

5. AUSTRIA

DATA PROTECTION BILL

presented to Parliament on 18 December 1974

I. GENERAL PROVISIONS

Competence

Section 1. [Constitutional clause]

Definitions

Section 2. In this Federal Act the terms listed hereunder shall be defined as follows:

1. *Personal data:* information, including personal identification marks, relating to a natural person or a juristic person or a 'personal company' in the sense of commercial law, either identified or likely to be identifiable;
2. *Persons affected:* persons or 'personal companies' in the sense of commercial law about whom data as defined in paragraph 1 hereof are collected or processed;
3. *Data processing, processing of data:* the storing, altering, combining, passing on or erasure of personal data regardless of the methods used;
4. *Collection, collecting:* the capture of personal data with oral or written assistance by the person affected;
5. *Storage, storing:* the recording of data on a data carrier;
6. *Alteration, altering:* the transformation of stored data with respect to their content;
7. *Combination, combining:* the temporary or permanent consolidation, in one data bank, of personal data collected for, or stored in, a number of different data banks;
8. *Passing on:* the divulgence of data kept in storage or obtained by

Privacy and Computers

data processing to persons or organisations outside the institution by or on behalf of which the data are processed;

9. *Erasure, erasing*: the obliteration of data kept in storage, leaving no possibility to reconstruct them;

10. *Data bank*: a file of personal data, ordered by certain characteristics, which can be rearranged or processed with a view to other characteristics by means of electronic data processing or comparable technical aids (automated data processing); including the information carriers and the machinery required.

Application of this Act in the Sphere of Federal Execution

Section 3. 1. The provisions set out in Chapters I, II, III, IV, VI and VII hereof shall be applicable to the collection and processing of personal data by or on behalf of any legal entity set up directly by law, other than the legal entities referred to in Section 4 below.

2. With the exception of the provisions of Sections 27 and 29 below, this Act shall not apply to data banks operated by or on behalf of legislative bodies.

3. Chapters II, III and IV of this Act shall not apply to the Austrian National Bank or the Austrian Postal Savings Bank.

Application of this Act in the Sphere of Länder Execution

Section 4. The provisions of Chapters I, II, III, IV, VI and VII of this Act shall be applicable to the processing of personal data in data banks operated by or on behalf of juristic persons created by law whose creation falls within the executive jurisdiction of the Länder, or by or on behalf of communes or associations of communes, [various provisos]

Data Banks accessible to the Public

Section 5. This Act shall not apply to data banks accessible to the public by virtue of legal provisions.

II. PROCESSING OF PERSONAL DATA

Permissibility of Data Collecting and Processing

Section 6. Personal data shall not be collected and processed for use in a data bank unless such activities are covered by an explicit statutory authorisation, or unless such activities form an essential prerequisite to the fulfilment by the legal entity concerned of its statutory functions.

Appendix B

Passing on of Data

Section 7. 1. Personal data subject to official secrecy (Article 20, paragraph 2, of the Federal Constitution) or to a statutory professional pledge to secrecy shall not be passed out of a data bank in any manner whatsoever.

2. Subsection 1 hereof shall not apply where –
 1. a law provides otherwise, or
 2. the person affected has given his written consent to the passing on of the data, or
 3. appropriate steps have been taken to ensure that the person affected cannot be identified, provided the only reason for keeping the personal data secret is the affected person's interest.

3. Passing on to agents of the Federation, the Länder, the communes and legally appointed professional organisations shall be permitted where the data form an essential prerequisite for the fulfilment by the recipient of its statutory functions.

Combination of Data

Section 8. Personal data kept in storage in a data bank shall not be combined with personal data stored in other data banks unless explicit statutory provisions provide so, or unless this is compatible with the purpose for which the data were collected.

Data Bank Ordinance

Section 9. 1. For each data bank, the Federal Minister in charge of supervising the entity operating the bank, after hearing the Federal Chancellor, shall issue a data bank ordinance which, with due regard to economic considerations and technological possibilities, shall set out those measures relating to organisation, personnel, technologies and buildings which, in view of the type of personal data involved and the technical equipment and size of the data bank, are necessary to prevent personal data being illegally revealed to third parties or passed, or altered, combined or erased by unauthorised persons.

