Prof. Dr. Arno Scherzberg, University of Erfurt, Germany

FREEDOM OF INFORMATION – GERMAN AND EUROPEAN PERSPECTIVES

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I. Introduction

Israel, the Federal Republic of Germany and the European Union are currently in a state of transition in regard to the concept of freedom of information. They are attempting to overturn a tradition characterized by state secrecy in favour of a principle of open access to government data collections.

In modern society – which is driven by speed, complexity and networking – individual development and the success achieved by organizations are ever more dependent on the quality, timeliness and availability of knowledge generated and processed by the community as a whole. Of particular significance here is access to information which is maintained by the state, since government records typically contain information from the fields of administration, policymaking, business and society. This is data which is otherwise not available or not available in the same breadth. Thus the government has a certain information monopoly[1]. The question of accessibility to such information is decisive as to whether or not the political discourse of society and the exercise of individual freedoms and rights are based on the complete range of available knowledge.

In spite of the dimensions which freedom of information assumes in terms of fundamental rights, democracy and the citizen's acceptance of their government, for many years calls for access to government records in Germany and the European Union invoked no response in the political sphere. Only in the past ten years – beginning with initiatives launched by the European Union – has a change in paradigm begun to take place. In the European Union freedom of information has been implemented almost completely since last year. In Germany three of the sixteen Federal States have passed laws providing access to information while the Federal Government last year submitted draft legislation on freedom of information[2] vis-a-vis federal agencies. At present this draft, in light of the events of September 11, is being reworked with regards to security policies but is still intended to go into law this year.

Before discussing the draft, however, I would like to review the laws which have prevailed to date in the Federal Republic and examine their historical roots. Then I will sketch the development of freedom of information in the European Union and summarize the constitutional framework within which the legal implementation of access to government information in Germany is moving.

II. The principle of limited public access to records and its historical roots

A. Historical background

The tradition of secrecy in public administration dates back to the era prior to the development of the modern state. It can be found even in the governmental structures of the late Middle Ages, then arising from the convergence of two phenomena:

– the lead function which clerical jurisprudence and canon law increasingly assumed on behalf of royal administration[3] and

[1] *Schoch, F.*, [1998] Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer (VVDStRL) 158, 180.
[2] See http://www.bmi.bund.de/top/dokumente/Artikel/ix_28349.htm.
[3] *Trantas, G.*, Akteneinsicht und Geheimhaltung im Verwaltungsrecht, 257 f. (1998).

– the onset and progress of autonomous political thinking, beginning with Machiavelli, as opposed to the predominance of religious and moral tenets[4].

In his essay entitled *Principe* Machiavelli in 1503 defined the state's interests in regard to the politics of power and subsumed them under the concept of *ragion di stato*, known appropriately in English as *raison d'état*, this being the sum of the knowledge and means which a ruler can draw upon to harm his enemies, to retain power and to pursue his political goals. Included here are not only an administrative apparatus beholden to the ruler but also the secrecy of its knowledge, being necessary to the exercise of power. The administration became a part of the *arcana imperii*, the sphere of secrecy to be set up for the state to safeguard the existing order. Thus it became a cornerstone of pre-democratic state power.

The close linkage between the concept of state and the rise of a professional civil service made secrecy in Germany appear to be quite a natural feature of public administration. This was in spite of clear liberalist's demands for open access in the Nineteenth Century and followed even through the transition to democracy. Max Weber, the famous sociologist of the early 1900s for example, saw the state's ability to function and its effectiveness as being imminently dependent upon the ability to keep its knowledge and its objectives secret from the public at large.

B. The principle of limited administrative openness in Germany

Within the Federal Republic of Germany of today the general dictate to maintain secrecy has evolved into a principle of limited administrative openness. Pursuant to this, citizen access to government information is no longer simply excluded. Rather – and provided that law does not expressly mandate access – the decision to disclose lies within the due discretion of the authority involved[5].

The most important specific piece of legislation governing access to information is contained in the Administrative Procedures Act – Verwaltungsverfahrensgesetz – of 1976. Its Section 29 grants participants in an ongoing administrative proceeding the right to inspect records, this being limited however to the extent that familiarity with the documents could be of significance in laying claim to or defending their legal interests[6]. This makes clear the limited scope of this entitlement. It serves not to create general transparency but only to protect the exercise of entitlements in a proceeding; it is the expression of the general principle of due process.

The right to inspect documents in the course of administrative proceedings is subject to numerous reasons for denial, reasons which in some cases are only vaguely worded. They authorize agencies to refuse inspection to the extent that this would impair the agency's properly carrying out its duties or would impact the welfare of the federal government or of a federal state. They may also be invoked to the extent that the proceedings require confidentiality as prescribed by law, by their very nature or in consideration of justified third-party interests. In the course of weighing conflicting interests the agency must ascertain in each case whether the reason presented for maintaining secrecy is momentous enough to justify infringement upon the right of inspection[7]. This weighing of interests is not defined in any greater detail in the Act itself. According to judicial rulings access may be denied only to prevent a concrete and grave endangerment of government interests. An appeal to the general rule of official secrecy is not sufficient for this purpose.

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[4] *Stolleis, M.*, Arcana imperii und Ratio status, Bemerkungen zur politischen Theorie des frühen 17. Jahrhunderts (1980).

[5] *König, D.*, [2000] Die Öffentliche Verwaltung (DÖV) 45/46.

[6] *Burmeister, J./Winter, G.*, in: Winter, G., Öffentlichkeit von Umweltinformationen, 87, 106 f. (1990); *Bonk, H. J.*, in: Stelkens, P./Bonk, H. J./Sachs, M., Verwaltungsverfahrensgesetz, Kommentar, § 29, Rn. 31 ff. (5th. ed. 1998).

[7] *Mengel, H.-J.*, [1990] Die Verwaltung 377, 386 f.

