Report of the Austrian Ombudsman Board
(Volksanwaltschaft)

to the National Council (Nationalrat) and to the Federal Council (Bundesrat)

Covering the 2003 Calendar Year

(Abbreviated English Version)

Preface

The present volume is a very abbreviated version of the original report compiled in German and consists of a general section, which describes the activities of the three members of the Austrian Ombudsman Board. In the following some cases involving human rights shall be mentioned.

The Ombudsman Board decided to add a special chapter on human rights to the annual reports beginning with the report on the year 2001. In this context also the present report deals with legal problems relating to human rights which the Ombudsman Board had to solve in 2003 when assessing complaints about administrative misconduct and infringements of legal provisions by federal and state authorities. So throughout the years a comprehensive mosaic about the human rights situation in Austria shall be created.

This report is submitted not only to the National Council but also to the Federal Council in accordance with the amendment to Art. 148d of the Federal Constitutional dated 13/8/1997, Federal Law Gazette 1997/87.

Both the original report written in German and the English translation are available free of charge from the Office of the Austrian Ombudsman Board (*Volksanwaltschaft*).

Ombudsman Mr. Dr. Peter Kostelka
Ombudsman Mr. Mag. Ewald Stadler
Ombudsman Mrs. Rosemarie Bauer

Vienna, December 2004

Volksanwaltschaft
(Office of the Austrian Ombudsman Board)
A-1015 Vienna, Singerstraße 17, P.O.Box 20
Telephone:+43/1/51 505
Telefax:+43/1/51 505/150
E-mail: post@volksanwaltschaft.gv.at
Internet: http://www.volksanwaltschaft.gv.at

Table of contents

Content

1 Engagement and activity of the Austrian Ombudsman Board (AOB)

1.1 Development of activities

15 787 engagements led to 6 561 investigative proceedings.

The AOB was engaged in 15 787 cases in the 2003 calendar year. 10 316 of the grievances concerned the administration sector. Investigative proceedings were instigated in 6 561 cases. Official proceedings were not yet completed or else the complainants still had means of legal recourse (legal assistance) open to them in the remaining 3 755 cases of grievance (comp. Art. 148a of the Federal Constitution [*Bundes-Verfassungsgesetz*]). ***Ex officio*** proceedings were launched in 69 cases.

	2002	**2003**
Contacts:	14 581	**15 587**
Administration (Federal & provincial administration)	10 187	**10 316**
Investigative proceedings	6 896	**6 561**
Federal administration	4 463	**4 198**
Provincial and district administration	2 433	**2 363**

Activities

Federal administration investigative proceedings

	Year 2002	**Year 2003**
Federal Chancellor's Office	20	**24**
Federal Ministry of External Affairs	33	**33**
Federal Ministry of Education, Science and Culture	177	**170**
Federal Ministry of Finance	494	**359**
Federal Ministry of Health and Women's Affairs	467	**364**
Federal Ministry of Internal Affairs	387	**330**
Federal Ministry of Justice	933	**938**
Federal Ministry of National Defence	74	**65**
Federal Ministry of Agriculture, Forestry, the Environment and Water Management	211	**214**
Federal Ministry of Social Security, Generations and Consumer Protection	784	**843**
Federal Ministry of Transport, Innovation and Technology	414	**424**
Federal Minister of Economics and Labour	449	**420**

Federal administration total	4 443	**4 184**

Provincial and district administration total	2 433	**2 363**

File code	Investigative proceedings according to assignment area	2002	2003
	Assignment area of Ombudsman Dr. Peter Kostelka		
BK	Chancellor	20	**24**
SV	Federal Minister of Social Security, Generations and Consumer Protection (Social Affairs area)	714	**787**
SV	Federal Minister of Health and Women's Affairs (health and accident insurance area)	423	**322**
SV	Federal Minister of Economics and Labour (Labour Exchange Office area)	205	**207**
JF	Federal Minister of Social Security, Generations and Consumer Protection (families area)	70	**56**
GU	Federal Minister of Health and Women's Affairs (health area)	44	**42**
V	Federal Minister of Transport, Innovation and Technology (transport area)	386	**384**
AA	Federal Minister of External Affairs	33	**33**
VORS	Chairman's scope of competence	6	
	Provincial and district administration	554	**498**
	Subtotal Ombudsman Dr. Peter Kostelka:	2 455	**2 353**
	Assignment area of Ombudsman Rosemarie Bauer		
FI	Federal Minister of Finance	494	**359**
LF	Federal Minister of Agriculture, Forestry, the Environment and Water Management (agriculture and forestry area)	198	**204**
U	Federal Minister of Agriculture, Forestry, the Environment and Water Management (environment area)	13	**10**
WF	Federal Minister of Education, Science and Culture (science area)	95	**89**
HWG	Flooding Act [*Hochwassergesetz*]	10	**5**
VORS	Chairman's scope of competence		**1**
	Provincial and district administration	1 313	**1 226**
	Subtotal Ombudsman Rosemarie Bauer:	2 123	**1 894**
	Assignment area of Ombudsman Mag. Ewald Stadler		
WA	Federal Minister of Economics and Labour	230	**213**
WA	Federal Minister of Transport, Innovation and Technology (Federal roadways, patent affairs and road-tax sticker areas)	42	**40**
I	Federal Minister of Internal Affair	387	**330**
J	Federal Minister of Justice	933	**938**
LV	Federal Minister of National Defence	74	**65**
UK	Federal Minister of Education, Science and Culture (education area)	82	**81**
VORS	Chairman's scope of competence	4	**8**
	Provincial and district administration	566	**639**
	Subtotal Ombudsman Mag. Ewald Stadler:	2 318	**2 314**

