

**Case C-272/19**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

1 April 2019

**Referring court:**

Verwaltungsgericht Wiesbaden (Germany)

**Date of the decision to refer:**

27 March 2019

**Applicant:**

VQ

**Defendant:**

Land Hesse

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**Subject matter of the main proceedings**

Data protection law; Information and access to files in relation to the applicant's personal data stored with the Petitions Committee of the Hesse *Land* Parliament; Refusal to provide information

**Subject-matter and legal basis of the reference**

Substantive scope of Regulation 2016/679, the term 'public authority, agency or other body' within the meaning of Article 4(7) of Regulation 2016/679; Right of access by the data subject pursuant to Article 15 of Regulation 2016/679; Independence and impartiality of the referring court or tribunal pursuant to Article 267 TFEU and Article 47(2) of the Charter of Fundamental Rights of the European Union

## Questions referred for a preliminary ruling

1. Is Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) – in particular Article 15 on ‘Right of access by the data subject’ thereof, – applicable to the committee of a parliament of a constituent state of a Member State that is responsible for processing the petitions of citizens – namely the Petitions Committee of the Hesse *Land* Parliament – and is that committee to be regarded in that connection as a public authority within the meaning of Article 4(7) of the Regulation No 2016/679?
2. Is the referring court an independent and impartial tribunal within the meaning of Article 267 TFEU read in conjunction with Article 47(2) of the Charter of Fundamental Rights of the European Union?

## Provisions of EU law cited

Charter of Fundamental Rights of the European Union (‘the Charter’), Article 47(2)

Article 267 TFEU

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Article 2, Article 3(1), Article 4(7), Article 15

## National provisions cited

Grundgesetz (Basic Law, ‘the GG’), Article 17, Article 92, Article 97

Deutsches Richtergesetz (German Law on Judges, ‘the DRiG’), Paragraph 26 ‘Administrative supervision’

Verwaltungsgerichtsordnung (Administrative Procedures Code, ‘the VwGO’), Paragraphs 1 ‘Independence of the administrative courts’, 18 ‘Acting judges’, 38 ‘Administrative supervision; higher administrative supervision authority’, 39 ‘Administrative activities’

Verfassung des Landes Hessen (Constitution of the *Land* of Hesse, ‘the HV’), Article 17 ‘Right to petition’, Article 126, 127

Hessisches Datenschutz- und Informationsfreiheitsgesetz (Hesse Law on data protection and freedom of information, ‘the HDSIG’), Paragraph 30(1)

‘Processing of personal data by the *Land* Parliament and municipal representative bodies’

Geschäftsordnung des Hessischen Landtags (Rules of procedure of the Hesse *Land* Parliament), Paragraph 112(6)

Datenschutzordnung des Hessischen Landtags (Data Protection Regulation of the Hesse *Land* Parliament) Annex 4 to the Rules of procedure of the Hesse *Land* Parliament, Paragraph 10 ‘Storage of data in the case of petitions’

Richtlinien für den Umgang mit Verschlussachen im Bereich des Hessischen Landtags (Guidelines for processing classified information within the Hesse *Land* Parliament) Annex 2 to the Rules of procedure of the Hesse *Land* Parliament (‘*Land* Parliament CI Guidelines’), Paragraph 13, ‘Protection of private secrets’

Hessisches Richtergesetz (Hesse Law on Judges, ‘the HRiG’), Paragraphs 2 ‘Analogous applicability of public service law’, 2b ‘Staff evaluation’, 3 ‘Appointment of judges’

### **Brief summary of the facts and procedure**

- 1 The applicant seeks information or access to files in relation to his personal data that is stored with the Petitions Committee of the Hesse *Land* Parliament and relates to Petition 1728/18, which was submitted by the applicant and on which a decision has been taken.
- 2 The defendant President of the Hesse *Land* Parliament has refused the request for information.
- 3 According to him, the petition process constitutes a parliamentary task of the Hesse *Land* Parliament, meaning that the Hesse *Land* Parliament does not fall within the scope of Regulation No 2016/679. He contends that this is clear from the provisions applicable in that regard, namely Paragraph 30(1) of the HDSIG, which relates to the processing of personal data by the *Land* Parliament and municipal representative bodies, and Paragraph 112 of the Rules of procedure of the Hesse *Land* Parliament, which refers to the Data Protection Regulation of the Hesse *Land* Parliament contained in Annex 4 to those rules of procedure and in the Guidelines for processing classified information within the Hesse *Land* Parliament contained in Annex 2 to those rules of procedure.
- 4 In the view of the President of the Hesse *Land* Parliament, according to those provisions, the confidentiality of the petition files and the data therein also had to be maintained vis-à-vis petitioners. Neither Regulation No 2016/679 nor Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, which was in force until 24 May 2018, make any mention of the processing of parliamentary matters.

