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The Austrian Draft Freedom of Information Law:

Essential recommendations for meeting international standards

Access Info Europe and the International Press Institute(IPI) welcome the initiative of the Austrian government to reform the current legal framework governing the right of access to information. This reform includes not only the development of a new access to information law (“Informationsfreiheitsgesetz”), but also changes to the Austrian Constitution, which until now has severely restricted access to information held by Austrian public bodies.

On a positive note, the draft Austrian access to information law applies to all individuals (not just Austrian citizens), extends tostate-owned companies, and includes a provision, albeit basic, directing public bodies to proactively publish information of general interest.Access Info and IPI also welcome a provision that allows for the submission of requests in “any technically possible and provided manner”, which brings Austria into the 21st century.

However, there are many aspects of the law that fall seriously short of international standards. As it stands, the current draft would not permit Austria to ratify the Council of Europe Convention on Access to Official Documents.

Access Info and IPI recommend that Austrian legislators make the following changes to the draft text so as to ensure that it meets international standards and to permit ratification of the Council of Europe Convention.

* In order to reflect international standards,Article 2 should define “information” to comprise *all* information held by public bodies, including correspondence and other documents that are not necessarily treatedas “official”.
* In order to ensure the fundamental nature of the right of access to information, changes should be made to the draft constitutional reformas well as Article 5 of Austria’s draft Informationsfreiheitsgesetz so that the right of access to information held by statutory associations of employers, employees and professionals (*gesetzliche berufliche Vertretungen*) is extended to everyone, not just themembers of such associations.
* The Austrian Informationsfreiheitsgesetz should only include exceptions that are in line with international standards such as the Council of Europe Convention on Access to Official Documents, and must ensure that the application of any exception is made following harm and public interest tests.
* Legislators should shortenthe two month time frame in which public bodies must answer requests for information to a maximum of 15 working days, in line with European norms. Regardless of the time frames permitted by law, Austrian public bodies should ensure they answer requests as soon as possible.
* The Austrian draft law must ensure that consultation with third parties does not negatively affect the maximum time limit for answering requests. Article 10 should also ensure that whilst third parties may be consulted, their opinions do not constitute an automatic veto over the provision of information, and that any limitation on the right of access may only be justified on the basis of the exceptions set out in the law,subject to a harm test and public interest test.
* Article 11.2, which enables the public administration not to issue rulings in cases in which access to information regarding legislative acts is denied, should be removed. All decisions by pubic bodies should be explained and justified and should granta right of appeal, which does not exist if a ruling is not issued.
* Austrian legislators should remove the requirement in Article 12.3 to pay €30 for a ruling that can be used to appeal refusals of access to information.
* The draft Informationsfreiheitsgesetz should ensure that companies using public money or those that carry out public functions are included in the law with the same expectations and obligations towards transparency as public institutions. In addition, the appeals mechanism regarding information denied by such companies should be modified. Applicants should not be forced to take initial appeals directly to the civil courts.
* The Austrian Informationsfreiheitsgesetz should include a provision that sets out the creation of an independent oversight body that can hear appeals and make binding decisions on public authorities to disclose information.
* Austria should ensure that the new Constitutional provision on access to information is consistent with international standards and European case law, and in particular with Article 10 of the European Convention on Human Rights.

The following analysis carried out by Access Info Europe of the draft Austrian Informationsfreiheitsgesetz outlines key problems with the text and makes recommendations in order to improve the proposed law.

**1. Definition of information**

International standards outline broad interpretations of what constitutes “information” held by public bodies. In Europe, the Council of Europe Convention on Access to Official Documents defines information as “*all information recorded in any form, drawn up or received and held by public authorities*”.

In breach of this standard, “information” as defined in Article 2 in of the draft Austrian access to information law restricts information to that which serves an official or company purpose. The definition also excludes drafts and notes, anunnecessary limitation that makes it harder for citizens to obtain the information necessary to participate in decision making and to hold their public officials to account.

Recommendation

* In order to reflect international standards,Article 2 should define “information” to comprise *all* information held by public bodies, including correspondence and other documents that are not necessarily treated as “official”.

**2. Right of access**

Access Info and IPI welcome the approach taken by the Austrian government in Article 5 of the current draft law to extend the right of access to information held by public authorities beyond just Austrian citizens. This is consistent with recognition of the fundamental nature of the right by bodies such as the European Court of Human Rights, the Inter-American Court of Human Rights, and the UN Human Rights Council. Most European access to information laws permit anyone to request information, regardless of citizenship.