Total	6 896	**6 561**

1.2 Completed cases

A total of 7 078 investigative proceedings were concluded in the year under review; a **formal recommendation** was required in 10 especially grave cases, a **formal declaration of grievance** in 9 cases and an **ordinance contestation** in the form of a board resolution in 2 cases.

7 078 investigative proceedings concluded

Completed cases	2002	**2003**
Grievance justified / objection	642	**758**
Grievance unjustified / no objection	3 698	**3 336**
Grievance impermissible	902	**938**
Grievance withdrawn	452	**488**
AOB not competent	1 608	**1 426**
Not suitable for treatment in terms of business rules and regulations	85	**111**
Formal declaration of grievance	10	**9**
Recommendation	13	**10**
Appeals of ordinance	0	**2**
Total completions	7 410	**7 078**

1.3 Contacts with citizens and authorities regarding investigative proceedings in 2003

Contacts with citizens ad authorities	2002	**2003**
Appointment dates	263	**270**
Visits	2 262	**2 067**
Information service	7 645	**8 341**
Written correspondence with complainants	21 093	**19 683**
of which outgoing letters to complainants	9 054	**9 297**
incoming letters from complainants	12 039	**10 386**
Written correspondence with authorities	10 499	**11 307**
of which to certified executive organs and authorities	5 125	**5 785**
from certified executive organs and authorities	5 374	**5 522**

1.4 Information service

Apart from the appointment dates public office hours, people seeking advice and assistance could visit the Board's information service in person daily from 8:00 a.m. to 4:00 p.m. or contact the information service by telephone at the Vienna number 01/515 05 ext. 100.

toll-free service number

In addition, a toll-free service number (0800/223 223) with direct-dial option to all extensions was set up on September 14, 2001.

Of the total of 8 341 telephone and personal contacts with the information service, 3 755 regarded administration.

many civil-law problems

The AOB was not competent to deal with the remaining 4 586 cases, which concerned mainly civil-law problems among private individuals. The largest number of these problems regarded family-law problems, mainly in connection with divorces and the consequences of divorces such as maintenance, child custody and visiting rights regulations.

2 Fundamental Rights Section

2.1 Fundamental requirements under rule of law as set out in the Federal Constitution (Art. 19 and 129 of the Federal Constitution)

2.1.1 Mandatory refund of costs in administrative court proceedings despite granting of procedural assistance

Despite being granted procedural assistance by the Administrative Court of Justice, persons seeking legal protection must refund the legal entity of the authority winning proceedings for regular expenditures in the amount of € 332.00 or – in a case of proceedings in which an oral argument is held before the Administrative Court of Justice – even € 710.00. In view of the fact that not a few persons must support themselves for an entire month on the latter sum, this leads to many financially less fortunate classes of the populace often refraining from asserting their rights before the Administrative Court of Justice because, in order to ensure their livelihood, they cannot take the financial risk they would have to bear, despite being granted procedural assistance.

The Administrative Court of Justice proceeds on the assumption of the basic rule-of-law principle that "all acts of state organs must be grounded in the law and, indirectly, finally in the Constitution, and that effective legal-protection facilities exist to ensure this postulation." However, public-law courts of justice can only fulfil their legal-protection function comprehensively if access to the Administrative and Constitutional Courts of Justice is arranged so that parties in poor financial situations also have the opportunity to assert grievances on rulings decreed on the basis of inadequate judicature and constitutionality.

In view of the assertions of the Constitutional Court of Justice on the essence of the rule-of-law principle, it is unjustifiable that legal protection facilities indispensably required under constitutional law which, according to the adjudication, "must have a specific minimum of actual efficiency for legal-protection applicants" can in fact only be claimed by sufficiently affluent persons.

2.1.2 Giving incorrect notice on right of legal recourse (VA BD/321-V/03)

In a ruling rendered by the Wiener Neustadt Federal Police Headquarters dated September 23, 2003, the notice on right of legal recourse stating "According to Art. 54c of the VStG, no ordinary right of appeal against this ruling is permissible" was recorded, al-

though Art. 54c of the VStG had already been repealed per the expiration of December 31, 2001.

