

## State representative presents activity report for inspection of files 2018/2019

For the first time since the Record Inspection and Information Access Act came into force in 1998, the State Commissioner is today publishing a separate activity report on file inspection. It covers the years 2018 and 2019.

First, a few details on the statistics (V 1, page 45): While the number of complaints fluctuated greatly year-on-year (2018: 58, 2019: 72), the areas in which citizens were interested have remained almost unchanged for years remained. The focus was again on the topics of construction, planning and transport, education and youth as well as the internal administration of authorities. The administrations often had difficulties with the question of whether the File Inspection and Information Access Act was applicable at all. While in 2018 the handling of personal data was still the third most common problem, in the following year compliance with the one-month standard processing period for requests for inspection of files was clearly the top priority. Most of the applications that ultimately led to complaints to the state commissioner were received by local authorities. Ministries were much less in demand. After this rate had dropped temporarily, in 2019 42% of all complainants turned to the Open Knowledge Foundation Deutschland e. V. operated Internet platform fragdenstaat.de to us.

In contrast to data protection, the legal basis for which the state commissioner has extensive powers such as e.g. B. equip them with powers to issue orders and set fines, the focus of their tasks in the field of file inspection is to mediate between applicants and authorities and to advise both sides about their rights and obligations. If it finds violations of the Act on Inspection of Files and Access to Information, it objects to them.

Such a complaint was necessary to a ministry, for example, in order to get the processing of an application for inspection of files going in the first place. One association was interested in the amount of legal fees that the state had incurred for legal representation in various proceedings between the association and the ministry (III 1, page 19). What he then experienced can only be described as an odyssey. Acknowledgment of receipt, hearing of the lawyer, requesting proof of eligibility to make the application, delay in reply – the whole register. After seven months, the authority rejected the application. The association is not authorized to submit an application because the aim of the application – to control public spending – is not clear from its statutes. But the ministry also put forward substantive reasons: the information involved trade and business secrets of the lawyer that are worthy of protection; moreover, the proceedings are still ongoing. Exactly why remains open. After the applicant lodged a complaint, the state representative intervened and asked for an opinion. No answer - a first memory, a second

memory. Finally, the state commissioner made a complaint to the ministry. The ministry finally announced that it had revised the legal opinion described in all points that were essential for the result. In addition, the lawyer concerned had meanwhile given his consent to the disclosure of the remuneration. As a result, the ministry complied with our recommendation to overturn the rejection notice and disclosed the requested information.

If an application is directed to information about the environment, it must be processed on the basis of the special environmental information law. The General File Inspection and Information Access Act then does not apply. The two laws sometimes contain different regulations, as the following case has shown (III 3, page 25): An applicant was interested in the statement that a city administration had submitted to the district as the local supervisory authority. It was about dealing with storm-damaged trees and ultimately about the felling of a tree. The city denied the request. According to the authority, disclosure would circumvent the decision of the district, which had previously also rejected a corresponding application. The district had relied on a provision of the File Inspection and Information Access Act, which exempts files used for supervision from the right of inspection. In addition, the city argued that it felled the tree to avoid damage as part of the traffic safety obligation, which is why the environmental information law is not applicable. In our view, this was not lawful for two reasons. First, only the supervisory body can rely on the exception of the File Inspection and Information Access Act for supervisory files, but not the supervised body. And secondly, documents on dealing with storm-damaged trees or on their felling are environmental information, the publication of which is based on the Environmental Information Act. This applies regardless of the purpose for which the documents were created. The Environmental Information Act does not provide for a blanket exception for supervisory files. As a result, the state commissioner determined that the city had violated the Act on Access to Files and Access to Information and objected to this. Dagmar Hartge:

“My control competence is limited to the file inspection and information access law. I am not responsible for environmental information law. In practice, however, environmental information is often the focus of interest. The separation of the legal bases makes access to information unnecessarily difficult for applicants and for the administrations.”

In recent months and years, daycare fees in Brandenburg have caused considerable debate. Anyone who thinks the costs are too high usually wants to do the math. It is often not so interesting whether the notice of fees corresponds to the provisions of the statutes, but whether the calculation of the space costs in the kindergartens was carried out correctly. An applicant who wanted to understand how retrospective claims for additional contributions came about contacted us after the city had rejected

her application for access to the calculation (IV 1, page 30). We contacted the city administration and were ultimately convinced by their arguments. According to this, the calculation in this case was trade and business secrets of the individual sponsors. Basically, there is a competitive market situation between the day-care centers. We found it understandable that the disclosure of the personnel and other operating costs of the individual day-care centers could have had a negative impact on the competitive position of the respective provider. However, it was not immediately clear to us why it should not have been possible to publish the figures without naming the individual carriers, i.e. in a separate form. As it turned out, this possibility was also ruled out, since the few kindergartens or providers would have remained identifiable due to their clear differences even in the event of blackening. In our opinion, the city had therefore rightly rejected the application. However, this result cannot be generalized as local conditions vary from community to community.

Several students complained about the rejection of their applications for access to information by the Berlin-Brandenburg State Institute for Schools and Media. There they had tried to publish Abitur exams for different grades and subjects - in some cases with the corresponding solutions and teachers' instructions (IV 3, page 37). The state institute justified its rejection with the exception for examination institutions from the scope of application of the File Inspection and Information Access Act. We shared this view. According to the provision mentioned, the exception applies if the facility is active in the area of teaching and examinations. For this it is sufficient that it develops the tests. The applications were made as part of the campaign initiated by the platform fragdenstaat.de with the motto "Ask Abi". A bizarre result of the campaign was that the activists in some states - similar to Brandenburg - failed due to the legal situation, but the Free State of Bavaria, which does not have a freedom of information law, actively published high school exams on the Internet.

In contrast to data protection, which is uniformly regulated throughout Europe, there is federal competition between the legislation on freedom of information in the Federal Republic of Germany. In the past two years, the trend towards transparency laws has intensified (I, page 8). Dagmar Hartge:

"More than two decades ago, Brandenburg took a leading position among the federal states with its file inspection and information access law. Since then, anyone can apply to inspect files. The further development of a transparency law would place this right alongside the obligation of the administration to publish information of its own accord. It is time to further develop information access rights in Brandenburg in this way."

Corresponding regulations can now be found in Hamburg, Bremen, Rhineland-Palatinate and Thuringia. There are efforts for a

transparency law in other countries. Some countries have also merged their general information access rights with environmental information law, while others grant freedom of information officers at least one supervisory authority in the field of environmental information law. If you look at the right to access information in Brandenburg, you will look in vain for comparable developments.

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