



Pühringer, Lisa (2017):

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SIAK-Journal – Journal for Police Science and Practice (International Edition Vol. 7), 44-51.

doi: 10.7396/IE_2017_E

Please cite this article as follows:

Pühringer, Lisa (2017). The New Act concerning Police Protection of the State, SIAK-Journal – Journal for Police Science and Practice (International Edition Vol. 7), 44-51, Online: http://dx.doi.org/10.7396/IE_2017_E.

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Note: A hard copy of the article is available through the printed version of the SIAK-Journal published by NWV (<http://nwv.at>).

published online: 9/2017

The New Act concerning Police Protection of the State



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After a discussion process of almost two years, the Act concerning Police Protection of the State (PStSG) was passed by the National Council on 26 January 2016 and entered into force on 1 July 2016. The discussion and the media attention relating to the Act concerning Police Protection of the State focused on the following central questions: What prerequisites (in particular which suspicious situations) have to apply in order to bring groups or individuals into the spotlight of the state protection authorities established with the security authorities? What powers do they need? Who controls the legality of the data collection and is this control really comprehensive and independent? Before these questions are examined in detail, a brief outline of the formation process of the Act concerning Police Protection of the State should be drawn up, since this has essentially distinguished itself from other law-making processes.

I. FORMATION PROCESS¹

In its government programme between 2013 and 2018², the Federal Government decided to create federal law regulations for the protection of the state, in order to enable effective and efficient defence against espionage, terrorism and extremism. In the spring of 2014, long before the attacks in Paris and Brussels, the evaluation of the existing statutory provisions for state protection had already begun internally under the premise of “modern police state protection to guarantee the greatest possible security on the basis of comprehensive legal protection”. This result then flowed into a demand analysis prepared by the Federal Agency for State Protection and Counter Terrorism. The project was scientifically supported by ALES, the Austrian Centre for Law Enforcement Sciences at the Institute for Criminal Law and Criminology at

the University of Vienna, which analysed the existing legal bases for the activities of the state protection authorities with regard to the requirements outlined.³

In order to ensure a discussion and design process as open and transparent as possible, a public penal discussion was held in December 2014 on the “Protection and security for our population – Challenges for state protection in a globalised world”, where scientists, media representatives and experts from foreign security authorities and intelligence services were represented on the podium.⁴

The comparison with the standards of other European state protection authorities and their practice led the security speakers of the parties represented in parliament with experts from the Federal Ministry of the Interior to Norway and Switzerland. Finally, in February 2015, a discussion ses-

sion took place in parliament on the topic of “modern state protection in the area of tension between security and surveillance”⁵, before the evaluation procedure of an Act concerning Police Protection of the State, with which the organisation, tasks, powers and legal protection should be regulated in its own law started. The evaluation procedure of this law took six weeks at the end of March 2015.⁶

The period up until the final decision in the National Council in January 2016 also clearly shows that not only a comprehensive examination of the opinions⁷ received in the evaluation procedure took place, but the text was also worked on⁸ until the last minute within the context of intensive parliamentary negotiations, at the end of which the law was passed by a simple majority in the National Council. It was also close to a broader majority, which Peter Pilz, security speaker for the Greens also wanted to imply when he spoke of the “most successful failure ever”.⁹

The future will show whether the law for the creation of modern state protection proves that it is able to guarantee maximum security on the basis of comprehensive legal protection.

In the following section it will be explained, what is in fact new and what has only been transferred from the Security Police Act (SPG) into the Act concerning Police Protection of the State in order to reserve the fulfilment of specific “preliminary tasks” exclusively in the scope of the so-called state protection authorities¹⁰, i.e. the Federal Agency for State Protection and Counter Terrorism and the regional constitutional protection agencies.