For the AOB, if an authority gives incorrect notice on right of legal recourse, this constitutes a case of **administrative grievance**, since it can lead to massive legal problems for the person mislead in such a manner, thereby detrimentally affecting the *de facto* efficiency of legal protection as dictated in constitutional law.

Thanks to the AOB's intervention, the obsolete document was removed so that similar errors cannot be repeated.

2.1.3 Prerequisites for substantiating grievances to the AOB (VA BD/57-V/03)

The chief of a Federal Police Headquarters questioned the substantiation of a complainant's objection to the AOB, stating, "By failing to submit an appeal within the stipulated time, the accused (who is indubitably obligated to participate in this matter – "Duty to Rescue" as set out in Art. 1304 of the Civil Code) is at fault in missing a deadline which can neither be reset nor circumvented by filing a grievance with the AOB."

Art. 148a Par. 1 of the Federal Constitution states that anyone may file a grievance with the AOB on grounds of alleged grievances with the administration to the extent that he/she is affected by such grievances and as long as such a means of legal recourse is not or **no longer** available to him/her. Therefore, a grievance filed with the AOB is also permissible if the party concerned can no longer avail him/herself of a means of legal recourse to which he/she is entitled *per se*, whereby the reason for this impossibility is just as irrelevant as any and all blame which may apply to the party concerned. The reference to Art. 1304 of the Civil Code fails to consider the fact that the legal standard proscribed by this statutory law is not applicable in the given context since the prerequisites for substantiating a grievance to the AOB are conclusively established in Art. 148a of the Federal Constitution.

2.2 Right to a reasonable duration of proceedings (Art. 6 of the EHRC; rule-of-law principle; Art. 41 of the EU Charter, codex for effective administration)

2.2.1 General

The procedural guarantees set out in **Art. 6** of the **EHRC** (European Human Rights Convention) apply to those areas of justice, administration and administrative penalty proceedings in which rulings are to be rendered on civil rights. The AOB follows the **judicature of the Constitutional Court of Justice** in matters beyond the scope of applicability of Art. 6 of the EHRC. In light of its decisions there can be no doubt that the permissible duration of appeal proceedings is limited under constitutional law. The Rule of law is simply inefficient if appeals are left unprocessed for years.

Furthermore, the AOB are of the opinion that the fundamental rights developed vis-à-vis the European Union Administration in accordance with the **Charter of Fundamental Rights in the European Union** and the **Codex for effective administration** should be taken into consideration in national practice as well.

2.2.2 Individual cases

2.2.2.1 Court proceedings (VA BD/759-J/02, BD/234-J/03, BD/367-J/03)

The entitlement guaranteed in Art. 6 Par. 1 of the EHRC to be heard “within a reasonable period of time” by a court which is to rule on claims under civil law or on the validity of a charge under criminal law, is the basis at all courts (irrespective of the instance on which they are to rule) for grievances to the AOB.

2.2.2.2 Dragging out appeal proceedings (VA BD/76-V/00)

By virtue of a ruling dated December 16, 1989, it was determined that Mr. F was entitled to a precise, established salary. However, the appeal filed via a letter dated January 9, 1990 was not ruled upon by the personnel office set up by the board of the Austrian Post Office AG Corp. until it issued a ruling dated December 19, 2002 and only following massive intervention on the part of the AOB. Thus, these appeal proceedings lasted almost ***13 years*****.**

The permissible duration of appeal proceedings is limited under constitutional law, especially since in view of the requisite effectiveness of legal protection, it is counterproductive

to drag out a case of settling a request for legal protection for years. Therefore, the AOB announced that allowing the proceedings on which the ruling was based to last almost 13 years was contrary to the rule of law and therefore constituted a **grievance in administration**.

2.2.2.3 Proceedings lasting five years upon issuing a BMLUW appeal ruling (VA BD/78-LF/03, BMLF 13.812/26-I 3/2003) [Federal Ministry of Agriculture, Forestry, the Environment and Water Management]

In the course of investigative work, the AOB discovered that appeal proceedings had taken a conspicuously long time in granting authorisation under water laws to remove and return groundwater for a heating pump.

No matter how reasonable the duration of proceedings are to be adjudged according to the circumstances on an individual case and how much consideration is to be taken in particular of the complexity of such a case from the factual and legal point of view, the reasons the authorities gave could in no way justify the five-year duration of these proceedings. Therefore, the delays determined in the proceedings under consideration were to be ascribed to the predominant fault of the authority and the AOB were to file a grievance on the halting progress in the proceedings.

