

A Question to all participants:

Is access to documents of the public administration a human right?

Yes/No

No abstention allowed only yes or no.

Who has filed a request?

Draft: The role of international lawmakers and their respective influence on national legislation on information access

In the knowledge that only those who use their freedom remain free
Preamble Federal Constitution of the Swiss Confederation

Access to information is part of freedom of expression, together with an active citizenry, and thus one of the preconditions for ensuring a vibrant and well-informed democracy.

First Baltic Sea NGO Forum 2001

law, jurisprudence: Rechtswissenschaft
legal certainty, legal security : Rechtssicherheit:
rule of law, constitutional state: Rechtsstaat
scale, measure: Maßstab

First Baltic Sea NGO Forum 2001

Access to information is part of freedom of expression, together with an active citizenry, and thus one of the preconditions for ensuring a vibrant and well-informed democracy. **NGOs demand of the governments** to respect and comply with their obligations following national and **international standards**, promoting openness in state affairs thereby assisting the formation of transparent and responsible governments in the region.

The NGOs call on the CBSS Member States to make the realisation of all human rights – civil, political, economic, social and cultural – a top priority on their political agenda

Contence

- Access to Information, Openness RTI, FOI, RtK
- Do you have a justified interest?
- History: International, Baltic Sea, Quantitative Evaluation
- History: Germany before 1997: proposals
- Laws in Germany 1998-2008
- Human Right Character: UN, Council of Europe
- What is a Human Right?
- Transition of International Treaties
- Court Decisions: Germany, International
- What are «allgemein zugängliche Quellen»?
- Freedom of Information Art. 5 Basic Law
- Why Access to Information? Why resistance?
- What Can be Done?
- Akteure. When will these 5 länder follow?

Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives.

A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.

-- James Madison --

Names for Access to Information

- Right to Information (rti-rating.org, right2info.org)
- Principle of Openness
- Openness of Administration/Government
- Freedom of Information (FOI) laws
- Administrative Transparency
- Right to Know (RTK day 29. September)

Notation, description, expression, name

ATI: UN, Russia, Poland, Lithuania

FOI: US, Latvia, Germany, (Iceland: Information Act)

Openness: Sweden, Finland, Norway, Denmark, Netherlands
Switzerland, (Estonia: Public Information Act.)

International Organisations

- European Union
 - Article 2 of the Treaty on European Union: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, ..."
- Council of Europe
 - European Convention on Human Rights (ECHR)
- UN: International Covenant on Civil and Political Rights. (ICCPR)

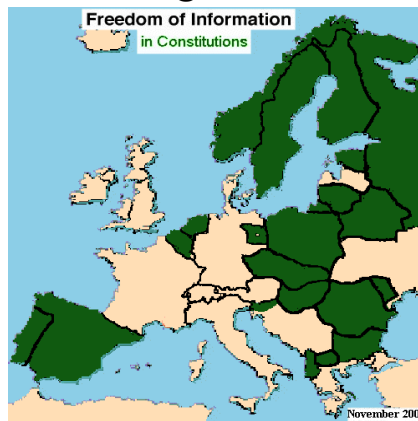
New members had to adopt FOI laws to qualify for membership.

The EU Commission wrote to me [8. May 2002](#):
"Germany will most certainly follow the example of its European partners."

History: International

- 1766 Sweden: [Anders Chydenius](#) (China)
- 1830 Carl Gustav Jochmann: Open Administration
- 1948 UDHR: Art. 19: «seek information»
- 1966 ICCPR: Art. 19 (2): «seek information»
- 1999: Special Rapporteur: UN Doc. E/CN.4/1999/64
- 2004: UN, OAS, OSCE Rapporteurs
- 2006-2009: European Court of Human Rights (ECtHR)
- 2012: General Comment No. 34 Art. 19 ICCPR
- 2011: ca. [115 states](#), either FOI laws or constitutional provisions

Baltic Sea Region: Role Model



The Baltic Sea Region is a good example looking at access to information in constitutions.

Sweden (1766) and Finland (1950) are the Pioneers. Other states followed. Lithuania (1992), Estonia (1992), Russia (1993), Poland (2001) and Norway (2004) have also constitutional protection of access to information. Norway (1970), Denmark (1985), Iceland (1996), Latvia (1998) and Germany (2005) adopted ATI laws.

