



Working group meeting « Independence and Efficiency »

**“Access to information held by public institutions
and processing of (secret) informations in administrative courts
procedure”**

QUESTIONNAIRE

15 and 16 June, 2017

**Bundesverwaltungsgericht - Federal Administrative Court,
Simsonplatz 1, 04107 Leipzig, Germany**

A. Access to information held by public authorities :

The law of the European Union has a twofold approach with regard to access to public sector information: addressees are the Member States on the one and the EU institutions on the other hand. The later are addressed by art. 42 of the Fundamental Rights Charter and art. 15 par. 3 TFEU, which establish a right to access to documents of the European Parliament, the Council and the Commission as well as of Union’s institutions, bodies, offices and agencies subject to the principles and the conditions defined in accordance with this paragraph. Hence regulation 1049/2001/EC of 30 May 2001 provides for public access to European Parliament, Council and Commission documents.

In the law of the administration of the EU (by Member State institutions) only sectorial limited provisions exist. The principle of conferral under art. 5 par. 1 and 2 9 prohibits to establish a comprehensive and coherent legal framework for the national right to freedom of information. Hence secondary law provides only for public access to environmental information under directive 2003/4/EC and for the re-use of public sector information under directive 2003/98/EC of 17 November 2003, amended by directive 2013/37/EU of 26 June 2013. Both are implemented under the framework of the directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of

such data. Moreover Directive 2007/2/EC of 14 March 2007 establishes an Infrastructure for Spatial Information in the EU (INSPIRE).

QUESTIONS

1. Whether the Members States exceed the minimum standard of the right of freedom of information under the secondary EU law ? If so, to what extend? In which fields?

No only minimum standards of the right of freedom of information are in place.

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

From formal perspective the access is rather broad. What is the issue is that in practice the local public authorities are restrictive in giving access to information justified by the protection of personal data or abuse of right to public information.

- 2.1. Who can apply for an access to information (only natural or also judicial persons, private or also public – e. g. municipalities when performing matters of self-administration?)

Any institution or individual can demand the right to access to public information. Public authority cannot demand the acces to public information from another public body.

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

No the right to access is limited to the information on activity of public authorities, public officers or other entities dealing with public duties or administrating public properties

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

Any public authority in the scope of its public duties.

4. What are the limits and exceptions?

Public security, protection of personal data of private and business entities as well as important economic interest of the state.

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

Yes.

6. Depending on the state of implementation, which are the main topics on access to public sector information discussed in the jurisprudence of the respective Member State's courts?

Limitations of the access to the public information and distinction between public and non public information.

B. Processing of informations in administrative courts procedure :

According to article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms about the right to a fair trial : « *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a*

democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice ».

These principles determine the fundamental rules applicable to proceedings before the administrative courts in Europe. How these principles are applied for the instruction and the judgment of cases brought before these jurisdictions? Are there any special rules or exemptions for cases relating to the protection of public order and public safety? What is happening when "a state of emergency" is implemented?

1. THE INSTRUCTION OF THE CASE

1.1. GENERAL DATA

1.1.1. Preamble: the system of evidence

Are all kinds of evidence admissible? Are the testimonies (opinions of witnesses) admissible? In general the case is decided based on the documents provided.

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

In general administration should prove that the information is not admissible.

1.1.2. The role of the parties :

The content of the file and the debate: can the parties freely define what they communicate to the judge?

In general yes the parties are not limited.

Can the parties, at any time, introduce new elements into the debate?
Yes in the first instance before the court.

Is a replica always possible? Has the opposing party a minimum duration to answer?
Yes. The court decides on any extension of time to answer. First answer should be submitted within 15 days from the claim submission.

1.1.3. The role of the judge :

Some parties are weak, others are powerful : is this issue taken into account in defining the applicable rules?

If the party is not represented it can be instructed by the court as well as assigned counsel can be established.,

Does the judge have a purely passive role or can he/she (or should he/she) require the production of information to a party to the dispute?

Yes the production of information can be required by the court.

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

In general yes.

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

No.

1.2. THE PRINCIPLE OF CONTRADICTION AND ITS LIMITS

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

Rather not.

These secret informations provided to a court by public authorities has to be communicated to the parties or not? Can the judge supply documents or other materials produced by a party (or a third party) to the opposing party? How does this mechanism apply ?

Documents provided by one of the parties can be supplied to the opposing party,

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

Yes.

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

All material provided by one party should be provided to the other.

2. THE CLOSURE OF THE INSTRUCTION

2.1. How and when does the closing of the instruction of a case takes place: before the hearing, at the time of the hearing or after the hearing?

After the hearing.

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

Yes.

3. THE HEARING

3.1. Possibility of a judicial decision without a hearing?

Yes in case of lack of action form the admistration.

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

Yes always.

3.3. Possibility of an in camera hearing?

No.

3.4. Possibility of a hearing in a closed court ?

Yes it is possible.

4. THE JUDICIAL DECISION AND THE CONTENT OF THE REQUIREMENT OF MOTIVATION

4.1. To what extent is it possible to use a secret / not public information in the reasoning of a judgment ?

Theoretically possible.

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

Yes but anonymised.

C. MANAGEMENT OF INFORMATIONS AND SECRET / OR NOT PUBLIC INFORMATIONS BY ADMINISTRATIVE COURTS DURING THE STATE OF EMERGENCY

Is there a specific national regulation about that?

No.