2.2.2.4 Three instances of refusal to rule -BMLFUW (VA BD/156-LF/02, BMLF 680.255/17-I6/02) [Federal Ministry of Agriculture, Forestry, the Environment and Water Management]

The spouses N.N. filed a grievance that the Federal Ministry of Agriculture, Forestry, the Environment and Water Management had still not handed down an alternative ruling one and a half years after suspending its ruling of May 11, 2001 acknowledged by the Constitutional Court of Justice on October 18, 2001.

Since the complainants' petitions dated December 16, 1998 were not settled in a reconstructable manner until about four and a half years later by virtue of a ruling dated June 25, 2003, the grievance under consideration proved to be **justified.**

2.2.2.5 Unreasonable delays in authorisation proceedings under water laws for constructing a shore-protection facility – BH Neusiedl/See (BD/161-LF/02, BMLF [Federal Ministry of Agriculture and Forestry] 16.241/01-I6/03)

N.N. filed a grievance that, after the ruling handed down on October 17, 2002 by the administrative court of justice, the supreme water-laws authority had only released after unnecessary postponement an alternative ruling on the appeal of several neighbours to the authorisation granted to him to construct a shore-protection facility.

The delay on the part of the supreme water-laws authority was especially grave in this particular case due to the facts that the complainant had already filed his petition on November 12, 1998 (!) and that considerable delays had already occurred in first-instance authorisation proceedings (ruling dated May 26, 2000). The state authority was responsible for delays in the subsequent appeal proceedings and the Federal Ministry called upon via an escheat petition also failed unlawfully to reach a relevant decision. The Federal Ministry did not render its ruling (dated November 26, 2003) on the neighbours' appeal until the dismissal of the escheat petition was suspended on May 2, 2002 by virtue of a decision rendered on October 17, 2002 by the Administrative Court of Justice and the filing of a new grievance of delay.

2.3 Principle of Equality (Art. 7 of the Federal Constitution, Art. 2 of the StGG Act)

2.3.1 A. Legal Practice

2.3.1.1 1967 Family Allowance Act (VA BD/25-JF/02) *[Familienlastenausgleichsgesetz]*

According to Art. 30j Par. 2 First Sentence of the 1967 Family Allowance Act as amended through Fed. Law Gaz. No. 311/1992, fares may only be refunded contingent upon other conditions to apprentices in a legally acknowledged apprenticeship. By contrast, young people who are being educated in an apprenticeship not legally acknowledged (e.g. medical-office assistant) are precluded without exception from receiving fare refunds.

In its **26th Report to the National Council and National Council**, the AOB pointed out in its Fundamental Rights section that the legislature's ruling according to which granting refunds of fares is based on a case of a legally acknowledged apprenticeship only would not stand up to a review for equality. The Constitutional Court of Justice shared this view in a decision handed down on March 3, 2003 and struck down the word "legally" from the

first sentence of Art. 30j Par. 2 of the 1967 Family Allowance Act as being unconstitutional.

2.3.1.2 Non-consideration of multiple births within the framework of childcare-allowance funds

In its **26th Report to the National Council and National Council**, the AOB demonstrated in its Fundamental Rights section that, in terms of equality law, it is not clear why it should be factually justified that child allowances are to be paid out only singly in a case of twins and/or progeny of a multiple birth, thus treating a multiple birth equivalent with a single birth. It is to be noted in this connection that the legislature supported this critique in the year under review by passing Art. 3a of the Childcare Allowance Act [*Kinderbetreuungsgeldgesetz*], stipulating that, in a case of multiple birth, the childcare allowance for the second and every other child increases by 50% of the sum set out in Art. 3 Par. 1 *leg. cit.*

2.3.1.2.1 Witnesses' entitlement to refund of their expenditures (VA BD/201-V/02)

*According to Art. 51a and d of the 1991 AVG Act, only those witnesses and other parties involved who are heard for purposes of gathering evidence in independent administrative appellate court proceedings or who are not heard in such proceedings through no fault of their own, are entitled to fees in accordance with Art. 2 Par. 3 and Art. 3 through 18 of the 1975 Fee Entitlement Act [*Gebührenanspruchsgesetz*]. The fact that there are no similar regulations regarding proceedings before all other administrative authorities means that witnesses heard in these proceedings have no entitlement to a refund of their expenditures.*

According to invariable jurisdiction at the Constitutional Court of Justice, the principle of equality prohibits the judicature from making any differentiation's other than those, which can be factually substantiated. Therefore, legal differentiation's are only in line with the Federal Constitution if they can be justified by actual differences in the established facts and circumstances. In light of this jurisdiction, it seems unconstitutional to make the entitlements of witnesses and other parties involved to a fee contingent upon whether they have been heard before an independent appellate court or another administrative authority.

