

Austria¹

Franz MERLI
Professeur,
Ruprechts-Karls-Universität
Heidelberg

1. Introduction

The EC Council directive on the freedom of access to information on the environment² was implemented in Austria by a federal Statute on Environmental Information³ which came into force on July 1, 1993. The statute grants everyone a formal right of access to environmental information. Additionally, it contains a number of provisions designed to enable the public authorities to give general information on the environment. Finally, it creates a duty to inform on certain environmental issues for private party polluters. In this last respect the UIG also implemented the EC

¹ Abbreviations: BGBl. Bundesgesetzblatt (Federal Law Gazette; year/no.); BlgNR Beilagen zu den stenographischen Protokollen des Nationalrates (annexes to the stenographic protocols of the National Council - the first chamber of the Austrian parliament); EC European Community; EEC European Economic Community; LGBl. Landesgesetzblatt (*Land* Law Gazette; year/no.); OJ Official Journal of the E(E)C; UIG see note 3.

² 90/313/EEC, OJ No. L 158, 23.6.1990, p. 56.

³ Bundesgesetz über den Zugang zu Informationen über die Umwelt (Umweltinformationsgesetz - UIG), BGBl. 1993/495; in the following: UIG. For general information see B.-C.Funk, Das Umweltinformationsgesetz (UIG) und der freie Zugang zu Umweltdaten, in: *Recht der Umwelt* 1994, p. 3; B.Heinl, Das Umweltinformationsgesetz, in: *ecolex* 1994, p. 507; J.Hofmann, Das Recht auf Umweltinformation. Rechtslage in der EU und in Österreich (1995).

Council directive on the major-accident hazards of certain industrial activities.⁴

Of course, comparable information rights have existed in the Austrian legal system before the enactment of the statute. However, they are limited in various ways: some of them are granted only to certain persons such as the parties to administrative or court procedures. Some of them, e.g. information rights under the Data Protection Statute⁵ or the Security Police Statute⁶, are restricted to data concerning the person requesting them. Some rights entitle everyone, but extend only to certain environmental subject matters such as information in connection with environmental impact assessment procedures⁷ or on waste waters⁸ and access to public registers, e.g. on water quality and water rights, chemical substances or contaminated sites⁹. Finally, and most importantly for our purposes, there is a general constitutional duty of all administrative authorities to answer requests for information and a corresponding right of everyone to receive information on any subject from them. But this right does not include, inter alia, a claim to inspect files.¹⁰

⁴ 82/501/EEC, OJ No. L 230, 5.8.1982, p. 1, as last amended by directive 88/610/EEC, OJ No. L 336, 7.12.1988, p. 14.

⁵ Datenschutzgesetz, BGBl. 1978/565.

⁶ Sicherheitspolizeigesetz, BGBl. 1991/566.

⁷ Umweltverträglichkeitsprüfungsgesetz, BGBl. 1993/697.

⁸ § 33 Wasserrechtsgesetz, BGBl. 1959/215.

⁹ §§ 59, 124 et seq. Wasserrechtsgesetz, BGBl. 1959/ 215; §§12, 41 Chemikaliengesetz, BGBl. 1987/326; § 13 Altlastensanierungsgesetz, BGBl. 1989/299.

¹⁰ Under art. 20 para. 4 of the Austrian Constitution all executive organs have to answer requests for information within their sphere of competence unless there is a legal duty to secrecy as provided by art. 20 para. 3 of the constitution. The duty to secrecy extends to facts of which the administrative functionaries know exclusively from their official activity if the concealment of these facts is necessary in the interest of the public order and security, the national defense, the international relations, in the economic interest of a legal person of public law, for the preparation of a decision, or in the prevailing interest of a private party. The details of the right to information (e.g. the deadline for the response, various exceptions and restrictions) are regulated for their respective spheres of competence in special statutes of the federation and

The UIG leaves all these existing information rights untouched as far as they exceed claims under the UIG. If they grant less than the UIG, it prevails and thus completes them.

