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Legal Analysis of the Austrian Freedom of Information Act

Access Info Europe is a human rights organisation focused on the promotion and protection of the right to information across Europe. Its team has extensive experience in analysing national access to information laws and offering advice for law reform. Access Info also runs the RTI Rating, which measures the strength of access to information laws and is widely used as an advocacy tool.

Austria currently has one of the weakest right to information laws in the world and consistently ranks at the bottom of the RTI Rating, with a score of 33 points out of 150. Due to this, Access Info welcomes the draft law amending the Federal Constitutional Act, the Court of Audit Act 1948 and the Constitutional Court Act 1953 and enacting a Freedom of Information Act.

This draft law brings with it some positive changes to the previous access to information regime in Austria: the right to information has now been elevated to a constitutional right, there are no longer charges to submit access to information requests, and the right now applies to all governmental agencies, including state-affiliated companies, not just administrative authorities like the previous law, and the right to access documents is introduced. Yet, just like the previous right to information law in Austria, there still exists very weak areas and certain loopholes that could weaken the right to information in practice.

Access Info has carried out an RTI rating analysis of this draft law, comparing it against accepted international standards. Whilst there are improvements from the previous law, this draft law only scored 57 points out of 150. The main areas of concern with this draft law are:

- Limiting definition of information;
- Weak proactive publication obligations;
- Weak harm and public interest test applicable to exceptions;
- No independent oversight body;
- Lack of sanctions regime for non-compliance;
- Only judicial appeal against refusals.

The right to information is a basic fundamental right in itself. It is linked to freedom of expression, and has been recognized by the European Court of Human Rights, the Inter-American Court of Human Rights and the UN Human Rights Committee. International standards and jurisprudence have confirmed that information held by public bodies belongs to the public. The Council of Europe Convention on Access to Official Documents states: “all official

documents are in principle public and can be withheld subject only to the protection of other rights and legitimate interests”.

The right of access to information is a fundamental human right both a proactive and reactive element:

» Proactive

The positive obligation of public bodies to provide, to publish, and to disseminate information about their main activities, budgets, policies and plans, so that the public can know what they are doing, can participate in public matters and can control how public authorities are behaving.

» Reactive

The right of all persons to ask public officials for information about what they are doing and any documents they hold and the right to receive an answer. The majority of information held by public bodies should be available, but there are some cases where the information is withheld in order to protect privacy, national security or commercial interests.

With a legitimate right to information, a strong access to information law and the political will to implement a strong access to information regime, citizens can see how and why governments make decisions. This gives citizens the ability to participate in decisions and hold public officials to account. According to the RTI rating, Austria currently has the worst access to information law in Europe. This draft law is an opportunity for Austria to bring its access to information law into line with international standards. To strengthen the law, Access Info lays out below weak areas with recommendations on how to rectify them.

1. Definitions of “information” too narrow

This draft law defines information as "any record serving official or business purposes within the sphere of activity of an institution." In practice, this could be interpreted narrowly in order to only give access to a specific set of information held by a public body, rather than all information held by it.

Recommendation

- » The definition of “information” should apply to **all material** held by or on behalf of public authorities which is recorded in any format, regardless of who produced it. The language in the Council of Europe Convention on Access to Official Documents is clear and would be a good source for this law: “*all information recorded in any form, drawn up or received and held by public authorities.*”

2. Lack of guidance on what should be proactively published

The law states that information of general interest must be published in a centralised information register. Information of general interest is defined as “information that concerns or is relevant to a general group of persons, in particular studies, expert opinions, statements and contracts with an object value of at least 100,000 euros.”

In terms of information that falls within the public interest that must be published proactively, it is welcome that this includes studies, expert opinions and statements. In terms of contracts, however this only concerns those with a value of over 100,000 euros, meaning that contracts below this value would not need to be proactively published. This threshold is too high and could allow the spending of large amounts of money to be hidden from public oversight.

While we also welcome the establishment of a centralised information register, the law is vague as to what exactly has to be published in this register, simply stating that “information of general interest” is to be published. The right of access to information entails a proactive and a reactive component. The proactive component is the positive obligation of public bodies to provide, to publish, and to disseminate information about their main activities, budgets, policies and plans. Therefore, national access to information laws should not only include rules and procedures on how to submit freedom of information requests, it should also include lists of what information should be proactively published at the institutional level and state level.