- 5 The applicant brought an action against the refusal to provide information before Verwaltungsgericht Oldenburg (Oldenburg Administrative Court) on 22 March 2013. The attempt to obtain information regarding the ministries that participated in the petition process and thus to satisfy the applicant's request was unsuccessful. This had the result that the process was resumed on 29 July 2015 and the applicant continues to pursue his objective of obtaining information in relation to the Hesse *Land* Parliament, Petitions Committee.
- 6 Pursuant to Paragraph 30(1) of the HDSIG read in conjunction with Paragraph 10 of the *Land* Parliament CI Guidelines, a refusal to provide information would be permissible if the Petitions Committee did not fall within the scope of Regulation No 2016/679. On the other hand, the action would be successful if the aforementioned provisions did not preclude the request for information. There is therefore a need for clarification with regard to the scope of Regulation No 2016/679, specifically its substantive scope pursuant to Article 2. This is the subject of the first question referred.
- 7 Due to the way in which the jurisdiction of administrative courts is organised in Germany, however, the referring court asks, as a preliminary matter, – formulated as the second question referred – of whether it is actually a court or tribunal within the meaning of the second subparagraph of Article 267 TFEU.

### **Brief summary of the basis for the reference**

#### ***The first question***

- 8 The applicant would have a right of access vis-à-vis the Hesse *Land* Parliament pursuant to Article 15 of Regulation No 2016/679 if the Petitions Committee of the Hesse *Land* Parliament fell within the scope of Article 2(1) of Regulation No 2016/679 and was a 'public authority' pursuant to Article 4(7) of Regulation No 2016/679.
- 9 Pursuant to Article 15 of Regulation No 2016/679, everyone has a right of access to personal data stored on him/herself pursuant to that regulation. This right exists with respect to the controller and therefore with respect to 'public authorities', as the data-processing bodies.
- 10 Regulation No 2016/679 cites 'public authority' or 'agency' in the definition for 'controller', but does not contain an express definition of the term 'public authority'. It merely distinguishes between public authorities and judicial authorities. However, the regulation also includes the term 'independent administrative authorities' (recital 31) and uses further authority-related terms which, however, are all covered by the general term 'public authority': supervisory authorities, customs authorities, law-enforcement authorities, health authorities, data protection authorities, data protection supervisory authorities, regulatory bodies, financial supervisory authorities and administrative authorities.

- 11 The term 'public authority' under that regulation cannot be inferred from the laws of the Member States. On the contrary, concepts in EU legal acts must be determined autonomously.
- 12 The term 'public authority' can be used in either an organisational/institutional sense or a functional sense. On the basis of Article 4(7) of Regulation No 2016/679 read in conjunction with the first sentence of Paragraph 30(1) of the HSDIG, it can be assumed that the term 'public authority' in the context of these provisions is to be understood in a functional sense, as Paragraph 30(1) of the HSDIG makes the applicability of the HSDIG and therefore Regulation No 2016/679 dependent on which task the Hesse *Land* Parliament is performing in each case (legislation or administration). According to this, public authorities are all public bodies that perform tasks of public administration. The Hesse *Land* Parliament is therefore a public authority if it performs tasks of public administration.
- 13 In addition to the term 'public authority', Article 4(7) of Regulation No 2016/679 uses the terms 'agency' and 'other body'. The distinguishing feature of a body is its organisational independence and the fact that it is independent of changes of officeholders and the fact that it performs tasks autonomously in its own name. The Petitions Committee of the Hesse *Land* Parliament is an independent body, that is to say a public authority within the meaning of the laws governing organisational structure.
- 14 The decisive factor is whether the tasks of the body fall within the area of public administration. It is not possible to provide a positive definition of 'administration'; it can be determined only by distinguishing it from the other functions of the State. 'Administration' is the activity that takes place outside the context of lawmaking and the dispensation of justice. The legislative task of a parliament is the task of creating legislation, as expressly clarified in recital 41 of Regulation No 2016/679 with regard to the creation of legal bases.
- 15 Thus, lawmaking is the lawmaking activity of legislative bodies, in this case that of the Hesse *Land* Parliament, and not the Petitions Committee. The examination and advisory function of the Petitions Committee of the Hesse *Land* Parliament constitutes neither an activity of dispensation of justice nor a legislative activity. However, the Petitions Committee does have the authority to obtain from the executive all the information, in relation to the facts and circumstances underlying the petition, that it needs to be able to process the petition properly.
- 16 The right to petition is governed in Article 16 of the HV (which corresponds to Article 17 of the GG). Pursuant to that provision, anyone can contact parliament, or any other Hesse administrative authority, with requests or complaints in writing; in so doing, the petitioner is entitled to formal confirmation of receipt of his petition, a substantive examination of his issue and a reasoned decision within a reasonable period of time. Beyond the entitlement to a decision, however,

Article 16 of the HV does not guarantee entitlement to a remedy to the issue sought by the petition.

