

Art. 209 – Police Data

Also Constitutional Court Orders Deletion of Manual Data

Platform Against Art. 209: Rehabilitation Bill Must be Dealt with Immediately!

Platform Against Art. 209 welcomes with pleasure the Constitutional Court's judgment on Art. 209- police data. As the Administrative High Court some days ago (VwGH 19.12.2005, 2005/06/0140), the Court found that those data have not only to be deleted from computer data banks but also from manual records on paper (VfGH 15.12.2005, B 1590/03).

After repeal of the anti-homosexual criminal statute August 2002 police authorities initially in general refused to delete the data on Art. 209-victims. They insisted that they needed those data for the enforcement of the Art. 209-substitute-provision Art. 207b CC. Minister of Interior, Dr. Ernst Strasser, therefore as late as February 2003 by decree ordered the deletion of the data of just those victims of Art. 209 who had been acquitted or whose proceedings have been dropped (Executive Order 05.02.2003, 3200/225-II/BK/2.3/03). In such cases the deletion is however, according to a verdict by the Constitutional Court, obligatory for suspects of all kinds of offences anyway.

Intensive lobbying by *Platform Against Art. 209*, joined by *Amnesty International*, and the first human rights cases, i.e. before the Data Protection Board, were then crowned by success. The Minister of Interior ordered the deletion of all data concerning Art. 209 from the national police databank "EKIS" on the one hand (Executive Order 10.04.2003, 8181/421-II/BK/1/03) and the destruction of all criminal identification data (fingerprints, pictures, genetic data etc.) of Art. 209-victims on the other (Decree 12.08.2003, BGBl II 361/2003).

Prisoner of Conscience and Teenager succeed over Data Protection Commission

Police authorities however still refused deletion of all data contained on paper. The Data Protection Commission shared their view and rejected all those complaints by Art. 209-victims. The question of paper data therefore had to be raised before the Constitutional Court and the Administrative High Court.

Two weeks ago the Administrative High Court announced a first decision giving way to such an application. The applicant was the man who in 2001 had been adopted as Austria's first prisoner of conscience for decades. In February 2005 the European Court of Human Rights convicted Austria in his case (*F.L. vs. Austria* 2005). The Administrative High Court - on the basis of the principle of proportionality - decided that entries have not only to be deleted from police computer data banks but also from manual records on paper since the proceedings violated the man's human rights.

The Constitutional Court now confirmed this view in his judgment published today. The judges quashed the decision of the Data protection Commission in the case of the young men who had been convicted under Art. 209 in 2000 for, as 19 year-old, engaging in sexual contacts with a 16-year-old (Austria has been convicted by the European Court of Human Rights also in this case: *Wolfgang Wilfling & Michael Woditschka vs. Österreich* 2004). It would not be clear why the registry could not be anonymized, the Court said.

Still unsolved is the issue of destruction of the files themselves. The victims of Art. 209 alleged such a right under the European Convention of Human Rights (Art. 8). The Constitutional Court and the Administrative High Court rejected this arguing that police files are not "filing systems" under the Data Protection Act. They did not deal with the arguments of the applicants under the European Convention of Human Rights. This question will now have to be decided by the European Court of Human Rights.

"The judgments of the Constitutional Court and Administrative High Court are milestones in the rehabilitation of victims of Art. 209", says Dr. Helmut Graupner, spokesperson for Platform Against Art. 209 and counsel of the applicants, "The more shameful seems inaction of parliament which for months now had time to deal with a comprehensive rehabilitation bill".

The interdenominational and supra-partisan Platform Against Article 209 comprises more than 30 organisations that joined in the fight against the discriminatory supplemental minimum age of 18 years for homosexual relationships between men only (in addition to the general age of consent of 14 for heterosexuals, lesbians and gays alike), as set forth in article Art. 209 of the Criminal Code. Nearly all associations of the homosexual movement, but also general organizations are members of the Platform, like AIDS-help-organisations, the Ombudspersons for Children and Adolescents of the States of Vienna and Tyrol, the Austrian National Student Union, the National Association of Probation, the Austrian Society for Sexual Research, and many others more. After the repeal of Art. 209 the Platform works for the release of all prisoners, for the deletion of all verdicts from criminal records and for just satisfaction of all victims of Art. 209. In addition it monitors the enforcement of the new Art. 209-substitute-provision, Art. 207b Criminal Code.

Full text of the judgment:

http://www.vfgh.gv.at/cms/vfgh-site/attachments/6/5/4/CH0003/CMS1138113809350/datenloeschung_209_b1590-03.pdf

More information:

Platform Against Art. 209: +43/1/876 30 61, 0676/3094737, office@paragraph209.at, www.paragraph209.at

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