2. The data bank ordinance shall in particular include provisions on access to the bank and to the information carriers; on the technical and constructional precautions to be taken in order to prevent unauthorised, negligent or accidental erasures or alterations of data or programs (physical data security); on checks of machinery

Privacy and Computers

and programs relating to personal data; on recording the passing on of data and on how long such records shall be kept on file; and on the groups of persons authorised to alter and pass on data as well as their obligations with regard to the secrecy of facts and information coming to their notice in the course of data processing activities.

3. Where it is intended to pass on personal data as provided in Section 7, subsection 2, paragraph 3 above, the data bank ordinance shall include provisions to ensure that these data are rendered anonymous.

4. Further, the data bank ordinance shall, with due regard to Section 7, regulate the disclosure and passing on of personal data in such a manner as to ensure that the legitimate interests of the persons affected in the confidentiality of personal data shall be safeguarded.

5. Whenever the objectives set forth in subsections 1 and 4 hereof so require, the competent Federal Minister shall revise the data bank ordinance to bring it in line with the latest technological developments.

Right to Information

Section 10. 1. Upon written request to the body operating the data bank, personal data shall be communicated to the person affected within four weeks in writing, in a form intelligible to the layman and readily readable, together with information as to the legal basis for their collection and processing, except where the request concerns data which must be kept secret even from the person affected by virtue of an explicit statutory stipulation or in the interests of a territorial authority.

2. Where a request presented under subsection 1 hereof is not granted in full, this shall be communicated to the person affected in writing.

3. The Federal Minister competent to issue the data bank ordinance (Section 9 above) may prescribe an administrative charge for providing information; its amount shall be fixed by ordinance in the form of a blanket sum with due regard to the average real cost of providing such information.

4. Subsection 1 hereof shall not apply where the body operating the data bank has already communicated the data to the person affected.

Obligation to Rectify Data

Section 11. 1. Any institution having ordered personal data to be

Appendix B

processed in a data bank shall rectify or erase, or cause to be rectified or erased, any personal data which are incorrect or incomplete or which have been collected or processed in contravention of Section 6 hereof, and in so doing shall proceed either *ex officio* or upon a decision of the authority materially competent to ascertain the data or at the affected person's request or upon a decision of the Federal Data Protection Commission, and shall act with dispatch not later than two weeks following the clarification of the information underlying the processing of the data. A request for rectification shall be considered without delay.

2. Where a request (under subsection 1 hereof) by the person affected is dismissed, he shall be informed to that effect in writing.

3. The burden of proving the correctness of processed personal data shall rest with the institution which has ordered their processing, except where information furnished by the person affected was the exclusive source of the data collected.

4. Where data have been rectified or erased at the affected person's request or upon a decision of the Federal Data Protection Commission, the person affected shall be informed of the rectification or erasure, and where the rectification or erasure has been effected on the basis of a decision by the Federal Data Protection Commission, the latter shall also be informed thereof. The person affected shall not be informed where the authority materially competent to ascertain the data has already informed him of the rectification of erasure.

5. Where personal data rectified or erased in accordance with subsection 1 hereof were passed on (Section 7) or combined (Section 8) prior to their rectification or erasure, the data processing body shall inform the recipient of these data of their rectification or erasure, provided that the person affected demands so; that he is able to show a legitimate interest in such a step; and that the recipient can be ascertained.

6. There shall be no rectification or erasure where the personal data concerned were correct and complete at the time when they were first gathered, and where the purpose for which they were gathered or processed rules out their alteration in response to changes in the facts underlying them.

7. Where data are rectified or erased by virtue of a decision of the authority materially competent to ascertain them, the institution having ordered their processing shall be bound by that decision.

Privacy and Computers

Criminal Records Excepted

Section 12. The provisions of Sections 10 and 11 of this Act shall not apply to the Criminal Records kept by the Federal Police Directorate, Vienna [. . .]

Publication of a List of Data Banks

Section 13. 1. Every institution within which or on whose behalf (Section 14 below) a data bank is operated shall by 1 February of each year inform the Federal Chancellery in writing of the fact that it operates a data bank, the latter's legal foundation, purpose and uses, the type of personal data being processed therein, and the category of persons affected.

2. The Federal Chancellery shall publish, in the Official Gazette of the *Wiener Zeitung*, a list of data banks each year not later than May. This notice shall in addition specify the type of personal data stored in each data bank, the category of persons affected and the purpose of each data bank.

