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UNIVERSITÄT LÜNEBURG



AARHUS CONVENTION
for our environment

**PRELIMINARY FINDINGS RELATED TO ACCESS TO JUSTICE
IN INFORMATION CASES CARRIED OUT IN GERMANY**

AARHUS CONVENTION TASK FORCE ON ACCESS TO
JUSTICE

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Access to justice forms a part of the socio-legal research project “Evaluation of the German Environmental Information Act”.

➤ **contracting authorities:**

- ❖ Federal Environmental Agency (UBA)
- ❖ Federal Environmental Ministry (BMUB)

➤ **contractors:**

- ❖ Independent Institute for Environmental Issues (UfU)
- ❖ Free University of Berlin
- ❖ Prof. Dr. Thomas Schomerus

➤ **duration of the project:** 10/ 2016 – 5/2019

➤ **empirical part:** stakeholder interviews & online survey

➤ **legal part:** analysis of ACCC-findings & recommendations, EU- & national jurisdiction and legal literature



UfU Independent Institute
for Environmental Issues



Federal Ministry for the
Environment, Nature Conservation,
Building and Nuclear Safety



There are currently more than 355 court decisions on the German Environmental Information Acts.

➤ 17 Env. Information Acts (1 Federal Act, 16 State Acts)

❖ Procedure:

- *First Step: review* in preliminary proceeding
 - next higher public authority (independent and impartial body established by law)
 - obligatory, pre-condition for access to court
 - in cases of private bodies falling under the EIA: review procedure
 - optional, no pre-condition for access to court
- *Second Step: action* at administrative court (first instance) –
 - enforcement action (applicant)
 - rescissory action (third party)
- *Third Step: appeal* (Berufung) at Higher Administrative Court –
- *Fourth Step: appeal on points of law* (Revision) at Federal Administrative Court

Section 6 EIA – Legal redress

(1) Disputes arising out of this Act shall be heard by the **administrative courts**.

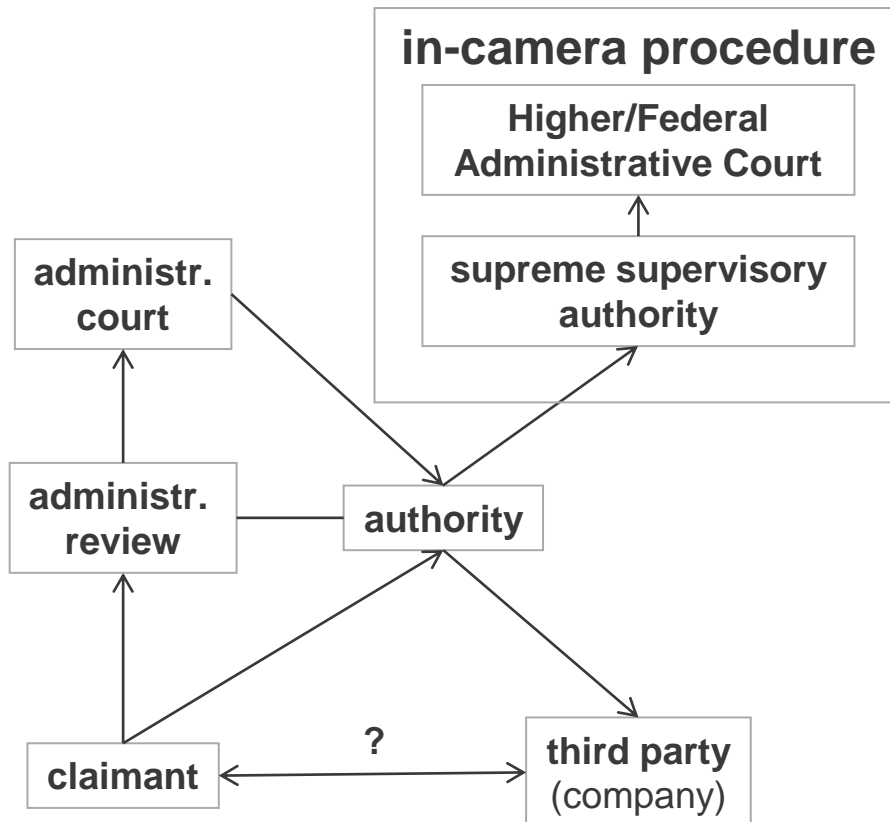
(2) In relation to decisions taken by the public administration as defined in section 2 subsection (1) number 1, also if the decision has been taken by a supreme federal authority, the **review** specified in sections 68 to 73 of the Code of Administrative Court Procedure³ shall be carried out.

(3) If an applicant takes the view that a body subject to a disclosure obligation as specified in section 2 subsection (1) number 2 has not satisfied a request in full, it may have that decision **reviewed** in accordance with subsection (4) below. No review of that kind shall be required for the purposes of bringing the action referred to in subsection (1) above.....



In cases with third parties involved, a specific in-camera procedure is offered to prevent the claimant from getting access to the requested information during court proceedings.