C. Access entitlements specific to certain areas or purposes[8]

While the rules governing administrative proceedings thus suspend the confidentiality of an agency's inner workings only in limited cases to support due process, secrecy outside of administrative proceedings is breached today by some specific legislation on freedom of information. To be mentioned above all are the Environment Information Act and the Press Act, both intended to improve public participation in political and administrative affairs. Other legislation includes the Archives Act and the act regulation access to the records kept by the state security police in former East Germany, serving the interest of both retroactive scientific and journalistic research.

In the environmental field wide-ranging freedom of information prevails even today. The right of access as being granted by Section 4 Paragraph 1 Clause 1 of the Environment Information Act of 1994 is independent of any ongoing administrative proceeding. It addresses all agencies charged with assignments in regard to environmental protection and is not contingent upon the existence of any particular interest. Only the way in which data is delivered lies within the discretion of the agency bound to give information, this being specified in Section 4 Paragraph 1 Clause 2 of the Act. The reasons for denying access are worded rather more concretely than is the case in the Administrative Procedures Act.

As regards dealings with the media and as set forth in current law, agencies need not provide access to documents but are obliged to provide information. Section 4 of the Press Acts of the Federal States requires government authorities to give to representatives of the print and broadcast media, the information they need to carry out their mandate to enlighten the public[9]. The broadly stated reasons for exceptions to this rule come to bear, for example, if the proper conclusion of pending judicial and administrative proceedings could be derailed or endangered or if the scope of the request for information exceeds justifiable limits[10]. In practice, however, journalists' access is thus limited to that information which is disclosed at the discretion of the administration. Further entitlements to information, which I can mention here only in passing, serve to facilitate legal relations – such as access to registers and lists – or to sustain rights – such as the entitlement as per the Data Privacy Act, making it possible to obtain information in storage about one's own person and the reason for which that information was collected.

D. Other access to information

Aside from the situations governed by the Administrative Procedures Act and by specific laws providing access, the legal situation to date has placed decisions on permitting reviews of records or giving information within the due discretionary powers of authorities[11]. Here the authority must weigh the interests of the applicant with conflicting public interests and the interests of third parties. An actionable entitlement to a decision "free of error" in applying discretionary powers devolves to the applicant only if he can demonstrate a "justified interest" in the information[12]. That would be assumed if, for example, a review of documents is

[8] For a complete overview see *Scherzberg, A.*, Die Öffentlichkeit der Verwaltung, 389 ff. (2000).
[9] *Groß, R.*, [1997] Die Öffentliche Verwaltung (DÖV) 133, 136, 141 ff.
[10] PresseG, § 4, (1); MediendiensteStaatsV, § 11 (2); *Löffler, M./Ricker, R.*, Handbuch des Presserechts, § 20, Rn. 5 ff.(3th ed., 1994); *Groß* (note 9), 139 f.
[11] See, for example, 30 BVerwGE (Decisions of Federal Administrative Court) 154, 159 f., and 50 BVerwGE 255, 263; BayVGH (Regional Higher Administrative Court), decision of 17.02.1998: [1999] Neue Zeitschrift für Verwaltungsrecht (NVwZ) 889 f.; OVG (Regional Higher Administrative Court) Nordrhein-Westfalen, decision of 23.04.1979, [1980] Die ÖffentlicheVerwaltung (DÖV) 222, 223. *Kugelmann, D.*, Die informatorische Rechtsstellung des Bürgers, 305 ff. (2001); *Schild, H.-H.*, [2000] Recht der Datenverarbeitung (RDV) 96, 99; *Erichsen, H.-U.*, [1993] Juristische Ausbildung (JURA) 180, 181; *Trantas, G.*, Akteneinsicht und Geheimhaltung im Verwaltungsrecht, 61 (1998).
[12] 61 BVerwGE 15, 22, and 69 BVerwGE 278, 279 f.; OVG Rheinland-Pfalz, decision of 02.10.1991, [1991] Deutsches Verwaltungsblatt (DVBl.) 1367; OVG Nordrhein-Westfalen, decision of 22.07.1988, [1989] Neue Juristische Wochenschrift (NJW) 544.

necessary to defend one's legal interests[13] or if a scientific interest in access can be demonstrated. It was rejected, however, in the case of an attorney, who without a specific mandate, sought access to instructions internal to the administration so as to be better able to advise clients in the future. Neither would an even more vague, general political interest in the information in question be recognized as justified interest. Consequently access to records may be denied in such cases without the decision being subject to review by a court of law.

III. The bases for change

A. International and European developments

Public information laws in Germany, in part still much characterized by authoritarian mindsets, are in marked contrast to international and European legal developments. Laws governing the review of records and access to information have been adopted in the meantime in most of the European states and in many countries outside Europe. The US Freedom of Information Act, dating back to the year 1966, triggered a wave of reforms in the western world introducing the fundamental obligation to provide information to the public. This took place initially in Denmark, France, the Netherlands, Greece, Portugal, Austria, Australia and Canada and was followed in the 1990s by Italy, Hungary, Belgium, Spain, Ireland, Poland and Israel. Even the United Kingdom, traditionally jealous of its official secrets, adopted a Freedom of Information Act in 2000. In the wake of the events of September 11, however, its effective date has been postponed to the year 2005.

Over and above this, pressure to achieve harmonization is being exerted by certain international agreements and declarations. Here I will only mention Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[14], the Rio Declaration of 1992 and the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted in 1998. The greatest catalytic effect for the Federal Republic was, however, the legal development in the European Union[15].

Its forerunner was the Fourth Environmental Action Program adopted by the European Community in 1987. It formulated for the first time the objective of improving environmental protection by strengthening the informational and participatory rights of citizens. The directive which followed in 1990 required the member states to introduce freedom of information in regard to environmental matters. It was not until the Final Act of the Maastricht Treaty in 1992 that proposals to regulate access to information vis-à-vis the Community organs themselves were adopted. In 1993 a Code of Conduct concerning public access to Council and Commission documents was adopted and enacted by way of implementing orders issued by the Council and the Commission which for the first time opened public access to documents maintained by the EU-organs. Pursuant to the 1997 Treaty of Amsterdam the concept of freedom of information was anchored in the Treaty itself and thus achieved constitutional status. Article 255[16] of the Treaty establishing the European Community details the principle of transparency as contained in Article 1, Paragraph 2 of the EU-Treaty. The latter requires that decisions in the Union be reached in the most open fashion possible and with maximum citizen participation. Art. 255 EC-Treaty now grants an entitlement to fundamentally open access to the documents held by the three organs of the Community, without the applicant having to satisfy any restrictive requirements.