III. DATA PROCESSING UNDER CONTRACT ON BEHALF OF THE LEGAL ENTITIES REFERRED TO IN SECTIONS 3 AND 4

Requirements

Section 14. 1. The legal entities referred to in Sections 3 and 4 above shall not be allowed to resort to the services of other legal entities or other persons in respect of the processing of personal data in data banks unless the provisions of Section 6 hereof are observed.

2. Where the services of other legal entities or other persons are used for processing personal data, the legal entities referred to in Sections 3 and 4 shall ensure by appropriate contractual clauses the observance of the provisions of Chapter II in the processing of these data. In contracts under which other legal entities or other persons are entrusted with the processing of personal data on behalf of the legal entities referred to in Sections 3 and 4, provision shall be made in particular for the drawing-up of data bank operating rules which meet the requirements of Section 9.

3. Arrangements for the processing of personal data under the terms of this Chapter shall be noted in the List of Data Banks (Section 13 above) except where they are of a temporary nature.

Appendix B

IV. FEDERAL DATA PROTECTION COMMISSION

Establishment and Composition

Section 15. 1. In order to ensure the observance of the provisions of Chapters II and III, a Federal Data Protection Commission shall be set up in the Federal Chancellery.

2. The Federal Data Protection Commission shall consist of fifteen members, eight of whom shall be judges. The other members shall be persons particularly experienced in the field of data protection.

3. Before vacancies on the Federal Data Protection Commission are filled, they shall be advertised in accordance with the Advertising of Vacancies Act.

4. The members of the Federal Data Protection Commission shall be appointed by the Federal President on the nomination of the Federal Government for a term of six years.

5. The following persons shall be disqualified from membership of the Federal Data Protection Commission:

1. Members of the Federal Government or of a Land government, and Secretaries of State;
2. Persons employed in any data bank falling under the provisions of this Act;
3. Members of a Land Data Protection Commission;
4. Persons not eligible for election to the National Assembly.

6. When a member of the Federal Data Protection Commission has not responded to three consecutive invitations to a sitting without a valid excuse, or where subsequent to a member's appointment any of the grounds for disqualification set forth in subsection 5 hereof come to apply to him, the plenary assembly of the Federal Data Protection Commission shall so determine after hearing him. This determination shall entail the loss of his membership. In all other cases, a member of the Federal Data Protection Commission can only be deprived of his office for serious reasons by a decision of the plenary assembly of the Commission approved by at least two-thirds of its members.

7. When a member leaves the Federal Data Protection Commission before the end of his term of office on account of his death or voluntarily or by virtue of subsection 6 hereof, a new member shall be appointed in his place (subsection 4). Subsection 2 hereof shall be applicable to such appointments, provided that a judicial vacancy

Privacy and Computers

shall be filled by a judge and a non-judicial vacancy by a non-judicial nominee.

Independence and Autonomy

Section 16. In the exercise of their office the members of the Federal Data Protection Commission shall be independent and shall not be subject to instructions.

Chairman

Section 17. The plenary assembly of the Federal Data Protection Commission shall elect by a simple majority a Chairman and a Deputy Chairman from among its judicial members.

[Remuneration of Members]

Section 18.

[Divisions and Procedure]

Section 19.

Complaints

Section 20. 1. Unless an ordinary court of justice is competent, or unless the affected person's request for rectification or erasure (Section 11) is already being considered in proceedings before the materially competent authority, the Federal Data Protection Commission shall have jurisdiction of the first instance to determine any complaint charging a violation of the provisions of this Act or of any ordinance issued hereunder provided the complainant claims that his rights have thereby been violated, and it shall determine applications filed under subsection 3 hereof.

2. Where data are rectified or erased on the basis of a decision by the authority materially competent to ascertain the data (Section 11, subsection 6), the Federal Data Protection Commission shall be bound by that decision.

3. Where, in the course of administrative proceedings in which personal data from a data bank subject to the provisions of this Act are used, an allegation is made of a violation of any provision of this Act or any ordinance issued hereunder, the administrative proceedings shall be suspended until the Federal Data Protection Commission issues its decision, unless there is danger in delay (Section 38 of the General Law on Administrative Procedure). At the same time application shall be made for the opening of proceedings before the Commission.

Appendix B

4. Decisions by the Federal Data Protection Commission shall not be subject to repeal or amendment through administrative channels. Appeals to the Administrative Court shall be permissible.