However, due to the distribution of legislative powers between the federation and the *Länder* under the Austrian constitution, the federal UIG may not cover all cases of environmental information.¹¹ Information within the sphere of competence of the *Länder* is subject to *Länder* regulation; for the delimitation of the spheres see infra IV (3). So far, only two *Länder* have enacted their own statutes on environmental information.¹² In the remaining *Länder*, requests for environmental information may be based on the mentioned statutes implementing the general constitutional duty to inform and, where they do not suffice, on the EC directive itself.¹³ The following remarks deal with the right to environmental information on the federal level.

the *Länder* (Auskunftspflichtgesetze; for the federation: BGBl. 1987/287); cf. B. Wieser, Auskunftspflichtgesetze mit Auszügen aus den Gesetzesmaterialien, Anmerkungen sowie der gesamten Judikatur (1990); B. Perthold-Stoitzner, Die Auskunftspflicht der Verwaltungsorgane. Eine systematische Darstellung des Auskunftsrechts nach Art 20 Abs 4 B-VG (1993). For a discussion of the relation of this general information right to the claims under the UIG see C. Bidner, Das Umweltinformationsgesetz - Zersplitterung des Auskunftsrechts, in: *ecolex* 1995, p. 135.

¹¹ Cf. Hofmann (note 3) p. 211 et seq. A proposition for a constitutional amendment to provide the basis for a comprehensive federal statute did not find the necessary support; cf. the reasoning of the draft bill to the UIG, 645 BlgNR, 18. Gesetzgebungsperiode, p. 9.

¹² Tirol: LGBl. 1996/3; Vorarlberg: LGBl. 1994/55.

¹³ Cf. R. Feik, Wo bleiben die Landesumweltinformationsgesetze? in: *Recht der Umwelt* 1994, p. 135 et seq.; Hofmann (note 3) p. 181 et seq., 307. For a (limited) direct application of the directive see also the German doctrine: e.g. H.-U. Erichsen, Das Recht auf freien Zugang zu Informationen über die Umwelt, in: *Neue Zeitschrift für Verwaltungsrecht* 1992, p. 409 et seq. (417); R. Röger, *Umweltinformationsgesetz*. Kommentar (1995) p. 22.

2. Information on the environment

Subject to the right to information are "environmental data" (*Umweltdaten*). § 2 UIG defines these as data (1) recorded on a data carrier and (2) concerning certain environmental issues.

(1) The first requirement limits the right of access to information already existing at the authority on paper and tapes, electronic data or data in any other recorded form as long as it is not just in the head of a functionary. Under the UIG, there is no duty of the authorities to engage in outside research or to procure information from other sources in order to satisfy requests. On the other hand, the origin of the information does not matter.

(2) The second requirement is framed very widely. Environmental data are all data concerning :

- the state of water, air, soil, fauna, flora, the natural living space, its change or nuisances by noise ;
- projects or activities which cause or may cause dangers for man or damage or may damage the environment, in particular by emissions, chemicals, waste, dangerous organisms or energy including ionizing rays, or by noise ;
- environmentally harmful qualities, quantities and effects of chemicals, waste, dangerous organisms, released energy including ionizing rays or noise ;
- existing or planned measures designed for the conservation, protection and improvement of the quality of water, air, soil, fauna, flora, the natural living space, for the reduction of noise and measures for the prevention and repair of damages, in particular by administrative acts and programs.

Curiously enough, but in accordance with the directive, information on human health is not included in this list. Therefore, such information may only be requested indirectly, i.e. by reference to other items such as living space or possibly harmful projects and activities.

3. Holder of the right to the environmental information

§ 4 subpara. 1 UIG vests the right of information in every person without reference to any legal title or interest. This includes legal persons under private law, but not state entities organized as legal persons under public law.¹⁴

4. Addressee of the right to environmental information

Information subject to the UIG is to be made accessible by (1) administrative organs (2) with environmental tasks (3) assigned to them by federal statutes (§ 3 subpara. 1 UIG).