While this law does implement an information register, details on exactly what should be published in it are lacking.

Recommendation

- » The law should specify exactly what each public body is to proactively publish in the information register. Annex I includes a non-exhaustive list of what the Austrian law should call for to be proactively published at the national and institutional level.

3. Procedure for submitting access to information requests lacks details and clarification

The procedures for requesting lack detail, which could cause problems for implementation in practice. While an access to information request can be submitted “in writing, orally or by telephone, in any technically possible and foreseen form” (Article 7.1), which is welcomed, the law lacks other necessary details, such as that it does not require an acknowledgement to be given to the requester upon receipt of the request.

While the law does mention clarification of requests which are not clear (Article 7.2), it does not state that public officials should give any particular assistance in formulating requests beyond this. Nor is it stated that public officials are required to provide assistance to requesters who require it because of special needs, for example because they are illiterate or disabled.

When a body receives a request that it is not competent to deal with, the law states that the body can either transfer the request to the competent body, or the body can refer the requester to that body. It should be stated that public officials should transfer the request in this situation.

Recommendations

- » Requesters should be provided with a receipt or acknowledgement upon lodging a request within a reasonable timeframe, which should not exceed 5 working days
- » Public officials should be required to provide assistance to help requesters formulate their requests in general if needed, as well as being required to contact and assist requesters where requests that have been made are vague, unduly broad or otherwise need clarification.
- » Public officials should be required to provide particular assistance to requesters who need it because of special needs, for example because they are illiterate or disabled.

4. Timeframes need to be brought into line with international standards

The law states that information shall be granted “without undue delay”, but it does not specify that responses should be provided “as soon as possible” and the maximum timeframe for responding to an access to information request is four (4) weeks, which is at the longer end of European standards (an average of 15 working days). The right of access to information is a fundamental right, and so public bodies should be obliged to prioritise answers and to respond as swiftly as possible.

In addition to this, the law allows for an extension of up to four (4) weeks on the rather vague grounds that “information cannot be granted in the period [of 4 weeks]” and does not explicitly state that this extension may only be used once.

Recommendations

- » The law should specifically state that requests should be dealt with “as soon as possible” rather than “without undue delay”.
- » Regarding timeframe extensions, the law should specifically state the grounds for applying such an extension and that it may only be used once.
- » When extensions are invoked, the law must require that requesters be notified and provided with the reasons for the extension, as well as details of how to appeal to challenge the extended timeframe for responding.

5. This law is trumped by some federal and land law provisions

The law explicitly states that Federal or Länder laws on access to official or business information shall remain unaffected by this law (Article 16). This is out of line with international standards. As stated above, the right of access should apply to **all material** held by or on behalf of public authorities, with only internationally accepted exceptions applicable.

Recommendation

- » The Freedom of Information Act should prevail over other legislation and over any restrictions on information disclosure in other legislation to the extent of any conflict.

6. Harm and public interest test or time limits to exceptions not explicitly stated

Article 6 on Secrecy contains the exceptions applicable to access to information. Austria has neither signed nor ratified the Council of Europe Convention on Access to Official Documents, and the exceptions contained in this law are not in line with the Convention. While the Explanatory Note explains that these exceptions are subject to a harm and public interest test, this is not explicitly stated in the law text itself.

In addition, while it is welcomed that partial access is granted to documents where only parts of it are covered by exceptions, it doesn't specify that refused information will be released once the exceptions cease to apply.

Recommendations

- » Austria should sign and ratify the Council of Europe Convention on Access to Official Documents.
- » The law should follow the Council of Europe Convention on Access to Official Documents, which lays out the following internationally accepted exceptions to access to information, which are all subject to a harm and public interest test:

Each Party may limit the right of access to official documents. Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

- a) national security, defence and international relations;*
- b) public safety;*
- c) the prevention, investigation and prosecution of criminal activities;*
- d) disciplinary investigations;*
- e) inspection, control and supervision by public authorities;*
- f) privacy and other legitimate private interests;*
- g) commercial and other economic interests;*
- h) the economic, monetary and exchange rate policies of the State;*
- i) the equality of parties in court proceedings and the effective administration of justice;*
- j) environment; or*
- k) the deliberations within or between public authorities concerning the examination of a matter.*

Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.