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[13] See, for example, 30 BVerwGE 154, 160; OVG Nordrhein-Westfalen, above, note 12.

[14] See European Court for Human Rights, [1999], Neue Zeitschrift für Verwaltungsrecht (NVwZ) 57.

[15] *Callies, C.*, Rechtsstaat und Umweltstaat – Zugleich ein Beitrag zur Grundrechtsdogmatik im Rahmen mehrpoliger Verfassungsrechtsverhältnisse, 469 ff. (2001).

[16] *Sobotta, Ch.*, Transparenz in den Rechtssetzungsverfahren der Europäischen Union - Stand und Perspektiven des Gemeinschaftsrechts unter besonderer Berücksichtigung des Grundrechtes auf Zugang zu Informationen, 278 ff. (2001).

In the meantime the Community's institutions have responded to that by adopting Regulation 1049/2001[17] and issuing separate implementation orders[18]. The Regulation determines that in principle all documents associated with Union activities are to be made accessible to the public upon application. That also applies to documents relating to the common foreign and security policy and to police and judicial cooperation in criminal matters. The Regulation is binding not only for the EU institutions themselves, but also for the member states in their dealings with documents stemming from the EU.

The regulation sets up a system of rules and exceptions. Let me clarify the three main categories of exceptions:

– Access is to be refused to a document where disclosure would undermine the protection of public security, defence and military matters, international relations and the financial, monetary or economic policy of the Community or a Member State as well as personal privacy and the integrity of the individual.
– Access will also have to be refused unless there is an overriding public interest in disclosure, where it would undermine the protection of commercial interests including intellectual property, of court proceedings or the purpose of inspections, investigations and audits.
– And access to documents which relate to a matter where the decision has not been taken or which contain opinions for internal use as part of deliberations and preliminary consultation within an institution shall be refused if disclosure would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

The system of rules and exceptions is, however, lifted in the case of "sensitive documents" which are classified as secret or confidential in the area of public security or defence. These documents are to be released only with the consent of the originator. In addition a member state can request that a document it originated not be communicated without its prior consent. Even though refusal must be substantiated in these and all other instances and even though the rules of the institutions concerning sensitive documents have to be made public, there is no longer a case-by-case examination of the necessity for secrecy so that the respective provision invites abuse in critical situations.

B. The reform process in Germany

In Germany the "Red-Green" government now in office in Berlin is pursing the idea of the "activating state." It intends to have citizens take greater part in public life and encourages them to assume greater responsibility. The introduction of free access to government information is meant to lay the foundation for responsibly exercising democratic participatory rights. It is also meant to take account of a transformed understanding of the administration, which, in addition to authoritative action, deals with the citizen in a more and more cooperative manner and that requires a more equitable distribution of information. At the same time freedom of information is to contribute to improved monitoring of the administration, this being in the interest of combating corruption.

Before I introduce in detail the freedom of information legislation drawn up by the Ministry of the Interior, we must first turn to the constitutional framework for the projected reform. In the debate in Germany one still hears the notion put forward that comprehensive rights to review documents are irreconcilable with the structure of a representative democracy and its separation of powers in which the parliament – and not the public – is charged with monitoring the government and the administration. Public interests cannot be enforced by private persons with their own personal needs, but rather by those who exercise public authority and are bound by law. Finally, it is postulated that the modern state, too, is dependent upon its *arcana*

[17] Regulation of 30. Mai 2001 regarding public access to European Parliament, Council and Commission documents, Official Journal L 145, 31/05/2001, pp. 43–48.
[18] See Commission Decision 2001/937/EC, ECSC, Euratom, Official Journal L 345, 29/12/2001, pp. 0094–0098

imperii, on the one hand to project a favourable public image and, on the other hand to ensure the functioning of its bodies and the frankness of its decision-making processes[19]. What does the Constitution have to say about all this?

1. The constitutional setting[20]

a) Public participation as a tenet of democracy

In establishing the principle that "all public authority originates with the people" in Article 20 Paragraph 2 Clause 1 the Basic Law – the German Constitution – embraces the concept of the sovereignty of the people and puts this in the context of the concrete proceedings involved in direct and indirect democracy[21]. The "origination" of public authority with the people is thus not conceived of as a historically unique and possibly idealistic construction, but rather as a continuous process of democratic legitimization, one which can be experienced in practice[22].

An essential instrument to this end, in addition to the occasional expression of popular will in elections, is continuous communication and feedback between the executive power and the people. The Federal Constitutional Court has quite rightly recognized the ongoing "confrontation between social forces, interests and ideas" as a privileged element of democracy[23] and has emphasized that the right of the citizenry to participate in the formulation of political objectives is not limited to "casting a ballot" but rather also embraces "exerting influence on the ongoing process of political opinion making."[24]

To enable this influence to be exerted, the state must be fundamentally open to public scrutiny and criticism and must deliver the basis of information needed for public discussion. Democracy does not demand a separation of state and society but rather a permanent and mutual co-influence between the formation of political objectives and the public opinion. This mandate develops autonomous efficacy vis-à-vis the government and the administration.

