The Ambivalence of Freedom of Information in Environmental Law

— Public Participation, Transparency and the Administrative Process —[*] [**]

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Contents

[Abstract]

Since the creation of rights to free access to environmental information 25 years ago, European and German freedom of information law hasdeveloped into a sophisticated field of differentiated legislation and filigree jurisprudence. Nonetheless, the conceptual objectives of statutory entitlements remain colourful. In principle, there are two different paths to justify freedom of

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information in constitutional theory and legal doctrine. One concept stresses the democratic function, another the function to promote the rule of law. The democratic justification grounds in the idea that free information furthers deliberation of the citizens in a free society and enables political choice of the members of a body politic. This theoretical concept is coherently substantiated and in conformity with basic requirements of a democratic process, as long as information rights are equally vested in all citizens. Nevertheless, the democratic justification remains highly abstract and does not correspond to the social and administrative practice. A more practical approach refers to the function of freedom of information to put the administrative branch under public control and insofar support the rule of law.

Despite positive effects on the administrative process, freedom of information can also adverselyinfluence the democratic and administrative process. First, freedom of information can unhinge the informational limitations, under which public authorities are intentionally placed. The fine balance of public informational interests and individual freedom rights behind the statutory framework can be underrun if information spreads uncontrolled. Second, freedom of information can disturb the formalized formation of will within the institutions of representative democracy and the de-politicized administrative procedure, which are both constitutional values of crucial importance in a liberal democracy. Ruling as the result of collective freedom needs power to rule, and there is no free society with weak political institutions. Thus, it would be counterproductive to lopsidedly optimize the freedom of information without sufficient protection of the administrative and democratic-politic process.

Ⅰ. The Mechanics of Freedom of Information Law

German administrative law comprises a broad spectrum of statutes that guarantee free access to public information. On federal level, the Parliament enactedthe (general) Freedom of Information Act[1], the Environmental

Information Act[2], the Consumer Information Act[3] and the Geo-Data Act[4]. Amongst those rather incoherently drafted statutes, environmental law served as a spearhead and laboratory to develop general principles of freedom of information law. Some European countries can look back at a long-standing tradition of public access to administrative files of any kind, whereas German administrative law relied, for the longest period, on the principle of nondisclosur e.[5] Relatively narrow access to administrative records was, in principle, only granted to applicants with a specific legitimate interest or to parties in an administrative proceeding, as far as knowledge of the files is necessary to facilitate the effective exercise of procedural rights (Section 29 Administrative Procedure Act)[6].

Finally, European environmental law penetrated the armour of a distinct administrative culture of secrecy,when the (former) European Community (EC, now: European Union [EU])established freedom of information rights.[7]A quarter

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1) *Informationsfreiheitsgesetz (IFG)*, Act of 5 September 2005 (Federal Law Gazette [Bundesgesetzblatt - BGBl.] Part I, p. 2722), last amendment by Article 2 (6) of the Act of 7 August 2013 (BGBl I, p. 3154)

2) *Umweltinformationsgesetz (UIG),* Act of 27 October 2014 (BGBl. I p. 1643).

3) *Verbraucherinformationsgesetz (VIG*), Act of 17 Oktober 2012 (BGBl. I p. 2166, 2725), last amendment by statutory provisions of 7 August 2013 (BGBl. I p. 3154).

4) *Geodatenzugangsgesetz(GeoZG)*, Act of 10 Februar 2009 (BGBl. I p. 278), last amendment by statutory provisions of 7 November 2012.

5) Profound analysis: Bernhard Wegener, Der geheime Staat − Arkantradition und Informationsfreiheit in Deutschland (2006).

6) E. G. *Bundes-Verwaltungsverfahrensgesetz (VwVfG),* Federal Act of 23 Januar 2003 (BGBl. I p. 102), last amendment by Act of 25 Juli 2013 (BGBl. I p 2749). There is a Federal Administrative Procedure Act that applies − broadly speaking − to procedures conducted by federal authorities. Additionally, there are 16 state acts applying to procedures in state authorities, which are most administrative proceedings, as not even state law but also federal law is usually implemented and enforced by state authorities according to Article 83 of the Constitution (*Grundgesetz*).

7) See for the development e. g. Dirk Bünger, Deficits in EU and US Mandatory Environmental Information Disclosure: Legal, Comparative Legal and Economic Facets of Pollutant Release Inventories 57 et sequ. (2013); Benjamin W. Cramer, Freedom of Environmental Information (2011).

of a century ago, in 1990, a EC-directive obliged the EC Member States to guarantee free access to environmental information.[8]The directive was overhauled in 2003 and obtained its currently applicable version.[9]

The common structure of modern freedom of information law guarantees any applicant, at his or her request, access to information held by a public authority, without the applicant having to state an interest.[10] Thus, anyone can, within individual discretion, claim any information desired. To satisfy such a claim, the authority may furnish information, grant access to files or provide information in any other manner.[11]The competent authority can refuse an application to protect public interests or individual rights. According to the relevant statutory law, the authority refuses an application for access to information where disclosure of the information may have detrimental effects onhigher-ranking public interests, like for example international relations, military or homeland security, the course of current judicial proceedings, a person's entitlement to a fair trial or the pursuit of investigations into criminal, administrative or disciplinary offences.[12] Additionally, the authority refuses access to information if this is necessary to protect personal data, intellectual property, or business respectively trade secrets.[13] In a society vigorously demanding maximum transparency and at the same time optimal data protection, it is up to the courts

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8) Council Directive 90/313/EEC of 7 June 1990, on the freedom of access to information on the environment, Official Journal L 158, p. 56.

9) Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003on public access to environmental information and repealing Council Directive 90/313/EEC, Official Journal L 41, p. 26.

10) Sec. 3 (1) UIG; Sec. 1 (1) IFG.

11) Sec. 3 (2) UIG; Sec. 1 (2) IFG.

12) Sec. 8 (1) UIG;Sec. 3 (1) Nos. 1-2 IFG. In particular, pursuant to Sec. 3 (1) Nos. 4 IFG, the entitlement shall not apply where the information is subject to an obligation to observe secrecy or confidentiality by virtue of a statutory regulation or the general administrative regulation on the protection of classified information, or where the information is subject to professional or special official secrecy. The specifically environmental UIG does not contain such a provision.

13) Sec. 9 (1) UIG; Sec. 5-6 IFG.

to bridge these inherent contradictions by interest balancing.

Ⅱ. The Impact on the Administrative Process

In the first period after free access to environmental information was established, administrative authorities reacted rather reluctant to applications and often tried to avoid transparency. The strategies of blunt recalcitrance – like charging excessive fees or generously classifying documents without proper cause – utterly failed. The administrative courts tenaciously helped to enforce legitimate claims. After 20 years of experience with statutes granting freedom of information, the fear of transparency impairing administrative functions has (almost) disappeared and has given way to a more pragmatic handling of applications.Today, authorities fulfil legitimate claims with professional routine. Of course, the access to information remains an endless game of cat and mouse. Based on practical experience, established institutions always resist change. The administration did not eagerly embrace freedom of information. Instead, it has elaborated the art of access avoidance, dextrously using legal grounds for refusal. Nonetheless, freedom of informationclearly left its mark on administrative cultur e[14]. Freedom of information permanently reminds administrative authorities that they are not only decision-makers with public authority but also communicator s,[15] which have to explain and justify their decisions in the face of a broader

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[14] See for the meaning of administrative culture and its impact on administrative procedures Eberhard Schmidt-Aßmann, *Verwaltungsverfahren und Verwaltungskultur, in* 28 Neue Zeitschrift für Verwaltungsrecht40 et sequ. (2007).

[15] See for the communicative function of the administration Claudio Franzius, *Funktionen des Verwaltungsrechts im Steuerungsparadigma der neuen Verwaltungsrechtswissenschaft, in* 39 Die Verwaltung 335, 352 (2006); Timo Hebeler, Verwaltungspersonal41 et seq. (2008); Anna Bettina Kaiser,Die Kommunikation der Verwaltung144 et seq. (2009); Arno Scherzberg, *Risikosteuerung durch Verwaltungsrecht: Ermöglichung oder Begrenzung von Innovationen?, in* 63 VVDStRL 214, 226 (2004); Eberhard Schmidt-Aßmann, *Zur Funktion*

public.

On the other side, naïve enthusiasm for a civic control of the public administration lost ground to sceptic realism. To harness freedom of information rights effectively, one must look for the right information in the right place and, once access to information is granted, must properly evaluate the data obtained. Both is often a highly sophisticated task, in particular, regarding environmental information. In environmental cases relevant information is mostly technical, complex, and only comprehensible to recipients with sufficient expertise and experience in natural science and technology. As a result, freedom of information became professionalized. A general entitlement of everybody to participate turned de facto into an instrument of professional actors of the civil society to achieve their specific objectives.

Besides querulous claims (like prisoners writing randomly chosen applications out of boredom[16]), there are three groups that typically assert freedom of information claims: An important group are competitors that try to gather information to gain a competitive advantage. Most legal disputes therefore arise regarding business secrets. Furthermore, freedom of information is a tool of non-governmental organizations and journalists. Civil organizations, especially those on the field of environmental protection, can use information to influence administrative proceedings, organize protest, substantiate claims, and prepare lawsuits. Journalists − even though they can usually rely on a special body of press laws[17] − use the general statutes granting free access to information for

des allgemeinen Verwaltungsrechts, in 26 Die Verwaltung 137, 156 (1994).

16) Reportedly, this happened to the government of North Rhine-Westphalia. The ministry of the interior just complied with the applications, thus, administrative courts never had to decide whether the application was inadmissible for abuse of law.

17) Recently, the Federal Administrative Court denied claims of journalists against federal authorities based on press laws of the constituent states, as the states did not have the sufficient legislative competence to oblige the federal administration with information rights. Journalist had only a minimum right to those information which are necessary to obtain to fulfil the constitutional assignment of the press pursuant to the freedom of press (Article

investigation.

Ⅲ. The Objectives of Freedom of Information Law: Democratic Participation, Public Control, or Decentralized Enforcement?

Even though the freedom of information continued its triumph in the last two decades, the conceptual objectivesremain colourful. In principle, there are two different main paths to support freedom of information with reason in constitutional theory and legal doctrine. One concept stresses the democratic function, another the function to promote the rule of law through public control.

1. Freedom of Information and Democracy

Advocators usually praise strong freedom of information rights as a means to enhance transparency and democratic accountability.[18] The European Court

5 (2) (2) Basic Law). This claim could be overcome by conflicting interests of confidentiality or by state secret privilege. See Federal Administrative Court [*Bundesverwaltungsgericht*] judgment of 20 February 20, Case 6 A 2.12, BVerwGE 146, 56 (2013), No. 29; decision of20 July 2015, Case 6 VR 1.15, No. 8; Higher Administrative Court of North Rhine-Westphalia [*Oberverwaltungsgericht Nordrhein-Westfalen*], decisionof 19 September2014, Case 5 B 226/14, 67 Neue Juristische Wochenschrift 3387, 3388 (2014). In the result, journalists try to harness general – non-press-specific –information rights to obtain information based on federal law. My court (as court of appeals) has tried to integrate freedom of press in the general freedom of information law by interpreting it in the light of the basic right. See Higher Administrative Court of North Rhine-Westphalia, judgmentof 10 August 2015, Case 8 A 2410/13.

