

**Free Access to environmental information**

**Report on Germany**

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

According to the clear majority in the literature and following the jurisdiction of the Bundesverfassungsgericht<sup>1</sup> (German Federal Constitutional Court) and the Bundesverwaltungsgericht<sup>2</sup> (German Federal Administrative Court) the Grundgesetz (German Constitution) contains no right of access to information held by public authorities. Art. 5 GG only guarantees the right to inform oneself out of “allgemeinverfügbare Quellen” (publicly available sources). The files and the information held by public authorities are not considered to be such sources.

Personally, I have argued in favour of the recognition of a constitutionally guaranteed right to access to information. I have therefore reinterpreted Art. 5 GG. This argument has so far only gained limited support.<sup>3</sup> The situation might change under the impression of EU-law and the jurisdiction of the ECHR.

The general situation is different only in Brandenburg. Here Art. 21 IV of the states constitution provides for a general right to access to information.

The constitutions of Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt and Thüringen contain provisions that guarantee a right of access to environmental information.<sup>4</sup> All these States have “new” constitutions drafted in the revolutionary situation after 1989.

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<sup>1</sup> See: BVerfGE 27, 71 (83) – Einfuhrverbot / Leipziger Volkszeitung; BVerfG, Beschl. v. 30.1.1986, NJW 1986, 1243.

<sup>2</sup> See BVerwG, Urt. v. 27.11.2013, 6 A 5.13, DVBl. 2014, 587, Rn. 19 f. See also Ziekow/Debus/Musch, Evaluation des Gesetzes zur Regelung des Zugangs zu Informationen des Bundes – Informationsfreiheitsgesetz des Bundes (IFG) im Auftrag des Innenausschusses des Deutschen Bundestages, Ausschuss-Drs. 17(4)522, S. 55 Fn. 65; Kloepfer/Schärdel, Grundrechte für die Informationsgesellschaft - Datenschutz und Informationszugangsfreiheit ins Grundgesetz?, JZ 2009, 453 ff.

<sup>3</sup> See Wegener, Der Geheime Staat, 2006, S. 480 ff.; ders., Informationsfreiheit und Verfassungsrecht, in Geis/Umbach (Hrsg.), Planung-Steuerung-Kontrolle – Festschrift für Bartlsperger, 2006, S. 165 ff.; supported by: Pernice, Verfassungs- und europarechtliche Aspekte der Transparenz staatlichen Handelns, Jahrbuch Informationsfreiheit und Informationsrecht 2013, 17, 27 ff.; Schmidt/Kahl/Gärditz, Umweltrecht, 9. Auflage 2014, Rn. 123.

<sup>4</sup> See Art. 39 Abs: 7 BbgVerf; Art. 6 Abs. 3 LV MV (Recht auf Zugang zu Umweltinformationen der öffentlichen Verwaltung); Art. 34 SächsVerf (Recht auf Auskunft über Umweltdaten); Art. 6 Abs. 2 Verf. LSA

*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*

The most important acts are: the Federal “Informationsfreiheitsgesetz” and its equivalents in the States. So far, general acts guaranteeing the Freedom of access to information are missing in Baden-Württemberg, Bayern, Hessen, Niedersachsen und Sachsen only.

Additional legislation concerns the access to information by consumers (“Verbraucherinformationsgesetz”).

The Public-Sector-Information (PSI) Directive 2003/98 has been amended by Directive 2013/37/EU. The amended directive makes it obligatory to deliver public-sector-information for further use. The German Federal ministry of Economics and Energy has published a proposal for a new “Informationsweiterverwendungsgesetz” replacing the existing one.<sup>5</sup> The proposal is available (in German only) under <http://www.bmwi.de/BMWi/Redaktion/PDF/Gesetz/entwurf-eines-gesetzes-ueber-die-weiterverwendung-von-informationen-oeffentlicher-stellen.property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>. The PSI-Directive and the “Informationsweiterverwendungsgesetz” have some (limited) relevance for the access to environmental information in so far as the question of fees for information is concerned.