(1) Administrative organs are all those not within the legislative and judicial branches. The definition includes not only authorities (i.e. organs with the "imperative power" to issue individual rulings and comparable acts) at all levels but also "other administrative organs" acting under the control of administrative authorities. This applies to organs and units such as auxiliary units, e.g. state examination and experiment stations, institutions for the distribution of financial subsidies and to private persons acting on behalf of the federal administration. Exempted are only organs of institutions which are organized as separate legal persons under private law (and therefore do not belong to the state administration), such as state-owned stock companies for road construction, and - by virtue of § 3 subpara. 1 no. 2 UIG - the organs of public security (but not the authorities they act for).

In the case of the "other administrative organs" the competent federal minister may provide by an ordinance that access to the information has to be given not by the organ itself but by the controlling authority (§ 3 subpara. 2 UIG). The Federal Police Directorates (*Bundespolizeidirektionen*) can refer requests to those organs from which their environmental information stems (§ 5 subpara. 5 UIG).

¹⁴ Hofmann (note 3) p. 219 et seq.

It should be noted that, unlike art. 2 para. b of the directive, the UIG does not make an exception for administrative authorities acting in a legislative or judicial capacity. Therefore, information concerning administrative rulemaking or the practice of the Independent Administrative Senates as instances of appeal in environmental information matters (see *infra* VII), as well as in cases of administrative penalties for offenses against federal environmental duties, is subject to the regime of the UIG.¹⁵

(2) The duty to provide information extends to administrative organs which are statutorily entrusted with environmental responsibilities. These responsibilities do not necessarily have to be their primary task. It is sufficient that the respective organs have to take into account, *inter alia*, environmental aspects within their other functions. Only organs without any specific environmental duties such as tax authorities are not covered.

(3) For constitutional reasons, the UIG, as a federal statute, applies only to administrative organs acting under federal law, i.e. fulfilling environmental responsibilities created by federal statutes.¹⁶ However, this does not generally exclude non-federal organs. Under the Austrian constitution, most federal statutes are implemented by organs of the *Länder* and the municipalities (*Gemeinden*). As far as this applies to a given federal environmental statute, the respective organs of the *Länder* and the municipalities are bound by the UIG as well. As most environmental law is governed by federal statutes, the remaining sphere which is not subject to the UIG is not very large. It comprises, *inter alia*, non-federal roads, zoning and building law, non-hazardous waste and nature conservation.

¹⁵ Cf. *infra* note 22.

¹⁶ For a list of examples and to the problem of an exact delimitation, see [Hofmann](#) (note 3) p. 226 et seq.

5. Access to environmental information and costs

The rules relating to the form of a request for environmental information are not very strict. A request may be brought in writing or any comparable form (e.g. fax or e-mail) and, if it concerns measured values of the day, also in person or by phone. If a request is not clear enough the applicant can be asked to give a written specification within two weeks (§ 5 subpara. 1 UIG). If the desired information is available, and unless there is a reason for secrecy (see *infra* VI), it must be given in the best possible form within everyone's grasp (§ 5 subpara. 2 UIG). On application, information shall be made accessible through the inspection of records or by handing out copies or printouts (§ 5 subpara. 3 UIG). Consequently, the mode of access is primarily a matter of choice for the applicant. The administrative organ may refuse a direct access to files or records only for secrecy reasons, and in such cases it must provide the requested information itself.¹⁷

The administrative organ must respond "without unnecessary delay" and at the latest within eight weeks; if there are special reasons for a delay, the applicant must be informed. A refusal is not form-bound but has to give the reasons (§ 5 subpara. 6 UIG).

Unlike other applications, requests for information under the UIG are not subject to a federal tax (§ 16 UIG); this does not apply, however, to the further applications which are necessary for legal protection (see *infra* VII). As a rule, neither may a charge be assessed for supplying the information. Exceptions include the price of publications and - subject to an ordinance yet to be enacted¹⁸ - the supply of information which requires high expenditure (§ 5 subpara. 4 UIG).

¹⁷ [Hofmann](#) (note 3) p. 241 et seq., 275.

¹⁸ To a draft version cf. [Hofmann](#) (note 3) p. 288 et seq.

6. Limits to the right to environmental information

Of course, the access to environmental information provided by the UIG is not unlimited. Apart from (1) general reasons for the refusal of a request, environmental data are, depending on their nature, subject either to (2) free or (3) restricted access.

