



LEUPHANA
UNIVERSITÄT LÜNEBURG

Best Practices on Access to Environmental Information
International Symposium

Research Project
„Evaluation of the German Environmental Information Act“

Main Challenges in the German Legal Practice

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UfU
Unabhängiges Institut
für Umweltfragen



Bundesministerium
für Umwelt, Naturschutz,
Bau und Reaktorsicherheit



Within the joint project, the legal analysis of the UIG is combined with the empirical study and the political science research.

➤ **focus of the legal analysis: Federal UIG**

- in addition Länder-UIGs, IFG, VIG, etc.



➤ **goals of the legal analysis:**

- giving an overview on legal questions
- identifying and clarifying open questions
- suggesting legal solutions, including changes of the Act



➤ **basis of the legal analysis:**

- literature, in particular legal commentaries and journal articles
- jurisdiction
- official documents



➤ **concept of the legal analysis:**

- problem areas, following sections of UIG

Although freedom of information, in particular environmental information, is not in the centre of German legal discussion, plenty of literature and also jurisdiction exists, making a legal analysis reasonable.



The UIG cannot only be considered a procedural law, but must be seen as an Act as part of substantive environmental law.

➤ **purposes:**

- environmental awareness
- environmental protection
- public welfare

➤ **(former) basic critique**

- destruction of German system of administration law, based on principle of secrecy (M. Ibler)
- privatization of general welfare (Th. v. Danwitz)

➤ **(current) basic critique**

- no constitutional right of access as in Art 42 Charter of Fund. Rights
- no obligation of information procurement
- private bodies forgotten

Section 1 – Purpose of the Act and scope

(1) The purpose of this Act is to establish a legal **framework for freedom of access to environmental information** held by and for bodies subject to a disclosure obligation and for the dissemination of environmental information of that kind.

(2) This Act shall apply to **Federal bodies and Federal institutions** with legal personality under public law subject to a disclosure obligation.

The UIG only covers the federal sector – additionally, each of the 16 Länder has its own UIG. All in all, more than 30 acts providing access to public information exist, leading to a confusing legal situation.



In the 2012-Flachglas Torgau- and in the 2013-Deutsche Umwelthilfe-case, the ECJ ruled that the UIG had to be changed.

➤ **ECJ, Flachglas Torgau:**

- bodies or institutions acting in a legislative capacity as public authorities
 - may fall under an exemption
 - but only until legislative process in question has ended

➤ **Administration Court Berlin, 2017:**

- participation of federal ministries in EU-legislation procedure does not fall under exemption

➤ **ECJ, Deutsche Umwelthilfe:**

- ‘bodies or institutions acting in a ... legislative capacity’ may not be applied to ministries when they prepare and adopt normative regulations which are of a lower rank than a law

Section 2 – Definitions

(1) ‘**Bodies subject to a disclosure obligation**’

means 1. government and other bodies of the public administration. Bodies advising those institutions shall be treated as part of the institution that appoints their members. Bodies subject to a disclosure obligation shall not include (a) the supreme federal authorities when **and as long as** acting in the context of the legislative process ~~or issuing statutory instruments~~, and (b) federal courts unless they are performing public administrative functions;

In 2014, German legislation reacted and altered the UIG.



Which private bodies fall under the scope of the UIG remains an unsolved question.

- **private bodies having public functions or providing public services relating to the environment**
 - **ECJ 2013 “Fish Legal & Shirley”**
 - undertakings vested “with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law”
 - information must be related to the provision of public services
 - **German Federal Administrative Court 2013:**
 - planning and construction of railways by German Network Rail Company falls under definition of private bodies
 - wide interpretation of control requirement
- **further private bodies?**
 - energy companies?
 - ...?

Section 2 – Definitions
(1) ‘Bodies subject to a disclosure obligation’ means...
2. any natural or legal person governed by private law having public functions or providing public services relating to the environment, in particular services of general interest relating to the environment, under the control of the Federation or a legal person under public law supervised by the Federation.

The Aarhus Implementation Guide suggests „categories or lists made available to the public”. No such list exists so far.



The term „environmental information“ must be interpreted broadly.

- **German Federal Administrative Court 2017:**
 - direct and indirect effects on environment covered
- **exclusive character?**
 - Administration Court Oldenburg: yes
 - Higher Administration Court Lüneburg: no
- **agricultural subsidies?**
 - Administration Court Düsseldorf: no
 - Administration Court Cologne and others: yes
- **indoor air?**
 - Higher Administration Court Berlin: yes

All in all, the term „environmental information“ is quite clear and does not cause major legal questions.

Section 2 – Definitions

(3) ‘**Environmental information**’ means all information howsoever stored on

1. the state of the **elements of the environment**, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
2. **factors**, such as substances, energy, noise, radiation, waste of any kind, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in number 1 above; ...