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*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?*

Before 1990/1992 the general rule under § 29 Verwaltungsverfahrensgesetz (general administrative procedure act) has been (and still is, as long as no special rule applies) that information held by public authorities is available only to the parties potentially legally effected by an ongoing administrative procedure. § 29 Verwaltungsverfahrensgesetz was introduced in the early 70<sup>th</sup> and modified the former even more restrictive standards. It introduced the so called “beschränkte Aktenöffentlichkeit”.

The directive had a major impact in so far as it was the first mandatory act that changed the established general rule of secrecy in (west) German administrative law. The other major impact has been the revolution of 1989.

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(Recht auf Auskunft über Umweltvorhaben und -daten des Landes); Art. 33 ThürVerf (Recht auf Auskunft über Umweltdaten).

<sup>5</sup> See *Beyer-Katzenberger*, Rechtsfragen des „Open Government Data“ – Aktuelle Entwicklungen und Rechtsprechung zur Weiterverwendung von Informationen des Staates, DÖV 2014, 144 ff.

*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.*

The available statistical information is very limited. So far no major problems have been reported. This especially true for the field of environmental information. Many court cases indicate that especially the industry is making use of its information rights. Prominent current cases concern the policy-making in the area of nuclear power and the respective U-turn decisions of the German government after Fukushima.

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

This provision generally creates hardly any problems. Courts tend to interpret it in a broad sense thereby following the jurisdiction of the ECJ. Cases concerned the funding of environmental protection measures, the emission-trading regime

*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)*

Everybody (and every legal entity) is considered to be a potential “Access right holder”. I do not know of any controversies concerning this provision.

*7) Significant national law and jurisprudence on the realm and obligations of private persons as defined by Art. 2 No. 2 b and c Dir 2003/4/EC. (see ECJ 279/11 (Fish Legal))*

Private persons still show a marked reluctance in recognizing one's own obligation to provide information. A duty to inform may not only arise if the performance of the public service by a private person is aimed at the protection of the environment. A similar obligation exists also if the performance of the task can be expected to produce negative effects on the environment. Consequently, the VG Berlin (Administrative Court) considered the “DB ProjektBau GmbH”, the branch of German Rail responsible for the construction and maintenance of the railway network, to be obliged to deliver information.<sup>6</sup>

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<sup>6</sup> VG Berlin, Urteil v. 5.11.2012 – VG 2 K 167.11, Rn. 85 ff.

*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)*

In Germany there is more discussion about the facultative exceptions under Art. 2 No. 2 Dir 2003/4/EC: “Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity.” Germany has opted for that restriction. The question then is, what is meant with a “judicial or legislative capacity”? Is it only legislation and jurisdiction in a narrow sense? Are parliamentary committees investigating the conduct of the executive acting in a legislative capacity? Can the executive be considered to be part of the legislation when drafting and preparing legislative acts? Can such an exemption apply also to the executive of the Länder when preparing the law-making process in the second chamber, the “Bundesrat”?

With regard to the EU-infringement procedure before the ECJ, I question the well established practice and jurisdiction of the ECJ to keep secret the written statements of the EU-Commission and the defendant.

*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 especially interesting.

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

Not enough information.

*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)?*

Copyright law or more generally the protection of intellectual property has the potential to restrict the free access to information mainly because its blur content and its dogmatic inaccuracies.<sup>7</sup> For environmental management thereof initially follows an administrative practical obligation. The environmental protection authorities must therefore draft its contracts with consultants and other information providers in a way that allows the further publication of such commissioned or acquired information. Copyrights held by the public

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<sup>7</sup> *Lenski*, Informationszugangsfreiheit und Schutz geistigen Eigentums, NordÖR 2006, 89 ff.; *Ramsauer*, Das Urheberrecht und Geschäftsgeheimnisse im UIG und IFG, AnwBl 2013, 410; *Wegener*, Zum Verhältnis des Rechts auf freien Zugang zu Umweltinformationen zum Urheberrecht, Gutachten für das BMU, 2010, [http://www.bmub.bund.de/fileadmin/bmu-import/files/pdfs/allgemein/application/pdf/gutachten\\_urheberrecht\\_bf.pdf](http://www.bmub.bund.de/fileadmin/bmu-import/files/pdfs/allgemein/application/pdf/gutachten_urheberrecht_bf.pdf).