Administration today is no longer involved primarily in the execution of clearly worded normative programs – as was the case in Max Weber's time. Modern statutory law contains more often than not poorly defined and incomplete provisions and is based on fuzzy political compromises. So the burden of managing conflicts of interest within the society is transferred to the administration applying that law. The executive is assigned the task of autonomously putting the law into more concrete terms, using its own political assessments when doing so. It enjoys planning, weighing, evaluating and discretionary latitudes when designing reality. This increasing responsibility of the executive demands accountability through appropriate mechanisms of communication and feedback which calls for its fundamental opening to public observation. Thus there devolves from the principle of democracy an obligation for the administration to grant access to its actions, knowledge and decisions.

b) Openness as a mandate of the constitutional state

The rule of law – understood as an ongoing "project" involving the greatest possible linkage of policy-making and law – aims on the one hand to discipline the state by way of the law, while on the other hand it intends to guarantee the enforcement of the law by the state. This latter aspect in the concept of the

[19] *Giesen, T.*, [1997] Datenschutz und Datensicherheit (DuD) 588 ff.
[20] For a complete overview see *Scherzberg, A.* (note 8), Cap. 6, 289 ff.
[21] See, for example, *Herzog, R.*, in: Maunz, Th./Dürig, G. et. al., Grundgesetz, Kommentar, Art. 20 (2), Rn. 33 ff. (1996).
[22] *Herzog* (note 21), Rn. 35 f.; *Jestaedt, M.*, Demokratieprinzip und Kondominalverwaltung, 265 f. (1993); 83 BVerfGE (Decisions of Federal Constitutional Court) 60, 71 f.
[23] 89 BVerfGE 155, 185.
[24] 69 BVerfGE 92, 107; 69 BVerfGE, 315, 346; 73 BVerfGE, 40, 71.

constitutional state may include the requirement to make it possible for the citizen to effectively exert and use his rights.

The exercise of entitlements to the benefit of the individual in many case depend on cognizance of economic, ecological, legal or social circumstances, which may be decisive for the success of a given legal disposition. Freedom of access to government data collections may thus be necessary to guaranteeing the exercise of entitlements to the individual good[25]. The executive in a constitutional state is obliged to "mediate"[26] between legal strictures and social realty and to intercede to achieve the observation, implementation and, if indicated, enforcement of the law in other sub-systems of society[27]. It is called upon to undertake action on its own in particular where it enjoys a monopoly As a minimum standard for constitutionally required transparency, the information on hand in government institutions and not otherwise available to the individual citizen is to be made accessible, whenever the citizen requires such information to design, pursue or exercise his entitlements.

The German Constitution establishes justice and guarantees freedom as per Article 20, Paragraph 2, Clause 2 of the Basic Law by way of and within the framework of a functional order characterized by the separation of powers. The many modifications of the classical model of the separation of powers initiated or permitted by the Constitution today preclude seeing the separation of powers primarily as a structure for mutual monitoring, inhibition and restraint of the powers. Their formulation in the Constitution is based rather on the objective of organizing the exercise of government powers in such a way that government decisions "are reached by those institutions which have available the best prerequisites to do so in accordance with their organization, composition, function and procedures." The principle of separation of powers is thus concerned with optimizing the exercise of competencies by the three branches of government.

An understanding of the separation of powers modified and reduced in this way however gives rise to the question of how to supervise and how to limit the powers exercised[28]. In answer one may point to the insights gained in the theoretical discussion on control, revealing the primarily preventive and educational effects of steering[29]. This is followed by the realization in system theory that any attempt to influence the behavior of self-referential operatives will as a rule be most successful not by external steering but by initiating self-regulation and self-monitoring. Self-monitoring is, however, advanced above all by ongoing external observation. In any case the officeholder acting in public view will monitor himself.

When instrumentalized in the context of the separation of powers, this realization leads to an expanded concept of checks and balances, here including the general public[30]. Public exposure is not only a pre-condition for proper function of surveillance of the government by the political parties in the opposition. It is also essential to ensuring self-monitoring by the executive and the courts. Just as for the legislature and the courts, public observation of administrative activities thus also attains constitutional status. The rule of law thus obliges the administration to give access to its knowledge and its actions.

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[25] *Häner, I.*, Öffentlichkeit und Verwaltung, 129 ff., 143 (1990); Wittling, A., Die Publikation der Rechtsnormen einschließlich der Verwaltungsvorschriften, 268 f. (1991).

[26] *Schmidt-Aßmann, E.*, in: Isensee, J./Kirchhof, P., Handbuch des Staatsrechts der Bundesrepublik Deutschland, I, § 24, Rn. 75 (2th ed., 1995).

[27] See *Luhmann, N.*, Das Recht der Gesellschaft, 425 (1993); *Herzog, R.*, in: Isensee, J./Kirchhof, P., Handbuch des Staatsrechts der Bundesrepublik Deutschland, III, § 58, Rn. 83 (1988); *Isensee, J.*, in: Isensee, J./Kirchhof, P., Handbuch des Staatsrechts der Bundesrepublik Deutschland, III, § 57, Rn. 46, 117 (1988).

[28] *Stern, K.*, Das Staatsrecht der Bundesrepublik Deutschland, II, § 36 V [p. 546 ff.], (2th ed., 1980).

[29] See, for example, *Krebs, W.*, Kontrolle in staatlichen Entscheidungsprozessen, 58 f., 112 (1984); *Klein, E.*, [1982] Die Öffentliche Verwaltung (DÖV) 797, 798.

[30] *Schmidt-Aßmann, E.*, in: Hoffmann-Riem, W./Schmidt-Aßmann, E./Schuppert, G. F., Reform des Allgemeinen Verwaltungsrechts, 11, 55 f. (1993); *Benz, A.*, Kooperative Verwaltung, 322 f. (1994); *Stern, K.*, Das Staatsrecht der Bundesrepublik Deutschland, I, § 20 IV 3 [p. 794], (2th ed., 1984); *Häner, I.*, Öffentlichkeit und Verwaltung, 134 ff. (1990).

c) Public participation as a dictum of fundamental rights

Finally, freedom of information as mentioned in Article 5, Paragraph 1, Clause 1 of the German Constitution is relevant. It ensures the individual's right to seek, receive and impart information and ideas from "sources in the public domain". According to widely held opinion, general accessibility of a source of information is measured by whether it is actually suitable for and intended to provide information to a circle of persons which is not specifically restricted[31]. Government data collections are normally dedicated to exclusive use by public administration and are not available for immediate access by the citizenry. But should that information for this reason alone not be included in the sphere protected by the freedom of information concept? If this were the case, the agency would decide on the accessibility of its records without any constitutional justification.