The term „every person“ who is granted access to environmental information also requires a broad interpretation.

- **no right of access for state institutions**
 - access limited to citizen – public authority relationship

- **but: right of access for non-state legal persons of public law in their own right**
 - municipalities
 - universities
 - church congregations
 - public broadcasting institutions

- **without having to state a legal interest**
 - Administration Court Hamburg 2010: egoistic interests do not hinder right of access

- **right of correct information?**
 - German Government 2004: only right of access to existing information, no verification requirement

Section 3 – Right to access environmental information

(1) **Every person** shall have the right in accordance with this Act to freely access environmental information held by or for a body subject to a disclosure obligation as defined in section 2 subsection (1) **without having to state a legal interest**. This shall be without prejudice to other rights to access information.

No major legal problems exist regarding the right of access in principle .



However, the requirements regarding the mode of access cause legal problems.

- **substantially greater administrative burden**
 - only reason for granting access in mode different from applicant's wishes, not for denying access
- **no sanctions for noncompliance with deadlines**
 - but: action for failure to act may be brought before the Administration Court
- **involvement of third parties**
 - practically, deadlines cannot be met
 - no sufficient provisions in UIG

No solution exists for solving this problem.

Section 3 – Right to access environmental information

(2) Access may be granted through the provision of information, an opportunity to inspect the files or in some other manner. If a request seeks information in a specific form, this shall be made available in the form requested unless there are good reasons to provide it in a different form. For these purposes, a good reason shall be taken to include a **substantially greater administrative burden**. ...

(3) Where a right specified in subsection (1) exists, environmental information shall be made available to the applicant having regard to the timescale specified by that person and, at the latest, on the expiry of the period referred to in the second sentence number 1 or number 2 below. The period shall begin on receipt of the application by the body subject to the disclosure obligation holding the information and shall end

1. **after one month or**

2. if the volume and complexity of the information is such that the one-month period referred to in number 1 above cannot be complied with, **after two months**.



Section 4 UIG provides certain requirements for an information request.

- **no quantity restriction**
 - high amount of requested information does not make request unclear
 - no solution provided for cases in which high amount of requested information could paralyse administration

- **anonymous requests**
 - no identification requirements in UIG
 - request in representation of the public
 - at least address needed?

- **simple questions as UIG-requests?**
 - Not legal problem, but
 - problem of statistics

Section 4 – Request and procedure

(1) **On request**, environmental information shall be made available by a body subject to a disclosure obligation.

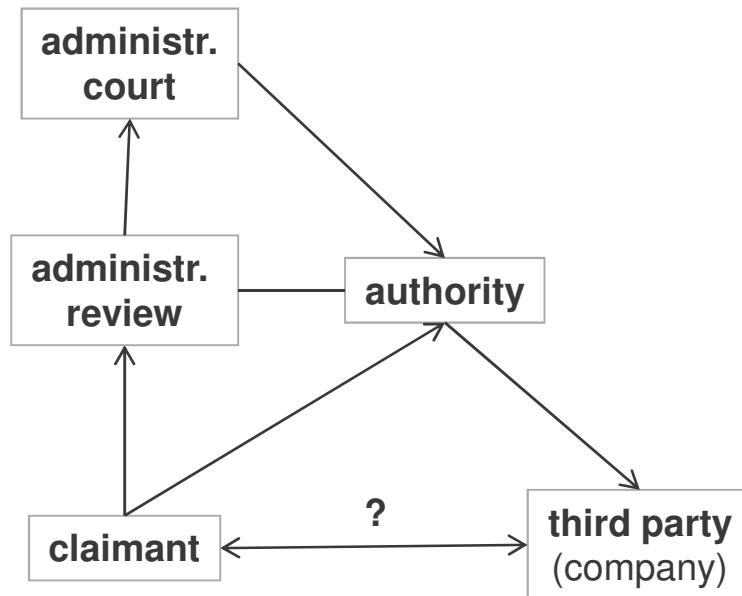
(2) The request **must make clear the environmental information** to which access is sought. If a request is too **unspecific**, the applicant shall be informed of this within one month and given the opportunity to specify the request. If the applicant thus specifies the request, the period within which the request must be answered shall start to run afresh. Persons seeking information **shall be assisted** in making and specifying their requests. ...

For guaranteeing free access to environmental information, requirements for the request must be kept low.



In cases with third parties involved, legal action can become complex.

- **in charge: administrative courts**
 - before: administrative review procedure
 - if private bodies in charge, specific review procedure



Section 6 – Legal redress

(1) Disputes arising out of this Act shall be heard by the **administrative courts**.