The Parties shall consider setting time limits beyond which the limitations mentioned in paragraph 1 would no longer apply.

7. Refusal notices are inadequate

Article 8 states that if the information is subject to an exception (or only partial access is granted), the applicant shall be informed of the refusal to grant full access within four weeks. Article 11 on legal protection however states that if access to the information is not granted, the body responsible for providing the information shall, upon written request from the requester, issue an official decision within two months after receipt of that request. The law also states that if access to information on matters of legislation is not granted, no notice shall be issued.

There seems to be contradictory timeframes in place for granting refusals. In addition to this, it is unacceptable that the requester would have to request the refusal notice, and that no notice is given regarding refusals of access to information on matters of legislation.

When a refusal is given, the law does not state that this refusal should contain a full legal explanation of the grounds for refusal nor that it should provide information on how to appeal.

Recommendation

- » A refusal notice should be issued automatically within 20 working days. The requester should not have to request the notice.
- » This should apply to all access to information requests.
- » When refusing to provide access to information, public authorities must a) state the exact legal grounds and reason(s) for the refusal and b) inform the applicant of the relevant appeals procedures.

8. Third party consultation process insufficient

In terms of third party consultation process, the law states that third parties can be consulted if the provision of information interferes with the overriding legitimate interest of another, in particular

- to safeguard the right to protection of personal data,
- to protect professional, business or trade secrets, or
- to protect the intellectual property rights of persons concerned,

The process however is not clearly set out, nor does it explicitly mention that third parties should not have veto power.

Recommendation

- » Clear and appropriate procedures must be put in place for consulting with third parties who provided information which is the subject of a request on a confidential basis. Public authorities shall take into account any objections by third parties when considering requests for information, but third parties do not have veto power over the release of information.

9. No Information Commissioner established under the law

The law does not provide for a separate oversight body, such as an Information Commissioner. Having an independent body charged with overseeing the implementation of the right of access to information is essential in a democratic society. The only relevant provision in the law is that it stipulates that the Data Protection Authority (DPA) should advise public authorities on the Freedom of Information Act in matters of data protection. A democratic society needs to be able to find a balance between access to information and data protection – without the DPA advising on this in the absence of an Information Commissioner, it is likely that data protection will constantly prevail.

International comparative best practice indicates clearly the benefits of an independent oversight body to provide a specialist, fast-track, free means for the public to defend the right of access to information. The implementation of access to information laws is generally more effective where such oversight bodies exist, and they can provide valuable guidance to public bodies in the early years of a full access to information regime.

Countries in Europe which have independent oversight bodies, the models for which Austria might wish to study, include Croatia, France, Germany, Ireland, Serbia, Slovenia, Spain, and the UK as well as the European Ombudsman at the EU level.

Recommendation:

- » An oversight body should be included within the law and below is a checklist of recommendations for establishing an oversight body:

Independence: The members of the oversight body should be nominated by either the executive or the parliament, and approved by the parliament following open hearings and process by which the public may make representations. There must always be at least three candidates for each position.

Candidates: There must be a prohibition on individuals with strong political connections from being appointed. Professional expertise should be required.

Term: Members of the oversight body should be appointed for at least 5 years and have security of tenure during this period except for major breaches of the law and incompatibilities.

Financial Independence: The oversight body must be able to propose its own budget for the future year, subject to parliamentary approval.