Reservations regarding this widely held notion were spurred in part by a decision handed down by Israel's High Court of Justice in 1990. "Indeed a private person may keep information at his disposal to himself. He has no obligation to disclose it unless the duty of good faith so requires.... Not so the public official. Information at his disposal is not his private property. It is property belonging to the public and he must bring it to the public's attention."[32]

The final conclusion here is in fact not absolutely compelling but the decision shows that public offices do not of necessity enjoy the same latitude as private persons in deciding on access to their records[33]. In the final analysis a constitution which intends not only to guarantee fundamental rights but also to open real opportunities to exercise freedom will not be able to close its eyes to regulating this question. Relevant here is the concept of the so-called obligatory regulatory components in fundamental rights.

The fundamental rights as granted by the Constitution are not only defensive rights which oblige governments not to hinder the enjoyment of freedoms by way of decrees and coercion. The fundamental rights also have an obligatory legal substance which augments this with the mandate to create and maintain a suitable setting for the exercise of individual freedoms. That obligatory legal aspect of the fundamental rights is *sedes materiae,* is the instrument used to respond to new challenges which arise from the fact that the worth and actual utility of the guarantees of freedom in an ever more complex and commercialized society are dwindling.[34]

The obligation implied in the right to seek, receive and impart information and ideas from sources in the public domain serves to guarantee that the knowledge required for unfettered and responsible opinion making will be available.[35] There is a miscarriage of this regulatory concern not only if access to generally available sources is denied to interested parties but also if the state were permitted to determine at its own discretion which records are to be classified as generally accessible and are to be released for public discussion. Public administration may neither generally deny the public access to the data which the

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[31] 27 BVerfGE 71, 83; 90 BVerfGE 27, 32; *Lerche, P.*, in: Kunst, H./Herzog, R., et. al. (Hrsg.) Evangelisches Staatslexikon, „Informationsfreiheit", Sp. 785, 786 (1th ed., 1966; 3th ed. 1987); Lerche, P., [1995] Juristische Ausbildung (Jura) 561, 565 f.; *Degenhart, C.*, in: Bonner Kommentar zum Grundgesetz, Art. 5 (1), (2) Rn. 250 ff.; *Pieroth, B.*, in: Erichsen, H.-U./Kollhosser, H./Welp, H.-J., Recht der Persönlichkeit, 249, 256 ff. (1996); *Hoffmann-Riem, W.*, in: Alternativ-Kommentar zum Grundgesetz, I, Art. 5 (1), (2), Rn. 86 ff. (1989).

[32] H.C.J. (High Court of Justice) 1601-1604/90 and M.H.C.J. 1890/90 from 1. Mai 1990. Piskei Din 44 (3), 353 (Shalit u.a. v. Peres u.a.); compare *Nolte, G.*, [1999] Die Öffentliche Verwaltung (DÖV) 363, 369.

[33] *Jarass, H.*, [1979] Archiv für Presserecht (AfP) 228, 230; *Lerche, P.*, Geheimschutz und Öffentlichkeitsinteresse, in: Bundesministerium des Inneren (Hrsg.), Verfassungsschutz und Rechtsstaat, 117, 119 (1981); *Hoffmann-Riem* (note 31), Rn. 99.

[34] *Hoffmann-Riem* (note 31), Rn. 88 ff., 99; *Degenhart* (note 31); *Baller, O.*, in: Haratsch, A./ Kugelmann, D./Repkewitz, U., (Hrsg.), Herausforderungen an das Recht der Informationsgesellschaft, 33, 57 (1996); *Bleyl, D.*, [1998] Datenschutz und Datensicherheit (DuD) 32, 33.

[35] 20 BVerfGE 162, 174; 27 BverfGE 71, 81, 84; 57 BVerfGE 295, 319; 90 BVerfGE 27, 31 f.

government alone has at its disposal nor may the administration select, according to political convenience, which information is to be published. Anything else would be tantamount to government influence of public debate. Thus the state enjoys no discretionary latitude in deciding on public accessibility to its records. On the contrary, the objective legal regulatory components inherent to the fundamental right to seek, receive and impart information from public sources oblige lawmakers and the executive to presume that government records are generally accessible sources of information.

d) The constitutional limits on public access

The Constitution, of course, not only opens access to government-held information, but also limits it. Constitutional dictums on secrecy can be derived primarily from the community's need for security, from its interest in effective execution of administrative activities and from personal and business interests in confidentiality. Let me consider a few of these points in detail.

(1) Secrecy vital to national security

Reasons for imposing secrecy can first of all be based on a potential threat to internal and external security and to good international relations.[36] To this extent established case law recognizes the primacy of an interest in maintaining secrecy where publication would render considerably more difficult or even impossible the execution of regulatory administrative tasks, the prosecution of criminal offenses or the operations associated with national security and intelligence.[37] The same must apply where there is interference in national defence or a hazard to Germany´s foreign relations. If one considers the monitoring function implied in the general requirement to open access, then the obligation to maintain secrecy can only apply to secrets which are actually legitimate. Thus it does not cover information which could give reason to suspect an infringement on the legal system or international agreements.[38]

(2) Executive branch functioning

The ability of the executive branch to function properly is also recognized by the Constitution as being worthy of protection.[39] The Constitution protects the effectiveness of government and administrative work, however, only within the framework of the "overall political and administrative system"[40] which it constitutes and this demands fundamental transparency for public authorities. The Constitution does not construct the state as a *forum internum* which would be only open to public observation to the extent that this is supportive to the government's public image. This is so despite the fact that the state manipulating its public image by public relations techniques - and thus through indoctrination – could at least on the surface appear to strengthen the identity and stability of the community.

