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State representative presents activity report for inspection of files 2020/2021

Today, the state commissioner for data protection and the right to inspect files, Dagmar Hartge, presented the President of the Brandenburg state parliament, Prof. Dr. Ulrike Liedtke, her activity report on file inspection for the years 2020 and 2021.

In the two reporting years, applicants complained in a total of 203 cases about incomplete or refused access to files. Infrastructural measures, but also matters of internal administration or the judicial authorities were in the foreground. There was also an increasing interest in health-related information during the reporting period – especially in connection with the corona pandemic. Compared to the previous reporting period, the proportion of complaints to the state representative increased by around 56% (2018/2019: 130 complaints). As part of our statistics (V 1 - 3, page 60), we also record the reasons why applications for access to files fail, as well as legal aspects that prove problematic in the complaints procedure. In previous years, it was already apparent that the usually one-month notification period was only insufficiently complied with. In the two years of the pandemic, this has become the most common practical problem. Administrations continue to have difficulties recognizing whether the File Inspection and Information Access Act is applicable at all or whether other legal bases apply. The existence of documents is increasingly disputed, i. H. information is requested, of which it is not at all clear whether it is available at all. Dagmar Hartge:Anyone who submits an application for inspection of files must identify them sufficiently, but often do not know exactly which documents are available from an authority, let alone what their exact designation is. The administration must therefore support applicants and explain what information is available. This requires a minimum of communication. Simply picking up the phone helps to avoid misunderstandings and speeds up processing. By the way, this applies to both sides.

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In contrast to the far-reaching powers in the field of data protection, the state commissioners have primarily mediating and advisory powers in their responsibility for the inspection of files. If it finds violations of the Act on Inspection of Files and Access to Information, it objects to them. However, it cannot issue binding instructions. In the reporting period, the state commissioner

made a complaint in seven cases.

An official administration was of the opinion that minutes of meetings of the representatives of an official municipality may not be published without blacking out the names of the municipality representatives (III 5, page 26). It was all about the minutes of such meetings, which had taken place in public anyway. The office demanded almost 200 euros for the separation of the personal data. We were of the opinion that members of a municipal representation are officials within the meaning of the File Inspection and Information Access Act. Data protection only prevents the disclosure of their names in exceptional cases. We were not able to identify such an exception. The official administration also argued with what we consider to be non-transferrable case law from a completely different area of expertise and maintained the blacking out and the cost assessment. However, she also made no attempt to ask the data subjects for their consent – at least she should have done so if the data had fallen under the alleged rejection of the law. It was not possible to reconcile the different legal opinions in the further course of the complaints procedure. The State Commissioner complained about violations of the File Inspection and Information Access Act and recommended the reimbursement of the fees already paid. Dagmar Hartge:

It contradicts the publicity of municipal council meetings to undermine them again by subsequently blackening out the minutes. The work of the municipal representatives must remain comprehensible for the citizens after the meetings. After all, opinions expressed in public meetings are not private matters. It is not the purpose of data protection to keep them secret.

The following case shows that insufficient communication already makes access to information more difficult: The applicant was interested in a file on a port structure going back many years (III 4, page 22). The city administration did not immediately respond to the request. As a result, there was extensive correspondence between us and the authorities. The latter initially explained that it wanted to reject the application because the consideration of sensitive data in the unsorted documents was disproportionately complex and inspection on site was not possible for pandemic reasons. She only informed the applicant about the reasons for the refusal after we had given us the relevant information – albeit in a very general and therefore difficult to understand manner. She offered to answer his questions in order to meet the need for information on the one hand, but to be able to reduce the effort on the other. She then informed us that the matter was settled. In fact, she wasn't. The applicant's questions were aimed at very specific information such as the date of the building application and the start of construction. In its answer, however, the city administration explained the date for the water law permit and a monument protection permit. After the state commissioner had tried in vain to clarify the matter, but the authority did not answer us, she expressed a

complaint.

