

## Avosetta Annual Meeting on 29/30 May 2015 in Bremen

### Free Access to environmental information

#### Questionnaire for the national reports

#### Austrian Report

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#### 1) *Constitutional frame, constitutionally guaranteed right of access to (environmental) information? Access to information as a fundamental (democratic) right?*

Until today the principle of „official secrecy“ (*Amtsverschwiegenheit*) is enshrined in the Austrian Constitution.

In this respect Article 22 para 3 of the Federal Constitution (B-VG) states that - save as otherwise provided by law – officials are pledged to confidentiality about all facts which they have obtained knowledge of exclusively from their official activity and which have to be kept confidential in the interest of the maintenance of public peace, order and security or any other interest included in an exhaustive list, e.g. for the preparation of a ruling or in the interest of the parties involved.

In 1987 the principle of „official secrecy“ has been complemented with an obligation for officials to disclose information about matters pertaining to their sphere of competence in so far as this does not conflict with a legal obligation to maintain confidentiality (*Auskunftspflicht*, Article 22 para 4 B-VG).<sup>1</sup>

The current constitutional framework and the emphasis on the principle of secrecy have long been criticized. The current government has proposed to amend the constitution in order to stress the duty to disclose information for officials and to introduce a constitutional right to access to information for individuals. However, so far no agreement has been reached over the respective proposal.<sup>2</sup> There is considerable doubt whether the proposed amendment reflects a move from the primacy of secrecy to the disclosure of information and information rights.

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<sup>1</sup> Detailed regulations on the obligation to give information are settled by federal (framework) legislation and legislation of the *Laender*.

<sup>2</sup> 19/ME XXV. GP.

*2) Other (national) legal acts providing access to information held by public authorities. Relationship with laws transposing Dir 2003/98 on re-use of public sector information*

Legislative competences to transpose Directive 2003/4/EC are fragmented; the directive has been transposed by federal law with regard to environmental matters settled by the federation (**Federal Environmental Information Act, *Umweltinformationsgesetz* - UIG**) and by provincial legislation (*Umweltinformationsgesetze der Länder*)<sup>3</sup>.

Several environmental laws contain specific provisions on access to information – e.g. with regard to chemical substances, industrial hazards or contaminated sites. Insofar as the legislation on environmental information is more favourable to access to information it will be applied but in general the laws on environmental information (*Umweltinformationsgesetze*) are without prejudice to such specific provisions.

As mentioned above general legislation on the disclosure of information – as an exemption from the principle of --- is settled in a federal framework law and federal and provincial legislation.<sup>4</sup>

Directive 2003/98 on re-use of public sector information has again been transposed both by federal and provincial legislation. On the federal level the *Informationsweiterverwendungsgesetz – IWG*<sup>5</sup> provides that this Law is without prejudice to provisions on access to information and legislation on official secrecy.

*3) National legal situation before Dir 90/313/EC: has the EC/EU legislation had a major impact on the national law on access to information?*

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<sup>3</sup> Umweltinformationsgesetz - UIG, BGBl 495/1993; Burgenländisches IPPC-Anlagen-, SEVESO II-Betriebe- und Umweltinformationsgesetz - Bgld. ISUG, LGBL 8/2007; Kärntner Informations- und Statistikgesetz - K-ISG, LGBl 70/2005; Vorarlberger Gesetz über den Zugang zu Informationen über die Umwelt (Landes-Umweltinformationsgesetz – L-UIG), LGBl 44/2013; Oö. Umweltschutzgesetz 1996 - Oö. USchG, LGBl 84/1996; Salzburger Umweltschutz- und Umweltinformationsgesetz – UUIG, LGBl 59/2005; Tiroler Umweltinformationsgesetz 2005 – TUIG 2005, LGBl 89/2005; Wiener Umweltinformationsgesetz – Wr. UIG, LGBl 48/2006; NÖ Auskunftsgesetz, LGBl 94a/2006; Steiermärkisches Umweltinformationsgesetz – StUIG, LGBl 65/2005.

<sup>4</sup> Bundesgrundsatzgesetz über die Auskunftspflicht der Verwaltung der Länder und Gemeinden (BGBl 286/1987 idF BGBl I 158/1998); Auskunftspflichtgesetz des Bundes (BGBl 287/1987 idF BGBl I 158/1998) and provincial legislation (see e.g. for Vienna - Wr Auskunftspflichtgesetz LGBl 20/1988 idF LGBl 33/2013).

<sup>5</sup> Bundesgesetz über die Weiterverwendung von Informationen öffentlicher Stellen, BGBl I 135/2005.

Before Directive 90/313/EC general and comprehensive legislation on access to environmental information was not in existence. Several environmental laws contained specific provisions on access to information, e.g. the Chemical Act, the Water Act or the Act on Contaminated Sites. However those provisions are only selective. The general laws on disclosure of information (*Auskunftspflichtgesetze*, see above Question 1) do not include a duty to actively disseminate information and in general disclosure of information was regarded more as an exception from official secrecy than as a rule. Insofar EC/EU legislation had a major impact on access to information and promoted a change of paradigm.

