PRIVACY INTERNATIONAL

Universal Periodic Review
Stakeholder Report: 23rd Session, Austria

The Right to Privacy in Austria

Submitted by Privacy International

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Introduction

1. This stakeholder report is a submission by Privacy International (PI). PI is a human rights organisation that works to advance and promote the right to privacy and fight surveillance around the world.

2. PI wishes to bring concerns about the protection and promotion of the right to privacy in Austria before the Human Rights Council for consideration in Austria's upcoming review.

The right to privacy

3. Privacy is a fundamental human right, enshrined in numerous international human rights instruments.[1] It is central to the protection of human dignity and forms the basis of any democratic society. It also supports and reinforces other rights, such as freedom of expression, information and association. The right to privacy embodies the presumption that individuals should have an area of autonomous development, interaction and liberty, a "private sphere" with or without interaction with others, free from arbitrary State intervention and from excessive unsolicited intervention by other uninvited individuals.

4. Activities that restrict the right to privacy, such as surveillance and censorship, can only be justified when they are prescribed by law, necessary to achieve a legitimate aim, and proportionate to the aim pursued.[2]

5. As innovations in information technology have enabled previously unimagined forms of collecting, storing and sharing personal data, the right to privacy has evolved to encapsulate State obligations related to the protection of personal data.[3] A number of international instruments enshrine data protection principles,[4] and many domestic legislatures have incorporated such principles into national law.[5]

6. In its resolution on the right to privacy in the digital age, adopted by consensus on 18 December 2014, the UN General Assembly called on all states to review their laws and policies regarding surveillance of communications with the view to uphold the right to privacy. The UPR review offers a significant opportunity for states to demonstrate that they are implementing this recommendation, by systematically reviewing states' compliance with their obligations to respect and protect the right to privacy.

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1 Universal Declaration of Human Rights (Article 12), International Covenant on Civil and Political Rights (Article 17); regional treaties and standards including the African Charter on the Rights and Welfare of the Child (Article 10), the American Convention on Human Rights (Article 11), the African Union Principles on Freedom of Expression (Article 4), the American Declaration of the Rights and Duties of Man (Article 5), the Arab Charter on Human Rights (Article 21), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 8).

2 See Human Rights Committee, General Comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation (art. 17); see also report by the UN High Commissioner for Human Rights, the right to privacy in the digital age, A/HRC/27/37, 30 June 2014.

3 Human Rights Committee, General Comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation (art. 17).

4 See the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (No. 108), 1981; the Organization for Economic Co- operation and Development Guidelines on the Protection of Privacy and Transborder Data Flows of Personal Data (1980); and the Guidelines for the regulation of computerized personal data files (General Assembly resolution 45/95 and E/CN.4/1990/72)

5 As of December 2014, over 100 countries had enacted data protection legislation: David Banisar, National Comprehensive Data Protection/Privacy Laws and Bills 2014 Map (December 8, 2014). Available at SSRN: http://ssrn.com/abstract=1951416 or http://dx.doi.org/10.2139/ssrn.1951416

Follow up to the previous UPR

7. There was one recommendation that had an effect on privacy and data protection in the report of the Working Group. The Russian Federation expressed concern that sectors of the population were vulnerable to racism and xenophobia, such as Sub-Saharan Africans, Muslims, and Roma.[6] The Russian Federation recommended Austria to *"Create a comprehensive system for the collection of data that would allow assessing the situation of vulnerable groups and minorities."*

8. Austria accepted the recommendation, noting that "*data are being comprehensively collected in Austria as far as this is useful to take targeted measures to improve the situation of the groups concerned and as far as it is in accordance with data protection provisions*."[7]

Domestic laws related to privacy

9. The Austria Constitution guarantees the protection and respect of the rights to privacy. Making specific reference to privacy of communications, Article 10 of the Basic Law of Austria[8] states:

> *"The privacy of letters may not be infringed and the seizure of letters may, except in case of a legal detention or domiciliary visit, take place only in times of war or by reason of a judicial warrant in conformity with existent laws."*

Article 10A states:

> *"Telecommunications secrecy may not be infringed. Exceptions to the provisions of the foregoing paragraph are admissible only by reason of a judicial warrant in conformity with existent laws."*

10. The Data Protection Act 2000[9] in Austria exists to meet the fundamental right to data protection. Section 1 defines the purpose of the act:

> *"Everybody shall have the right to secrecy for the personal data concerning him, especially with regard to his private and family life, insofar as he has an interest deserving such protection..."*

11. Privacy of the dwelling is explicitly protect in Austrian law under the 1862 act, [10] Protection of the Rights of the Home, Section 1:

> *"A domiciliary visit, that is, a search of a home or the appurtenant premises may rule only be undertaken on the strength of a judicial*

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6 A/HRC/17/8, Report of the Working Group on the Universal Periodic Review: Austria, pp. 40

7 A/HRC/17/8 Add. 1. para. 93.29

8 Basic law of 21 December 1867 on the General Rights of Nationals in the Kingdoms and Länder represented in the Council of the Realm. Available at: https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1867_142/ERV_1867_142.pdf .

9 Federal Act concerning the Protection of Personal Data (DSG 2000). Available at: https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1999_1_165/ERV_1999_1_165.pdf .

10 Protection of the Rights of the Home, https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1862_88/ERV_1862_88.pdf .

warrant stating the reasons. This warrant shall at once or at least within 24 hours."