Mandate & Powers: the mandate and powers of the oversight body should include the following:

Appeals: The oversight body receives and decides on appeals against administrative decisions;

Binding decisions: The decisions of the oversight body are binding and must be complied with or challenged in court; if not complied with, sanctions may be imposed;

Powers of inspection: The power to both request copies of documents and to enter the premises of public bodies and review documents;

Review of classified documents: The right to review documents that have been classified;

Declassification of documents: The oversight body can order revisions to classification of documents / can recommend revisions to classification;

Structural Remedies: The oversight body can order structural remedies in public bodies (such as improved record management, more training, etc.);

Sanctions: the oversight body can impose sanctions and these must be paid or challenged in court;

Education: the oversight body is mandated to ensure that relevant public officials are educated on the Freedom of Information Act;

Awareness Raising: The oversight body is charged with raising awareness about the law and educating the public;

Monitoring implementation: The oversight body is charged with collecting data from public bodies so that it can monitor implementation of the Freedom of Information Act;

Reporting: the oversight body must present a report to parliament, that shall also be public, on an at least annual basis.

Oversight of Proactive Publication: The oversight body should be charged with supervision of proactive publication requirements, including:

Receiving complaints from public on proactive publication;

Reviewing proactive publication ex-officio;

Ordering specific remedies;

Ordering structural remedies (such as improving websites, improving record keeping, or conducting more training);

Reporting on compliance with proactive publication requirements in its annual report.

Advancing the Right: The oversight body should be charged with having a proactive role in developing the right of access to information in Austria. To this end it should be empowered to:

Develop Criteria: the oversight body can develop guidance on implementation and criteria for interpretation of the Freedom of Information Act;

Propose Legislation: The oversight body can propose legislative reforms / changes to implementing regulations to the executive and relevant parliamentary committees;

Initiate and be a party to Litigation: The oversight body can participate as an amicus curiae or similar in relevant court cases in which it is not a party.

10. There only exists a judicial appeal and the grounds for appeal are limited

There are two different procedures concerning appealing a refusal to provide access to information from public bodies and private bodies obliged to provide information (Non-sovereign foundations, funds, institutions and undertakings). Grounds for appeal however are limited and there only exists a judicial appeal, there is no appeal to an independent oversight body.

Recommendation

- » Requesters should have both the right to lodge an external appeal with an independent administrative oversight body (e.g. an information commission or ombudsman) as well as a judicial appeal.
- » The grounds for appeal to the oversight body should be broad (including not only refusals to provide information but also refusals to provide information in the form requested, administrative silence and other breach of timelines, charging excessive fees, etc.).

It should be explicitly stated that in the appeal process the government bears the burden of demonstrating that it did not operate in breach of the rules.

11. Lack of sanctions for non-compliance

The law does not contain any sanctions for those who do not comply with the law. In addition, as stated before, there is no independent oversight body to oversee the access to information regime and to administer sanctions for non-compliance.

Recommendation

- » An independent oversight body should be created to oversee the implementation of access to information by public bodies and to administer sanctions.
- » Sanctions should be imposed on those who wilfully act to undermine the right to information, including through the unauthorised destruction of information.
- » The law should put in place a system for redressing the problem of public authorities which systematically fail to disclose information or underperform (either through imposing sanctions on them or requiring remedial actions of them).

- » The independent oversight body and its staff should be granted legal immunity for acts undertaken in good faith in the exercise or performance of any power, duty or function under this law.
- » There should be legal protections against imposing sanctions on those who, in good faith, release information which discloses wrongdoing (i.e. whistleblowers).

12. Promoting the right of access to information

The law does not put in place specific measures for the training on and the promotion of the right of access to information. This is an essential part of ensuring not only that public officials know how to implement this right in practice, but that citizens are aware of their right to information and know how to use it.

Recommendation

- » Public authorities should be required to appoint dedicated officials (information officers) or units with a responsibility for ensuring that they comply with their information disclosure obligations.
- » A central body, such as an information commission(er) or government department, should be given overall responsibility for promoting the right to information.
- » Public awareness-raising efforts (e.g. producing a guide for the public or introducing right to information awareness into schools) should be required to be undertaken by law.
- » A system should be put in place whereby minimum standards regarding the management of records are set and applied.
- » Public authorities should be required to create and update lists or registers of the documents in their possession, and to make these public.
- » Training programs on the right of access to information should be obligatory for public officials.
- » Public authorities should be required to report annually on the actions they have taken to implement their disclosure obligations. This includes statistics on requests received and how they were dealt with.
- » A central body, such as an information commission(er) or government department, should have an obligation to present a consolidated report to the legislature on implementation of the law.