*4) Statistical information about the use of the access-right including types of users if known (eg NGOs, competitive industry, general public, environmental consultants, etc). Difficulties of the administration handling the number and/or the scope of applications.*

No statistical information or information about difficulties of the administration available.

The access right is used by lawyers and by NGOs regularly. Members of the general public often request (and receive) environmental information without specifically referring to the access-right or the Environmental Information Act.

*5) Significant national law and jurisprudence on the definition of “environmental information” (Art. 1 para 1 Dir 2003/4/EC*

The definition of “environmental information” has been transposed almost literally in § 2 of the UIG

With regard to the former directive 90/313/EC see the preliminary ruling in C-316/01 (*Glawischnig/Austria*) concerning information on products manufactured from genetically modified soya and maize that was not qualified as environmental information under directive 90/313/EC.

*6) Significant national law and jurisprudence on determining the access right holder (“without having to state an interest”, Art. 3 para 1 Dir 2003/4/EC)*

According to § 4 Abs 1 UIG the access right holder does not have to state an interest.

No significant jurisprudence.

*7) Significant national law and jurisprudence on the realm and obligations of private persons as defined by Art. 2 No. 2 b and c 4/EC. (see ECJ 279/11 (Fish Legal)*

The relevant definitions have been transposed almost literally (§ 3 Abs 1 Z 4 UIG). No significant jurisprudence so far.

**8) National law and jurisprudence on the public authorities to be addressed (“information held by or for them”) (Art. 3 para 1 Dir 2003/4/EC)**

See: § 4 Abs 1 UIG.

Information held for a public authority shall include environmental information which is physically held on behalf of a public authority by a natural or legal person that is under no obligation to provide access to information; e.g. information on emissions that are held by a private operator of an installation.

**9) Significant national law and jurisprudence on practices on access conditions (terms, “practical arrangements”) (see Art.3 paras 3 – 5 Dir 2003/4/EC)**

Nothing significant. See § 9 (4) and § 9 (6) UIG.

**10) Law and practices/jurisprudence on charges for access (copying? administrative time?)**

The Federal Environmental Information Act - UIG<sup>6</sup> authorizes government to enact an ordinance specifying reasonable charges for the provision of information. Access to publicly accessible lists and registers and access to the requested information on site is free. The laws of the States (*Umweltinformationsgesetze der Laender*) include similar provisions, allowing for ordinances of the state governments.<sup>7</sup>

**11) Do any public authorities claim copyright in the material supplied, and impose conditions relating to use of information under copyright law (such as due acknowledgement and user fees in case of re-publication)?**

As far as I can see, this is not the case.

**12) National law and jurisprudence on the role of affected third parties in access procedures esp. concerning trade secrets and personal data (designation of trade secrets, consultation prior to release of information, etc)**

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<sup>6</sup> § 5 (1) UIG.

<sup>7</sup> see § 19 Abs 5 Bgld ISUG, § 10 K-ISG, § 16 Abs 5 OÖ USchG, § 5 Abs 5 Stmk UIG, § 5 Abs 6 Tir UIG, § 5 Abs 5 Wr UIG, § 27 Abs 5 Slbg UUIG; the laws of lower Austria and Vorarlberg explicitly mention the possibility of advance-payment: § 11 Abs 5 NÖ Auskunftsg, § 5 Abs 5 Vbg UIG.

The UIG (§ 7) provides for participation of individuals who claim that the information required is concerning confidential commercial or industrial information (trade secrets). Authorities have to give potentially affected third parties notice of a request for information and ask them to give their opinion regarding the confidentiality of the information requested within two weeks. It is up to the authorities to weigh the interests involved and to decide whether the information is to be held confidential. In case the third party concerned claims the information to be confidential, authorities have to give them written information in case access to the information will be granted.

### *13) Significant national law and jurisprudence on exceptions (Art. 4 Dir 2003/4/EC)*

*More specifically:*

- a. Confidentiality of commercial or industrial information*
- b. Confidentiality of the proceedings of public authorities / internal communications /*
- c. Approach to the disclosure of:*
  - “raw data’ (Aarhus Compliance Committee case ACC/53/ Uk – see AC Implementation Guide 2014 p 85)*
  - “material in the course of completion” vs. “unfinished documents” see AC Implementation Guide 2014 p 85*
- d. “Information on emissions into the environment” (Art. 4 para 2 subpara 2 Dir 2003/4/EC, see T-545/11*
- e. International relations, public security, national defence (see T-301/10 Sophie t’ Veldt)*
- f. Weighing of interests in every particular case (Art. 4 para 2 subpara 2 Dir 2003/4/EC*

Provisions concerning exceptions have been transposed in § 6 UIG.

Only few decisions on exceptions are available. Rulings mostly deal with the confidentiality of commercial and industrial information (in Austria: trade secrets) and specifically with alleged damage arising from access to information.