II. CENTRAL TASKS PURSUANT TO THE ACT CONCERNING POLICE PROTECTION OF THE STATE

For a better understanding, the content and scope of the Security Police Act and in

particular its core, namely security-related threat prevention, will be discussed. The security authorities have to avert offences punishable by law insofar as they represent a dangerous attack, namely in a temporary sense, even if the attack takes place at the stage of the unpunished preparatory act, i.e. in close temporal connection with the committing of the offence (Section 16(1)1 in connection with Section 21(1) of the Security Police Act). In addition, the duty of defence also refers to criminal connections (Section 16(1)2 in connection with Section 21(1) of the Security Police Act).¹¹ For these tasks, all security authorities and the bodies attached to them are already at the disposal and within the range of security-related powers of the Security Police Act (Sections 32 ff.), including the covert investigation measures pursuant to Section 54 of the Security Police Act.

In addition, the Security Police Act also recognises in Section 22(2) the task of prevention of probably dangerous attacks, whereby fewer data collection authorisations, above all no authorisations for covert information generation, are available for this.¹² In order to have an adequate premission task in the context of dangerous extremist groups, namely before they act in a criminal way, the task of extended threat research for a grouping (Section 21(3) of the Security Police Act) was implemented into the Security Police Act in 2000 together with the preliminary check by the Legal Protection Commissioner (RSB) with the Federal Minister of Interior.¹³ This task has now been taken out of the Security Police Act and transferred (almost) unchanged into Section 6(1)1 of the Act concerning Police Protection of the State, which is why it is only available for specially trained constitutional protection bodies¹⁴ (and not all bodies of public security services).

In contrast to the extended threat research of the grouping, the extended threat

research of the individual (Section 21(3)1 of the Security Police Act) has been proven to be too restrictive in practice based on several reasons since its introduction in April 2012.¹⁵ The evaluation by ALES also came to the conclusion that the current task of “extended threat research with regard to individuals” generally appears to be too narrow and that a sensible perception by the Federal Agency for State Protection and Counter Terrorism in the case of potentially dangerous individuals is hardly possible under the applicable legal situation.¹⁶

The low level of practical application can be seen in the figures published by the Legal Protection Commissioner: between the introduction of the extended threat research for individuals in 2012 and the end of 2014, only a total of five applications were submitted for authorisation to the Legal Protection Commissioner.¹⁷ The proof of the requirements prescribed by the legislator, in particular the fact that the person concerned cumulatively provides means and knowledge to bring about material damage to a great extent of danger to humans, was not possible in most cases.

On the basis of this initial situation, it was clear that this formulation would need to be changed somewhat if a legal basis for conducting investigations is needed against potentially dangerous individuals.

The new provision in Section 6(1)2 of the Act concerning Police Protection of the State prescribing preventative protection links the admissibility of the observation of an individual to the condition that there must be a justified suspicion that the person concerned will commit a very definite act of intentional criminal offence in the foreseeable future, one that is listed in the criminal catalogue of so-called “attacks endangering the constitution”. Section 6(2) of the Act concerning Police Protection of the State exhaustively names those offences

related to extremism, terrorism, proliferation, intelligence activity or espionage whose commissioning is to be carried out by the Federal Agency for State Protection and Counter Terrorism and the regional constitutional protection agencies. In addition, a certain motivation (ideologically or religiously motivated) or a specific target for the attack (constitutional institutions or critical infrastructure) is required for some offences. For the purpose of the task, it needs more than mere assumptions, but still no preparatory activities in close temporal connection with the execution of the offence.

The challenge from the state authorities’ point of view is to inform the Legal Protection Commissioner, who is still responsible for the pre-control of this task (see Section 14 of the Act concerning Police Protection of the State), of those circumstances which give rise to a reasonable suspicion that the person concerned will probably commit one of the listed attacks endangering the constitution.

This means that if the task of extended threat research has only been extended to the individual; in practice, this is likely to lead to an increase in the number of requests for authorisations in this area.

Nothing has changed with regards to the control system applicable before the fulfilment of the task commences.¹⁸ Before the start of any investigations, the Legal Protection Commissioner has to be informed by the state protection authorities and he decides whether, and if so, for how long and which investigatory measures can be applied (Section 14(2) of the Act concerning Police Protection of the State). This means that no investigations can be made in this area without authorisation. The authorisation of the Legal Protection Commissioner may be granted for a period of a maximum of six months at a time, so that he can inform himself regularly based on the preliminary

investigations conducted thus far and based on these results, can assess whether further investigations are to be permitted.