The democratic state, however, is not based on a manipulated political consensus and in this spirit it is based not upon unity but rather upon diversity – the diversity of political opinions and the interchangeability of the government and the opposition at any given time. The democratic state thus gains identity from the competition among political alternatives and thus may not obscure the political character of its decisions. Consequently it may impose secrecy not in the interest of its own protection of a public image but only to defend against concrete dangers to its existence and functionality. Pursuing any other type of raison d´etat is prohibited.

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[36] See, for example, *Mayer-Metzner, H.*, Auskunft aus Dateien der Sicherheits- und Strafverfolgungsorgane, 165 ff. (1994).

[37] 57 BVerfGE 250, 284; 67 BVerfGE 157, 184 f.; 74 BVerwGE 115, 120 f.; 84 BVerwGE 375, 379 f.; compare 31 BVerwGE 301, 306; *Meyer-Metzner* (note 36), p. 169.

[38] *Mayen, T.*, Der grundrechtliche Informationsanspruch des Forschers gegenüber dem Staat, 211 (1992); compare *Preussner, M.*, [1982] Verwaltungsblätter Baden-Württemberg (VBlBW) 1, 5.

[39] See, for example, 28 BVerfGE 191, 200; 67 BVerwGE 206, 209; *Kopp, F.*, Verfassungsrecht und Verwaltungsverfahrensrecht, 200 ff. (1971); *Ossenbühl, F.*, [1982] Neue Zeitschrift für Verwaltungsrecht (NVwZ) 465, 469; *Hartisch, A.*, Verfassungsrechtliches Leistungsprinzip und Partizipationsverbot im Verwaltungsverfahren, 64 ff., 74 ff., 130 (1975); *Schmidt-Aßmann, E.*, [1979] Juristische Ausbildung (Jura) 505, 509; for the opposite view see *Steinberg, R.*, [1982] Die Öffentliche Verwaltung (DÖV) 619, 621.

[40] *Schmidt-Aßmann* (note 39); *Häberle, P.*, [1973] Archiv des Öffentlichen Rechts (AöR) 625, 631.

Unrestricted access to government information can, however, give reason to fear negative influences on the efficiency of specific decision-making processes. The objectivity, independence and impartiality of decision-making would not be secured if draft proposals and other preliminary documents which are not necessarily balanced or complete were made immediately available for public criticism. Official decision-makers must be granted a sphere for internal deliberations and a phase for creative planning, strategy and preparatory consultations which is shielded from public scrutiny[41]. This is true in particular for the government as it formulates its objectives, e.g. in preparatory consultations within and among departments, all of which require confidentiality. The same protection is granted to preparatory consultations among government agencies, consultation in boards and bodies, and the negotiation processes which take place between public administration and private individuals. Otherwise the peculiar characteristics of collective decision-making where frank words are uttered only behind closed doors, would be misunderstood, The results of the decision-making process are, on the contrary, subject to public scrutiny as long as no other reason for secrecy intervenes. This is true particularly for the products of cooperative administrative actions which are set down in a public-private contract or as an informal agreement.

There is some dissent regarding the assessment of the impact of freedom of information on an ongoing administrative proceeding.[42] Thus, from the point of view of democratic and constitutional principles, it is necessary to remember that legal provisions today are being practiced and implemented to an ever greater extent "in and by administrative proceedings." Consequently the administrative process becomes an independent function helping to shape political integration within society. In administrative proceedings decisions of considerable weight are made which call for a democratic discipline by public surveillance. The concept embodied in the Administrative Procedures Act – which restricts information access to those involved in the proceedings and consequently allows at best retroactive general publicity – is therefore insufficient in terms of constitutional law.

The above argument would not prevail if premature disclosure of certain projects, plans or internal processes would endanger the objective success of administrative activities. This applies above all to criminal and disciplinary investigations but also to tax evasion inquiries. Here the public interest preclude any disclosure of data before the investigations have been concluded. But in other cases too, publicizing data can run contrary to the regulatory aims of a given law. The need to impose secrecy, however, has priority over the constitutional mandate to make matters public only if it also serves a constitutional good.

Finally the protection of the functional capability of the administration may also exclude the publication of data which was provided to the agency on the condition of confidentiality. Often economic and environment agencies are dependent upon the willingness of private persons and companies to provide information and cooperation.[43] The agencies must therefore be in a position to guarantee confidentiality as regards the data which is voluntarily provided to them. Different procedures apply only in cases where confidential information was deliberately falsified.[44]

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[41] *Schröder, M.*, [1990] Neue Zeitschrift für Verwaltungsrecht (NVwZ) 905, 907; *Jerschke, H.-U.*, Öffentlichkeitspflicht des Exekutive und Informationsrecht der Presse, 142 ff. (1971).

[42] Compare *Erbguth, W.* [1994] Juristenzeitung (JZ) 477 ff.; *Hellmann, U.*, Die Öffentlichkeitsbeteiligung in vertikal gestuften Zulassungsverfahren für umweltrelevante Großvorhaben nach deutschem und europäischem Recht, 97 ff. (1992); *Hoffmann-Riem, W./Rubbert, S.*, Atomrechtlicher Erörterungstermin und Öffentlichkeit, 33 ff., 63 ff. (1984); *Mahrenholz, E.-G.*, in: Brandt, W./ Gollwitzer, H./Henschel, J.-F. (Hrsg.), Ein Richter – Ein Bürger – Ein Christ, Festschrift für Helmut Simon, 261, 275 (1987).

[43] *Gurlitt, E.*, Die Verwaltungsöffentlichkeit im Umweltrecht, 72 (1989).

[44] See, for example, *Preussner* (note 38), p. 1,6.