Comparison: World - Germany

- 84 states with approx. 4,5 billion have better FOI laws than Germans (<http://rti-rating.org>)
- 115 states (<http://right2info.org/laws>) with 5,5 billion have either FOI law or constitutional provisions In 5 local states (länder) in Germany FOI is missing
- The UN Convention against Corruption is ratified of more than 158 states with more than 6,5 billion but not Germany.
- Germany did not ratify the Criminal Law Convention on Corruption (GRECO), Transparency Parties

International standards for ATI, „best praxis“

GRECO = Group of States against corruption

9 December 2011: GRECO concludes in report

Greco RC-III (2011) 9E that Germany has implemented or satisfactorily dealt with only four of the twenty recommendations contained in the Third Round Evaluation Report.

Questions

- When will an improved FOI law come?
- When will the last 4 local states adopt FOI laws?
- When will Germany ratify corruption conventions?
- [Parliamentwatch](#) (Abgeordnetenwatch)
 - Parties in federal parliament Bundestag
 - Parties in 5 local states (länder)
- [Direct to Chancellor Merkel](#), [Citizens dialogue](#)
- [Petition](#) Federal Parliament Bundestag
- NGOs were [informed](#), published in [NRZ](#)

■ National Integrity Report D

- weakness 2, 3, 4, 8, 34, 35 and 52 ff. for a republic with integrity cover FOI and corruption problems
- Why „good to very good“ performance???
- TI must adjust [scale](#)
- What answer from [federal parties](#), WTO [TI International](#), [OECD](#), [OSCE](#), [CoE](#)?
- Will [EU](#) tell Germany what's right?
- Press has biggest potential to become better

WTO = World Trade Organisation

OECD = Organisation for Economic and Co-operation and Development

OSCE = Organisation for Security and Cooperation in Europe

■ What is a Human Right?

- [UN](#): All humans are born with these rights
- [Art. 1 \(2\) Basic Law](#): “inviolable and inalienable human rights as the basis of every community”
- [Art. 1 \(3\) Basic Law](#): The following basic rights shall bind the legislature, the executive and the judiciary
- Definition FDGO: [Verfassungsschutzg. § 4\(2\)g](#) : die im GG geschützten Menschenrechte

FDGO = Freiheitliche Demokratische Grundordnung

Access to Documents EU

- Access to documents of Council - and Commission (OJ 1993 L 340/43)
- 1994: Environmental Information (EU Directive RL 90/313/EEC) **Member states**
- EU Treaty, 1997, Article 255
- Charta der Grundrechte der Europäischen Union, Article 42
- EU Commission 8. May 2002: “Germany will most certainly follow the example of its European partners.”

UN: Human Right ATI

- 1948 [UDHR](#) Art. 19: “seek information”
- 1966 [ICCPR](#) Art. 19 (2): “seek information”
- 1992 Constitution Brandenburg Art. 21 (5)
- 1998 Die Aarhus Convention
- Special Rapporteur: UN Doc. E/CN.4/1999/64, para. 12, [E/CN.4/2000/63](#) , para. 42
- UN, OAS, OSCE Rapporteurs on International Mechanisms for Promoting Freedom of Expression of 6 December 2004:
[Access to information a human right](#)

UDHR = Universal Declaration of Human Rights

ICCPR = International Covenant on Civil and Political Rights

OAS = Organisation of American States

Both UDHR and ICCPR respect privacy

UN: ICCPR

- Article 19 of the International Covenant on Civil and Political Rights (ICCPR)
- **General Comment No. 34 Art. 19 ICCPR:**
 - "18. Article 19, paragraph 2 embraces a general right of access to information held by public bodies. Such information includes all records held by a public body, regardless of the form in which the information is stored, its source and the date of production."
 - Germany tried to **remove** this paragraph

ICCPR = International Covenant on Civil and Political Rights

German Mission at UN 11.2.11:

"Paras. 18 to 20 are thus rejected in whole".