III. DATA PROCESSING AUTHORISATIONS ACCORDING TO THE ACT CONCERNING POLICE PROTECTION OF THE STATE

The central instrument within the context of fulfilling the task of “preventing constitutional attacks” is information procurement, and not the use of command and force. Therefore, a substantial and detailed section of the law (3rd main section) consists of provisions on the use of personal data. These provisions, much debated in the legislative process, particularly the “data application of state protection”¹⁹ described in detail, together with differentiated deletion regulations, bring clarity from the point of view insofar as the purpose, the concerned parties, the data types and the retention period are explicitly mentioned. So what do the new data acquisition authorisations look like?

In the Act concerning Police Protection of the State, the prerequisite for any use of personal data is the necessity and the proportionality for the fulfilment of the tasks (Section 9 of the Act concerning Police Protection of the State). It is already clear from the inclusion of this principle at the beginning of the 3rd main section that an ungrounded use of data or such use in advance is not permitted. In each individual case, the investigative measure used must be proportionate to the occasion, namely the feared crime.²⁰

1. Special investigations (Section 11(1) of the Act concerning Police Protection of the State)

In addition to the investigative measures of observation (item 1), covert investigation (item 2), the use of image and sound

recording devices (item 3) already provided for in the Security Police Act, there are exactly six new investigative measures, whereby we already recognise up to three measures of all other investigative powers within the area of security in the Security Police Act (Section 54).

Newly added, but not unknown by the Security Police Act, are the acquisition of data related to location and IP addresses (item 5), as well as the use of licence plate recognition devices for vehicle inspections (item 4). These authorisations also include the exhaustively enumerated data from transportation companies, such as travel agencies or airlines (item 6).

a) Acquisition of connection data (Section 11(1)7 of the Act concerning Police Protection of the State)

We are entering completely new territory by gathering data on who communicated when, with whom and from where over a certain period of time (item 7). This means that until now, the recording of connection data has been restricted to the Code of Criminal Procedure (StPO). In contrast, in the area of security, it was only possible to selectively query location data.²¹ The Act concerning Police Protection of the State now provides the option to obtain connection data within a specific past and future period – naturally only insofar as these data are available to telecommunications operators for operation or billing purposes. Therefore, no data retention has been introduced with this legislation, not even in a slimmed-down form.

In order to ensure that the acquisition of connection data is also carried out in the field of state protection via the data hub that ensures a secure transmission, the necessary amendments to the Telecommunications Act of 2003 have also been harmonised simultaneously with the Act concerning Police Protection of the State.²²

Since the acquisition of connection data is undoubtedly one of the most sensitive measures, as it became clear in the evaluation procedure and in the parliamentary process, this is only permissible under the most severe conditions: this measure can only be requested at the Legal Protection Senate if an attack endangering the constitution is suspected, the realisation of which is met with serious punishment (Section 17 of the Security Police Act), and only then if all other investigations proved to be unsuccessful (*ultimo ratio*).

b) Use of representatives (Section 11(1)2 of the Act concerning Police Protection of the State)

Like the acquisition of connection data, at least according to the prevailing opinion,²³ the use of representatives within the framework of a covert investigation was until now limited to the Code of Criminal Procedure.

The use of representatives is now permitted both in the Security Police Act (Section 54(3) in conjunction with Section 3a of the Security Police Act) and in the Act concerning Police Protection of the State (Section 11(1)2 of the Act concerning Police Protection of the State), in strict accordance with the provisions of the Code of Criminal Procedure. This is essential for state protection work, because in practice, due to the strictly conspiratorially operating groups and the existing language barriers, it is extremely difficult to infiltrate as a covert investigator of the bodies of security authorities.²⁴

This idea can also be found in the text of the law, in which the state security authorities have to justify their reasons for obtaining the authorisation. For this reason, in the specific case, the application of security bodies as covert investigators does not suffice (Section 14(2) of the Act concerning Police Protection of the State).