Examples:

The refusal of access to information about the operational and monitoring regulation (“*Betriebs- und Überwachungsverordnung*”) of a hydroelectric power station, especially information regarding flushing, lowering the water level, flood management and flood

protection was upheld because of on-going judicial procedures. The tribunal held that it had to prevent the information being used for litigation-PR.<sup>8</sup>

An independent tribunal saw no violation of a trade secret with regard to the request for disclosure of an environmental permit for a water power station because a violation of trade secret had not been made plausible (e.g. conclusions that can be drawn to the production process).<sup>9</sup> However information about data concerning a wastewater treatment plant was refused due to trade secrets. The official expert claimed that the information about wastewater quantity (*Zulaufdaten*) might disclose internal technologies and processes.

#### **14) Judicial control of access-decisions**

##### **a. Have specialised administrative appeal bodies (information officer etc) been set up? How do they work? Are their opinions respected?**

In Austria no specialised administrative appeal bodies have been set up.

The Austrian legislation regarding judicial control of access decisions does not provide for effective and timely review procedures:

According to the relevant Austrian laws (for the federal level see § 8(2) Environmental Information Act) when the authorities refuse to provide the requested environmental information they do so by providing an informal letter of refusal. This letter of refusal has to be provided within the time limits set up in the Directive (as soon as possible, within one/two months). However, the letter of refusal does not qualify as an adequate basis for judicial review. Therefore, when access to information has been refused, the applicant has to submit a further request for an official notification in order to be able to seek judicial remedies (*Antrag auf Erlassung eines Verweigerungsbescheids*). According to general procedural laws the time limit for providing an official notification is six months.

The Aarhus Compliance Committee (ACCC/C/2010/48) has already held that the relevant Austrian legislation, especially the requirement for a separate “official notification” and the timeframe of review procedures is not in compliance with the Aarhus Convention (Art 4 Para 7). An amendment of the Federal Environmental Information Act is currently in preparation in order to ensure “Aarhus-compliance”. This draft law is insufficient in so far as the need for

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<sup>8</sup> UVS Vienna (independent administrative panel) 26.4.2013, MIX/42/3920/2013.

<sup>9</sup> UVS Styria (independent administrative panel) 23.8.2010, 41.18-1/2010.

a request for an official notification of refusal is maintained and access to review procedures therefore takes more than one or two months.

Where authorities fail to comply with a request for information or ignore a request, courts can only review the legality of such an act/omission. The duty to provide access to information does not devolve to the courts and the Austrian legal system does not provide for a claim for disclosure of information that has wrongfully been denied. Effectiveness of judicial review is thus limited.

*b. Court review: “in-camera”-control? Standing of parties affected by decisions denying or granting access?*

Standing is granted not only for applicants whose requests for information have been denied or ignored but also for individuals claiming that the required access to information affects their right to keep confidential commercial or industrial information they hold.

*15) How do states fulfil the duty to make information actively available?*

At federal level the Federal Environment Agency (“*Umweltbundesamt, UBA*”) is designated as the Austrian coordination centre for environmental information and responsible for promoting the exchange of information between the authorities, finding ways to facilitate access to environmental information and ensuring and increasing their quality. The website [www.umweltbundesamt.at](http://www.umweltbundesamt.at), which is accessible to the public, is the central information source regarding a large range of environmental information: for example air, water, soil quality, industry, waste management, genetic engineering and many more. The website is connected with a lot of different databases. Especially the database for environmental impact assessments deserves particular mention: Every environmental impact assessment, which has been done or is still running in Austria, is documented in this database. Thus every interested person has the opportunity to get information about the proceeding of the approval procedure, the environmental impact study and the final decision. UBA also provides publication databases to make different studies available.

UBA is also responsible for preparing the environmental inspection report (“*Umweltkontrollbericht*”), which has to be prepared and published every three years. The environmental inspection report aims to illustrate the state of environment in Austria. In order to publish the report, UBA-experts have to observe and evaluate the state of the environment continuously and have to make their results available.

The e-government platform [www.help.gv.at](http://www.help.gv.at) gives a short overview of all necessary information about environmental information - especially how to get them and where they are available.

Besides general information the website of the Federal Ministry of Agriculture, Forestry, Environment and Water Management (“BMLFUW”) provides inter alia a water information system called WISA (<http://wisa.bmlfuw.gv.at/>), a fully automatic radiation early warning system and an electronic data management system in Environment and Waste Management, called EDM ([https://secure.umweltbundesamt.at/edm\\_portal/home.do](https://secure.umweltbundesamt.at/edm_portal/home.do)). Originating from waste law, EDM is a platform for operators and authority, which is partly also publicly accessible. The platform should facilitate fulfilling the registration requirement and reporting obligations (nowadays especially for IPPC installations) using electronic ways of communication.

On the federal state level there are several meta-information-systems and information systems (“Landesumweltinformationssysteme”), which provide information actively, for example daily measured air quality data (<http://www.luft-bgld.at/Messwerte.html>).

In order to foster cooperation between all national levels (federal government, federal states, cities and municipalities) and to promote the systematic dissemination of environmental information, offered on online portals of national authorities a project group the “environmental information (*“Projektgruppe-Umweltinformation, PG-UP”*)” has been established. The objective is to set up a central information system, which provides a “One-Stop-Shop” for environmental information. The set up of this central information system is still work in progress.