Council of Europe: ATI

- 1950: Article 10 **ECHR**
- PACE 1979: **Recommendation 854**
- Council of Europe, 1981: **Recommendation No. R (81) 19**
- CoE 2002: **Recommendation (2002) 2**
- 2006-2009: **Cases European Court of Human Rights**
- 2007: **Binding Convention**
- **Recommendation CM/Rec(2012)3**

ECHR = European Convention for Human Rights

PACE = Parliamentary Assembly of the Council of Europe

EctHR: ATI

- 11. April 2006: GERAGUYN KHORHURD PATGAMAVORAKAN AKUMB ./.
ARMENIA, [Appl. No. 11731/04](#)
- 10. July 2006: [Matky ./.](#) Czech Republic,
Appl. No. 19101/03
- 14. September 2009: TÁRSASÁG A SZABADSÁGJOGOKERT ./.
Hungary, [Appl. No. 37374/05](#)
- 26. May 2009: [Kenedi ./.](#) Hungary, Appl.
No: 31475/05

ECtHR = European Court of Human Rights

International Courts

- [Japan \(1969\)](#), [India \(1982\)](#) and [South-Korea \(1990\)](#):
Access to Information precondition for freedom of
opinion
- Inter American Court of Human Rights (IACHR) 25.
Sep. 2006: [Claude v. Chile](#)
- European Court of Human Rights:
 - 11. April 2006: Akump v. Armenia, [Appl. no 11721/04](#)
 - 10. Juli 2006: Matky gegen Tschechien, [Antrag Nr. 19101/03](#)
 - 14.9.2009: TÁRSASÁG A SZABADSÁGJOGOKÉRT ./.
Ungarn, [EGMR Antrag Nr. 37374/05](#)
 - 26.5.2009: [Kenedi ./.](#) Hungary, [EGMR Antrag Nr: 31475/05](#)

Proposals: Germany before 1997

- 1830 Carl Gustav Jochmann: Openness of administration (Öffentlichkeit der Verwaltung)
- 1980 Humanistische Union: Free Access to Files
- 1985 The GREEN in Bundestag: Law on Access to Files about Environment (AERG)
- 1990 ALTERNATIVE LISTE Berlin: FOI law
- 1992 Constitution Brandenburg
- 1992 Simitis: [informationelle Selbstbestimmung](#)
- 1993 [Proposal to implement ATI in Basic Law](#)
- 1997 Green Party in Bundestag: [FOI law](#)

Vorschlag Hessens in der Verfassungskommission von Bund und Ländern im Jahre 1993 im Zuge der Diskussion um eine Änderung des Grundgesetzes im Rahmen der Wiedervereinigung war dafür schon eine Mehrheit vorhanden, allerdings wurde die notwendige zweidrittel Mehrheit damals noch nicht erreicht ([BT Drucksache 12/6000](#), Kapitel 3.4).

Civil Society

- DGIF, Aktionsbündnis Informationsfreiheit für Bayern, Transparency, Greenpeace, HU, netzwerk recherche, Mehr Demokratie
- Open Knowledge Foundation Deutschland ([okfn.de](#))
 - [FragDenStaat.de](#) FOI applications electronic
 - „Arbeitskreis OGP“ ([OpenGovPartnership.de](#))
- Open Government 2.0 Netzwerk Deutschland ([www.gov20.de](#))
 - [OpenGovGermany.com](#)

okfn.de: Wissen ist dann offen, wenn keine technischen oder rechtlichen Einschränkungen bestehen, welche Schaffung, Nutzung, Weiterverarbeitung und Weiterverbreitung von Wissen durch jedermann für jegliche Zwecke behindern.

Open Government bezweckt eine verbesserte Teilhabe der Bürgerinnen und Bürger am Handeln von Politik und Verwaltung „auf Augenhöhe“ und umfasst die Dimensionen Transparenz, Partizipation, Korruptionsbekämpfung und Rechenschaftslegung.

Open Government 2.0 Netzwerk Deutschland ([www.gov20.de](#)): Open Data, Partizipation und Zusammenarbeit. Unsere Vision ist eine offene Verwaltung. Wir glauben, Transparenz und Offenheit sind elementare Bestandteile vom Verwalten und Regieren der Zukunft.

We reject kings, presidents, and voting. We believe in rough consensus and running code.

Dr. David C. Clark, Massachusetts Institute of Technology

Laws in Germany

- 1994: Environmental Information Law (EU Directive [RL 90/313/EWG](#))
- 1998-2001: Brandenburg, Berlin, Schleswig-Holstein und NRW
- 2005: Federation (coalition parties)
- 2006: Hamburg, Bremen, Mecklenburg-Vorpommern, Saarland
- 2007: Thüringen, Sachsen-Anhalt, RLP
- 2008: [Consumer Information Law](#)

RLP = Rheinland-Pfalz

Transition of international Treaties

- Art. 25 Basic Law: „The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.“
- Art. 59 Basic Law (2): Transformation: rank “of a federal law”
- Art. 20 (3) Basic Law: executive and the judiciary (shall be bound) by law (rule of law)
- Art. 19 (4) Basic Law: recourse to the courts (Legal remedies)