- 17 The fact that the Petitions Committee is part of the Hesse *Land* Parliament and therefore of a legislative body does not automatically mean that the Petitions Committee should be accordingly associated with legislative activity and therefore the parliament as the legislature. The Petitions Committee's field of activity does not correspond to the tasks of the Hesse *Land* Parliament (cf. Article 116 et seq. of the HV) that endow it with the characteristics of a legislative body, since, on the one hand, its activity is not binding in nature and, on the other hand, the Petitions Committee does not have a right of initiative or a right to exercise influence. The action it takes is always dependent upon the input of the citizen and the content of the request. The same applies to petitions to public authorities. Thus, the right to petition does not distinguish between public authorities and the Hesse *Land* Parliament.
- 18 As there is no general definition of what the legal concept of a public authority and therefore of administration consists, the concept must be defined on a case-by-case basis. A broad understanding of administration and therefore a wide definition of the term 'public authority' is to be assumed here. This assumption is also supported by the fact that, unlike Directive 2003/4/EC (the environmental information directive), Regulation No 2016/679, in Article 2(2), specifically does not exclude institutions acting in a judicial or legislative capacity (cf. judgment of the Court of Justice of 14 February 2012, *Flachglas Torgau*, C-204/09, EU:C:2012:71, paragraphs 40-44).
- 19 The regulatory objective of Regulation No 2016/679 is therefore of decisive importance for the interpretation of the term 'public authority'. Pursuant to Article 3(1) of Regulation No 2016/679, the regulation applies to the processing of personal data in the context of the activity of the controller. In this respect, the Petitions Committee of the Hesse *Land* Parliament does not differ in any way from an 'administrative' authority (data protection authorities, data protection supervisory authorities, regulatory bodies, financial supervisory authorities) as regards the petition of a data subject.
- 20 Regulation No 2016/679 is intended to strengthen the rights of data subjects and thus the personal rights and self-determination of citizens. Substantive considerations of the right to petition do not explain why the processing of the personal data of a petitioner who contacts a public authority by means of a petition pursuant to Article 16 of the HV is subject to the General Data Protection Regulation and therefore a full right of access pursuant to Article 15 of Regulation No 2016/679, but a petition to the Petitions Committee of the Hesse *Land* Parliament is not. The referring court therefore assumes that the Petitions Committee of the Hesse *Land* Parliament is a public authority (body) within the meaning of Article 4(7) of Regulation No 2016/679. There are therefore no grounds for refusing access pursuant to Article 15 of Regulation No 2016/679. In particular, the referring court is also unable to see any restriction pursuant to

Article 23 of Regulation No 2016/679. It takes the view that the *Land* legislature did not intend to restrict the rights of the data subject in the reasoning for the HDSIG.

*The second question*

- 21 However, the court is able to refer this question only if it is a ‘court or tribunal’ within the meaning of Article 267 TFEU. Regarding the characteristics of a ‘court or tribunal’ cited in the case-law of the Court of Justice, the referring court makes reference to the judgments of 17 July 2014, *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088, Paragraph 17) and 6 October 2015, *Consorti Sanitari del Maresme* (C-203/14, EU:C:2015:664, paragraph 17).
- 22 It has doubts in relation to the characteristic of independence. It refers to the interpretation of the requirement of independence in the case-law of the Court of Justice. According to this, the requirement of independence is comprised of two aspects.
- 23 The first, external, aspect presumes that the court exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and is thus protected against external interventions or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them (judgment of 16 February 2017, *Ramón Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 37).
- 24 The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject-matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law (judgment of 16 February 2017, *Ramón Margarit Panicello*, C-503/15, EU:C:2017:126, paragraph 38).

*The first aspect*

- 25 The referring court has doubts in relation to the first aspect because the courts are hierarchically subject to the Ministry of Justice and are therefore subordinated to it, even if the courts do not take orders or instructions from any source.
- 26 The referring court refers to the case-law of the Court of Justice regarding the independence of supervisory authorities in the area of data protection, according to which there must not be any direct or indirect external influence (from the State or the *Länder*) (cf. judgment of 9 March 2010, *Commission v Germany*, C-518/07, EU:C:2010:125, paragraphs 19 in addition to paragraphs 28, 30, 34 and 36). The referring court takes the view that this must also apply to the courts. The courts must also not be subject to any influence or instructions in the performance of their duties. This applies not only to their own case-law (decision-making), but

also to the path towards decision-making, that is to say to the organisation of the courts, the procedures, and the techniques used, etc.