The Council of Europe Convention is also clear on this point, stating that governments should ensure “the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities.”

Running counter to this general provisionof access for all, however,Article 5 limits access when it comes to information held by statutory associations of employers, employees and professionals (*gesetzliche berufliche Vertretungen*), to members of these associations. This undermines the principle of universality of access recognised earlier in Article 5, and is out of line with international standards.

Recommendation

* In order to ensure the fundamental nature of the right of access to information, changes should be made to the draft constitutional reform as well as Article 5 of Austria´s draft Informationsfreiheitsgesetz so that the right of access to information held by statutory associations of employers, employees and professionalsis extended to everyone, not just the members of such associations.

**3. Exceptions and harm and public interest tests**

The draft law at Article 6.1 sets out a series of interests that may be used as the basis for denying access to information. Whilst this list is broadly in line with the exceptions to be found in international standards and other freedom of information laws, there are ways in which the proposed provisions in Austria are out of line with these standards in ways that would place illegitimate limits on the right of access to information.

In the first instance, the law fails to establish a clear presumption of openness, whereby all information held by the state is public by nature unless disclosure would prejudice or harma legitimate protected interest (the ‘harm test’), and where there is no overriding public interest in its disclosure (the ‘public interest test’).

Furthermore, the draft law is out of line with international standards, such as the Council of Europe Convention on Access to Official Documents,because it establishes exceptions that are overly broad or not permitted under international law, as set out further below and in the table on page 7.

***3.1 International relations***

Protection of international relations from harm is a legitimate exception to the right of access to information but this provision in the draft Austrian law, Article 6(1)1 is structured in a problematic way.

In the first instance, rather than denying access on “foreign affairs and integration grounds”, there should be a clear test for where publication of the information would cause harm to foreign affairs, and this harm test must be balanced by a strong public interest test.

The second clause of Article 6(1)1 refers to the “directly applicable provisions of European Union or international law”. The Ministry for European and Foreign Affairs has suggested that the exemption be rephrased to state "on compelling foreign affairs and integration grounds, with special regards to international commitments of Austria on the basis of legal provisions of the European Union or other international law." In other words, that where an international treaty requires information to be kept secret, that treaty will override the Austrian Freedom of Information law. This clause is likely to lead to confusion as it conflates protection of international relations with supposed secrecy obligations international treaty obligations and EU law.

Such a clause is not typical of access to information laws and is not required by international standards. Indeed, although the Ministry has made a reference to the European Convention on Human Rights, there is nothing in that Convention that requires exceptions to be broader than the limited list set out in the Council of Europe Convention on Access to Official Documents.

Indeed, just as no other national law should override the limited exceptions of the access to information law, similarly no international provision should threaten to undermine Austria’s protection of the right of access to information.Hence this clause should be removed from the list of exceptions.

***3.2 Decision-making exception***

International standards recognise that access to information in a timely manner in the early stages of decision making enables the engagement of members of the public in policy development and legislative processes and thus helps to ensure that the decisions taken best serve the wider public.

Article 6(1)5 of Austria’s draft transparency law, however, enables public authorities to restrict access to information without needing to justify how decision-making would be harmed if published.

Article 6(1)5 also anticipates in unacceptably broad protection for the activities of various institutions (the Federal President, the federal government, federal ministers, state secretaries, state governments or individual members thereof and state governors), as well as court proceedings, administrative processes, and the development of legislation. These are all provisions indicative of the current culture of government secrecy in Austria.

This article should be changed so that Austria can sign and ratify the Council of Europe Convention which onlyallowsfor “the deliberations within or between public authorities concerning the examination of a matter” to be protected against disclosure, but only after the application of harm and public interest tests.

***3.3 Economic interests of institutions***

There is always a clear public interest in (to ensure accountability and allow for scrutiny) how public money is spent. It is therefore problematic and completely out of line with international standards for Article 6(1)6 of the draft to allow public bodies to withhold information based on the economic or financial interest of public institutions;the national, state or local authorities; or statutory associations of employers, employees and professionals. There should be a general presumption that all matters relating to the spending or management of public funds should be public. It should also be made clear that public bodies do not have the same commercial interests as private companies, and that a higher standard of transparency and participation applies. Hence, this exception should be removed from the draft law.