18) E. G. Felix Ekardt/Kirstin Schenderlein,*Gerichtlicher Kontrollumfang zwischen EU-Bürgerfreundlichkeit und nationaler Beschleunigungsgesetzgebung, in* 27 Neue Zeitschrift für Verwaltungsrecht1059, 1063 (2008); Andreas Fisahn, Demokratie und Öffentlichkeitsbeteiligung 331-338 (2002); Volker M. Haug, *„Partizipationsrecht" – Ein Plädoyer für eine eigene juristische Kategorie, in* 47 Die Verwaltung 221, 234-235 (2014); Gertrude Lübbe-Wolff, *Europäisches und nationales Verfassungsrecht, in* 60

of Justice apparently concurs with this position, referring to the objectives formulated in the recitals of EU freedom of information law[19]. An "increased openness" – the Court states – "enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system."[20] The Court stresses that transparency was particularly democratic as far as the legislative process itself is concerned. "Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights."[21]

a) Publicness and the Democratic Process

The underlying ratio of this approach is the idea of responsivity in the democratic process. The public can politicise transparent information and sanction (or threaten to sanction) alleged misconduct individually by protest[22] or democratically in the next election. In contrast, what remains unknown will hardly ever be a basis for rational choice of a body politic. Therefore, the European Court of Justice concludes: "The possibility for citizens to find out the

Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer 246, 278-280 (2001).

19) See Recital 2 of the Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Official Journal L 154, p. 43.

20) European Court of Justice, judgment of July 1, 2008, Joint Cases C-39/05 P and C-52/05 P, *Sweden and Turco/Council of the EU*, Official Journal 2008 I-4723, No. 45; affirmatively repeated in European Court of Justice, judgment of October 17, 2013, Case C-280/11 P, *Council of the EU/Access Info Europe*, No. 32; judgment of July 3, 2014, Case C-350/12 P, *Council of the EU/Sophie in 't Veld*, No. 53.

21) European Court of Justice, judgment of July 1, 2008, Joint Cases C-39/05 P and C-52/05 P, *Sweden and Turco/Council of the EU*, Official Journal 2008 I-4723, No. 46.

22) Protected by the basic rights of freedom of speech and freedom of assembly, Article 5(1)1 and 8(1) Basic Law.

considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights"[23]. Corresponding to the democratic function, "the right of public access to documents of the institutions is related to the democratic nature of those institutions".[24]

Hereby, the Court interlocks freedom of information with the epistemic foundations of democracy[25].This rather abstract approach is similar to the justification the German Federal Constitutional Court has provided with regard to the principle of publicness within the parliamentary process. "Decisions, which may have substantial effects, in principle, must follow a procedure, which provides the public with an opportunity to form and express an opinion, and which requires the representative body to discuss imperative and extent of measures in public debate."[26] These interpretations,offered by different Courts to corroborate the democratic function of transparency and publicness, are conclusive as far as the political − in particular: legislative − process is concerned. The underlying model is not necessarily connected with a theory of deliberative democracy, as public debate is a procedural concept that matches with democracy as open procedure as well as with (substantive) deliberation.

b) Democratic Equality and Participation

Nevertheless,the question how freedom of information can contribute to enhance democratic legitimacy deserves a closer look, in particular, as freedom of information is often qualified as a part of a general framework of public

23) European Court of Justice, judgment of October 17, 2013, Case C-280/11 P, *Council of the EU/Access Info Europe*, No. 33.

24) European Court of Justice, judgment of September 21, 2010, Joint Cases C-514/07 P, C-528/07 P and C-532/07 P (Sweden/API), Official Journal2010 I-8533, No. 68.

25) See generally Oliver Lepsius,*Die erkenntnistheoretische Notwendigkeit des Parlamentarismus*, in Demokratie und Freiheit 123 et sequ. (Bertschi, Martin et al., eds. 1999).

26) Federal Constitutional Court, judgment of February 28, 2012, 2 BvE 8/11, *Case concerning the Stability Mechanism Committee*, BVerfGE 130, 318, 344 (2012).

participation.[27] The integration of environmental information rights as a main pillar of a broader scheme of public participation (the two other pillars are procedural participation of the public and access to judicial review in environmental matters) is, in particular, strongly supported by the Arhus Convention[28].Thus, information rights are interwoven with the (demanding, sophisticated, and highly controversial) idea of participatory democracy[29]. And concepts of deliberative democracy –both procedural and substantive[30] – can easily qualify the freedom of information as a contribution to deliberation, of course. Indeed, the more recent jurisprudence of German courts tried to combine freedom of information with the communicative foundations of democracy.[31]

Nonetheless, whether freedom of information can achieve democratic objectives has to be tested against basic requirements of democratic ruling. Democracy is a mode of ruling based on equality and freedom of all members of a body politic, which legitimizesthe exercise of sovereign powers. Thus, democratic decisions must be subject to political sanctioning. Sovereign powers are limited on a temporary basis as each current government is empowered only for a period of time, and the people has the right to remove it from office by

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27) See Felix Ekardt, Information, Partizipation, Rechtsschutz: Prozeduralisierung von Gerechtigkeit und Steuerung in der Europäischen Union (2010); Sabine Schlacke/Christian Schrader/Thomas Bunge, Informationsrechte, Öffentlichkeitsbeteiligung und Rechtsschutz im Umweltrecht (2009).