(3) Personal privacy

The right of privacy, and in particular the confidentiality of personal data, grants the citizen the authority to decide over the disclosure and utilization of data which refers to him or her.[45] This includes specifying the circle of recipients.[46] Consequently disclosing personal data without the consent of the person affected is consistent with the Constitution only if a legal foundation has been created[47] which establishes overriding private or public interest[48] and which observes the principle of proportionality.[49] Over and above such legislation must define the rights of affected persons to be informed of the nature and the scope of use of the data in question.[50]

A general and overriding interest in publication will be recognized primarily for "data with a social component," such as data associated with marital status[51] or the receipt of government grants.[52] Declarations submitted in conjunction with an administrative procedure which a citizen initiates may also exhibit an overriding social component. If the citizen makes use of government procedures to pursue his interests, then he enters an area of increased democratic and constitutional interest in public observation– even when the process is not one in which the public participates.[53] In any case the measure of impairment to personal privacy must in the individual case be in an appropriate relationship to the objective pursued by imposing that impairment. The privacy interests are overriding particularly in regard to facts relating to the more intimate personal sphere.[54]

(4) Business secrets

The protection of property set forth in Article 14, Paragraph 1, Clause 1 of the German Constitution deals with the ownership, use and control over valuable rights and goods.[55] Included here is control over trade and operational secrets. These are facts associated with business operations, which are to be kept secret according to the will of the proprietor[56] and based on his justified business interests.[57] This could apply to lists of customers, contract details, data on production resources and processes, and the composition and identity of substances employed – but also to advertising and marketing strategies. The protection provided by Article 14 also embraces the rights to "intellectual property" and above all copyright entitlements.[58]

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[45] 65 BVerfGE 1, 43; 78 BVerfGE 77, 84; 80 BVerfGE 367, 373; *Erichsen, H.-U.*, Zur Umsetzung der Richtlinie des Rates über den freien Zugang zu Informationen über die Umwelt, 88 f. (1992); *Bizer, J.*, Forschungsfreiheit und informationelle Selbstbestimmung, 137 ff. (1992); *Mayer-Metzner* (note 36), 97 ff.

[46] *Rubbert, S.*, Saal- und Medienöffentlichkeit mündlicher Verhandlungen zwischen Verwaltung und Bürgern, 186 ff. (1985).

[47] 65 BVerfGE 1, 46; *Stettner, R.*, in: Merten, D./Schmidt, R./Stettner, R., (Hrsg.), Der Verwaltungsstaat im Wandel, Festschrift für Franz Knöpfle, 351, 363 (1996); *Eberle, C.-E.*, in: Schmidt, K., (Hrsg.), Rechtsdogmatik und Rechtspolitik, 91, 97 ff. (1990); *Simitis, S.*, in: Fürst, W./Herzog, R./Umbach, D. (Hrsg.), Festschrift für Wolfgang Zeidler, II, 1475, 1493 f. (1987); *Bizer* (note 45), 178 ff., 187 f.

[48] 65 BVerfGE 1, 44; 92 BVerfGE 191, 197.

[49] 65 BVerfGE 1, 44, 46; BVerfGE [1988] Neue Juristische Wochenschrift (NJW) 3009; *Rosenbaum, C.*, [1988] Juristische Ausbildung (Jura) 178, 183; *Erichsen, H.-U.* (note 45), 89.

[50] 65 BVerfGE 1, 46; compare BVerwG [1992] Deutsches Verwaltungsblatt (DVBl.) 298, 301; *Gallwas, U.*, [1992] Neue Juristische Wochenschrift (NJW) 2785, 2789; *Knemeyer, U.*, [1992] Juristenzeitung (JZ) 348 ff.; OVG Bremen [1987] Deutsches Verwaltungsblatt (DVBl.) 701.

[51] 78 BVerfGE 38, 51.

[52] 67 BVerfGE 100, 144.

[53] *Turiaux, A.*, Umweltinformationsgesetz, Kommentar, § 8, Rn. 18 (1995).

[54] 65 BVerfGE 1, 46; 77 BVerfGE 1, 47; 89 BVerfGE 69, 82 f.

[55] *Schlachter, J.*, Mehr Öffentlichkeit wagen, 132 (1993).

[56] See, for example, *Breuer, R.*, [1986] Neue Zeitschrift für Verwaltungsrecht (NVwZ) 171, 172; *Schröder, M.*, [1985] Umwelt- und Planungsrecht (UPR) 394, 396; *Erichsen* (note 45) 72; compare *Scherzberg, A.*, [1994] Deutsches Verwaltungsblatt (DVBl.) 733, 741.

[57] Compare VGH Baden-Württemberg (Regional Higher Administrative Court) [1998] Neue Zeitschrift für Verwaltungsrecht (NVwZ) 987, 989; *Erichsen* (note 45), 73; *Scherzberg* (note 56) 742 f.; *Kummer H.-J./Schumacher, J.*, Umweltinformationsgesetz, 60 (1997); for the opposite view see *Fluck, J.*, [1994] Neue Zeitschrift für Verwaltungsrecht (NVwZ) 1948, 1053 f.

[58] 31 BVerfGE 229, 239; 51 BVerfGE 193, 217; *Jarass, H.*, in: Jarass, H./Pieroth, B., Grundgesetz, Kommentar, Art. 14, Rn. 7 a (4th ed., 1997).

Infringement of operational and trade secrets or of copyright matters is permissible only when based on a legal foundation which establishes overriding public or private interests and which observe the principle of proportionality. So legislation must take into account the monetary value of the property or secret and the investment committed to its creation. Here again an overriding "social component" in the data can narrow the interest in maintaining secrecy. However, restricting access to information is appropriate if there is reason to fear that the continued viability of the business might be endangered.

e) Conclusions

The promotion of freedom of information in Germany is consequently not only compatible with – but in fact is demanded by the Constitution. The protected spheres of internal and external security, international relations, functioning of the administration, personal privacy and business secrets, however, set limits on the constitutional requirement to open access. To this extent the legislator must strike an equitable balance between the principle of public scrutiny and the conflicting considerations described above.