authorities themselves create no right to deny access to information. In particular, the first publication copyright is displaced by the opposite provisions of the Freedom of Information Acts and therefore the Environmental Information Act. Practically relevant restrictions on access to information, or more precisely the use of information, can arise only in so far as regards the continued commercial use of publicly generated information. This, however, is then a question of equal treatment under the PSI-Directive and its German transposition in the Informationsweiterverwendungsgesetz(IWG).

*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)*

See

§ 9 Environmental protection act: protection of other interests<sup>8</sup>

(1) Where

1) by disclosing the information personal data will be disclosed and thereby third party interests will be significantly impaired,

2) intellectual property rights, in particular copyrights, would be infringed by the making available environmental information or

3) the disclosing of information will effect trade or business secrets or information subject to tax secrecy or the confidentiality of statistics,

the application shall be rejected, unless the third parties involved have agreed to the disclosure or the public interest to disclose the information outweighs their interests. Access

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<sup>8</sup> My own crude translation. The German text reads as:

§ 9 Umweltinformationsgesetz : Schutz sonstiger Belange

(1) Soweit

1. durch das Bekanntgeben der Informationen personenbezogene Daten offenbart und dadurch Interessen der Betroffenen erheblich beeinträchtigt würden,

2. Rechte am geistigen Eigentum, insbesondere Urheberrechte, durch das Zugänglichmachen von Umweltinformationen verletzt würden oder

3. durch das Bekanntgeben Betriebs- oder Geschäftsgeheimnisse zugänglich gemacht würden oder die Informationen dem Steuergeheimnis oder dem Statistikgeheimnis unterliegen,

ist der Antrag abzulehnen, es sei denn, die Betroffenen haben zugestimmt oder das öffentliche Interesse an der Bekanntgabe überwiegt. Der Zugang zu Umweltinformationen über Emissionen kann nicht unter Berufung auf die in den Nummern 1 und 3 genannten Gründe abgelehnt werden. Vor der Entscheidung über die Offenbarung

der durch Satz 1 Nummer 1 bis 3 geschützten Informationen sind die Betroffenen anzuhören. Die informationspflichtige Stelle hat in der Regel von einer Betroffenheit im Sinne des Satzes 1 Nummer 3 auszugehen, soweit übermittelte Informationen als Betriebs- und Geschäftsgeheimnisse gekennzeichnet sind.

Soweit die informationspflichtige Stelle dies verlangt, haben mögliche Betroffene im Einzelnen darzulegen, dass ein Betriebs- oder Geschäftsgeheimnis vorliegt.

(2) Umweltinformationen, die private Dritte einer informationspflichtigen Stelle übermittelt haben, ohne rechtlich dazu verpflichtet zu sein oder rechtlich verpflichtet werden zu können, und deren Offenbarung nachteilige Auswirkungen auf die Interessen der Dritten hätte, dürfen ohne deren Einwilligung anderen nicht zugänglich gemacht werden, es sei denn, das öffentliche Interesse an der Bekanntgabe überwiegt. Der Zugang zu Umweltinformationen über Emissionen kann nicht unter Berufung auf die in Satz 1 genannten Gründe abgelehnt werden.

to environmental information on emissions can not be refused on the grounds referred to in paragraphs 1 and 3. Before deciding on the disclosure of information protected in sentence 1 number 1 to 3 the third parties concerned must be heard. As a rule, the public authorities shall consider third parties rights to be effected, if the submitted information has been marked as a trade of business secret. Public authorities can oblige potentially affected third parties to show in detail that a business or trade secret exists.

(2) Environmental information, submitted to the authorities by private parties without a (potential) legal duty to inform, shall – if the public interest of disclosure does not outweighs their interests – not be disclosed without their consent. Access to environmental information on emissions can not be refused on the grounds referred to in sentence 1.

