

Agrarmarkt Austria
Dresdner Straße 70
1200 Wien
Österreich

Ihr Zeichen: ZD/Ze-S205/21-197
Mein Zeichen: #2290

Sehr geehrte Damen und Herren,

vielen Dank für Ihre Antwort vom 18. Juli 2021 auf meine Anfrage vom 26. Mai 2021 nach dem Bundesgesetz vom 15. Mai 1987 über die Auskunftspflicht der Verwaltung des Bundes und eine Änderung des Bundesministeriengesetzes 1986 (Auskunftspflichtgesetz) – BGBl. Nr. 287/1987.

Ich habe diese Anfrage für die europäische NGO Access Info eingereicht. Access Info hat auch die folgende Antwort auf Ihren Bescheid formuliert, die aufgrund von Zeitgründen nicht mehr ins Deutsche übersetzt werden konnte. Sollten Sie für die Bearbeitung eine deutsche Fassung benötigen, lassen Sie mich das gerne wissen.

To recall, my request sought the following:

Eine Liste der Endempfänger der Gemeinsamen Agrarpolitik der Europäischen Union in Österreich für die Jahre von einschließlich 2012 bis 2018.

Die Liste sollte für jeden Endempfänger beinhalten:

- *Namen*
- *Kommune, in der der Empfänger wohnhaft oder angemeldet ist*
- *Zahlungen aufgeschlüsselt nach vom Fonds finanzierten Maßnahmen und Empfänger im jeweiligen Rechnungsjahr*
- *Art und Beschreibung der vom Fonds finanzierten Maßnahmen, unter denen die Auszahlung erfolgt.*

In your response, you argue that my application has to be rejected because it pertains to personal data, which is protected under Art. 4 of Bundesgesetz zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten (Datenschutzgesetz - DSGVO) - BGBl. I Nr. 165/1999 (Austria's Federal Act concerning the Protection of Personal Data). The DSGVO is used for both legal and natural persons.

On data of natural persons, you specifically argue that personal data of natural persons may only be processed and passed on to third parties by the AMA under one of the six conditions explained

in Art. 6 of the DSG. According to your evaluation, none of the six conditions are applicable to my request.

Furthermore, pursuant to Regulation (EU) No. 1306/2013, Art. 111- Art. 114 and the Implementing Regulation (EU) No. 908/2014, Art. 57 - Art. 62., the AMA is obliged to publish the requested data on www.transparenzdatenbank.at for a certain period of time (if the funding is above a threshold of EUR 1,250 per budget year) which shall remain accessible for two years.

Longer access is therefore not provided for in the legal basis and would violate the data subjects' right to data protection. As a consequence, the AMA is no longer authorised to publish the requested data from the period 2012 to 2018 and accordingly there is no legal obligation to pass this data on to third parties.

Notably, the AMA is also not aware of any task in the public interest that would justify passing on the data in accordance with the request.

On data of legal entities and associations of persons, you assert that legal persons enjoy the same right to confidentiality of personal data as natural persons.

You also specify that a separation of the dataset into a new dataset with purely legal persons is not possible as no identification is made in the master data directory of the AMA that would allow automated, separate output. Doing it manually would cause a disproportionate effort by the administration.

I ask you to reconsider your decision on the following grounds:

Regulation 1306/2013 does not expressly state that information on final beneficiaries cannot be released upon request after the two-year period of public disclosure.

Article 111 of Regulation 1306/2013 states:

The information referred to in the first subparagraph shall be made available on a single website per Member State. It shall remain available for two years from the date of the initial publication.

While the Regulation states that this information shall be made available on the national website for two years, it does not expressly state that this information cannot be made available upon request after this time period.

I note that this same information was provided in Spain after the Spanish government consulted with the European Commission's Directorate-General for Agriculture and Rural Development.