(1) A request for information may be refused if it is manifestly abusive, e.g. when the applicant already has the requested data, or if it concerns internal communications which, made public, would render impossible or considerably more difficult a legal decision (§ 6 UIG). The latter restriction is somewhat unclear;¹⁹ despite its phrasing it may be designed to cover cases in which the publication of the information (e.g. on planned regulations of environmental use) could jeopardize not the enactment, but the effect of the decision in question (cf. art. 3 para. 2 last indent of the directive).

(2) Certain environmental data are accessible by everyone without any further conditions because they are either not personal or they do not deserve protection. These are data relating to :

- the state of water, air, soil, fauna, flora, the natural living space or nuisances by noise,
- the consumption of the natural resources water, air or land in an aggregated or statistical form,
- the emissions of substances or waste by an individual industrial installation in chronologically aggregated or statistical form, and
- the exceeding of legal limits to emissions (§ 3 subpara. 2 UIG).

(3) Other environmental data are subject to restricted access. They may not be made accessible if secrecy is required in the prevailing interest of the public security, the national defense or of third parties (§ 4 subpara. 3 UIG). In cases relating to such

data the administrative organ deciding on the request has to weigh the concerned interests: on one hand the mentioned secrecy interests, among them commercial and industrial confidentiality, and on the other hand the interests behind the information request, in particular the protection of health, the protection against persistent or severe damages of the environment and the protection of the rights and freedoms of other parties (§ 4 subpara. 4 UIG).²⁰

For the appreciation of commercial and industrial confidentiality, the UIG gives some guidelines: The corresponding interest shall prevail only if the access to the requested information would disclose directly or indirectly (by way of conclusions) a commercial or industrial secret and thus make possible a considerable economic loss of its holder. Minor economic losses and losses which arise exclusively as a result of diminished prestige where the public gets to know of an enterprise's environmentally harmful activities do not constitute an interest to secrecy worthy of protection (§ 4 subpara. 3 UIG).

In addition to that, there are some procedural rules: if a request for information possibly concerns confidential commercial or industrial data, the administrative organ has to hear their holders to the need of secrecy. If an enterprise wishes to keep secret certain data it must give the reasons for confidentiality but such a statement does not bind the administrative organ. After the weighing of interests, it may nevertheless decide to make the respective data accessible. In this case it has to inform the concerned persons (§ 7 UIG).

²⁰ For the relation of these provisions to the general rules on the protection of personal data under the Datenschutzgesetz (note 4), see Hofmann (note 3) p. 251 et seq.; R. Feik, Datenschutzrechtliche Überlegungen zum Umweltinformationsgesetz (UIG), in: Osterreichische Juristen-Zeitung 1995, p. 13.

¹⁹ Cf. Funk (note 3) p. 7.

7. Legal remedies

Under the Austrian legal system, informal acts and omissions of executive organs are, as a rule, not subject to legal remedies. Therefore the UIG provides that a person whose request for information was (fully or partially) refused or ignored may apply for a formal administrative act (*Bescheid*) which has to be served at the latest within six months under the general or special rules of administrative procedure applying to the respective administrative authority. If the request is made at an administrative unit not entitled to enact such acts, it has to be served by the competent control authority (§ 8 subpara. 1-3 UIG). Being a "*Bescheid*", the refusal must state its reasoning and information on the legal remedies applicable.

Appeals against such formal refusals are decided - again within six months - by the Independent Administrative Senate (*Unabhängiger Verwaltungssenat*) of the respective *Land* (§ 8 subpara. 4 UIG). These Senates are organized as executive authorities but they act as quasi-judicial bodies and in this function are not bound by anyone's instructions. A complaint to the Senate may also be filed by the applicant if the administrative authority fails to serve the formal act within the proper time, and by a third party such as the holder of a commercial or industrial secret who claims an infringement of his/her rights to data protection by the decision of the administrative organ to make data accessible (§ 8 subpara. 5 UIG). There are no special rules designed to ensure the protection of secret data during the appeal procedure but the general rules should suffice if applied in an appropriate way.²¹ The decisions of the Senate are subject to a review by the Administrative Court and - for alleged violations of constitutional rights - of the Constitutional Court.