***3.4 Intellectual property***

It is also out of line with international standards to restrict access to information to protect intellectual property as currently stipulated in Article 6(1)7.c of the Austrian draft law. The Council of Europe makes clear that the protection of intellectual property does not establish an exception to access since information held by public bodies is public by nature (although intellectual property should, of course, be considered when contemplating reuse of the information obtained). The Explanatory Memorandum to the Convention states, at Paragraph 19, that:

*As regards theuseofinformationreceived,whichisnotregulatedintheConvention,generallyrequestorsarefreetousetheinformationforanylawfulpurpose. This includes disseminating the information and, for example, publishingit.Such use may for example be determined by laws such as those regulating intellectual property …*

This position is also supported by the advice of the UK Information Commissioner:

*at first it may appear thatthere is a conflict between copyright and the principle thatdisclosures under FOIA are free from conditions and are to theworld at large. But it is important to recognise that norestrictions are placed on the use of the information in order tofacilitate its disclosure under FOIA…althoughcopyright may place some restriction on the dissemination ofthe information by the original recipient…* (https://ico.org.uk/media/for-organisations/documents/1150/mintellectual\_property\_rights\_and\_disclosures\_under\_the\_foia.pdf)

***3.5 Other laws overriding access to information***

International standards establish that access to information legislation prevails over other laws that outline frameworks for access or restriction to information. Article 6(1)8 in the Austrian draft law is therefore out of line with international standards because it permits any other law that defines theinterests which may be used as the basis for keeping information secret to override the Informationsfreiheitsgesetz.Exceptions outlined in national access to information laws should provide adequate protection for information that should, at any point in time, remain out of the public domain.

***3.6 Harm and public interest tests***

The draft law failsto set out a clear harm test for considering exceptions (phrases such as “in the interests of” do not meet the international standard of requiring that there be a foreseeable and likely harm to the protected interest). This provision should be modified at every instance to ensure that an exception can only be invoked if there is a likely and foreseeable harm to the protected interest.

Furthermore, the public interest override is so weaklyworded that it would make it impossible for Austria to sign and ratify the Council of Europe Convention on Access to Official Documents.

Recommendation

* The Austrian Informationsfreiheitsgesetz should only include exceptions that are in line with international standards such as the Council of Europe Convention on Access to Official Documents, and must ensure that the application of any exception is made following harm and public interest tests.

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| --- | --- | --- | --- |
| **Exception permitted by Council of Europe Convention** | **Related exception in Article 6 of Austrian Informationsfreiheitsgesetz** | **Harm test** | **Public interest test** |
| national security | 2. in the interest of national security 3. in the interest of comprehensive national defence | None | Exists |
| international relations | 1. on compelling foreign affairs and integration grounds, in particular in relation to directly applicable provisions of European Union or international law | None | Exists |
| public health and safety | 4. in the interest of the preservation of public tranquillity, order, and safety | None | Exists |
| the prevention, investigation and prosecution of legal wrongs | 5. in the interest of the unimpaired preparation of a decision, in particular  b) in the interest of an administrative or court procedure or the preparation of an administrative or court ruling, examination or other activity of an administrative body or court, in particular for the protection of rules on confidentiality or public participation | None | Exists |
| privacy | 7. in the prevailing justified interest of another, in particular  b) for the protection of the fundamental right to data protection (Art. 1 of the Data Protection Act 2000) | Exists | Exists |
| legitimate commercial and other economic interests | 7. in the prevailing justified interest of another, in particular  a) for the protection of professional, trade, or company secrets | Exists | Exists |
| management of the economy | - | - | - |
| fair administration of justice and legal advice privilege | 5. in the interest of the unimpaired preparation of a decision, in particular  b) in the interest of an administrative or court procedure or the preparation of an administrative or court ruling, examination or other activity of an administrative body or court, in particular for the protection of rules on confidentiality or public participation | -None | -Exists |
| conservation of the environment | - | - | - |
| legitimate policy making and other operations of public authorities | 5. in the interest of the unimpaired preparation of a decision, in particular  a) as relates to actions of the Federal President, federal government, federal ministers, state secretaries, state governments or individual members thereof and state governors  c) in the interest of legislation and of the involvement of the National Council and the Federal Council (or state parliaments) in the activities of the executive | None | Exists |
| NOT IN COE CONVENTION | 6. in the economic or financial interest of the institutions, national or local authorities or statutory associations of employers, employees and professionals according to Art. 1 | None | Exists |
| NOT IN COE CONVENTION | 7. in the prevailing justified interest of another, in particular  c) for the protection of intellectual property or | Exists | Exists |
| NOT IN COE CONVENTION | 8. for the protection of other public, equally important interests as provided by law | Exists | Exists |

**4. Timelimits**

It is important that access to information legislation establish reasonable timeframes so thatcitizens can receive information in time to participate effectively in decision-making processes. Swift processing by public authorities is particularly important for journalists, who are often writing about time-sensitive matters and upon whose coverage the public often depends. The Council of Europe Convention supports this need by requiring that requests be dealt with “promptly” and answered “as soon as possible”.