- 27 This is not the case for any of those aspects: the external and internal organisation is prescribed by the Ministry via the procedures for the courts and public prosecutor's offices and by other legal acts. The Ministry determines, via a central service provider, the Hessische Zentrale für Datenverarbeitung (Hesse Central Office for Data Processing, HZD), the communication methods (telephone, fax and internet, amongst others) and the IT set-up via the so-called 'HessenPC', which is designed for administration. The referring court takes the view that this has the result that the administration can ultimately access all the data of the courts, even if it probably does not do so in practice. The courts therefore do not enjoy the independence that would enable them to perform their duties free from external influence.
- 28 The possibility remains that the courts, which, with the exception of the 'independent judges', are part of the general public administration and therefore under the control of the government of their respective *Land*, are not able to act objectively when they interpret and apply national and European provisions. This is demonstrated simply by the fact that, contrary to Regulation No 2016/679, the courts do not have independent control over data protection, as the bulk of data processing is prescribed by the Ministry, namely the information technology office of the Hesse judicial authorities (an IT office that is an intermediate authority within the Ministry of Justice) or by the HZD, without a court having any effective influence on this (cf. recital 20 of Regulation No 2016/679). The reason for this is that not only is judicial activity carried out by means of the judgment to be delivered, it also concerns the entire process of court proceedings, from the receipt of an action/application through to completion via the service of the judgment/order.
- 29 Even the mere risk of courts being politically influenced (via equipment, staff allocation etc. by the Ministry of Justice) can give rise to the risk of decisions of the courts being influenced. For example, statistics on the burden on the courts produced by the Ministry may create pressure to bring cases to a conclusion. In this respect, the referring court takes the view that such statistics on the actual burden on the courts do not say very much, as the required time frames for the average completion of court decisions are determined by the Ministry itself, and some proceedings that must also be processed are not even included in the statistics.

*The second aspect*

- 30 Regarding the second aspect, it should be stated that the national constitutional situation guarantees only the functional independence of the judges, but not the institutional independence of the courts. This is evidenced by the fact that the judges – and therefore also the judge of the referring court – are appointed and promoted by the Minister of the Hesse Ministry of Justice (Paragraph 3 HRiG),

their evaluation is governed by the Hesse Ministry of Justice (Paragraph 2b HRiG) and, moreover, the provisions of the law on public servants are applicable to judges.

- 31 Pursuant to Paragraph 18 ('Acting judges'), for the purpose of covering staff requirements of a merely temporary nature, an established public servant qualified for judicial office can be appointed as an acting judge for a period of at least two years, but for no longer than the duration of his main office. Such a public servant then returns to administration. This is intended to cover a temporary increase in staffing needs in the first instance of the administrative courts in exceptional situations and should be compatible with the Basic Constitutional Law. In such a case, it is also possible for the acting judge to come from a public authority that is frequently represented before the court as a defendant.
- 32 Regarding independence, however, the manner of appointment of the members of a court must also be taken into account (in this respect, see in particular ECtHR, 18 July 2013, *Maktouf and Damjanović v. Bosnia and Herzegovina*, ECLI:CE:ECHR:2013:0718JUD000231208). This may well be questionable in the case of acting judges.
- 33 The question therefore arises as to whether, at least in proceedings to which the Hesse Ministry of Justice is party, judges that are appointed and promoted by the Minister of Justice, who also makes decisions on the processing of their personal data in the context of the publication of their contact details (even if only within the *Land* of Hesse), have complete independence and can rule without being subject to any influence, and even if only because they have submitted an application for a post involving a promotion, on which, once again, the Ministry of Justice ultimately decides. The referring court takes the view that what was decided in relation to Directive 95/46/EC regarding data protection supervisory authorities has to apply here too – in fact, the standards established for public authorities in the decision must apply *a fortiori* to jurisdiction and therefore to the courts (see, in that regard, Opinion of Advocate General Bobek, C-530/16, EU:C:2018:29, points 32 and 33).
- 34 The courts are functionally independent only to the extent that their judges are independent and subject only to the law (Article 126 of the HV). Otherwise, the judges, and in particular the court, are subject to external influence. This is because the Ministry of Justice decides on the number of judges and posts of each court, as well as on the non-judicial staff of the court. It also decides on the equipping of a court with, inter alia, IT and applications.
- 35 However, functional independence on the part of judges is not by itself sufficient to protect a court from all external influence. The independence is not only intended to preclude direct influence, in the form of instructions, but is also intended to ensure that they are put beyond the reach of external influence, whether direct or indirect, which is liable to have an effect on the court's decisions

(see, in that regard, judgment of the Court of Justice of 16 October 2012, *Commission v Austria*, C-614/10, EU:C:2012:631, paragraphs 41 to 43).

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