2.3.1.2.2 Unequal treatment of foreigners within the framework of the Victims of Crime Act *[Verbrechensopfergesetz]* (VA BD/194-SV/03)

According to Art. 1 Par. 1 of the Victims of Crime Act, the Federal Ministry of Social Administration must obligate the Federation against restitution of benefits to provide assistance to victims of crimes or their survivors in accordance with this Federal act. It can be seen from Art. 1 Par. 2 and Par. 7 leg. cit. *that. under certain conditions, this assistance is also to be provided to citizens of contractual parties to the EEA Treaty. According to Art. 41a of the Victims of Crime Act, similar services can be granted as compensation to the extent that special hardships obtain as set out in the statutes of this Federal act.*

Concerning the Federal Constitutional Act on implementing the international treaty on eliminating all forms of racial discrimination, the Constitutional Court of Justice pronounced in VfSlg 14.191/1995 that Art. 1 Par. 1 of this constitutional act "also [contains] the precept of treating foreigners equally – a precept also including the rule of objectivity; unequal treatment of foreigners is . . .therefore only permissible if and to the extent that there is a perceptible, equitable reason therefor and that such unequal treatment is not disproportionate."

In light of this judicature, the group of entitled persons established in Art. 1 of the Victims of Crime Act is a matter of concern in terms of constitutional law to the extent that, consequentially, a citizen of a country not subscribing to the EEA Treaty cannot enjoy the benefit of such assistance from the outset, even if he has lived for many decades in Austria and if the focus of his life is here, whereas a citizen of a contractual party to the EEA Treaty is entitled to all assistance benefits even is he has only a loose connection to the Republic of Austria. However, the constitutionality of the legal situation presented is to be affirmed if and because Art. 14a of the Victims of Crime Act is to be interpreted in line with the Constitution such that foreigners who are not citizens of a state contractual to the EEA Treaty but who nevertheless have a special connection to the Republic of Austria (e.g. due to having lived in the country for a long time) must also be granted "similar services." In the AOB's view, such an interpretation is in line with the Constitution and therefore possible and a precept (comp. VfSlg 16.122/2001).

2.3.2 B. Enforcement

2.3.2.1 Freedom of property (Art. 5 of the StGG/Principle of due course of law)

2.3.2.1.1 Trade-authority approval of an experimental operation (VA BD/45-WA/03)

Neighbours of a fruit and vegetable wholesaler filed an objection to the AOB concerning the fact that the trade operation has been active for more than one year without an authorisation of the production facility. A review showed that, due to the length of investigative proceedings, the trade authority issued experimental-operation approvals in June 2002 and February 2003 in accordance with Art. 354 of the Trade Ordinance.

The ruling's pronouncement contains the unambiguous formulation that approval is given for the implementation of the work required to **erect an office and warehouse building** for the fruit and vegetable wholesaler.

This formulation in the ruling is confusing to both the parties to whom it is addressed and to third parties, viz. the neighbours involved, for example; it is also extremely dubious in terms of certainty of the law. That is, the pronouncement allows a significant amount of leeway for interpretation. Should the trade authority interpret it narrowly, the operator could be called to account under the law should he see the ruling not only as authorisation to construct an office and warehouse building but also as authorisation for the business operation *per se.* However, should the trade authority interpret it broadly, the neighbours' party rights will be reduced to the prevention of environmental immissions.

Corresponding to the judicature of the Administrative and Constitutional Court of Justice, the neighbours have no position as parties in the course of authorisation according to Art. 354 of the Trade Ordinance. They may only claim their rights as parties in the form of an appeal in the course of the actual production facility authorisation proceedings. Since the entire operation was obviously started up on the basis of the ruling dated February 12, 2003, the neighbours have no option of legal recourse until the actual production facility authorisation has been decreed, due to the trade authority's broad interpretation of the ruling's pronouncement.

2.4 Freedom of trade (Art. 6 of the StGG Act)

2.4.1 Re-issuance of taxi-driver ID cards (VA BD/250-V/96, BD/342-V/02)

According to the judicature of the Administrative Court of Justice and the practice of enforcement based thereon according to Art. 6 Par. 1 Fig. 1 of the Business Rules and Regulations for non-scheduled passenger traffic (BO), new taxi-driver ID card may not be issued to a taxi driver who has temporarily lost his licence to drive his private motor vehicle due to specifically exceeding the permissible maximum speed until at least one year after the re-issuance of his driving licence.

Since the AOB considers this legal situation dubious in terms of constitutional law for the reasons sketched out in its **25th Report to the National Council and the Federal Council** in vie of the fundamental right of freedom to practice a trade, the Federal Minister competent *in rem* was called upon in a **recommendation** dated June 14, 2002 to amend the legal situation such that temporary confiscation of a driving licence no longer entails *eo ipso* a one-year prohibition to practise a profession.

