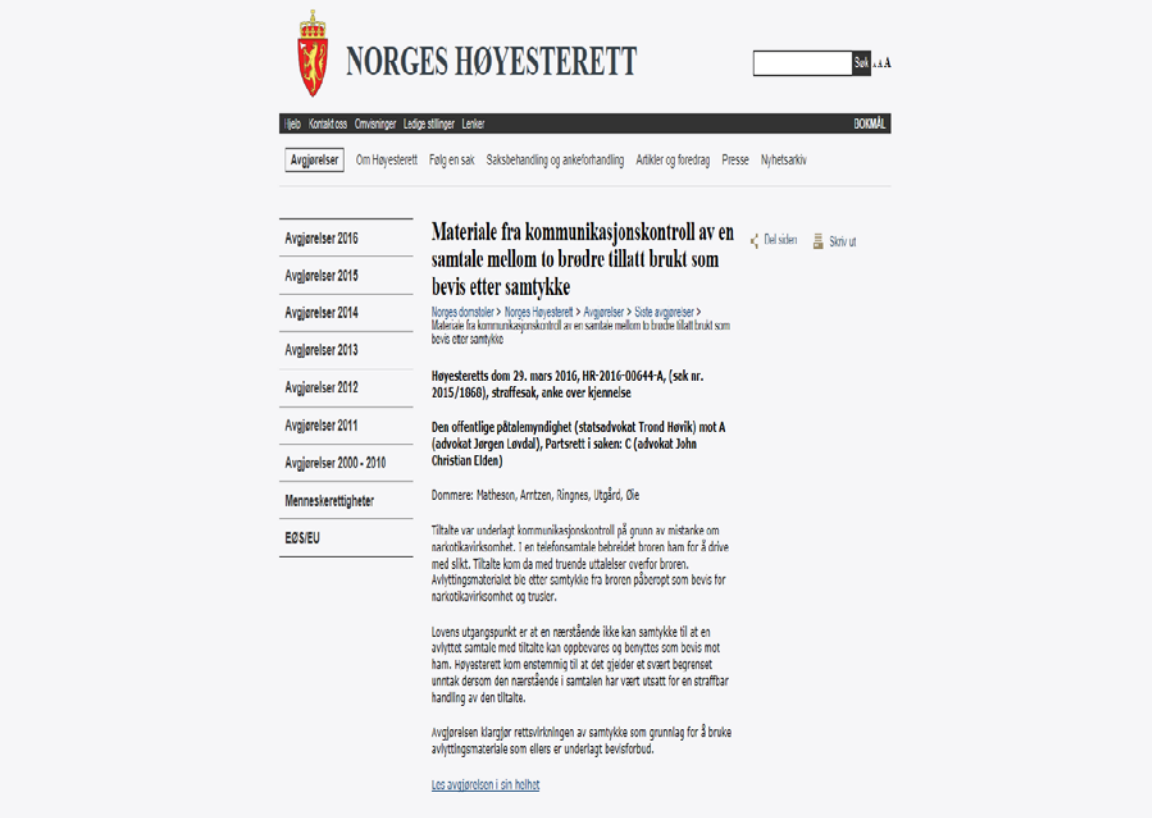
short summary) is added by the administration. Also the main online legal payment services, Lovdata and Gyldendal rettsdata, add certain metadata before publishing the decision.

10.5. "The right to be forgotten" is an important principle in Norway. This is, inter alia, illustrated by the provision in the Regulation on Public Access to the Administration of Justice, Section 11, third subsection, litra a; cf. our answer to Q10.1.

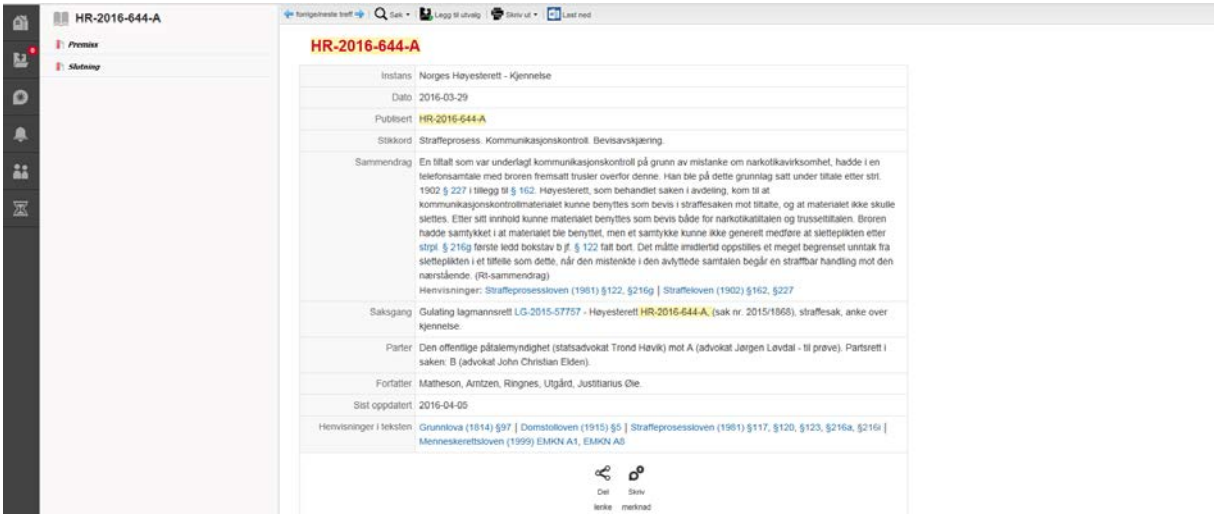
11. Online publication of decisions

11.1. All the judicial decisions of the Supreme Court and of the Appeals Selection Committee of the Supreme Court are published in the main online legal payment services Lovdata and Gyldendal rettsdata. All judgments and sentences, and some important procedural decisions, are also available on the Supreme Court's open webpage for a limited period of time after they have been delivered.