28) United Nations Economic Commission for Europe (UNECE) Convention of 25 June 1998 on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.Concise analysis Lothar Michael, *Gibt es eine europäische Umweltöffentlichkeit?, in* Liber Amicorum Peter Häberle435 440-443 (Alexander Blankenagel,Ingolf Pernice/Helmuth Schulze-Fielitz, eds., 2004).

29) Benjamin R. Barber, Strong Democracy: Participatory Politics for a New Age(2004); Robert A. Dahl, Democracy and its Critics225 et seq. (1989);Joan Font, Participatory Democracy in Southern Europe(2014); Joseph F. Zimmermann, Participatory Democracy(1986).

30) See for that Dahl (above, note 29), p. 163-175

31) See Federal Administrative Court [*Bundesverwaltungsgericht*] judgment of 20 February 20, Case 6 A 2.12, BVerwGE 146, 56 (2013), No. 27; judgment of 25 March 2015, Case 6 C 12.14, Nos. 26, 30; Higher Administrative Court of North Rhine-Westphalia, judgementof 10 August 2015, Case 8 A 2410/13.

free elections. Beyond these elementary requirements, democracy is open to different concepts how to establish responsivity between sovereign decision-making on the one hand and the unregulated formation of will of the people on the other hand.

The broader concept of participation wants to address and mobilizethe civil society to influence the administrative process. Participation, in fact, practically depends on individuals with certain private objectives and on highly organized parts of the society. Examples for both groups are the neighbour who wants to proceed against an industrial plantor the nongovernmental organization, which tries to promote particular objectives due to its environmentalist charter. Neither individuals nor nongovernmental organizations represent the affected body politic; and neither of them is publicly accountable. Both private individuals and nongovernmental organizations just exercise their political freedom rights. If the law privileges nongovernmental organizations, as it does with regard to certain rights to participate in administrative procedures and to file lawsuits,[32] it creates inequalities, which may be justified but do not promote democracy. Therefore, public participation of the public concerned as such cannot generate democratic legitimacy.[33]

However, the law of freedom of information differs significantly from public

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32) See Sec. 63-64 of the Federal Nature Conservation (*Bundesnaturschutzgesetz*) Act of 29 July 2009 (BGBl. I S. 2542), last amendment by statute of 7 August 2013 (BGBl. I S. 3154); Act on Legal Remedies in Environmental Issues (*Umweltrechtsbehelfsgesetz*) of 8 April 2013 (BGBl. I S. 753), last amendment by statute of 7 August 2013 (BGBl. I S. 3154).

33) See Klaus Ferdinand Gärditz, *Angemessene Öffentlichkeitsbeteiligung bei Infrastrukturplanungen als Herausforderung an das Verwaltungsrecht im demokratischen Rechtsstaat, in*Gewerbe-Archiv 273 -275 (2011); Thomas Mann, *Großvorhaben als Herausforderung für den demokratischen Rechtsstaat, in* 72 Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer 544, 561 et sequ. (2013); Fritz Ossenbühl, Welche normativen Anforderungen stellt der Verfassungsgrundsatz des demokratischen Rechtsstaates an die planende staatliche Tätigkeit?, 125-126 (1974); Walther Schmitt Glaeser, *Partizipation an Verwaltungsentscheidungen, in* 31 Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer 179, 220 (1973).

participation in administrative procedures. One particularity of freedom of information law is that it guarantees unconditional rights to *anyone*, not only a 'public concerned' or privileged NGOs. The Directive 2003/4/EC as well as the German Environmental Information Act guarantees a right of access to environmental information held by or for public authorities "to any applicant at his request and without his having to state an interest" (Article 3(1) Directive2003/4/EC). Everybody can claim access to information, even non-nationals, who are not members of the relevant democratic body politic. Thus, freedom of information respects the basic requirement of democratic equality, as every member of the body politic is entitled to use free information as a basis of political discourse in an open society and as a guidance to raise one's voice in democratic elections. If access to information is used to make individual entitlements more effective (like the preparation of lawsuits), the rationale behind it is individual freedom and not democracy. In the result, general freedom of information rights are compatible with the propositions of liberal democracy and democratic equality, as long as statutory law equally entitles each member of the democratic body politic and does not privilege the access of certain groups.

c) Democratic Epistemology

Additionally, freedom of information addresses the epistemic structure of a free and democratic society. Its fundamental precondition is that nobody has a claim to the truth, thus, (at least in theory) everything can be a subject of political discourse. Democratic making and implementing of law generates legitimacy and validity– not truth. Democratic process is always in flux, fleeting, and open-ended. Democratic legislation or administration, at least in a free society, does not decide scientific disputes referring to scientific truth.[34]Indeed,

34) Klaus Ferdinand Gärditz, *Zeitprobleme des Umweltrechts – Zugleich ein Beitrag zu*

scientific snapshots in time are no valid basis for political ideologies.[35] Nonetheless, making and applying law inevitably comprises the evaluation of conflicting scientific opinions.[36] One cannot enact laws on climate protection without having an opinion about the existence and the causes of climate change.However, political institutions can only interpret and evaluate facts but cannot arbitrarily construe or alter them.[37] For example, a majority vote cannot abolish climate change or conjure up rain clouds. Thus, public information on facts applied is also the substratum to challenge the rationality of democratic decisions on factual grounds.