The Federal Minister indicated complied with this **recommendation** in that Art. 6 Par. 1 Fig. 1 of the BO was changed via the amendment Fed. Law Gaz. II No. 337/2003 such that proof that the applicant actually drove motor vehicles regularly for at least one year before submitting the application must only be provided upon the first issuance of a taxi ID. The constitutional problem pointed out by the AOB is thereby solved.

2.5 Data protection (Art. 1 of the 2000 Data Protection Act [*Datenschutzgesetz*])

2.5.1 Providing personal registration data to local daily newspapers (VA BD/6-BKA/03)

A Ms. M informed the AOB that in the Vorarlberg province, all its citizens are automatically congratulated in local daily newspapers on each of their birthdays after reaching their 70th one; these persons are not asked whether they wish this and the newspapers also give their addresses. All the Vorarlberg communities and towns provide these data to a daily newspaper for publication without consulting the persons involved as to whether they wish such placements at all.

A person's given name and surname, address and date of birth constitute personally related data as defined in Art. 4 Fig. 1 of the 2000 Data Protection Act. In addition, accord-

ing to invariable Supreme Court of Justice judicature, the protection standardised in Art. 7 of the 2000 Data Protection Act of persons concerned in provision of data also extend to cover their names and addresses. According to this stipulation, provision of processed data is allowed e.g. if there is express or implicit legal coverage thereof. Although, according to Art. 18 Par. 1 of the 1991 Personal Registration Act [*Meldegesetz*], the registration authority must provide information from the registration file upon request and against proof of identity, neither this statute nor any other in the Personal Registration Act justifies forwarding the entire stock of information on a registered person in a community to a third party.

Based on AOB involvement in the matter and via a decree dated May 23, 2003, the Security Department for the Vorarlberg Province notified all district offices and those of towns with their own charters that the aforementioned provisions [of data] were not covered under the Personal Registration Act.

2.5.2 Security precedes data protection (VA BD/73-I/01)

The AOB has become aware from many areas of investigation of the tense situation between the public interest in guaranteeing security and the interest in private data protection. The situation often becomes acute when, in the course of specific administrative proceedings, medical officers compile or process health-related data and, if necessary, forward them for use in other legal areas.

In the AOB's view, in order to guarantee uniform procedure, forwarding health-related data in the public sector should be founded on a clear legal basis; not only individual citizens would be protected from data forwarding **extending too far**, but the general public would also be protected from **too restrictive handling**.

2.5.3 Identification department actions (fundamental right to respect for private life, Art. 8 of the EHRC)

Art. 65 of the Security Service Act [Sicherheitspolizeigesetz] *has existed since September 1, 1993 as a legal basis for Identification Department actions. As of 1997, relevant grievances to the AOB increased. Overall consideration in investigative proceedings established that the security authorities and officers interpret the law broadly and often excessively and that they do not form their administrative practice in line with the law.*

Personal characteristics (as a rule: photograph, distinguishing physical marks, fingerprints) for identification purposes should be established within the framework of security-

department investigations on grounds of suspicion of **slight** unlawful acts (e.g. property damage, shoplifting) in the typical grievance cases presented here whereby, furthermore, the respective suspicion situations were also variously strong in character, some of them being merely slight.

None of the grievances investigated included an indication of gang crime, organised crime and/or criminal societies, for which reason special account should have been taken of the legal precept of considering the suspect's person **individually** and observing **special** preventative aspects. However, failure to do so was discovered in almost all of the cases examined, or else it was insufficient or inappropriate.

The AOB noticed a particularly disadvantageous aspect in that the principle of relativity anchored in the Security Department Act was regularly "forgotten" in both administrative procedures and in the statements of position provided to the ARA.

2.6 Right to fair court proceedings (Art. 6 of the MRK)

2.6.1 Asserting neighbour's rights in court in cases of production facilities authorised in a simplified way (Art. 359b of the Trade Ordinance)

*According to Art. 359b of the Trade Ordinance, production facilities smaller than 1,000 m² are to be authorised in simplified proceedings, wherein neighbours have the right to inspect the project documentation and to be heard in the proceedings – however, they do **not** have a position as participating parties.*

The Supreme Court of Justice findings dated July 8, 2003, file code 40b 137/03f, clearly establish for the first time that neighbours' rights to be heard are insufficiently safeguarded by the provision set out in Art. 359b of the Trade Ordinance. This decision is in accord with the critique the AOB has been asserting for years. In a multitude of reports, the AOB considered the introduction of the expansion of simplified proceedings and the correlated elimination of the neighbours from business-facility law and/or the reduction of the neighbours' rights to the mere entitlement to a hearing to be miscarried. Just as the AOB to date, the Supreme Court of Justice is of the opinion that the neighbours' lack of position as participating parties in simplified proceedings is **not** compensated by the fact that the neighbours may petition for *ex post facto* [legal] instructions according to art. 79a

Par. 1 of the Trade Ordinance and thus do have a position as participating parties to that extent.

