

# A Question to all participants:

Is access to documents of the public administration a human right?  
(Privacy respected)

Yes/No

Material: [http://wkeim.bplaced.net/files/human\\_right-access\\_information.pdf](http://wkeim.bplaced.net/files/human_right-access_information.pdf)  
<http://wkeim.bplaced.net/files/ATI-BSNF.html>

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

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

# First Baltic Sea NGO Forum 2001

Access to information is part of freedom of expression, together with an active citizenry, and thus one of the preconditions for ensuring a vibrant and well-informed democracy. **NGOs demand of the governments** to respect and comply with their obligations following national and **international standards**.

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

# Contence

- Access to Information, Openness, RTI, FOI, RTK
- History: International, Baltic Sea, quantitative evaluation
- Germany: Questions, NIS report
- Human Right: UN, Council of Europe
- History: Germany before 1997: proposals
- Laws in Germany 1998-2008
- Transition of International Treaties
- Court Decisions: International, Germany
- Freedom of Information Art. 5 Basic Law
- Players, Participants.
- Norway: Electronic Public Records
- What Can be Done? What to Do?
- When will these 5 länder follow?

# Expression Access to Information (ATI)

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

# International Organisations

- European Union

- Article 2 of the Treaty on European Union: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, ..."

- Council of Europe

- European Convention on Human Rights (ECHR)

- UN: International Covenant on Civil and Political Rights. (ICCPR)

# History: International

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

# Baltic Sea Region: Role Model





# Right to Information Law Rating: Baltic Sea

Country	Date	Total Rating
Serbia	2004	135
Denmark*	1970	66
Latvia	1998	65
Norway*	1970	64
Iceland*	1996	63
Germany*	2005	54

# Comparison: World - Germany

- 84 states with approx. 5,4 billion have better ATI laws than Germans (<http://rti-rating.org>)
- 115 states (<http://right2info.org/laws>) with 5,89 billion have either ATI law or constitutional provisions In 5 local states (länder) in Germany FOI is missing
- The UN Convention against Corruption is ratified of more than 158 states with more than 6,5 billion but not Germany.
- Germany did not ratify the Criminal Law Convention on Corruption, Transparency Parties (GRECO)

# Questions

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

# National Integrity Report D

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

# What is a Human Right?

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

# Access to Documents EU

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

# UN: Human Right ATI

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

# UN: ICCPR

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



# Council of Europe: ATI

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

# EctHR: ATI

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

# Constitutional and International Courts

- [Japan \(1969\)](#), [India \(1982\)](#) and [South-Korea \(1990\)](#):  
Access to Information precondition for freedom of opinion
- Inter American Court of Human Rights (IACHR) 25. Sep. 2006: [Claude v. Chile](#)
- European Court of Human Rights:
  - 11. April 2006: Akump v. Armenia, [Appl. no 11721/04](#)
  - 10. Juli 2006: Matky ./ Czech Republic, [Appl. No. 19101/03](#)
  - 14. September 2009: TÁRSASÁG A SZABADSÁGJOGOKÉRT ./ Hungary, ECtHR [Appl. No. 37374/05](#)
  - 26. May 2009: [Kenedi ./ Hungary](#), ECtHR Appl. No. 31475/05

# Proposals: Germany before 1997

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

# Civil Society

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

# Laws in Germany

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

# Transition of international Treaties

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

# Court Decisions Germany

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



# Keim ./ Germany

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

# Complains ICCPR

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

# Why is human right ATI not respected in Germany?

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

# Freedom of Information Art. 5 Basic Law

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

# Why resistance?

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

# Players, organisations

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

# Adoption of FOI laws

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

# OEP.no

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



# Human Rights Commissioner CoE

Report 11. Sep. 2007 on Germany:

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

# What has been done?

- approx. 3 dozen petitions about the right on a good administration
- Suggestion EU Directive FOI laws
- approx. 2 dozen FOI requests e. g. Stuttgart 21
- 4 constitutional complaints and 3 ECtHR complaints
- ICCPR Complaint to UN Human Rights Commission
- Germany did not follow BS NGO Forum rec.

# What to do?

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

# Before Baltic Sea NGO Forum 2001



# When will these 5 Länder follow?



# Last question

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

Yes/No

Material: <http://BSNF-ATI.tk>  
<http://home.broadpark.no/~wkeim/files/ATI-BSNF.html>