Proceedings opened Ex Officio

Section 21. 1. Where in the course of proceedings under Section 20 above, the suspicion arises that the provisions of this Act or any ordinance issued hereunder may have been violated also with regard to other affected persons, the Federal Data Protection Commission shall *ex officio* open proceedings to investigate such suspicions; the persons affected shall be duly informed thereof, and they shall have the status of parties (Section 8 of the General Law on Administrative Procedure) in such proceedings.

2. The provisions of Section 19 and of Section 20, subsections 2 and 3, shall also apply to such proceedings.

Conjoint Proceedings

Section 22. Where necessary to ensure that proceedings are efficient, speedy, simple and economical, the plenary assembly of the Federal Data Protection Commission shall conjoin proceedings which have been opened (Sections 20 and 21), and shall allot them to one division for determination. The composition of such a division shall be governed by Section 19.

Publication of decisions; Annual Report

Section 23. 1. The decisions of the Federal Data Protection Commission shall be published except where publication would injure legitimate interests of the persons affected.

2. The Federal Data Protection Commission shall each year report to the Federal Government about its activities, paying special regard to observations made and experience gathered in conducting proceedings under this Act. The Federal Government shall bring this report to the notice of the National Assembly.

V. PRIVATE DATA BANKS

Restrictions on Private Data Banks

Section 24. In a data bank not subject to the provisions of Section 3 or Section 4 above, and which is operated by an enterprise (Section 2 of the Turnover Tax Act 1972) or by an association, the

Privacy and Computers

ascertainment, collection and processing of personal data shall be conducted in a manner corresponding to the declared purpose of the enterprise or association, and to an extent which respects the private and family lives of the persons affected.

Use of foreign Data Processing facilities

Section 25. A legal entity not subject to Sections 3 and 4 hereof which is domiciled in Austria shall not use data processing facilities situated outside Austrian Federal territory for processing personal data unless the provisions of Section 24 hereof are observed.

Supervision

Section 26. 1. The observance and enforcement of the provisions of Sections 24 and 25 hereof shall be the responsibility of the authority charged with the general supervision of the legal entity which operates the data bank. Where no such authority is competent to supervise the legal entity collecting or processing the data, supervision shall be entrusted to the locally competent District Administrative Authority (Section 3 of the General Law on Administrative Procedure).

2. In addition to powers that may be at its disposal by virtue of other laws, the supervisory authority (subsection 1) may order the discontinuance or restriction of any data gathering or processing activities not conforming to the provisions of Section 24 or Section 25 hereof.

VI. PENAL PROVISIONS

Misuse of Data

Section 27. He who, in contravention of the provisions of Section 7 hereof, discloses or makes use of any personal data that have been entrusted, or have become accessible, to him exclusively on account of his being charged with functions relating to data processing, shall be punished by the competent court of justice with imprisonment not exceeding six months or a fine not exceeding 360 equivalent day-rates, unless some other legal provision stipulates severer punishment for the offence.

Breach of secrecy in Private Data Banks

Section 28. 1. He who discloses or makes use of a secret that has been entrusted, or has become accessible, to him in the course of his

Appendix B

professional concern with functions relating to data processing in a data bank (Section 2, paragraph 10) of a type other than the data banks referred to in Sections 3 and 4, the disclosure or use of which is likely to injure a legitimate interest of the person to whom the data refer, shall be punished by the competent court of justice with imprisonment not exceeding six months or a fine not exceeding 360 equivalent day-rates.

2. The perpetrator shall not be punished where the disclosure or use, on account of its substance and form, is justified by a public interest or a legitimate private interest.

3. The perpetrator shall not be prosecuted unless the person whose interest in secrecy has been violated (subsection 1) so demands.

Unauthorised obtention of Data

Section 29. 1. He who illegally obtains from a data bank any personal data the disclosure or use of which is likely to injure a legitimate interest of the person affected (of Section 2, paragraph 2), and who does so with intent to disclose or make use of the data, shall be punished by the competent court with imprisonment not exceeding six months or a fine not exceeding 360 equivalent day-rates.

2. The perpetrator shall not be prosecuted unless the person affected so demands. But where the act has been perpetrated in respect of a data bank of a type referred to in Sections 3 and 4 hereof, the public prosecutor shall prosecute the perpetrator given the consent of the person whose interests have been injured (subsection 1).

FINAL PROVISIONS

[Entry into Force]

Section 30.

[Communes' own sphere of competence]

Section 31.

[Enforcement]

Section 32.