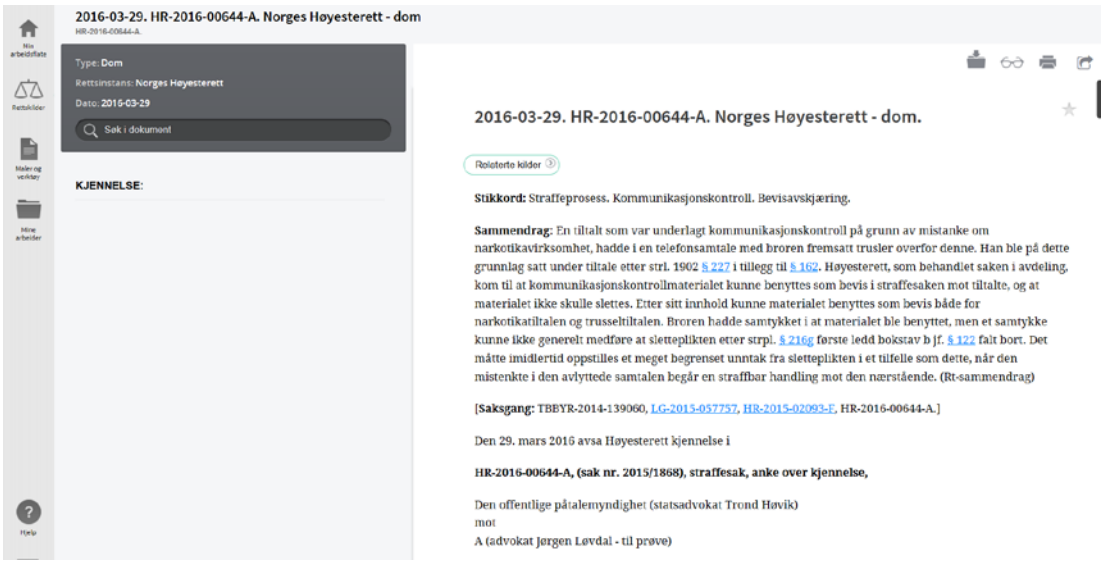
11.2. Cf. the answer to Q1. Example of the heading for a publication on the Supreme Court's open webpage (http://www.domstol.no/hoyesterett):



Example of Lovdata's (www.lovdata.no) heading:



Example of Gyldendal Rettsdata's (www.rettsdata.no) heading:



11.3. The decisions available on the Supreme Court's and Gyldendal Rettsdata's webpages can be downloaded in pdf format. Lovdata *also* offers versions in doc, docx, html and txt. The Supreme Court does not provide datasets.

12. Public availability of other documents

12.1. The Supreme Court only publishes the justices' birth year, native place, the date they assumed office and their cvs. The information is available in Norwegian, Sami and English, and is published by our information advisors. As no justices have raised any objections to the disclosure, the Supreme Court has not taken a stand as to whether the online publication of the information is cumpolsary.

Justice Magnus Matningdal's English profile:

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Supreme Court Justice Magnus Matningsdal

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Born 1951 in Hå, Rogaland. Inaugurated as Supreme Court Justice on 11 August 1997

Law degree (cand. jur.) 1976

Licentiata juris 1982

Juris dr (JD) 1986

Junior lawyer in Stavanger 1976-77

Deputy Judge at the Jæren District Court 1977-1979

Lecturer and subsequently Research Fellow at the Faculty of Law, University of Bergen 1979-1986

Temporary Judge at the Jæren District Court 1980

Professor at the Faculty of Law, University of Bergen 1987-1989

Occasional Temporary Judge at the Gulating Court of Appeal 1988-1989

Judge at the Jæren District Court 1989-1996

Associate Professor at the Faculty of Law, University of Bergen 1989-1997

Senior President of the Gulating Court of Appeal 1996-1997

Supreme Court Justice from 11 August 1997

12.2. Only the decisions are puslished online; and not other parts of the court file such as the parties' submissions and records of the deliberations. Dissenting opinions are, however, *an integrated part* of norwegian court decisions, and will thus be published together with the majority opinion.

12.3. The justices are reluctant to give supplementary comments to their own decisions, appreciating that the reasoning for a particular result should exclusively follow from the written grounds of the relevant decision. That said, the justices are free to express their general views on any legal issue. The freedom of speech includes both the right to indicate their opinion on the legal value of one of their own decisions and the right to comment on other collegues' decisions. The justices have an implied duty to maintain appropriate respect to collegues, but we are not aware of any incidents where a Supreme Court justice has crossed this line. In practice, several of the justices frequently express personal views on particular topics of law in, for instance, law journal articles and/or speeches.

Part III

13. The freedom of information is an important right in a democratic country. The general view appears to be that the current law, as described above, strikes a sound balance between the right to access information and the protection of privacy. We do not expect to see any essential amendments in the next decade.

    As for the protection of privacy more generally, we may face new and/or more severe challenges safeguarding privacy in the fight against terrorism. When faced with such challenges, the main role of the Supreme Court of Norway will be to ascertain, clarify and

develop the constitutional right to privacy as set forth in Article 102 of the Constitution. It is full consensus that the constitutional right shall not run short to that of the parallel convention rights, which means that any applicable case law from the relevant international courts or tribunals will be taken into account. Case law from the European Court of Human Rights has a key position, but also any other relevant human rights treaty may be considered.