Obviously, the Senates cannot supply the requested information as they do not have it.²² Neither can they undo access to information once given. What they can do, is to declare illegal the provided access or to repeal the formal denial of the administrative organ (if there is one) and to declare its duty to give the desired information. In the latter case, the administrative organ then has to supply the information or -in the case of a procedural mistake - make a new decision based on the opinion of the Senate.²³ Moreover, any declaration of illegality, be it separate or included in a repeal decision, can serve as a basis for a liability suit against the state for material damages.²⁴

8. General environmental information of the public

The state of the environment is the subject of periodical reports of the Austrian Central Statistics Authority.²⁵ In addition to that, a number of statutes on various aspects of the environment provide for an active informing of the public by the competent authorities. For instance, under the federal Statute on Ozone, the *Landeshauptmann* (head of government of a *Land*) has to inform the public and to give recommendations in cases of high concentrations of ozone; under the same statute, the federal government reports to the federal parliament on the reduction of substances leading to the emergence of ozone.²⁶ The most

²² Cf. the decision of the Independent Administrative Senate for Oberösterreich (UVS OÖ) of Nov.6, 1995, No. 590003/3/Le/La. The statement contained therein that the Senates are not administrative organs in the sense of the UIG is true in the light of the application that the Senate itself give the desired information held by another administrative organ; it is very doubtful, however, in its generality, since the Senate may very well hold other environmental data; see the text before note 15.

²³ Cf. the decisions of the Independent Administrative Senate for Oberösterreich (UVS OÖ) of Oct.7, 1994, No. 590000/3/Le/La and No. 590001/3/Gu/Atz; and of Feb.16, 1995, No. 590002/3/Kl/Rd.

²⁴ Hofmann (note 3) p. 239 et seq., 283.

²⁵ Österreichisches Statistisches Zentralamt (ed.), *Umwelt in Österreich. Fakten und Trends*.

²⁶ § 8 Ozongesetz, BGBl. 1992/210.

²¹ Cf. Hofmann (note 3) p. 281 et seq.

important official information on the environment of a general character is the - published - report on environment control which the Federal Minister of the Environment, Youth and Family has to deliver every other year to the parliament.²⁷ The UIG does not create new duties of this kind but it (1) improves the possibilities of official information by a number of measures and it (2) adds to the duties of the authorities duties of private party polluters to actively inform the public and the authorities.

(1) All administrative organs to which the UIG applies are authorized to publish environmental information of interest to the public unless it is subject to a duty of secrecy (§ 9 UIG). With the exception of the Federal Police Directorates, all these organs have to provide each other on request with environmental data (§ 11 UIG). Finally, the Federal Minister of the Environment, Youth and Family had to establish until January 1, 1995, a central environmental databank (*Umweltdatenkatalog*) which contains information on the existence, the quality and the extent of environmental data available at the various administrative organs to which the UIG applies (§ 10 subpara. 1 UIG).²⁸ In order to ensure that the information in this databank is up to date and complete, all these organs have to report on their data at regular intervals (§ 10 subpara. 3 UIG). The databank is expressly designed to serve to inform the public. Therefore it is accessible to everyone.²⁹ The data contained therein may be published as well (§ 10 subpara. 2 UIG).

²⁷ § 14 Umweltkontrollgesetz, BGBl. 1985/127.

²⁸ An Austrian-German treaty provides for a close cooperation with the German authorities and the establishment of a joint data bank. The respective activities are also part of the CORINE program of the EC and should facilitate the data exchange with, among others, the European Environment Agency (EEA), the Central European Environmental Data Facility (CEDAR) in Vienna and the Regional Environmental Center for Central and Eastern Europe (REC) in Budapest; cf. Hofmann (note 3) p. 293 et seq.

²⁹ Address: Umweltdatenkatalog beim Bundesministerium für Umwelt, Jugend und Familie, Stubenbastei 5, 1010 Wien, Phone 0222/51522-5239, Fax 0222/51522-7232.