- **in charge: administrative courts**
 - on request: is refusal to submit lawful?
 - strict confidentiality



Code of Administrative Court Procedure, Section 99:

- (1) Authorities shall be **obliged to** submit certificates or files, to transmit electronic documents and **provide information**. If the knowledge of the content of these certificates, files, electronic documents or this information would prove disadvantageous to the interests of the Federation or of a Land, or if the events **must be kept strictly secret in accordance with a statute** or due to their essence, the competent **supreme supervisory authority** may refuse the submission of certificates or files, the transmission of the electronic documents and the provision of information.
- (2) On **request** by a party concerned, the **Higher Administrative Court** shall find by order without an oral hearing whether the **refusal to submit** certificates or files, to transmit the electronic documents or to provide information **is lawful**. If a **supreme federal authority** refuses the submission, transmission or information on grounds that the interests of the Federation would be impaired were the content of the certificates or files, of the electronic documents and the information to become known, the **Federal Administrative Court** shall decide; ... The members of the court shall be obliged to **maintain confidentiality**; the grounds for the decision may not provide an indication of the nature and content of the secret certificates, files, documents and information.



The Information Commissioners at Federal and State level are the responsible authorities, but not for the Environmental Information Acts.

➤ Federal Commissioner for Freedom of Information

❖ tasks:

- ombudsman
- supervision of public authorities
- information on freedom of information, i.e. guidelines

➤ no such competent authority for Env. Information Act

❖ reasons:

- environmental information: Ministries for the Environment/freedom of information: Ministries for the Interior
- German Conference of Freedom of Information Commissioners:
 - urgent recommendation to give Freedom of Information Commissioner responsibility for Env. Information Act

Freedom of Information Act, Section 12: Federal Commissioner for Freedom of Information

(1) Anyone considering their right to access to information pursuant to this Act to have been violated may **appeal to the Federal Commissioner for Freedom of Information.**

(2) The function of Federal Commissioner for Freedom of Information shall be performed by the **Federal Commissioner for Data Protection.**

(3) The provisions of the Federal Data Protection Act on the **monitoring tasks** of the Federal Commissioner for Data Protection (Section 24 (1) and (3) to (5)), on complaints (Section 25 (1), sentence 1, nos. 1 and 4, sentence 2 and sub-sections 2 and 3) and on further tasks pursuant to Section 26 (1) to (3) shall apply mutatis mutandis.



German courts have paved the way for a wide interpretation of provisions for granting access to information,...

➤ “public authorities”

- ❖ Higher Administration Court Berlin-Brandenburg (2015):
 - no exemption such as the “core area of executive self-responsibility”
- ❖ Administration Court Berlin (2017):
 - no exemption for federal ministries working in EU-legislation
- ❖ Federal Administration Court (2017):
 - German Railway Company “DB Projekt Bau GmbH”

➤ “environmental information”

- ❖ Higher Administration Court Berlin-Brandenburg (2015):
 - indoor air covered

➤ administrative procedure

- ❖ Higher Administration Court Münster (2011):
 - general requirement of rapid action
 - expiry of deadline: problem of missing sanctions
- ❖ Federal Administration Court (2005):
 - requested information must not be specified in detail
 - high amount of data: problem of paralysing authority
- ❖ no court-decision yet:
 - anonymous requests: no interest, no name



...and exception clauses were mostly interpreted in a narrow manner.

➤ **“protection of public interests”**

- ❖ Higher Administration Court Coblenz (2008):
 - public security: reasons must be substantiated (Al Qaida)
- ❖ Federal Administration Court (2012):
 - internal communications: expert opinions et al. given to the public authority before the begin of communication not covered
- ❖ Federal Administration Court (2016):
 - misuse: must be proven explicitly (industrial espionage)

➤ **“protection of private interests”**

- ❖ Federal Administration Court (2017):
 - no right of personal data for companies
 - against ECJ (2010)
- ❖ Higher Administration Court Munich (2000):
 - property and geo-data = personal data
- ❖ Higher Administration Court Mannheim (2008):
 - intellectual property rights for public authorities
 - against High Court Cologne (2006)
- ❖ Federal Administration Court (2017):
 - no confidentiality of commercial or industrial information for public authorities



Costs can create a barrier for access to courts.

➤ “costs”

- ❖ Higher Administration Court Münster (2007):
 - charges also for legal assessments in cases with third-party participation
 - problem: should not be put on applicants' shoulders
- ❖ Administration Court Karlsruhe (2014):
 - definition of “simple information” free of charge: when administrative expenses and the necessary search for the information can be kept low
- ❖ only very few decisions
- ❖ Env. Ministry and Federal Environment Agency: no fees charged

➤ administrative appeal

- ❖ no fees if request itself is free of charge
- ❖ when fees are payable: proportionally to original fee (max. 500€)

➤ court procedure

- ❖ dependent on value of dispute (in general, 5,000€)
- ❖ first instance
 - court fee: 439€
 - attorney fees: 925€ x 2
- ❖ second instance
 - court fee: 584€
 - attorney fees: 1,033 € x 2
- ❖ all inclusive (2 instances: 4,938 €)
- ❖ losing party bears these costs



Conclusions

- In Germany, access to justice is guaranteed by the Constitution.
- German courts are taking access to justice in environmental information-cases seriously.
- Most of the ca. 350 judgments were in favour of the information request.
- The information commissioners are not responsible for the Environmental Information Act (with the exception of Rhineland-Palatine and Schleswig-Holstein).
- The in camera-procedure in cases with third-parties involved is relatively seldom been carried out.
- Some public authorities at federal level such as the Env. Ministry charge no fees, but there is no uniform standard.
- Applicants requesting information are only charged court fees if they lose the case. However, court fees of 5,000€ or more can create a substantial barrier for access to justice.



Thank you for your attention!

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