Since the neighbours' rights to a hearing in simplified proceedings is not safeguarded in their full scope by Art. 359b of the Trade Ordinance, Art. 364a of the Civil Code must be interpreted in alignment with the Constitution such that a business facility authorised in simplified proceedings according to Art. 359b of the Trade Ordinance is **not** an officially authorised business facility in the sense of Art. 364a of the Civil Code.

2.7 Right to respect for private lives (Art. 8 of the EHRC)

2.7.1 Protecting family life in cases of anonymous adoptions (VA BD/1216-SV/03)

Ms. M. agreed to an anonymous adoption regarding her child born in November 2002. Nevertheless, the Public Servants Insurance Commission sent her medical treatment vouchers in September 2003 on which the names of the adoptive parents appeared.

For the AOB, there is no doubt whatsoever that the constitutionally guaranteed right of the child and his/her adoptive parents to respect for their private and family lives was infringed by the occurrence described above. According to Art. 8 of the EHRC, a child's biological parents may not learn the identity of the adoptive parents in a case of anonymous adoption, [even if] due to the mistaken dispatch of medical treatment vouchers.

2.7.2 Right to retain a surname (VA BD/1-AA/03)

Mr. N.N. had dual citizenship when he was born in 1985. According to the determinant legal situation, he would have had to be given the surname of his wedded father. However, Mr. N.N. had borne a differently formulated double name since his birth (the name consisting of the first part of his father's surname and his mother's surname) which, as it appeared on his birth certificate and in other documents such as school grade reports, was considered to be his legally correct surname. When, in May 2002, the Austrian Consulate General in Munich rejected his application for a passport bearing the double name he had been using since birth, Mr. N.N. turned to the AOB for assistance.

Since complainant surname (which he had been using since birth) had been confirmed as legal many times over, a forced "correction" would constitute a grave infringement of Art. 8 of the EHRC. Since the principle of interpretation in alignment with the Constitution

stipulates that the executive organs must also consider the Constitution and the fundamental rights embedded in it when applying the law, it seems that a teleological reduction of the scope of applicability of the simple-law statute in Art. 3 Par. 1 Fig. 4 of the Change of Name Act [*Namensänderungsgesetz*] seems called for, in order to solve this case of grievance in a manner in line with the Constitution.

The Municipal Authority Dept. 61, competent for name laws within the country eventually decided to grant Mr. N.N`s request.

2.7.3 Special characters in orthography of names (VA BD/244-V/03)

Ms. S applied to the AOB for assistance since a special character in her given name did not appear in her driving licence (issued in 2003) because it could not be reproduced in EDP processing.

The AOB had already shown in its **22nd report to the National Council and the Federal Council** that the authorities are obligated to reproduce surnames accurately in terms of both letters and characters, whereby the fact that diacriticals (e.g. dieresis, cedilla) are generally held to be unsuitable in EDP does not alter the circumstance that the name right is an immutably protected one and that authorities may not arbitrarily alter proper names and/or their orthography. In light of private and family names constitutionally protected in Art. 8 of the EHRC, which indubitably protects the right to bear one's (full) name, every applicant for the issuance of a driving licence has the right to have their given and surnames always written the way they actually are. Therefore, if a character cannot be reproduced in EDP processing, the entry must be made by hand or in typewritten characters.

Thanks to AOB's intervention, the competent Federal Ministry instructed the transport authorities to enter special characters by hand if and as need be.

2.7.4 Covert installation of a location transmitter in an automobile (VA BD/95-I/02)

After a number of intentional fires were set out, the complainant himself became suspected of arson. In order to gather further evidence, security officers installed an elec-

tronic device in the complainant's automobile via which the vehicle's whereabouts could be traced using a remote radio tracker.

When the complainant happened to notice the device (mounted on the underside of the vehicle), he contacted the locally competent provincial police station; but he was unable to obtain either an explanation or support there. By contrast, the police expressly denied that the electronic device had been installed as part of security-authority activity and that the complainant merely had his own personal options of discovering the owner of the device at his disposal.

The AOB points out as especially deserving of complaint the fact that the security authorities' investigations in the service of criminal justice are being conducted far too independently, i.e. without the involvement of the prosecuting authorities or the criminal courts. In view of the circumstances, it is doubtful whether the state prosecutor or investigating magistrate would have ordered security-authority investigations using technical surveillance equipment if they had been given the results of investigations prior to the commencement of such technical surveillance.

In the AOB's view, secretly using a location transmitter to monitor the movements of the complainant's private vehicle constitutes an infringement of fundamental rights as set out in Art. 8 of the EHRC; we emphasise that the requisite express legal basis for such an infringement does not exist.