Annex I

Information to be proactively published: at national level and by institutions

I. National Level Publication of Information and Data

At the national level, all the following information should be available, either on a centralised website or data portal, or on the website of the relevant ministry. For key information, the data should be collected from all relevant public bodies and private bodies performing public functions and published centrally to ensure that it is easily findable and accessible for the public.

1. National Laws, and draft legislation

- All national laws and statutes available online, in consolidated versions as in force along with history of modifications.
- Draft laws prepared by administration as well as those being considered by the national parliament, along with details of timeframes, opportunities for comment, structured participation processes.

2. Government Budget & Spending

- National government budget with planned expenditure for the upcoming year
- Income, included detailed tax income data
- Updated budget with actual expenditure
- Expenditure reports, detailed, regularly updated, and available for previous years
- Audit reports and evaluations (all historic copies must be available)

3. Judicial Information

- Database of court decisions
- Data on civil, criminal, and administrative court processes, including on timeframes and on outcomes

4. Election Data

- Election Results
- Results by constituency / district for all major national electoral contests.

5. National Statistics

- Key national statistics on demographic and economic indicators such as Gross Domestic Product (GDP), or unemployment and population statistics.
- Census data
- Trade data: Details of the import and export of specific commodities and/or balance of trade data against other countries.
- All SDG datasets not covered by other categories here, gathered in one place, in an open data, easily accessible format.

6. Health Sector performance

- Statistics generated from administrative data that could be used to indicate performance of specific services, or the healthcare system as a whole. Including, mortality and survival rates; levels of vaccination; levels of access to health care; health care outcomes for particular groups; and waiting times for medical treatment.

7. Education

- Data on performance of education system; Test scores for pupils in national examinations (not only rates of approvals); School attendance rates; Teacher attendance rates.

8. Crime Statistics

- Statistics on levels and nature of crime, with high granularity on types of crime and geographical data, which should include, specifically:
 - o Gender crimes data
 - o Attacks on freedom of expression: data including attacks on and killing of journalists, human rights defenders, and environmental activists

9. Media and Internet

- Data on radio and broadcast licences issued along with all official data on viewing figures
- Data on Transparency of Media Ownership (all media outlets)
- Data on state funded advertising
- Data on levels of internet access (disaggregated by income, gender, age, race, ethnicity, migratory status, disability, geographic location, etc.)

10. Environmental and Climate Change data

- Environmental Impact Assessments
- Emissions data
- Air quality data: data about the daily mean concentration of air pollutants, especially those potentially harmful to human health.
- Water Quality: data on the quality of designated drinking water sources and environmental water sources.
- Biodiversity monitoring data

11. Migration

- Data on immigration and emigration
- Data on integration, employment, and well-being of migrants

12. National Geo-Spatial Data

- A geographical map of the country including national traffic routes, stretches of water, and markings of heights. The map must at least be provided at a scale of 1:250,000 (1 cm = 2.5km).

- Database of postcodes/zipcodes and the corresponding spatial locations in terms of a latitude and a longitude.
- Data on administrative units or areas defined for the purpose of administration by a (local) government.

13. Land Ownership

- Land ownership data (cadastre): Map of lands with parcel layer that displays boundaries in addition to a land registry with information tenure of all parcels of land.

14. Transport Data

- Transport data with details of when (times) and where (stops) public transport services, such as buses and rail services, are expected to operate.

15. Public Procurement

- Detailed information on public procurement processes, criteria, number of participants, amounts tendered, and outcomes of decision-making on tender applications with details of the bid and the awardee
- Information regarding minor contracts (those issued with no tender process) with the names of contractors, values of contract, details of work to be performed
- Information on other agreements signed, with details on parties, purpose, value, term of duration, and amendments
- Copies of contracts and agreements, interim reports, modifications of contracts, interim and final evaluations, and reports on completion of contracts, audit reports.

16. Company Register

- Database with all registered companies along with details of owners and annual accounts and reports from each registered company.
Beneficial ownership register, with details of all owners including the ultimate, beneficial, owners of every company.