Most European countries, as well as the EU,have maximum time limits of 15 or 20 working days. Authorities in a number of European countries, such as Finland, Denmark, and Portugal must answer requests in 10 working days, whilst Estonia has the shortest time limit of five working days.

The Austrian government’s proposal to set a maximum time limit of 16 weeks (eight weeks, plus an eight week extension – not to mention a further eight weeks to issue a ruling) to answer requests is significantly out of line with common practice in Europe. Those exercising their fundamental right of access to information should not be burdened by lengthy time limits that do little to encourage arapid response.

Recommendation

* The draft legislation should shorten the time frame in which public bodies must answer requests for information to a maximum of 15 working days, in line with European norms. Regardless of the time frames permitted by law, Austrian public bodies should ensure they answer requests as soon as possible.

**5. Third parties**

In limited cases, third parties may need to be consulted in order to ensure that public authorities are able to strike an adequatebalance between the right of access to information and other rights and interests, such as privacy and commercial confidentiality.

Whilst it is therefore appropriate that the Austrian draft law contains a provision (Art. 10) enabling public authorities to carry out such a consultation, the law must ensure that this process is not carried out to the detriment of the requester by indefinitely delaying the answer to a request.

The provision must also make clear that third parties do not have a veto over the publication of information, and that any reason not to publish information must be based on the exceptions laid out in the law and subject to both harm and public interest tests.

Recommendations:

* The Austrian draft law must ensure that consultation with third parties does not negatively affect the maximum time limit for answering requests.
* Article 10 must also ensure that whilst third parties may be consulted, their opinions do not constitute an automatic veto over the provision of information, and that any limitation on the right of access may only be justified on the basis of the exceptions set out in the law,subject to a harm test and public interest test.

**6. Issuing Rulings**

As in any state subject to the rule of law, citizens should be given the opportunity to appeal decisions made by public authorities. The Council of Europe Convention clearly establishes that “A public authority refusing access to an official document wholly or in part shall give the reasons for the refusal. The applicant has the right to receive on request a written justification from this public authority for the refusal.”

Article 11.2 of the Austrian draft Informationsfreiheitsgesetz, however,denies this option to persons who request information related to ongoing legislative processes, because public authorities are not required in suchcases to issue a rulingthat can then be challenged. This option leaves requesters without recourse in one of the most important areas of public life – the drafting of legislation – that, in turn, requires one of the highest levels of transparency in order to guarantee public participation and public debate.

Recommendation

* Article 11.2, which enables the public administration not to issue rulings in cases in which access to information regarding legislative acts is denied, should be removed. All decisions by pubic bodies should be appropriately motivated and justified and should grant a right of appeal, which does not exist if a ruling is not issued.

**7. Fees and Charges**

A review of European and global practices makes clear that demanding fees for processing information requests isnot the norm. Indeed, no country in Europe charges requesters for submitting requests. The Council of Europe Convention only permits a fee to be charged "for a copy of the official document, which should be reasonable and not exceed the actual costs of reproduction and delivery of the document.” In other words, only photocopying and postage charges are permitted.

Whilst the Austrian draft Informationsfreiheitsgesetz does not explicitly state that there is a cost or upfront fee in order to make a request for access to information, Article 12.3 does require requesters to pay €30 fee for the issuance of a ruling, i.e., the document explaining the decision that is needed to appeal refusals to disclose information. For persons who are denied access to information, it can be argued that there is no difference in practice between paying a fee up front and paying a fee for the issuance of a ruling. Persons should not have to pay to know why requests for access to information are denied, and should not have to pay for public authorities to properly evaluate their requests. This fee requirement makes it more difficult for Austria to meet basic international standards on access to information.

Recommendation

* The Austrian government should remove the requirement in Article 12.3 to pay €30 for an official Ruling that can be used to appeal refusals of access to information.

**8. Transparency of companies**

Whilst Access Info and IPI welcome the extension of the scope ofAustria’s draft access to information law in principle to publically-financed companies and those carrying out public functions, it is noted that Article 14 unduly excludes certain kinds of such companies (such as shareholder companies in which the government owns a controlling stake).

The UN Human Rights Committee recognises that it is important for the right of access to information to “include other entities when such entities are carrying out public functions”. Likewise, the Council of Europe Convention invites countries to include as subject to their access to information lawsall entities “insofar as they perform public functions or operate with public funds.”