(2) In relation to decisions taken by the public administration as defined in section 2 subsection (1) number 1, also if the decision has been taken by a supreme federal authority, the **review** specified in sections 68 to 73 of the Code of Administrative Court Procedure³ shall be carried out.

(3) If an applicant takes the view that a body subject to a disclosure obligation as specified in section 2 subsection (1) number 2 has not satisfied a request in full, it may have that decision **reviewed** in accordance with subsection (4) below. No review of that kind shall be required for the purposes of bringing the action referred to in subsection (1) above. No action may be brought against the competent body specified in section 13 subsection (1).

In such cases, a specific in-camera procedure is required to prevent the claimant from getting access to the requested information during court proceedings.



Authorities shall take measures to facilitate access to information.

- **relationship to E-Government Act of 2013**
 - basic requirements for federal authorities to optimize procedures and to provide access to E-data (open data)
- **not in charge: information commissioner**
 - only responsible for IFG
 - no such institution exists regarding UIG
- **no explicit requirement for publishing guidelines**
 - Fed. Environmental Ministry: yes
 - other ministries: mostly non existent
- **liability for data-correctness?**
 - in principle: no

However, such requirements remain vague.

Section 7 – Support in obtaining access to environmental information

(1) Bodies subject to a disclosure obligation shall take **measures to make it easier to access the environmental information** held by and for that body. For those purposes, they shall work to-wards ensuring that environmental information held by or for them progressively becomes available in **electronic databases** or is stored in other formats accessible by electronic means.

(2) Bodies subject to a disclosure obligation shall facilitate access to information through **practical arrangements**, such as:

1. the designation of **information officers** or information points,
2. the publication of **registers** on the environmental information available,
3. the establishment of publicly accessible **information networks and databases** or
4. the publication of **information on the responsibilities** of authorities.

(3) The bodies subject to a disclosure obligation shall ensure as far as possible that all information compiled by such bodies or behalf thereof is **up to date, correct and comparable**.



Grounds for refusal are also the most common grounds for legal disputes.

- **adverse affects**
 - prognosis required
- **international relations:**
 - Fed. Admin. Court 2016: EU-relations included
 - disputed
- **public security:**
 - Adm. Court Mainz: list of certain industr. plants included – overruled
- **confidentiality:**
 - results of administrative discussions not included
- **course of justice:**
 - ECJ 1998: admin. appeal procedure not included
- **additional grounds for refusal?**
 - executive self responsibility?

Section 8 – Protection of public interests

(1) If disclosure of the information would **adversely affect:**

1. **international relations, defence** or important interests of **public security,**
2. the **confidentiality** of the proceedings of bodies subject to a disclosure obligation referred to in section 2 subsection (1),
3. the **course of justice**, the ability of any person to receive a fair trial or the ability to conduct an enquiry of a criminal, administrative or disciplinary nature;
4. the **state of the environment** and its elements referred to in section 2 subsection (3) number 1 or the protected interests specified in section 2 subsection (3) number 6, ...

They must be interpreted narrowly.



For most grounds for refusal, a public-interest test is obligatory.

➤ public interest test

- private interests of applicant basically not relevant, but public interest in disclosure
 - applicant as representative of general public
- Fed. Admin. Court 2009:
 - general public interest not sufficient, but
 - specific public interest required

➤ information on emissions

- only emissions from installations, or also indirect emissions, i.e. from pesticides?
- ECJ 2016:
 - counter-exception – wide interpretation required
 - pesticides included

Section 8 – Protection of public interests

(1) If disclosure of the information would

adversely affect...

the request **shall be refused**, unless the **public interest** in disclosure is greater. Access to environmental information on **emissions** shall not be refused on the grounds referred to in numbers 2 and 4 above.

activity	emission?
direct or indirect output of substances et al.	yes
internal output within installations	Fed. Adm. Court: no
other sources such as pesticides	ECJ: yes
product-placing on the market	ECJ: no
placing on the market if products which are supposed to be put into the environment	ECJ: yes

Defining information on emissions remains a highly disputed legal topic.



Data protection, intellectual property rights and confidentiality of commercial or industrial information are often used as grounds for refusal.

- **protection of personal data and freedom of information complement each other**
 - see recital 154 of regulation (EU) 2016/679
 - only natural persons covered
 - substantial impact required
 - geo-data as personal data?

- **official documents do not fall under exemption for intel. property rights**
 - intel. property rights of publ. authorities?

- **confidentiality of commercial or industrial information are not defined by law**
 - legal persons of public law concerned?

- **tax information is secret**

Section 9 – Protection of other interests

(1) If

1. disclosure of the information would reveal **personal information** and this would have considerable adverse effect on the interests of the person concerned,
 2. **intellectual property rights**, in particular copyrights, would be infringed through the disclosure of environmental information or
 3. disclosure would undermine the **confidentiality of commercial or industrial information** or the information is protected according to the principle of **tax secrecy** or statistical confidentiality,
- the request shall be refused unless the persons concerned have given their consent or there is a greater public interest in disclosure.