12. The European Convention on Human Rights is also directly applicable in Austria, having been adopted at the level of a constitutional law. Article 8 of the European Convention on Human Rights declares:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

International obligations

13. Austria is a signatory to the Universal Declaration of Human Rights ('UDHR') and has ratified the International Covenant on Civil and Political Rights ('ICCPR'). Article 17 of the ICCPR, which reinforces Article 12 of the UDHR, provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation". The Human Rights Committee has noted that states parties to the ICCPR have a positive obligation to "*adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right [privacy].*"[11]

14. Article 50 of the Federal Constitutional Law in Austria states that the conclusion of a treaty requires the approval of the National Council and, in certain cases, also the consent of the Federal Council.[12] In most cases the provisions of the conventions are directly applicable before courts and administrative authorities provided that they are sufficiently clear and precise.

Areas of concern

Intelligence agency cooperation and foreign surveillance of Austrian communications

15. On 20 November 2014, Austrian Interior Minister Johanna Mikl-Leitner and Defense Minster Gerald Klug officially acknowledged that the country's intelligence services had cooperated with foreign intelligence services, including the United States National Security Agency. No information was given about the nature of the cooperation or of the Austrian law that underpins this cooperation. Klug said:

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[11] General Comment No. 16 (1988), para. 1

[12] Federal Constitutional Law, Article 50. Available at: https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1930_1/ERV_1930_1.pdf.

"On the one hand, we benefit from cooperation with other intelligence agencies, but on the other hand, we need answers regarding data collection on the territory of Austria, which scale we were unaware of until a few weeks ago."[13]

16. In 2014 a book by journalist Glenn Greenwald, "No Place to Hide" revealed a listening post known as the Vienna Annex on top of the IZD Tower in Vienna.[14] The danger of a "listening post" present in Austria is exacerbated due to the important institutions present in Vienna and in the vicinity of the IZD Tower like the United Nations, the International Atomic Energy Agency, and the Organisation of Petroleum Exporting Countries.[15]

17. If foreign governments are conducting surveillance and data collection in Austria without the knowledge of the government, this could represent a serious interference with the rights of Austrian citizens and residents, contravening Austria's positive obligation to protect against unlawful interferences with privacy.

18. In her June 2014 report on the right to privacy in the digital age, the former UN High Commissioner for Human Rights, Navi Pillay, noted the "disturbing lack of governmental transparency associated with surveillance policies, laws and practices, which hinders any effort to assess their coherence with international human rights law and to ensure accountability."[16] It is essential that Austria rectify the deficit in transparency of surveillance currently underway in Austria immediate.

19. Austria should endeavour to provide clarity to its citizens and institutions within its border on the basis and limits of its cooperation with other intelligence agencies through increasing the transparency of any intelligence sharing relationships they have with other states.[17] Austria must also provide relevant safeguards for any international cooperation that may be taking place in the Austria.[18]

20. The Austrian government must demonstrate that they have taken all steps to protect the right to privacy of those within its territory and jurisdiction. The obligation to protect the right to privacy of those within a country's territory without distinction of any kind, including nationality, was reaffirmed in the Office of the United Nations High Commissioner's report "The Right to Privacy in the Digital Age".[19] The Austrian government must protect the right to privacy by maintaining the integrity of their communications systems and safeguarding against illegitimate access of those communications systems.[20]

Areas of improvement

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13 Miki-Leithner, J., *Austrian interior, defense minsiters admit cooperation with NSA*, TASS, 20 November 2014. Available at: http://tass.ru/en/world/708200

14 Der Standard.at., *NSA spioniert angeblich vom Dach des Wiener IZD Tower aus*, 23 September 2014. Available at: http://derstandard.at/2000005912745/Vienna-Annex-Die-NSA-sitzt-im-22-Bezirk. For more information, see: Möchel. E., *Die NSA-Station im 22. Wiener Gemeindebezirk,* 22 September 2014. Available at: http://fm4.orf.at/stories/1746596/.

15 Schmid, F., *Greenwald-Buch zeigt: Österreich ist Partner der NSA*, der Standart,at, 13 May 2014. Available at: http://derstandard.at/1399507355149/Greenwald-Buch-Oesterreich-ist-Partner-der-NSA .

16 A/HRC/27/37, para. 48.

17 International Principles for the Application of Human Rights to Communications Surveillance. See: https://necessaryandproportionate.org/

18 Ibid.

19 A/HRC/27/37, para. 32

Data Retention Directive

21. On 8 April 2014 the Court of Justice of the European Union declared the Data Retention Directive 2006/24/EC invalid *ab initio*, meaning all legislation that was implemented under the Directive was invalid.[21]

22. The judgement was referred to the court by the Constitutional Court of Austria (*Verfassungsgerichtshof*) and found that the retention of all subscribers' data in the EU represented an "interference with the fundamental rights of practically the entire European population".

23. Subsequent to the CJEU's decision, on 27 June 2014 the Austrian Constitutional Court declared the implementation of the Directive in Austria to be not proportionate and unconstitutional. Data retention has not been re-legislated since that time, which is a welcome step by the Austrian government that recognises the severe interference posed by data retention with the right to privacy.

Recommendations

24. We recommend the government of Austria to:

- Ensure that its communication surveillance laws, policies and practices adhere to international human rights law and standards;
- Make clear the basis and limits of any intelligence sharing arrangements their intelligence agencies have with foreign intelligence agencies;
- Ensure that intelligence sharing arrangements are in accordance with the law by providing to Austrian citizen's with a clear understanding of the legal nature of the relationships;
- Take positive steps to protect the right to privacy of those within its territory and jurisdiction, endeavouring to maintain the integrity of communications systems and safeguarding against illegitimate access of those systems.

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[20] International Principles on the Application of Human Rights to Communications Surveillance. See: https://necessaryandproportionate.org/ .

[21] Judgment in Joined Cases C-293/12 and C-594/12, 8 April 2014. See: http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140054en.pdf