Additionally, the draft text foresees that appeals to access to information decisions made by companies subject to the law are to be taken directly to the civil courts, rather than through the administrative courts, as is the case for appeals involving public bodies. This makes it very difficult for individuals to challenge decisions of companies to refuse access to information because of the high costs and risk involved in taking cases to civil court. This provision makes the creation of an independent oversight body even more necessary (see section 9).

Article 14 of the Austrian draft law should be adapted to international standards to ensure that publicallyfunded companies or those carrying out public functions are held to the same levels of scrutiny and obligation to transparency as public administrationsover the way public money is spent or public functions carried out. To this end,Article 14 should also require companies to give reasons when refusing access to information, and should ensure that individuals are able to appeal decisions via mechanisms other than the civil courts.

Recommendation

* The Austrian Informationsfreiheitsgesetz should ensure that companies using public money or those that carry out public functions are included in the law with the same expectations and obligations towards transparency as public institutions. In addition, the appeals mechanism regarding information denied by such companies should be modified. Applicants should not be forced to take initial appeals directly to the civil courts.

**9. An Oversight Body**

The draft Austrian access to information law does not establish an independent oversight body for the right of access to information, and only provides requesters with the option of recourse to the administrative courts.

An oversight body can serve to protect the right of access to information byhearing appeals against failures to respect the right to information, whether it be by a formal refusal, administrative silence or other issues that have arisen during the filing and processing of a request. A further important role of an independent oversight body is to promote the right of access to information, through activities such as educating public officials in their obligations and informing members of the public about their rights.

Independent oversight bodies in a range of countries, including France, Germany, Ireland, Slovenia, and the UK as well as the European Ombudsman at the EU level, have played an essential role in the implementation of access to information laws, ensuring consistent interpretation across all public bodies and ruling on appeals.

Another positive role of the oversight body is to gather information about the functioning of the right: statistics on the number of requests filed, the number answered, the time frames, and the nature of the problems that have arisen, all of which will in turn guide more effective implementation of the right in the future.

The Council of Europe Convention goes further by stating that “This review body must be able, either itself to overturn decisions taken by public authorities which it considers do not comply with the legislation in force, or to request the public authority in question to reconsider its position.”

Numerous countries across Europe already comply with this standard. Several countries (including Germany and the UK) combine the function of the data protection agency with an information commissioner. Another model is oversight of the right of access to information by the ombudsman, this being the prevailing Nordic model (Finland, Sweden, Norway), which is also that chosen by the European Union. Austria has both a data protection agency and an ombudsman’s office, and so is in the position to assign to one of these bodies the role of oversight of the access to information law. Alternatively it could opt for the model of France, Italy, Portugal and Spain,all of which have a separate Information Commission.

Recommendation

* The Austrian Informationsfreiheitsgesetz should include a provision that sets out the creation of an independent oversight body that can hear appeals and make binding decisions on public authorities to disclose information.

**10. Constitutional Provision**

The proposed constitutional reform by Austrian legislators is not in accordance with Article 10 of the European Convention on Human Rights (ECHR) which protects freedom of expression, and does not adequately protect the right of access to information in line with European and international standards. The provision does not guarantee clear harm tests or public interest tests, and some restrictions to the right of access to information in the proposed reform go beyond the exceptions in the standards recognised in the Council of Europe Conventionon Access to Official Documents.

In a series of cases (including one case against Austria) the European Court of Human Rights has ruled that Article 10 of the ECHR also protects the right of access to information. As a party to the Convention, Austria must ensure that its constitution is in line the requirement of Article 10 that any limitation on freedom of expression and information meet the three-part test, i.e., any limitation must be designed to protect legitimate interests, be established by law, and be necessary in a democratic society.

To this end, the future Constitutional provision on freedom of information, which replaces the previous secrecy provision, must include clearly-defined harm and public interest tests.

It is important also that the Constitutional provision does not establish restrictions on the right of access to information that go against international standards such as the Council of Europe Convention on Access to Official Documents. Constitutional provisions protecting the right of access to information exist in countries such as Finland, Sweden, Lithuania, and Norway,which have all signed and ratified the Convention on Access to Official Documents. Any exceptions to access to information as defined in law in these countries are restricted to those outlined in the Convention.

Recommendation

* Austria should ensure that the new Constitutional provision on access to information is consistent with international standards and European case law, and in particular with Article 10 of the European Convention on Human Rights.