Every decision − even if it is legally binding and administratively final − is potential subject to discussion, politicisation, and critique. Anyone can challenge or discuss the scientific or political propositions of legislative or administrative acts, irrespective of their formal legal validity. In contrast, what remains unknown stays outside open discourse. In particular, environmental policy is often a debate about risks and effective prevention strategies based on insecure and contentious information. Freedom of information − as a procedural concept[38] − enables the effective formation of a counter-public[39] that can challenge the interpretation of the world offered by the representative-democratic institutions. Against this

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*interdisziplinären Verständigungschancen zwischen Naturwissenschaften und Recht, in*Europäisches Umwelt- und Planungsrecht 2, 15 (2013). From a historic perspective Torsten Wilholt, Die Freiheit der Forschung215, 253 et sequ.(2012).

35) Hans Mohr, Wissen: Prinzip und Ressource 192 et sequ. (1999).

36) See Lorraine Code, *Doubt and denial: epistemic responsibility meets climate change scepticism, in*Thought, Law, Rights and Action in the Age of Environmental Crisis25-44 (Anna Grear/Grant Evadne, eds., 2015).

37) Christoph Möllers, Demokratie − Zumutungen und Versprechen45 (2008); concurring Gärditz (above, note 34), p. 15.

38) Ekardt (above, note 27).

39) See for its importance in a representative democracy Otto Depenheuer, *Bürgerverantwortung im demokratischen Verfassungsstaat, in* 55 Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer 90, 118 (1996); Nadia Urbinati, *Represenative democracy and its critics, in*The Future of Representative Democracy 23, 26-27 (Sonia Alono/John Keane/Wolfgang Merkel, eds., 2011).

background, freedom of informationmirrors the incompleteness of a democratic society and the openness of its political discourse. Freedom of information is a way to epistemic disillusion, too.

d) Privatization of the Public

The underlying concept of individual freedom of information rights has a theoretical implication, which remained – albeit the broad debate on the subject – rather unobserved. As the principle of publicness transforms into individual rights, the collective public itself is disaggregated, individualized and – finally – privatized.[40]Access to information is a depoliticized individual right, an entitlement at private disposal. On the one hand, the democratic public dissolves. On the other hand, individual rights are instrumentally functionalized to serve democratic aims.[41]This puzzling phenomenon indicates that a simple explanation of freedom of information as a tool to further the democratic structure of administrative procedures would remain too shallow.

2. Freedom of Information as a Means to Facilitate Effective Enforcement

Beyond democratic functions, freedom of information is undisputedly an adequate instrument to hold the administration accountable for its decision-making. Accountability is traditionally built on hierarchy. One public

40) Cornelia Vismann, Akten – Medientechnik und Recht, 302 (3rd ed., 2011).

41) A striking example are information rights derived from the individual basic right of the freedom of the press. German courts have created such information rights but primarily argued with the fundamental importance a free press has for a democratic society. The individual right appears only as an instrumental consequence to enforce the demands for information of a democratic society. See Federal Administrative Court, judgment of 20 February 2013, Case 6 A 2.12, 32 Neue Zeitschrift für Verwaltungsrecht 1006 No. 27 (2013); judgment of 25 March 2015, Case 6 C 12.14, 59 Zeitschrift für Urheber- und Medienrecht 709 No. 26 (2015).

body supervises another and the supervisor requires some authority − in particular, by a legal competence of sanctioning − over the supervised.[42] Basically, "the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences"[43]. However, the hierarchical model of accountability − represented by legal supervision of superior administrative authorities and parliamentary control over the government − has its obvious flaws. Central supervisory bodies have limited resources, are vulnerable to political bias, and pursue their own (administrative) interests. Accountability by supervision has to focus on specific issues, remains punctual, and produces deficits in enforcement, for which environmental law is widely known[44].

a) Balancing partiality

Freedom of information promotes transparency and, thus, countersa presumedpropensity of the executive for abusing power. Free access to information, in particular in environmental law, can counter-balance a structural bias of the administration, a tendency to favour enterprises applying for approval of environmentally relevant large-scale infrastructure projects. Such projects are typically an integral part of a broad political strategy, like developing business districtsand generating jobs. Railroads, harbours, highways, industrial parks, or airports are highly political issues and often the crown jewels of the regional infrastructure policy,predetermined by governmental decisions on the level of

42) Genevieve Lester, When Should State Secrets Stay Secrets? 10 (2015).

43) Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework,* 13 European Law Journal447 (2007); with reference to Bovens see also Paul Craig, *Accountability, in*The Oxford Handbook of EU Law, 431, 431-433 (Anthony Arnull, Damian Chalmers, eds., 2015).

44) E. G. Gertrude Lübbe-Wolff, *Vollzugsprobleme der Umweltverwaltung, in*Natur und Recht (NuR)217 (1993);Renate Mayntz/Jochen Hucke, *Gesetzesvollzug im Umweltschutz: Wirksamkeit und Probleme, in*Zeitschrift für Umweltpolitik und Umweltrecht (ZfU) 217 (1978); Renate Mayntz/Eberhard Bohne, Vollzugsprobleme der Umweltpolitik (1978).

regional planning.[45]The political will to succeed with infrastructural policy might push back environmental concerns, in particular, if the scenery lacks an effectively organized counter-public.Free access to environmental information can mitigate these risks, in particular, if a well-informed public can bring pressure to bear on the political decision-makers. Or to put this conclusion positively, informational transparency can establish trust in the impartiality, fairness and reasonableness of administrative decision-making.