17. Weather Forecast

- 3-day forecasts of temperature, precipitation and wind.
- All historical weather data as collected by the national meteorological agency.

18. Right of Access to Information

- Annual report on compliance with the right of access to information, with data on requests, including timeframes for responding, exceptions applied for refusals and all other relevant data.
- Details of all appeals against refusals, including the decision of the independent oversight body (Information Commissioner, Transparency Council, Ombudsman's Office, or other body as relevant).

- Details of all court cases relating to the right of access to information (constitution and/or law), with the decisions of each court in the appeal process collected in one place.

II. Institutional Level Publication of Information and Data

This section sets out the information – including documents and data – that should be available on all public bodies and other bodies performing public functions and/or operating primarily with public funds. The data should be made available on websites that permit it to be easily accessed institution by institution. This can be achieved a central, searchable website, and/or on the websites of each body.

1. Institutional Information

- Legal basis of the institution
- Internal regulations
- Description of functions and powers

2. Organisational Information

- Organisational structure, which should include key personnel, such as the head of the body and each department
- Property (real estate) held by the public body

3. Operational Information

- Strategy and plans (annual and multi-annual)
- Programmes with specific goals, activities
- Evaluations of compliance and results

4. Policies, Acts, Decisions

- Decisions, regulations, resolutions, agreements, other formal acts, particularly those that directly affect the public and/or constitute an interpretation of law or have legal effects.

5. Budget Information

- Budget – planned and actual
- Income from all other sources (services, property, international organisations, etc.)
- Expenditure reports, detailed, regularly updated, and available for previous years
- Audit reports and evaluations (all historic copies must be available)

6. Public Procurement and Contracts

- By institution if not in a centralised database:
- Detailed information on public procurement processes, criteria, number of participants, amounts tendered, and outcomes of decision-making on tender applications with details of the bid and the awardee

- Information regarding minor contracts (those issued with no tender process) with the names of contractors, values of contract, details of work to be performed
- Information on other agreements signed, with details on parties, purpose, value, term of duration, and amendments
- Copies of contracts and agreements, interim reports, modifications of contracts, interim and final evaluations, and reports on completion of contracts, audit reports.

7. Grants and Subsidies

- Information on the beneficiaries of grants and subsidies, the objectives, amounts and reports on implementation and evaluation

8. Expenditure on Travel, Missions, Entertainment

- Travel expenses (transport, accommodation, meals, entertainment, other) of all senior and mid-level public officials
- Summary of expenditure of all other public officials on
- Meetings, events, and entertainment expenditure

9. Public Officials

- Names of senior personnel and their responsibilities along with their profiles, career information
- Salaries of all ministers, elected officials, senior public officials (including politically appointed advisors), judges, directors of publicly run private companies, etc.
- Salary scales by posts for all other officials
- Assets declarations and conflict of interest declarations of all ministers, elected officials, senior public officials (including politically appointed advisors), judges, directors of publicly run private companies, etc.

10. Open Meetings

- Information on meetings including which are open meetings and how to attend these meetings;

11. Decision-Making & Public Participation

- Copies of draft policies, decisions, and regulations along with evidentiary reports and impact assessments being used in the decision-making process, along with the time lines and decision-making moments, so as to permit public comment
- Information on how to participate in structured consultation processes and, after each process, a report on how the public input was taken into consideration

12. Interest Groups & Lobby Transparency

- The agendas of all senior public officials
- Minutes of all meetings held with lobbyists and other interest groups
- Institutional / national lobby register

13. Public Services, Complaints, Whistleblowers

- Descriptions of services offered to the public, guidance, copies of forms, information on fees and deadlines;
- Contact information for public, including citizen support/information service
- Information on how to make formal complaints about the body, including institutional level mechanism and/or contact information of a relevant ombudsman's office or similar

14. Datasets & Statistics

- Datasets and statistics gathered by the body should be indicated on the website of the body, and either available for download or with links to the relevant open data portal

15. Publications

- Information on publications issued, including whether publications are free of charge or the price if for sale

16. Transparency & the Right to Information

- Information on the right of access to information and how to request information, including contact information for the responsible person in each public body
- Publication of requests received, information requested, appeals and outcomes