"Die Entstehung von universellem Völkergewohnheitsrecht erfordert zwar nicht, daß einem Völkerrechtssatz ausnahmslos alle Staaten ausdrücklich oder durch konkludente Handlung zugestimmt haben. Dieses Völkergewohnheitsrecht muß aber auf einer allgemeinen, gefestigten Übung zahlreicher Staaten beruhen, der die Rechtsüberzeugung zugrunde liegt, daß dieses Verhalten Rechtens sei" (vgl. BVerfGE 92, 277 <320>, BVerfGE 66, 39 [64 f.]; 68, 1 [83], vgl. International Court of Justice, Reports 1969, S. 41 ff. - Festlandsockel-Fall; BVerfGE 46, 342 [367] m. w. N.).

Allgem. Regeln des Völkerrechts: Diese Regeln müssen auf einer allgemeinen, gefestigten Übung der Staaten beruhen, der die Rechtsüberzeugung zugrunde liegt, daß dieses Verhalten Rechtens sei (vgl. BVerfGE 66, 39 [64 f.]; 68, 1 [83]).

Court Decisions Germany

- [ECHR Art. 46](#): State bound by ECtHR decisions
- [LG Mainz \(1 QS 25/98\)](#): Courts are not allowed to follow ECtHR, Parliament must change law
- [Consumer org.: OLG S-H Az:4 LB 30/04](#): [Property protected in Basic Law](#), not consumer rights, [no revision allowed](#)
- [BVerwG 7 C 3.11 und 4.11](#) – decision of 3.11.2011: FOI also for government action

Keim ./ Germany

- [Keim-D: Access public documents](#): [1 BvR 1057/02](#), [VG 2 A 85.04](#): ICCPR not even discussed, amount in dispute € 12000.-
[1 BvR 1981/05](#), [1 BvR 2565/05](#), ECtHR Appl. No. 41126/05
- [Keim-D: Sideline jobs of MPs](#), [VG 2 A 55.07](#), [1 BvR 238/09](#), [EGMR 46953/09](#),
Intervention: [2 BvR 1033/07](#),
[EGMR 31583/07](#)

In the knowledge that only those who use their freedom remain free Preamble Federal Constitution of the Swiss Confederation

The ECtHR finds that that all juridical domestic remedies have been used, according to Article 35 (1) of the Convention.

Complains ICCPR

- **Individual Complaint** to Human Rights Committee
- Complaint **18.4.2002** and **25.4.2003**: Several denials of access
- Answer: **3.6.2002**, and **8.5.2003**: „not sufficiently shown, that all juridical remedies have been used“
- **20.11.2005**: VG 2 A 85.04, 1 BvR 1981/05, BvR 2565/05 have been added
- **No Answer**
 - 3.6.2002: „Domestic juridical/administrative remedies do not appear to have been exhausted“

Why is human right ATI not respected in Germany?

- ECHR Art. 46: Germany bound
- **BVerfG 2 BvR 1481/04**: ECHR has rank of law
- In praxis this decision is ignored:
 - Applies to Germany not to court
 - No basic right is given, which is stronger than ECHR
 - Only a special judgement is valid not valid for other cases
 - ECtHR judgement no basis for constitutional complaint

In Norway, Switzerland and Austria human right conventions have a rank higher than laws. In Netherlands human rights are higher ranked than the constitution.

BVerfG 2 BvR 1481/04: "Die Bindungswirkung einer Entscheidung des EGMR erstreckt sich auf alle staatlichen Organe und verpflichtet diese grundsätzlich, im Rahmen ihrer Zuständigkeit und ohne Verstoß gegen die Bindung an Gesetz und Recht (Art. 20 Abs. 3 GG) einen fortdauernden Konventionsverstoß zu beenden und einen konventionsgemäßen Zustand herzustellen."

Freedom of Information Art. 5 Basic Law

- Freedom to inform without hindrance from generally accessible sources. (g.a.s.)
- No law for general secrecy
- FOI (Federation, 11 Länder): Everybodys right
- [BVerfGE 103, 44 \(61\)](#): Law defines border of generally accessible sources
- Everybodys right+Rule of law - and Democracy (Art. 20)+ Art. 5 Basic Law = Access to information basic right (Rossi)

BVerfGE 103, 44 (61): "Legt der Gesetzgeber die Art der Zugänglichkeit von staatlichen Vorgängen und damit zugleich das Ausmaß der Öffnung dieser Informationsquelle fest, so wird in diesem Umfang zugleich der Schutzbereich der Informationsfreiheit eröffnet."