2. Reform legislation

When presenting the reform legislation in Germany I will limit myself to the draft at present (2002) under discussion at the federal level.[59] It adopts a rule-and-exception policy for freedom of information as required by the Constitution and imposes rights of access without specific prerequisites upon the information held by federal authorities and agencies. Its range of applicability is, however, limited. All specific legal provisions on access to records, regardless of whether they be sweeping or restrictive in nature, remain in effect. Consequently the draft does not intend to introduce a uniform concept of freedom of information, but instead only to install regulations subsidiary to existing legislation. This will aggravate the fragmentation of the law already existing and will lead to uncertainties as to the scope of application. Laudable, however, is that the draft postulates and is based upon a functional agency concept and exempts legislative and judicial institutions from freedom of information only for the execution of their specific legislative and judicial functions. The draft legislation does on the other hand not apply to private bodies, even in case of outsourcing of administrative functions. Within the framework of the exceptions the draft differentiates between regulations without any discretionary latitude and those with. Mandatory reasons for denying access are found in Section 3 No. 1 in the fields of national security, international relations and in defense matters. Section 3 No. 2 protects the confidentiality of deliberations within agencies, under the condition, however, that the particular consultation depends upon confidentiality. The reasons for denial set forth in No. 2 include unjustifiable and intolerable impact on the abilities of agencies to carry out their work and fulfill their assignments if the information in question were to be revealed. Adjacent to this, and in harmony with the provisions in constitutional law, confidentiality in the formulation of objectives by the government is protected, both in regard to discussions in the Cabinet as well as to preparatory papers at the Cabinet level and at department levels. Section 3 No. 3 orders the exclusion of access in order to maintain secrecy as required by special laws, for example in tax and social matters or in rules for privileged information for physicians and attorneys. It allows however, secrecy to be ordered also in administrative rules only, such as instructions on handling classified matter, if they are based on a law. In such cases, the need for maintaining secrecy would no longer be subject to a case-by-case examination, and this appears to violate the Constitutional call for general freedom of information.

A certain discretionary power is granted for the protection of administrative processes in Section 4. Its No 1 addresses information deriving from pending administrative proceedings, with the exception of the results of evidential hearings and expert opinions. As regards administrative proceedings governed by the Administrative Procedures Act, however, the limitation of access by participants per Section 29 remains in

[59] Several months after this presentation the referred draft was dropped by the Federal Government. A modified Freedom of Information Act came into force in 2006, see BGBl. I 2005, 2722.

effect, which, given what has been said above, is constitutionally insufficient. Also exempted, as a rule, is information which was provided on the condition of confidentially.

Weighing the factors in accordance with the particulars of the individual case is provided for in the field of personal privacy and business secrets in Sec. 5 und 6. Here confidential interests have fundamental priority over the applicant's interests in obtaining information. Therefore government agencies may in general disclose personal data only with the consent of the individual affected. This applies – as set forth in Section 5, Paragraph 1, Clause 2 and in Paragraph 2 – in particular to sensitive information as to racial or ethnic background, political opinions, religious or philosophical convictions, trade union membership, health matters and sexual orientation as well as to information which is subject to either professional or official secrecy. Otherwise the personal confidentiality is subject to barriers erected to protect the overriding interests of third parties or the general public. Section 5, Paragraph 3, No. 1 to 3 specify that, as a rule, the name, title and position of a public official or expert taking part in a procedure or process are to be revealed if that person's participation does not in itself dictate secrecy, such as would be the case for intelligence services. Otherwise the agency must weigh the situation – and the wording of Section 5 points to the fact that safeguarding confidential interests has fundamental priority over the interests of the applicant in obtaining the information. In no case may personal information be transmitted without consent of the person affected before the decision has become final and conclusive vis-à-vis that party or until he has been notified of immediate execution.

The disclosure of operational and trade secrets is also excluded unless the applicant's interest in receiving information is overriding in the individual case. To be considered here in particular is whether and to what extent the company affected could suffer economic damage due to the disclosure of information. Its interests in secrecy may, however, not be in conflict with the legal system and thus are irrelevant where the data in question could deliver evidence for a felony or misdemeanour. If the application for access is referenced to official records documenting the circumstances surrounding privatization (when founding a public-private partnership, for instance), one must remember that transparency especially in this area serves the purposes of combating corruption.

There is no particular form prescribed for the application for access to information. Responsible here is the agency which has the desired information at its disposal. The agency is not to be obliged to forward the application to any other agency. If the data have been received from another agency, then it is important to determine whether the receiving agency at the same time obtained its own right to dispose of that data. In contrast to European and Israeli law, the draft does not specify any time period within which a decision on the application has to be reached and refers instead to the legal remedy of court action on the grounds of administrative inaction. This is extremely unsatisfactory and does not take proper account of the rapid decay of the value of information in modern society.

According to the German draft, fees may be imposed only where access is granted or information given, but not if the same is refused. Fees may not be levied for simple verbal and written information although remuneration for expenses may be required. Otherwise, depending upon the administrative effort involved, fees of up to a maximum of € 500 are possible. This has a prohibitive effect on potential applicants but is allegedly intended to counteract the danger of abusive utilization of freedom of information and the competitive disadvantages of private information providers. The European Union charges € 10 plus 3 cents per page when providing more than 20 pages of photocopies. This of course meets the goal in a form which is much more workable for the applicants.

Praiseworthy, on the other hand, is that the Federal Data Protection Officer will be competent to follow up on complains about infringements of the rights safeguarded by the Act. He has the right to object to violations to the head of the respective agency. The German draft does not contain any provisions in reference to legal protection in the courts. Here the general rules of procedural law apply which of late specify an "in camera" hearing for disputes regarding obligations to the release of files or information. Since,

as set down in the legal concept, access to information is to be the rule and the denial of access the exception, the public agency which decides on the application for access to information bears the burden of proving the existence of legitimate reasons for denial.

IV. Concluding remark

Regardless of the nature of the legal design of freedom of information in the different countries, decisive for its implementation will be the value assigned to the interest in public surveillance as opposed to the interests in secrecy held by the state, by the individual and by business organizations. It is, however, not only the wording of the law which will decide on this emphasis. Decisive here will be individuals who enforce the law in practice – judges, attorneys and public servants who devote themselves to its implementation. They hold the responsibility to implement the transparency as required by democracy, countering illegitimate government and private demands for secrecy which are not of sufficient weight and not worthy of protection by law. This article may provide them with some good arguments in this endeavour.