b) External Public Control

Free access to environmental information, in combination with legal standing of NGOs in environmental litigation, fosters an atmosphere of public control, which has a preventive effect on the administration. The administration is softly pushed to handle files more carefully and take concerns as well as potential risks seriously. Additionally, external control is a sufficient argument of the state administration to lowerundueexpectations of investors that administrative proceedings will be “rubber-stamped” smoothly. Sometimes, information claimsforeshadow legal actions, in particular, lawsuits before an independent and impartial administrative court. This even strengthens the operating officials in the administration, which are often under political pressure when it comes to approving industry plants or essential infrastructure. Thus, public access to

45) For the steering of instrastructure projects by instruments of regional planning law see Klaus Ferdinand Gärditz, *Möglichkeiten und Grenzen raumordnungsrechtlicher Einwirkung auf die Entwicklung von Binnenhäfen, in*Zeitschrift für Umweltrecht (ZUR) 651 et sequ. (2013); Ondolf Rojahn, *Umweltschutz in der raumordnerischen Standortplanung von Infrastrukturvorhaben, in*30 Neue Zeitschrift für Verwaltungsrecht654 et sequ. (2011); Rudolf Steinberg, *Landesplanerische Standortplanung und Planfeststellung − unter besonderer Berücksichtigung der Planung von Verkehrsflughäfen, in*125 Deutsches Verwaltungsblatt (DVBl) 137 et sequ. (2010); Rainer Wahl, *Erscheinungsformen und Probleme der projektorientierten Raumordnung*, in: Festschrift für Dieter Sellner zum 75. Geburtstag 155 et squ. (Klaus-Peter Dolde/Stefan Paetow/Eberhard Schmidt-Aßmann/Klaus Hansmann., eds., 2010).

environmental information might mitigate a specific deficit in enforcement of environmental law.

c) Freedom of Information, the Rule of Law, and Democratic Effectiveness

In the result, freedom of information can promote effective enforcement of environmental law and, thereby,the rule of law[46] − the legality of environmental administration.Additionally, public controlindirectly enhances democratic ruling, as the laws enforced are the promulgated will of democratically elected lawmakers.[47]From a theoretical point of view legal norms as a matrix of evaluative and contra-factual interpretation of the world require an adequate distance to practices of the institutions, which apply the relevant norms.[48] Nonetheless, democracy as a mode of self-determination, primarily realized by making and implementing laws,depends on practical consequences and, thus, on a minimum degree of effectiveness.Therefore, democracy not only requires statutes to be issued but also to be properly implemented and enforced.[49]In a democratic legal order, instruments enhancing the effective enforcement of the rule of law − like freedom of information rights can do − indirectly support the practical evolvement of democratic government.

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46) See for a parallel evaluation with regard to public participation Klaus Ferdinand Gärditz, Europäisches Planungsrecht67 (2009); Mann (above, note 33), p. 559.

47) Similiar regarding participation Gärditz (above, note 33), p. 275; *id.*,*Die Verwaltungsdimension des Lissabon-Vertrags, in* 63Die öffentliche Verwaltung (DÖV) 453, 458 (2010); Haug (above, note 18), p. 238; Ekart Hofmann, *Die Modernisierung des Planungsrechts: das Energierecht als neues Paradigma der Öffentlichkeitsbeteiligung in einer Planungskaskade?, in*65 Juristenzeitung701 (2012); Lübbe-Wolff(above, note 18), p. 279.

48) Christoph Möllers, Die Möglichkeit von Normen (2015).

49) See e. g. Klaus Ferdinand Gärditz, *Rechtsstaat, in*Berliner Kommentar zum GrundgesetzNo. 86 (Karl Heinrich Friauf, Wolfram Höfling, eds., 2015); Friedhelm Hufen, *Gesetzesgestaltung und Gesetzesanwendung im Leistungsrecht, in* 47 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 142, 147 (1989); Eberhard Schmidt-Aßmann, *Der Rechtsstaat, in*Handbuch des Staatsrechts, Vol. II, § 26 Nos. 21, 24 (Josef Isensee/Paul Kirchhof, eds., 3rd ed. 2004); Christian Waldhoff, Staat und Zwang13 (2008).

Ⅳ. Freedom of Information Law as a Hazard for a Democratic Administration in the Information Age

Nevertheless, freedom of information can also haveadverse effects on the democratic and administrative process.

1. Impediments on the Parliamentary Process

Two recent examples might illustrate potential conflicts: An applicant demanded information withheld by the Office of the Federal Chancellor (*Bundeskanzleramt*) regarding the legislative process, which lead to the sudden turn in energy policy and the nuclear power phase-out in Germany in the aftermath of the Fukushima accident. Remarkably, the applicant was not an environmental activist but an energy supplier company. The Administrative Court of Berlin passed a sentence on the Office and obliged it to furnish the demanded information. The Court held that the authority could not deny the claim based on the confidentiality of governmental decision-making.[50] In another environmental information case, a law firm tried to get access to the files of a parliamentary committee of enquiry, which had investigated measures of the regional government taken against nuclear energy suppliers on dubious legal meri t[51]. Conspicuously, the applicants were regular counsels of one of the largest competitorson the energy market. Although the lawyers did not bring the case to court,[52] the case illustrates the impediments freedom of information can place

50) Administrative Court of Berlin, judgment of 18 December 2013, Case 2 K 249.12, Zeitschrift für Umweltrecht 433 (2014).

51) The courts had quashed the administrative decision before. See Federal Administrative Court, decision of 20 December 2013, Case 7 B 18.13, 129 Deutsches Verwaltungsblatt 303 (2014); Higher Administrative Court of Hesse, judgment of 25 February 2013, Case 6 C 824/11.T,Zeitschrift für Umweltrecht(ZUR) 367 (2013).