C. Löser

Amtsgeheimnis und Informationsfreiheit im Wandel
Seminararbeit zum Seminar

Gegenwartsfragen des Staats- und Verwaltungsrechts
bei Prof. Dr. Maximilian Wallerath

Sommersemester 2006

http://www.psychotekk.de/~cloeser/Amtsgeheimnis_und_Informationsfreiheit.pdf

Why resistance?

- Max Weber: Bureaucracy defends own privileges
- Information is power
- Swedish experience: Even after 250 years hat bureaucracy has not given up resistance. Conclusion: Strict, complaint possibilities, independent Ombudsman
- Change of paradigm (cultural revolution)

Players, organisations

- Bundestag: 7 years adopted own proposal
- EU Commission: points to Council of Europe
- EU Parliament: Wrote that FOI law is missing
- UN Human Rights Committee: [is silent](#)
- Council of Europe: [observes Germany](#), [PACE](#), Survey, [binding Convention](#)
- OSCE: [observes Deutschland](#), Survey
- [Helsinki Committee](#): writes reports

Adoption of FOI laws

- Goodbye to general secrecy is a “cultural” revolution, shift of paradigm
 - Administration is sceptical
 - Governments hesitate
- Problem solving: In Schleswig-Holstein, Berlin, Hamburg, in Federation, Rheinland-Pfalz and Thüringen 6 times parliaments have worked out, suggested laws and adopted them.

OEP.no

- [Electronic Public Records \(State\)](#)
- Subject, sender, addressee, date
- Case - and document number
- www.oep.no, Search function, electronic ordering and electronic answer
- [3385 requests](#) per 100 000 inhabitants
- Germany: less then 2 requests per 100 000 inhabitants per year

In Sweden an answer should be given within 24 hours. In Norway you should get an answer within 1 to 3 days. After 5 working days you may complain.

In Germany authorities have to answer within one month. If the complaint is not successful, the Freedom of information commissioner may wait one year or more: There is no time limit.

Human Rights Commissar

[Report 11. Sep. 2007 on Germany:](#)

- German Institute for Human Rights should monitor and advice parliaments
- Build up human rights education for judges and administration
- Independent complaint possibilities
- National Actionplan Human Rights

What has been done?

- approx. 3 dozen [petitions](#) about the right on a good administration
- Suggestion
[EU Directive FOI laws for members](#)
- approx. 2 dozen [FOI requests](#) e. g. [Stuttgart 21](#)
- [4 constitutional complaints](#) and 3 ECtHR complaints

What to do?

- The suggestions of the Human Rights Commissioner were rejected by Bavaria. [Complaint](#) against rejection of access to the reasons (costs for domestic courts estimated € 3200)
- NGO shadow [report](#) to UN Human Rights Commission CCPR/C/DEU/6 6. state report
- Question to NGOs for [support](#). Access Info Europe positive

Before Baltic Sea NGO Forum 2001



Baltic Sea Region before first NGO Forum

Roger Vleugels: Overview of all FOI laws, * October 9 2011 *

Ranking Countries Number of requests 2010 per year per 100,000 inhabitants

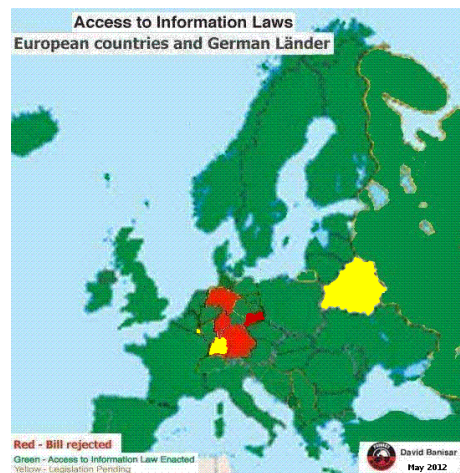
1 Norway 1250

17 Finland 10

24 Germany 2

Russia <1

When will these 5 Länder follow?



The EU Commission wrote to me 8. May 2002:
“Germany will most certainly follow the example of its European partners.”

Last question

Is access to documents of the public administration a human right?

Yes/No