(2) Anyone obliged under federal law to measure and document the emissions of his/her installation has to make accessible for the public in an appropriate way the results for the last month and the last year. For reasons of secrecy the information may be given for the respective polluting substances in kg per month/year. They can also be presented in a summarized version including the lowest and highest values measured within the respective period (§ 13 subpara. 1 UIG). The operator of an installation which was licensed under federal law must also inform the employee's council (*Betriebsrat*) of the environmental duties and conditions imposed by the license (§ 13 subpara. 2 UIG). In addition to that, the Federal Minister of the Environment, Youth and Family and the federal minister competent for the respective business may enact (but have not yet enacted) an ordinance calling for regular reports to the Ministry of the Environment covering further environmental data of certain industrial installations (§ 12 UIG). Finally, the UIG provides for special information duties in connection with major-accident hazards of certain industrial activities (§ 14 UIG together with another ordinance³⁰); these provisions implement the corresponding EC Council directive.³¹ The mentioned duties of private persons are sanctioned by administrative penalties; the highest possible fine is 200,000 Austrian Schillings³² (§ 15 UIG).

9. Conclusions

With the UIG, the Austrian federal legislator took a rather liberal approach to the right to environmental information. The UIG does not take advantage of all possibilities the directive provides in limiting access to information. On the other hand, a number of

³⁰ Störfallinformationsverordnung, BGBl. 1994/391.

³¹ See note 4.

³² This is equivalent to about 15,000 ECU.

shortcomings have been criticized.³³ The most important ones among them are the poor coordination of the rights under the UIG and other information rights; the splitting of the law into federal and *Länder* statutes; the failing implementation in some of the *Länder*; and the poor effectiveness of the legal remedies - for the applicant, as a result of the long duration of the respective procedures and for a concerned third party, due to the lack of preliminary measures impeding access to his/her data.

A first study on the practical impact of the UIG³⁴ shows that in November 1994, only 13 % of the population had heard of its existence. In 1994, there were no more than 156 information requests based on it; most minor enterprises did not know of their duties to make emission data available to the public; many major enterprises had not yet fulfilled these duties; at the time of the report, the Environmental Databank listed about 5,000 entries. On June 14, 1996, an inquiry of the author at the (rather comprehensive) computerized Legal Information System of the Federation (*Rechtsinformationssystem des Bundes - RIS*) produced only four decisions of the Independent Administrative Senates concerning the UIG ;³⁵ there are no decisions of the Administrative or Constitutional Courts yet.

However, the time is not yet ripe for a comprehensive evaluation. Changes of reality like those intended by the directive and the UIG cannot be produced overnight. From a mid-range perspective there is no reason why the UIG should not contribute to an improved protection of the environment.

³³ Cf. Hofmann (note 3) p. 209, 283, 285 et seq.; Feik (note 13); Bidner (note 10); and the separate vote of the deputy of the Green party, M.Langthaler, to the report of the parliamentary committee on the UIG bill, 905 BlgNR, 18.Gesetzgebungsperiode, p. 10.

³⁴ Report of the Federal Minister of the Environment, Youth and Family to the National Council, III-35 BlgNR, 18.Gesetzgebungsperiode (June 23, 1995); the most important results are presented in M.Kind, Umweltinformationsgesetz auf dem Prüfstand, in: Recht der Umwelt 1995, p. 123.

³⁵ See notes 22 and 23.

Adresse utile :

AUTRICHE : Bundesministerium für Umwelt, Radetzkystrasse,
2, A-1031 WIEN,
Tél. 222 711 58 /4220 ; Fax : 222 711 58/4226

LE DROIT A L'INFORMATION
EN MATIERE D'ENVIRONNEMENT
DANS LES PAYS DE L'UNION EUROPEENNE

*Etude de droit comparé de l'environnement
réalisée par :*

L'Association Européenne de Droit de l'Environnement

en collaboration avec le

Centre de Recherches Interdisciplinaires
de Droit de l'Environnement, de l'Aménagement
et de l'Urbanisme-CNRS

Ouvrage réalisé avec le concours
du Conseil Régional du Limousin

1997

PULIM