52) The author of this statement represented the affected state parliament as counsel and drafted the administrative decision of the committee, which refused to grant access to the files.

upon the parliamentary process. If information is probably going to be public, apparently it is far more difficult for a parliamentary committee to obtain relevant files, as the government or private parties concerned might successfully decline to produce evidence with regard to the protection of state or business secrets.[53] This, again, could easily obstruct the supervisory function of parliament, which activates the democratic accountability of the government.

2. Shielding of the Legislative Process under EU Law

The European Court of Justice (ECJ), in principle, has accepted that the democratic process would suffer if anyone had unlimited access to legislative records. In 2012, the ECJ, due to a reference for a preliminary ruling (Article 267 of the Treaty of the Functioning of the European Union), had to deal with the question whether Article 2(2) of the (Environmental Information) Directive 2003/4/EC allows the Member States to exclude ministries from the purview of EU environmental information law. The Directive abstractly allows for the exclusion of "bodies or institutions acting in a [···] legislative capacity". The Court held that the Member States could exclude not only parliaments but also ministries from access to information if the government directly participates in the legislative process (like by drafting bills or giving opinions), but only until the legislative process in question had ended. The Court strongly predicates its opinion on the protection of the legislative process. The Directive allowed Member States "to lay down appropriate rules to ensure that the process for the adoption of legislation runs smoothly, taking into account the fact that, in the various Member States, the provision of information to citizens is, usually,

Neither the decision not its legal ratio was challenged.

53) From my point of view, access to information can be refused to protect the effectiveness of a parliamentary inquiry. See Klaus Ferdinand Gärditz, *Parlamentarische Untersuchungsausschüsse als informationspflichtige Stellen?, in* 34 Neue Zeitschrift für Verwaltungsrecht1161, 1165-1166 (2015).

adequately ensured in the legislative process".[54]In other words, asparliamentary legislation – due to a specific nature of the legislative[55] – is inherently public it needs no additional transparency. Even though the Court does not explicitly refer to it, the judgment is a reference to the principle of representative democracy enshrined in Article 10 of the Treaty of the European Union.[56]

3. Balance of Informational Powers and Representative Democracy

Freedom of information can also undermine the sophisticated balance of powers with regard to the control of information. Knowledge is power. Therefore, the distribution of information within the public institutions is also an issue of separation of powers.[57] The control of information flows is a crucial part of the administrative functions of a modern state, more than ever, as we live in an information society. There are two risks inherent in the concept of free access to information.

First, freedom of information can unhinge the informational limitations, under which public authorities are placed. The command of the information flux can be a probable instrument to achieve administrative aims without direct exercise of sovereign competences. For example, issuing a press statement or an official warning that a certain foodstuff is contaminated with genetically modified organisms or residues of pesticide might well effectively ban the product from

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54) European Court of Justice, judgment of 14 February 2012, Case -204/09, *Flachglas Torgau*, No. 43.

55) European Court of Justice, judgment of 14 February 2012, Case -204/09, *Flachglas Torgau*, No. 44.

56) Klaus Ferdinand Gärditz, *Die Entwicklung des Umweltrechts im Jahr 2012: Zwischen institutioneller Prozeduralisierung, justizieller Europäisierung und energiewirtschaftlicher Transformation, in*Zeitschrift für Umweltpolitik und Umweltrecht (ZfU) 381, 385 (2013).

57) Christoph Möllers,*Kognitive Gewaltengliederung,in*Wissen – zur kognitiven Dimension des Rechts113 (Hans Christian Röhl, ed.,2010); Kai von Lewinski, Die Matrix des Datenschutzes 60-61 (2014).

the market as consumption rapidly diminishes. The warning is de facto self-executing, while a direct ban of the affected product by administrative act would be subject to lawsuits filed by the affected company. Disregarding the question under which legal requirements it would be legal to issue such a statement,[58]at least, it is obvious that the scope of information at the disposal of a public authority determines its power to intervene. The fine balance of public informational interests and individual freedom rights affected is underrun if information spreads uncontrolled.

Second, the idea of representative democracy is that of a delegation of power on representatives who shall form a political will independently. The mechanics of representative democracy, its sophisticated checks and balances, and − last but not least − its internal protections of individual freedom are incompatible with a model of public control in permanency, which can finally turn into a tyranny of populism. In particular, the administration also safeguards the rule of law and is a formalized counterpoise to balance the volatile rigours of the political process.[59]Both the free formation of will within the institutions of representative democracy and the formalized as well as de-politicized administrative procedure are constitutional values of crucial importance in a liberal democracy.[60]

Of course, the current statutory law of free access to information does not compromise the foundations of representative democracy. Albeit, an ideology

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58) Compare the authorization in Sec. 31 of the Act on making products available on the market of 8 November 2011 (BGBl. I p. 2178, 2012 I p. 131).

59) This is the ratio of the German civil service system. See Federal Constitutional Court, judgment of 19.9.2007, Case 2 BvF 3/02, BVerfGE 119, 247 (261 f.); Markus Kenntner, *Sinn und Zweck des hergebrachten Berufsbeamtentums, in* 122 Deutsches Verwaltungsblatt (DVBl) 1321, 1326 et sequ. (2007); Herbert Landau/Martin Steinkühler, *Zur Zukunft des Berufsbeamtentums in Deutschland, in* 122 Deutsches Verwaltungsblatt (DVBl) 133, 135 et squ. (2007); Josef Franz Lindner, Zur politischen Legitimation des Berufsbeamtentums 19 et sequ. (2014).