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

An additional interesting question has been whether secrecy-obligations under corporate law can oblige public authorities that are (part-) owners of semi-private companies to keep information secret which they obtained in meetings of the supervisory boards or similar committees. A request for such information concerning the still not opened Berlin-Airport has been rejected by the OVG Berlin 28.1.2015 – OVG 12 B 21.13 – under the rules of the “Informationsfreiheitsgesetz” and under the (constitutional) rules of the freedom of the press. The applicant failed to claim information under 2003/4/EC Dir.

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#### *More specifically:*

##### *a. Confidentiality of commercial or industrial information*

Plays probably the most important role among the exceptions concerning the protection of private interests. The most important case is the Glyphosate Case still pending before the ECJ, C-673/13 P.

##### *b. Confidentiality of the proceedings of public authorities / internal communications*

The main ongoing „information struggle“ regarding this exception is probably the large number of information requests by the nuclear industry concerning the shut-down of its installations after Fukushima. See foreexample VG Berlin, Urt. v. 18.12.2013, VG 2K 249.12, ZUR 2014, 433 ff.; (nicht rechtskräftig, Berufung anhängig beim OVG Berlin unter Az. 12 B 6.14). The case concerned an information request addressed at the Bundeskanzleramt. The administrative court granted access to most of the requested information and decided that not any general and simple negative effect on the authority’s deliberations can justify secrecy. The public authority had failed to show a significant and specific danger for its future conduct. Especially the court mentioned the jurisdiction of the Bundesverwaltungsgericht,

which claimed that the completion of an administrative procedure generally ends the protection of the information.

The Bundeskanzleramt unsuccessfully tried to invoke the concept of “executive privilege” (or in the German wording of the Bundesverfassungsgericht the “KernbereichexekutiverEigenverantwortung”). It should be noted, that the 2003/4/EC Dir. contains no such exemption.

*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*

In VG Braunschweig, Az. 2 A 1033/12, Urt. v. 12.12.2012, the lower administrative court of Braunschweig decided on the Glyphosate case mentioned in the question (still pending before the ECJ as C-673/13 P). The Court’s decision is very much an opposite decision to T-545/11. “Emissions” are considered to be only emissions of industrial installations according to the industrial emissions directive. The Aarhus implementation guide played a role in justifying this. The court also regarded the public interest served by disclosure to be less important than the interest served by the refusal.

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*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*

See above d.

**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?*

Concerning the freedom of information legislation in general, the task of supervising the practical application has generally been put in the hands of the public “Datenschutzbeauftragten” (some form of ombudsman responsible for the supervision of the legislation concerning the protection of personal data) of the Bund and the Länder. The Datenschutzbeauftragten are traditionally concerned rather with the protection of private secrets. Their ability to defend the public’s right to information was therefore initially questioned. Nevertheless, their “civil liberties”-approach has enabled them to advocate for



the freedom of information at the same time. Their opinions are generally not legally binding. They examine individual cases, provide some statistics, publish annual reports and try to influence public authorities.

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

The German lawmaker established a rather strange system of “in-camera”-control but not by the Courts deciding the case but by special chambers of the High- and Federal Administrative Courts, deciding “in-camera” in a separate proceeding just on the “secret-quality” of the information in question. The idea behind it is a better protection of (state) secrets by special branches of the judiciary.

On the EU-level, the numerous-clausus of court actions, limiting the information-seeker to the action for annulment, seems to be a major obstacle for the effective judicial enforcement of information requests.

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

Although quite a lot of information is available via the public authorities websites, especially some more specific obligations under Art. 7 2003/4 are still partly disregarded. This is especially true for Art. 7 II

“(e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;

(f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found in the framework of Article 3;

(g) environmental impact studies and risk assessments concerning the environmental elements referred to in Article 2(1)(a) or a reference to the place where the information can be requested or found in the framework of Article 3.”

The possibility to make references only to the places where such information can be requested is generally favored by the authorities.