

**Draft of an Act to Regulate Access
to German Federal Government Information
(Freedom of Information Act – FOIA)**

dated . . .

The German Bundestag has enacted the following Act:

Sec. 1 Principle

- (1) Everybody has a right of access to official information from agencies of the federal government according to the terms of this Act, without having to show a legal interest. This Act applies to other federal bodies and institutions to the extent that such bodies and institutions perform public administrative duties. A person or legal entity is the equivalent of an agency within the meaning of this Act to the extent that an agency makes use of such person or entity in the performance of its public duties.

- (2) The agency can issue information, grant access to files or provide information in some other manner. If the applicant seeks information in a particular form, such information can be supplied in a different form only for cause. In particular, significantly higher administrative expenditure represents such cause.

- (3) Provisions in other regulations on access to official information take precedence, with the exception of Sec. 29, Administrative Procedures Act, and Sec. 25, Book Ten of the German Social Code.

Sec. 2 Definition of terms

Within the meaning of this Act:

1. Official information is any record made for official purposes regardless of the manner in which it is stored. Drafts or notes that were not made as part of a procedure are not included.
2. A third party is anyone for whom personal data or other information is present.

Sec. 3 Protection of special public interests

There is no right of access to information

1. if the disclosure of the information could have a detrimental effect on
 - a) international relations;
 - b) military or other sensitive security interests of the German Armed Forces;
 - c) internal or external security interests;
 - d) control or monitoring duties of financial, anti-trust or regulatory authorities;
 - e) matters of external financial control;
 - f) measures to prevent prohibited foreign trade;
 - g) an ongoing legal proceeding, the right of a person to a fair proceeding or the carrying out of criminal, administrative or disciplinary investigations;
2. if the disclosure of the information could jeopardize public safety;
3. if and as long as
 - a) the required confidentiality of international negotiations or
 - b) agencies' consultations could be impaired;
4. if the information is subject to secrecy or confidentiality regulated by law or by the General Administrative Regulation on the Material and Organizational Protection of Classified Information, or is subject to a professional or special official secret;
5. in regard to temporarily acquired information of another public office that shall not be part of the concerned agency's own operations;

6. if the disclosure of the information would be likely to impair the fiscal interests of the federal government;
7. in the case of information gathered or supplied on a confidential basis, to the extent that the third party's interest in confidential treatment continues at the time the application for access to the information is made; and
8. in regard to intelligence services and agencies and other public offices of the federal government that perform duties within the meaning of Sec. 10 (3) of the German Security Screening Act.

Sec. 4 Protection of the official decision-making process

- (1) The application for access to information shall be rejected for drafts of decisions and for work and resolutions made for their direct preparation, insofar and as long as the premature disclosure of the information would prevent the success of the decision or pending official measures. Results of evidence gathering and expert opinions or opinions by third parties do not usually serve the direct preparation of a decision pursuant to sentence 1.
- (2) The applicant shall be informed when the respective proceeding has been concluded.

Sec. 5 Protection of personal data

- (1) Access to personal data may only be granted to the extent that the applicant's interest in the information outweighs the third party's interest warranting protection or the third party has consented. Particular types of personal data within the meaning of Sec. 3 (9) of the German Data Protection Act may only be communicated if the third party has given express consent.

- (2) The applicant's interest in the information does not take precedence in the case of information from documents to the extent that they are connected with the third party's employment relationship, in particular personnel files, and in the case of information that is subject to professional or special official secrecy.
- (3) As a rule, the applicant's interest in the information outweighs the third party's interest warranting protection in excluding access to the information when it is limited to name, title, academic degree, professional and functional designation, office address and telecommunications numbers, and if the third party has provided an opinion in a proceeding as an expert or in a comparable capacity.
- (4) Name, title, academic degree, professional or functional designation, office address and telecommunications numbers of staff are not excluded from information access to the extent that they are the expression and result of official activities and do not fulfill any exceptional circumstances.

Sec. 6 Protection of intellectual property and business and trade secrets

There is no right of access to information to the extent that it conflicts with protection of intellectual property. Access to business and trade secrets may only be granted to the extent that the party concerned consents.

Sec. 7 Application and procedure

- (1) The agency with the right of granting access to the requested information shall decide on the application for access. In the event of Sec. 1 (1), sentence 3, the application shall be directed to the agency making use of the services of a natural person or legal entity under private law to perform the agency's duties. If the application concerns third party data within the meaning of Sec. 5 (1) and (2) or Sec. 6, the application must be substantiated. In the case of uniform applications by more

than 50 people, Sections 17 to 19 of the Administrative Procedures Act shall apply accordingly.