On this specific point, on 24 March 2021, the Commission confirmed in writing that:

*For dissemination of beneficiaries data, Art. 111 Regulation (EU) No 1306/2013 applies. However, this is restricted to two years (Articles 111 and 112). After these two years, there is no EU justification for publishing these data. **The request of the company in question concerns the full access to agricultural subvention payments for the period of 2012 to 2017 that clearly falls outside these two years and is therefore not covered by Art. 111 Regulation (EU) No 1306/2013.** [emphasis added]*

In relation to the disclosure of such information upon a request for information submitted pursuant a national access to information law, the European Commission also specified: "Art. 86 GDPR allows

access to official documents according to the laws of the respective Member State. Thus, it has to be decided by the Spanish Authorities how this access is granted”

There is therefore no restriction to be found in Regulation 1306/2013 on releasing this data.

A natural person's right to the protection of their personal data is not absolute.

Personal data is regulated by Bundesgesetz zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten (Datenschutzgesetz - DSGVO) - BGBl. I Nr. 165/1999 (Austria's Federal Act concerning the Protection of Personal Data). This text incorporates EU regulation 679/2016 into Austrian law.

Recital (4) in the General Provisions of Regulation 679/2016 articulates clearly that:

The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.

Accordingly, Recital (1) of Article 23 of the same regulation sets out legitimate restrictions that Member States can apply to a natural person's right to have their personal data protected. Pertinently, these measures can be applied:

When such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard [...] (e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matter

The principle of 'general public interest' established above is explicitly applied to the freedom of expression and information context by Articles 85 and 86 of Chapter IX ('Provisions relating to specific processing situations') of Regulation 679/2016. According to Article 85, Austria is subject to the following obligation:

- 1. Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.*
- 2. For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for exemptions or derogations [...] if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information.*

I am a journalist and I submitted my request in collaboration with Access Info Europe, a preeminent organisation advocating and researching freedom of information and transparency across the EU. The activities of myself and Access Info plainly fall within the bracket of 'processing for journalistic purposes and the purposes of academic, artistic or literary expression.' As such, the need to 'reconcile the right to the protection of personal data [...] with the right to freedom of expression and information' in considering whether to approve my request is particularly pressing.

There is a strong public interest in the post release upon request of this information.

Article 2, Chapter 1, Part 2 of Austria's Federal Act concerning the Protection of Personal Data (DSG) on "Data processing for specific purposes" states that:

7. (1) For achieving purposes in the public interest, scientific or historical research purposes or statistical purposes whose goal is not to obtain results in a form relating to specific data subjects, the controller may process all personal data that

2. The controller has lawfully collected for other research projects or other purposes

I argue that there is a strong public interest in providing me with this data, as it is necessary for achieving the legitimate aims of protection of the Union's financial interests and enhanced transparency.

The preamble of Regulation 1306/2013 states the publication of information on beneficiaries is necessary for achieving these legitimate aims and that publication does not go beyond what is necessary to do so in a democratic society:

(72) the objective of better protection of the Union's financial interests, to enhance transparency and to highlight the achievements of beneficiaries in providing public goods while ensuring that that publication does not go beyond what is necessary for achieving these legitimate aims.

(85) Therefore it must be considered that providing for the general publication of the relevant information does not go beyond what is necessary in a democratic society in view of the need to protect the Union's financial interests as well as, the overriding weight of the objective of the public control of the use of the money from the Funds.

Regulation 1306/2013 on the financing, management and monitoring of the common agricultural policy recognises the role played by civil society, including by the media and non-governmental organisations in their contribution to the monitoring for fraud and any misuse of public funds. It states that the publication of the name of the beneficiaries of the funds provides a means of reinforcing the public control of the use of the funds and is necessary to ensure an adequate level of protection of the Union's financial interests:

(76) In this context the role played by civil society, including by the media and non-governmental organisations and their contribution to reinforcing the administrations' control framework against fraud and any misuse of public funds, should be properly recognised.

(79) If the objective of the public control of the use of the money from the funds is to be achieved, a certain level of information about beneficiaries needs to be brought to the attention of the public. That information should include data on the identity of the beneficiary, the amount awarded and the fund from which it comes and the purpose and the nature of the measure concerned.

As I collaborate with a civil society organisation that is seeking to ensure there is proper oversight of the spending of EU funds and therefore protection of the Unions financial interest, I am asking for information that is deemed necessary for the achievement of that legitimate aim.

