[DE] Federal Administrative Court extends media rights to information from German Federal Intelligence Service

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In two recent decisions, the *Bundesverwaltungsgericht* (Federal Administrative Court – BVerwG), Germany's highest ordinary administrative court, ordered the *Bundesnachrichtendienst* (Federal Intelligence Agency – BND) to show greater transparency towards journalists. Under these decisions, the BND is required to disclose to journalists the identity of parties, involved in court proceedings, who had fought against the disclosure of press contacts in a separate court procedure, and that of media representatives invited to hold 'informal briefings' with the BND. These information rights also give media representatives the opportunity, for both reporting and research purposes, to assess the relationships between the BND, as one of the three German federal intelligence services with specific responsibility for foreign civil and military intelligence, and other media representatives.

Both procedures relate to a connected case that, in essence, concerns 'background' or 'informal' briefings to which the BND had invited selected media representatives since 2016. A correspondent from a well-known daily newspaper who had not been invited to these briefings had asked the BND for information about which journalists had been invited. He had claimed he was trying to investigate whether the BND had been improperly collaborating with certain selected journalists, a subject that was strongly in the public interest. After the BND refused his request, the correspondent had appealed to the courts and, at the end of 2019, had finally been granted the right to such information for 2016 and 2017 by the BVerwG (case no. 6 A 7.18). A newspaper publisher had appealed to the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) against this decision in order to prevent the information being released, but the BVerfG had rejected the complaint. However, it had not disclosed which newspaper publisher had lodged the request. The newspaper correspondent had then asked the BND and the BVerfG to reveal the identity of the complainant and its lawyers, as well as the content of the complaint, on the grounds that this information could reveal, as part of his research, whether the complaint to the BVerfG had been made as a favour to the BND. When both the BND and the BVerfG refused his request, he took further legal action.

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In its first ruling of 23 March 2021 (BVerwG 6 VR 1.21), the BVerwG upheld the action, with respect to the BND, by imposing interim measures, ordering the BND to reveal the identities of the complainants and their legal representatives, and to indicate whether they had been among the circle of media representatives who had been invited to background briefings. The BVerwG based its decision on the freedom of the press that was protected under the German Constitution and enjoyed by all journalists, whichever media they worked for. It stressed that it was essentially up to the media themselves to judge which information they needed in order to prepare a report on a particular subject. The only exception would be if their research was based on pure speculation and information obtained out of the blue. However, this was not the case here, as the BVerwG stressed with a particular reference to the German interior minister's comment that this type of "ad hoc advance briefing is a standard feature of public authorities' media relations work". Moreover, possible collusion between federal authorities and selected press organisations was a matter of considerable public interest.

In a separate procedure, the same newspaper correspondent asked for information about when and for what reason the BND had invited media representatives to its premises in Berlin, since June 2019. He also wanted to know which media representatives the BND had spoken to individually and on what dates, and which media they represented. In a ruling of 8 July 2021, the BVerwG (case no. 6 A 10.20) partially upheld this request, agreeing that information about 'informal briefings' should be disclosed, but not details of individual conversations. The legitimate private interests of the journalists and media concerned did not outweigh the right to information which, here also, was directly based on the fundamental right to the freedom of the press. The BND could not argue that disclosing the names would breach editorial confidentiality and the protection of sources because the information requested would not reveal any link to a specific investigation and its disclosure would therefore not risk exposing actual research activities. Neither would the media representatives' general privacy rights be breached because the information concerned their professional lives, which were of a public nature. However, the situation was different when it came to the disclosure of names and dates of individual conversations.

Beschluss des BVerwG

https://www.bverwg.de/de/230321B6VR1.21.0

Decision of the Federal Administrative Court

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