A savings bank received a fairly extensive request for inspection via the fragdenstaat.de platform. Among other things, the applicant was interested in the individual salaries of the board members, in details of the sponsoring by the Sparkasse and in the plans and projects it supports. He also wanted to know who from a lottery

Savings program benefits and which charitable purposes the bank has supported and to what extent. He also asked for various information on the financial management of the Sparkasse. Finally, he inquired about the amount of donations made by the Sparkasse and asked for the names of those who had been supported in this way (III 7, page 35). At his request, he only received an automatic confirmation of receipt and then heard nothing more from the public-law institution. While we initially only tried to ensure that they processed the application at all, an extensive exchange of the different legal positions developed in the further course of the complaint procedure, which was actually quite tough. While the Sparkasse disclosed part of the requested information as a result of our consultation, they convinced us that in some cases statutory exceptions do not allow this. For example, for data protection reasons, the remuneration of board members can only be disclosed with their consent. Ultimately, we also accepted information on sponsorship as information relevant to the competition – the law on file inspection and access to information does not apply to savings banks if they take part in the competition. However, we rated differently how the donations were handled and the people and institutions who received the donations. After several different reasons for refusal, the savings bank decided that the disclosure of the donation recipients was contrary to banking secrecy. However, we did not realize this. Banking secrecy aims to maintain confidentiality about customer-related data. In our opinion, however, whether the recipients of the donation in question possibly had customer accounts with the Sparkasse was completely irrelevant for answering the inquiry. It was all about who had received donations for what. The reference to the primary secrecy regulation of banking secrecy thus constituted a violation of the File Inspection and Information Access Act, which Ms. Hartge objected to.

It would have been a big surprise if the Covid-19 pandemic had not also had an impact on file inspection during the reporting period. However, our consultations and complaints procedures during the past two years of the pandemic were less about the daily number of infections, their territorial distribution or other up-to-date information. Rather, the public was more interested in concrete measures to deal with the pandemic.

Already in the first phase of the pandemic, an outbreak of infection in Potsdam's Ernst von Bergmann Clinic had dramatic

consequences. In order to clarify this, the Robert Koch Institute prepared an investigation report as part of a request for administrative assistance, which was submitted to the state capital Potsdam (IV 6, page 52). She first tried to refer an applicant to the Ministry of Health, which was also involved, and stated what reasons she felt opposed the disclosure of the report. In the further course of the procedure, the city administration asserted pretty much all the reasons for the refusal of the law. For example, she cited personal data, trade and business secrets, law enforcement matters, the conduct of official proceedings and priority confidentiality regulations. We demanded a comprehensible explanation. In the end, the authority limited itself to internal company data and health data, which the law does not provide for. Again, there was no explanation that would give us even a vague understanding of what the concerns were. Later, the public prosecutor's investigations came into play again - even if the report was blacked out, it could not be released as evidence intended in a preliminary investigation. Information about the context, which would have been necessary to classify the matter in terms of information access law, was again missing. We also expressed the impression that the extensive media coverage on the subject left few secrets left. It was then said that the report would be published; however, she did

City quickly backed down and claimed the opposite - again because of the public prosecutor's investigation. On our advice, the state capital finally involved the public prosecutor's office and the hospital concerned and gave the green light a year and a half after the application was submitted. Dagmar Hartge:

Again and again, public authorities try to get applications off the table with a veritable storm of rejection. This is the attempt to assert as many reasons for rejection as possible in order to perhaps get a suitable provision as a result. However, such a blanket approach does not correspond to the obligation to justify a refusal in a comprehensible manner. Applicants want to understand why exactly one piece of information cannot be disclosed. And my agency cannot control effectively without proper justification.

After it was reported in the media that a city administration was using a private security company to monitor the ban on gatherings and contact in public spaces, an applicant was interested in the relevant contract and in the instructions that regulate the use of the company (IV 4, page 46). The city denied the request, citing, among other things, the company's alleged right to refuse to disclose the information. The city administration initially did not specify the exact legal reasons for the refusal, but later in the process named a regulation that protects, among other things, trade and business secrets. While the authority believed that the company was free to decide what information it would disclose, we were of the opinion that the need

for protection was limited to established company and business secrets. The company must be heard so that the authority can make this determination. However, the decision is made by the authority, not the company concerned. The city's view would have been justified ten years ago, but in the meantime the legislator has changed the law on file inspection and access to information accordingly - which the city administration denied to us. After the claimant filed a lawsuit, we suspended our mediation efforts. As a result of the court case, the contract was issued with some redactions.

Following a result of the evaluation of the Federal Environmental Information Act, the federal legislature expressly gave the Federal Commissioner for Freedom of Information the authority to monitor compliance with the (quite far-reaching) environmental information law during the reporting period (I, page 8). Similar regulations already exist in some federal states. The state commissioner took this as an opportunity to once again suggest adapting the Brandenburg state law (II, page 14). However, there has been no response from the state government so far. So it will remain the same for the foreseeable future: We are not allowed to advise or control in the field of environmental information law. For applicants, this unfortunately means that in many cases we cannot offer them any support.

The activity report file inspection 2020/2021 is available for download on our website under the heading Service/Activity reports.

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