- (2) If a right of access to information exists in part, the application shall be granted in the scope possible in order to access the information without disclosing information subject to a duty of secrecy or without disproportionate administrative expenditure. The same shall apply analogously in those cases in which the interests of a third party are involved and the applicant agrees to the blocking out of said information.
- (3) Information can be furnished orally, in writing or electronically. The agency is not obligated to review the correctness of the content of the information.
- (4) In the event of inspection of official information, the applicant can take notes or have photocopies and printouts made. Sec. 6, sentence 1 remains unaffected.
- (5) The applicant shall be given access to the information without delay, taking into account any time he or she has specified, but no later than expiration of the period according to sentence 2, no. 1 or 2. The period commences upon receipt of the application by the agency having access to the information and ends
 1. upon the expiration of one month or,
 2. upon the expiration of two months, if the extent the information is so extensive and complex that the deadline specified in no. 1 cannot be met.

Sec. 8 Procedure in the case of third party involvement

- (1) The agency shall provide a third party, whose interests are affected by the application for access to information, with a written opportunity to comment within

one month, to the extent that there are indications that the third party may have interests warranting protection that preclude access to information.

- (2) The decision according to Sec. 7 (1), sentence 1, is issued in writing and must be disclosed to the third party as well. Access to the information will be given only when the decision in regard to the third party is non-appealable or its immediate enforcement has been ordered and two weeks have passed since the third party was informed that disclosure was ordered. Sec. 9 (4) applies analogously.

Sec. 9 Rejection of application, recourse to the law

- (1) A decision in which an application is rejected in whole or in part shall be given within the period according to Sec. 7 (5), sentence 2.
- (2) To the extent that the agency rejects the application in whole or in part, the agency shall give notice as to whether and when access to information is expected to be possible at a later date.
- (3) The application can be rejected if the applicant already has the requested information or it can be obtained through generally accessible sources in a reasonable manner.
- (4) Objection and action to compel performance are permissible against a negative decision. The objection proceeding according to the provisions of the Eighth Section of the Administrative Court Procedure Act can also be held if the decision was made by a top-level federal agency.

Sec. 10 Fees and expenditures

- (1) Fees and expenses will be charged for official acts according to this Act. This shall not apply to the provision of simple information.

- (2) The fees will also be assessed taking into account the administrative expenditure so that the right to access to information according to Sec. 1 can be exercised effectively.
- (3) The German Ministry of the Interior is authorized to determine by ordinance, without approval of the German Assembly [Bundesrat], the facts generating fees and fee rates for official acts according to this Act. Sec. 15 (2) of the Administrative Costs Act does not apply.

Sec. 11 Publication duties

- (1) Authorities shall maintain indexes which reflect the available collections of information and purposes for which information is gathered.
- (2) Organizational and file plans that do not contain personal data are to be made generally available according to the terms of this Act.
- (3) Authorities should make the plans and indexes mentioned in (1) and (2) along with other appropriate information generally available in electronic form.

Sec. 12 Federal Commissioner for Freedom of Information

- (1) The duties of the Federal Commissioner for Freedom of Information will be performed by the Federal Commissioner for Data Protection.
- (2) Any person can seek redress from the Federal Commissioner for Freedom of Information if that person feels his or her right of access to information pursuant to this Act has been violated.
- (3) The provisions of the German Data Protection Act concerning the monitoring duties of the Federal Commissioner for Data Protection (Sec. 24 (1) and (3) to (5)), concerning complaints (Sec. 25 (1), sentence 1, no. 1 and no. 4, sentence 2 and (2) and (3)), as well as other duties pursuant to Sec. 26 (1) to (3) apply analogously.

Sec. 13 Revisions of other regulations

(1) The German Data Protection Act in the version officially published on January 14, 2003 (BGBl. I [Federal Law Gazette], p. 66,) is revised as follows: The words “for data protection and freedom of information” replace the words “for data protection” in the information in the table of contents on the title of the third subsection in the second section and on Sec. 21 to Sec. 26, as well as in Sec. 4c (2) sentence 2; Sec. 4d (1), (6) sentence 3; Sec. 6 (2) sentence 4; Sec. 10 (3) sentence 1; Sec. 19 (5) sentence 2, (6) sentence 1; in the title of the third subsection in the second section; in Sec. 21 to Sec. 26; in Sec. 42 (1) sentence 1, second clause, (4) sentence 3 and in Sec. 44 (2), sentence 2.

(2) The following sentence is inserted in Sec. 5 (4) of the Federal Archives Act in the version officially published on January 6, 1988 (BGBl. I, p. 62), which was most recently revised by Article I of the Act dated June 5, 2002 (BGBl. I, p. 1782): “The same applies to archived materials insofar as they had already been open to information access pursuant to the Freedom of Information Act prior to their transmittal to the Federal Archives.”

Sec. 14 Reporting and evaluation

The federal government will inform the German Bundestag about the application of this Act two years prior to its expiration. The German Bundestag will evaluate the scientific validity of the Act one year prior to its expiration.

Sec. 15 Effective date

This Act shall take effect on the first day of the third month following its promulgation. It shall expire on the first day of the sixth year following its effective date.

Berlin, 14 December 2004

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