60) Klaus Ferdinand Gärditz, *Der digitalisierte Raum des Netzes als emergente Ordnung und die repräsentativ-demokratische Herrschaftsform, in* 54Der Staat113, 120 (2015).

of unlimited transparency does. The ideal of transparency challenges hierarchy and informational asymmetry. Transparency means informational symmetry, equal fighting chances, negotiation of the citizens on par with their democratic institutions. Levelling the informational playing field means to question political ruling power.[61]The empowerment of the citizen intentionally goes along with weakening public institutions. However, democracy as a way of effective self-government of the people is a form of *rule*, not only "a mode of associated living"[62] or a parlour for deliberation. Ruling as the result of collective freedom needs power to rule, and there is no free society withweak political institutions. This makes it necessary, to hedge freedom of information and protect the mechanics of efficient as well as effective decision-making of the democratically accountable institutions. It is a democratic decision to define the degree and scope of free access to information – and to limit it properly. It would be counterproductive to lopsidedly optimize the freedom of information without sufficient protection of the administrative and democratic-politic process.

V. Résumé: The Ambivalence of Freedom of Information Law

Overall, freedom of information remains ambivalent. Freedom of information undisputedly has a significant value in promoting accountability of the administration and control over the implementation of the law. It is a concept based on distrust, and distrust in those who wield power is an underlying rationale of both democracy and the rule of law. Nonetheless, representative democracy and balance of powers as foundations of liberal constitutionalism ground on the idea that the people entrusts agents to exercise sovereign powers distanced from

61) Byung-Chul Han, Transparenzgesellschaft 31 (3rd ed., 2013).
62) John Dewey,Democracy and Education 80 (1916/2008).

the unregulated and volatile political discourse of a free society. This is incompatible with a status of permanent politicized public control.

Democratic implications of the freedom of information law are rather abstract and idealistic. The ideal of a politicized public that requires information to form a democratic will is theoretically solidly founded but matches neither with administrative practice nor with social reality. Thus, preferable to me seems the more pragmatic and functional approach using freedom of information as a mere instrument to support the rule of law. The public as an abstract construction can only become real in effective institutions.[63]Therefore, the institutional setting of administrative procedures matters. Traditional law of freedom of information was founded on an administrative environment of traditional paper files and town hall meetings. In the age of internet – with its aggressive political culture, its unmuted expression of raw spontaneous political opinion, its leaking culture, and its propensity to crude distortion and conspiracy theories – administrative communication and information management face new challenges. The permanent diffusion of information in scattered and disaggregated channels and the lack of a coherent public obliterate all ideals of sublime discourse. Even more, we need the organized procedures of legislative law-making and administrative decision-making anchored in stable institutions. As to that, freedom of information is a rather unpromising concept.

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63) Volker Gerhardt,Öffentlichkeit – Die politische Form des Bewusstseins 507-508 (2012).

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[국문초록]

환경법상 정보자유의 양면성
- 공공참여, 투명성과 행정절차 -

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25년 전 환경정보에 자유롭게 접근할 수 있는 권리가 창설된 이래로, 유럽과 독일의 정보공개법은 차별화된 입법과 세분화된 법률학의 영역으로 수준 높게 발달해왔다. 그럼에도 불구하고 법령에 명시된 권리들의 개념적 대상들은 형형색색으로 존재하고 있다. 원칙적으로 헌법적 이론과 입법론 안에서 정보의 자유를 정당화하기 위한 두 가지의 다른 방법이 존재한다. 하나의 개념은 민주주의적 기능을, 다른 하나의 개념은 법의지배를 강화하기 위한 기능을 강조하는 것이다. 민주적 정당성은 자유사회 하에서 정보의 자유에 대한 더 많은 시민들의 숙고와 토의 속에 기반하고 이는 정치적 구성원으로서의 시민이 정치적 선택을 하는 것을 가능하게 한다. 즉, 모든 시민에게 정보기본권이 동일하게 주어진다면 이론적 개념은 민주적 과정의 기본적 요구에 합치하게 된다. 그러나, 민주적 정당성은 실로 매우 추상적으로 존재하며 사회적 그리고 행정적 그 실제와 부합되지 않는다. 더 실질적인 접근은 공적 통제와 법의지배 하에서 행정부에 중점을 두어 정보자유의 기능을 언급하는 것이다.

행정절차의 긍정적인 영향에도 불구하고 정보의 자유는 민주적, 행정적 절차에 정반대의 영향을 미칠 수도 있다. 우선, 정보의 자유는 공권력이 의도하는 대로 정보의 한계들을 무너뜨릴 수 있다. 즉, 정보가 무분별하게 확산된다는 전제하에 공공의 관심사인 정보와 개인의 자유권사이의 적합한 균형은 흐트러질 수 있다. 다음으로, 정보의 자유는 자유민주주의 하에서 지극히 중요한 헌법적 가치인 대의민주주의와 비정치적인 행정절차의 기관에서의 공식적인 형성과정을 방해할 수도 있다. 총체적 자유의 결과로서 통치는 통치력 즉 그 힘을 필요로 하며 약한 정치체제 혹은 제도들 하의 자유사회란 존재하지 않는다. 따라서, 행정적 그리고 민주정치 절차의 충분한 보장 없는 정보의 자유는 한쪽만을 지나치게 강조하는 역효과를 낳을 수 있다.

주 제 어: 정보의 자유, 환경정보, 민주주의, 법의 지배, 참여, 행정절차, 공적 통제
Key Words: freedom of information, environmental information, democracy. rule of law, participation, administrative procedure, public control