2.8 Fundamental European Union rights

2.8.1 Art. 18, 38 and 43 of the Charter of Fundamental Rights of the European Union

2.8.1.1 Non-accreditation of child-upbringing times in an EU member state (VA BD/413-SV/03)

According to Art. 227a of the General Social Insurance Act and under more closely defined conditions, the time of bringing up one's one child within the country (up to a maximum of 48 months after the child's birth) is deemed to be a substitute qualifying period to be taken into account when assessing for pensions. Bringing up a child within the country

is equivalent to doing so in an EEA member state under certain conditions, one of which is the time of bringing up the child after the entry into force of the EEA Treaty.

Since, in its **26th Report to the National Council and the Federal Council**, the AOB drew attention to the fact that the European Court of Justice had ruled in a case concerning Austria (verdict dated February 7, 2002, C-28/00) that, when establishing insured times for old-age insurance, it is a breach of Community law if times of bringing up a child in an EEA member are not taken into account because they were acquired before the EEA Treaty came into force.

In response to this ruling, the Federal Ministry of Social Security, Generations and Consumer Protection prepared a comprehensive work-paper to establish a method of enforcement, which conforms to Community law.

2.8.1.2 Retroactive contributions paid for accreditation of school times spent in another EU member state (VA BD/341-SV/03)

From April 1960 to May 1968, the Austrian citizen K. attended the City Mercator High School (public secondary school) in Duisburg, from which he successfully matriculated. Living in Austria again as of 1968, he attended Graz University from October 1968 to February 1976. Since then, he has been subject to compulsory insurance in Austria exclusively and has been gainfully employed. When the Pension Insurance Commission told him on the telephone that retroactive contributions could not be paid for accreditation of times spent in German schools, he applied to the AOB for assistance.

In view of the European Court of Justice verdict dated February 7, 2002, C-28/00, the question arises as to whether such retroactive contributions for school times as of November 1965 to a maximum of 24 months are to be considered permissible on grounds of Community law.

After a thorough investigation based on the principles and valuations worked out by the European Court of Justice in the ruling quoted, the AOB came to the conclusion that, if the scope of applicability of Art. 227 Par. 1 Fig.1 in combination with Par. 3 and 4 of the General Social Insurance Act is interpreted in alignment with Community law, such retroactive contributions can not only be paid for times spent at the Austrian schools specified in more detail in the aforementioned statute, but also for times spent at comparable schools in another EU member state, as long as a "sufficient correlation can be made" to the (other) Austrian periods of insurance. Such a correlation indubitably exists in the pre-

sent case of grievance since, based on his German schooling and accredited graduation, the claimant was able to complete times of Austrian university study; in addition, his German schooling also formed the basis for his gainful employment (exclusively in Austria) thereafter.

The Pension Insurance Commission agreed with the AOB's considerations of the matter in terms of Community law and approved Mr. K's application to make such retroactive contributions.

2.8.2 Art. 39 and Crime Victims (EEA) 1612/68 (Freedom of Movement Ordinance)

2.8.2.1 Support in accordance with the Victims of Crime Act

A Dutch citizen, gainfully employed and who had relocated her permanent residence to Austria in 1977 had been the victim of a crime prior to this date in the Netherlands. The consequences of the crime began to limit her ability to work to the point that she underwent therapy. The Federal Ministry of Social Security, Generations and Consumer Protection refused to pay the costs of the therapy, stating as its reasons that, according to Art. 16 Par. 3 of the Victims of Crime Act (VCA), EEA citizens may only be treated equally if an act causing such harm was committed after the entry into force of the EEA Treaty.

Assistance in accordance with the VCA is restricted as set out in Art. 16 Par. 3 of the VCA to the extent that the equal-treatment statute set out in Art. 1 Par. 7 of the VCA is only applicable to citizens of EEA member states if the act (the crime) was committed after the entry into force of the EEA Treaty; however, since Austria joined the EU after passing the VCA, this restriction cannot be applied to Union citizens living in Austria as their freedom of movement as workers entitles them to do.

The AOB's intervention resulted in the Federal Ministry of Social Security, Generations and Consumer Protection dispatched a standing instruction covering the entire country, stipulating that Art. 16 Par. 3 of the VCA was is no longer applicable in cases of this type and that petitions which had been rejected based on this item of law were to be taken up again *ex officio*.

2.8.2.2 Legislative delay in implementing the racism and gainful employment directives (VA K/140-LAD/03)

The AOB would like to point out that the directive 2000/43/EC dated June 29, 2000 “on applying the Equal Treatment Act without differentiation of race or ethnic origin” and the directive 2000/78/EC dated November 27, 2000 “on establishing a general framework for realising equal treatment in gainful employment and occupation” were to have been adopted in national law by July 19, 2003 and December 2, 2003 respectively. However, no corresponding legislative ruling had been handed down yet at the time of this report’s copy deadline.