Always: a public-interest test is required before disclosure is denied.



Before disclosing third-party information, specific procedure must be carried out.

➤ procedure:

- presumption that third-party interests are affected if information is marked as confidential
- on request by authority, third party shall substantiate confidential nature of information

➤ Higher Administration Court Berlin-Brandenburg 2018:

- no specific form required
- procedure must be transparent – third party must be informed about content of information request
- no requirement to disclose name and address of person requesting information
 - forbidden to do so?

Section 9 – Protection of other interests

(1) ...

Before a decision is taken to disclose the information specified in the first sentence numbers 1 and 3 above the **persons concerned shall be consulted**. The body subject to a disclosure obligation shall presume, as a rule, that the interests of a person as specified in the first sentence number 3 above are affected, if the information provided is **marked as confidential** commercial or industrial information. Where a body subject to a disclosure obligation so requires, persons whose interests are potentially affected shall **substantiate** the confidential nature of the commercial or industrial information supplied.

In practice, a company will always mark all kind of information as confidential.



In a media society, active dissemination of environmental information can be considered even more important than granting access on request.

- **further dissemination requirements** x
 - GeoZG (INSPIRE)
 - IFG
- **specific dissemination requirements in major emergencies**
- **missing:**
 - no individual right to active dissemination
 - unclear relationship to open-data regulations
 - no information-collection requirement
 - no sanctions in cases of non-compliance
 - website “Portal U” shut down in 2014

Section 10 seems no longer up to date.

Section 10 – Informing the public

(1) The bodies subject to a disclosure obligation shall **inform the public about the environment** to an appropriate extent and in an **active and systematic manner**. In this context, they shall disseminate environmental information which is relevant to their functions and which is held by and for them.

(2) The environmental information to be disseminated shall **include at least:**

1. texts of international treaties, Community legislation adopted by European Community institutions and provisions adopted by federal, state or municipal authorities on the environment or relating to it;
2. policies, plans and programmes relating to the environment;...

(3) Environmental information shall be disseminated in a manner that is **understandable and easily accessible** to the public. For these purposes, where available, electronic means of communication shall be used.

(4) The requirements to inform the public specified in subsections (1) and (2) above may be satisfied also by creating links to **Internet sites** where the environmental information to be disseminated can be found.



Charges may not have a prohibitive effect.

- **ECJ 1999:**
 - Authorities not allowed to charge all, in particular not indirect costs

- **Fed. Admin. Court 2000:**
 - balance between cost coverage and public interest in information disclosure

- **Fed. Fee Act not applicable**

- **in practice:**
 - Fed. Level, esp. fed. Env. Ministry: no charges
 - Länder and municipal level: wide range

There are next to no lawsuits regarding fees for disclosing env. Information.

Section 12 – Charges

(1) Charges (**fees and expenses**) shall be levied for the **provision of information** in accordance with this Act. This shall not apply to the provision of **oral information and simple written information, the opportunity to consult environmental information on site**, the measures and arrangements specified in section 7 subsections (1) and (2) and the information provided to the public specified in sections 10 and 11.

(2) Fees shall be set at levels, having regard also to the **administrative burden involved**, such that the **effective exercise of the right to access information** set out in section 3 subsection (1) is ensured. ...

activity	fee
disclosure of simple information	no fee
disclosure of extensive written information	up to 250 €
extraordinary cases, in particular if third party involved	up to 500 €



The current UIG does not adequately reflect the technological and legal developments in the new media world.

- **The UIG is mainly based on the right of (passive) access to environmental information. the traditional German structure of the “administrative act” (Verwaltungsakt) has its advantages, however, new forms of communication are needed which are understood and applied by the media generation.**
- **The various Acts providing access to information should be incorporated in one comprehensive “Information Code”.**
- **(Better) guidelines are needed at all administrative levels.**
- **Freedom of Information Acts should be combined with the Sustainable Development Goals (SDGs)**

SDG 16.10: Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements

2018: The Working Group of the Parties: ...

- v. Welcomed the initiatives of the Parties and stakeholders to promote active dissemination of environmental information and **use of new technologies** and called on Parties, partner organizations and other stakeholders to undertake similar initiatives;...
- vii. Encouraged Parties and stakeholders to continue the submission of **case studies on electronic information tools** and population of the Aarhus Clearinghouse with the relevant resources



Looking forward to the discussion.



Thank you for your attention!

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Quelle: <http://www.leuphana.de/news/meldungen-forschung/ansicht/datum/2017/08/28/energieforum-der-wind-schreibt-keine-rechnungen.html>