My request has the specific goal to ensure that there is public scrutiny of the spending of public funds, and that there can be a fully-informed, evidence-based public debate about how such funds are used. Having this data public is not only essential to ensure full oversight of how public money has been spent over the past few years in Austria, but also so its citizens can be confident that public bodies are managing public funds in a responsible manner.

Not all information sought is personal data that falls under the protection of GDPR, as final beneficiaries can also be legal persons.

While my request does capture personal data (names of final beneficiaries who are private individuals), not all information sought is personal data, as final beneficiaries can also be legal persons.

While you asserted in your reply that legal persons enjoy the same right to confidentiality of personal data as natural persons, Recital (14) of the opening observations of Regulation 679/2016 explicitly excludes such data from the instrument's remit, stating:

This Regulation does not cover the processing of personal data which concerns legal persons and in particular undertakings established as legal persons, including the name and the form of the legal person and the contact details of the legal person.

The judgement of the Court of Justice of the European Union in *Camara di Commercio v Manni* (2017)¹ establishes that Member States are competent to restrict access to personal data concerning legal persons in publicly held registers only where the natural person in question specifically 'appl[ies] to the authority responsible for keeping, respectively, the central register, commercial register or companies register,' and where there are 'exceptionally justified [...] compelling legitimate grounds relating to their particular situation.'

Although the 2012-2018 CAP beneficiaries registers are no longer public, they are publicly held registers that contain personal data, data on legal persons, and personal data which concerns legal persons. The latter two types of data are not protected by the EU's Regulation 2016/679 or by the DSG. As such they cannot be considered 'personal data' for the purposes of Austria's Federal Act on the federal administration's obligation to provide information.

Therefore, the argument of refusing my request due to data protection should not be used on all information sought due to the fact that not all information captured should fall under data protection. At the very least, partial access should be granted and the names of the beneficiaries that are legal persons should be released.

In refusing to process this data, there is a failure to respect the principle of Member State consistency, as set out in Regulation 679/2016.

A colleague has already received the requested data from 12 European Union countries (and, in addition, from the United Kingdom), all of which granted her access to the names of the beneficiaries and the amounts awarded for the years 2012-2018.

A full list of the countries for which access to the data has been granted in a response to an identical FOI request is: Croatia, Cyprus, Czechia, Denmark, Hungary, Italy, Latvia, Netherlands, Romania, Slovakia, Spain, Sweden. We are expecting to receive this data from other countries.

This underscores that there should be no impediment to Austria providing this data.

Recitals (9) and (10) of the opening observations of the Regulation clearly articulate the requirement for consistency in the application of data protection principles by Member States:

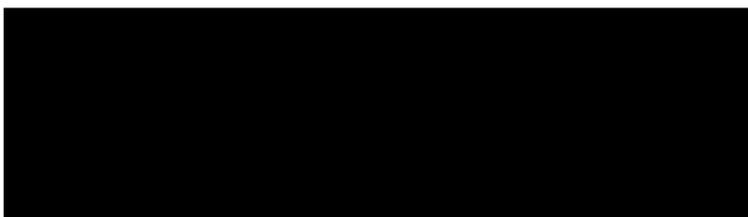
¹<https://curia.europa.eu/juris/document/document.jsf?text=&docid=188750&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=766008>

Differences in the level of protection of the rights and freedoms of natural persons, in particular the right to the protection of personal data, with regard to the processing of personal data in the Member States may prevent the free flow of personal data throughout the Union. Those differences may therefore constitute an obstacle to the pursuit of economic activities at the level of the Union, distort competition and impede authorities in the discharge of their responsibilities under Union law [...] the level of protection of the rights and freedoms of natural persons with regard to the processing of such data should be equivalent in all Member States. Consistent and homogenous application of the rules for the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data should be ensured throughout the Union.

It is clear that in not releasing this data to me, due to data protection concerns, Regulation 679/2016 is not being applied in a “consistent and homogenous” manner across Member States.

In light of the above, I kindly ask that you review the initial decision. Should you have any questions on the above, I would be delighted to respond to them.

Ich freue mich auf Ihre Antwort,



Maximilian Henning, 19.08.2021