The use of representatives is accompanied by strict management, monitoring and documentation obligations. This includes, for example, the commitment of the representative to the instructions of the representative manager, documented instructions, guidelines for regular contact with the representative as well as careful control of the representative. This is intended to ensure official influence on the private individuals involved in state activities.²⁵

c) On the criticism of the acquisition of connection data and the use of representatives

Anyone who has followed the media coverage knows that the acquisition of connection data and the use of representatives has been widely criticised. This criticism was also taken into account by means of an amendment to the plenum in the National Council,²⁶ by deciding that the authorisation of these two measures would not be granted by the Legal Protection Commissioner alone, but together with two of his deputies with a simple majority in the Senate, the so-called Legal Protection Senate (Section 14(3) of the Act concerning Police Protection of the State). The argument that if a measure is carried out under the Code of Criminal Procedure, at least two persons (one prosecutor and one judge) must always rule on the admissibility, whereas according to the Act concerning Police Protection of the State, only one person, namely the Legal Protection Commissioner decides, is spurious.

Moreover, another argument was mentioned in the evaluation procedure: regarding the fact that by the acquisition of connection data, an intervention in the secrecy of telecommunications required a court decision (Art. 10a of the Basic Law on the General Rights of Citizens [StGG]), it should be noted that in a decision dated June 2012,²⁷ the Constitutional Court de-

cided that telecommunications secrecy ensures the confidentiality of telecommunications. In other words, the contents of a message transmitted in this way is protected, however, other related data are not. Telecommunication secrecy therefore applies to all content data, but not the entire telecommunication traffic per se. If we take the announcement of the opposition²⁸ seriously, amongst other things regarding its appeal to the Constitutional Court, then we will have clarity on this in the foreseeable future.

2. The data application of state protection (Section 12(1) of the Act concerning Police Protection of the State)

As already briefly mentioned, in addition to the special investigative measures, the basis for a central database has been created, which enables the state protection authorities to recognise possible threats and dangers across Austria as soon as possible in order to be able to establish cross-links between individual persons classified as dangerous and the structures behind them, as well as to establish new investigative approaches. Designed as an information system, the Federal Agency for State Protection and Counter Terrorism and the nine regional constitutional protection agencies may process the exhaustively named data for their identified concerned parties (para. 1(1) to (5)), which were previously determined legally on the basis of the Act concerning Police Protection of the State, the Security Police Act or the Code of Criminal Procedure. It is important in this context that data on dangerous groups, dangerous individuals, suspects according to the Code of Criminal Procedure and persons who are classified abroad as dangerous, as well as their contacts and companions may be recorded in a central database. The differentiated deletion obligations (Section 12(3) of the Act con-

cerning Police Protection of the State) anchored in the law ensure that the data is only stored for as long as it is necessary for the fulfilment of the task.

A database is only as good as the quality of data it contains. Reliable and manageable quality assurance is therefore essential. In this case, to name but one example, the deletion periods designed in a differentiated way can also be made practicably manageable by means of automation support. For example, when the authorisation of the Legal Protection Commissioner ends and there is no reason for further processing, the data is simultaneously deleted from the file as well as from the data application (Section 13(1) of the Act concerning Police Protection of the State). The control of the database rests with the Legal Protection Commissioner, who can gain an insight at any time (Section 14(1) in conjunction with Section 15(1) of the Act concerning Police Protection of the State).

IV. LEGAL PROTECTION

Finally, the central aspect of legal protection shall be examined, that is to say, the control of the activities of the state protection authorities. Right from the beginning of the discussions, there was no dispute about the fact that more tasks and powers are only decided with more legal protection.

As already mentioned at the beginning, the institution of the Legal Protection Commissioner that is independent and not bound by instructions (Section 91a of the Security Police Act) was established as the central controlling body. However, it should also be noted that other alternatives were also examined, for example the transfer of legal protection to an administrative court. On the one hand, it was argued that the administrative courts are established in the constitution²⁹ as appellate courts, i.e. to decide in retrospect on the legality of admi-

nistrative actions, and as such are also not designed for prior approvals, which may sometimes also be urgent. On the other hand, if the administrative court that has to decide on the legality of the case was also implemented as a prior vetting authority, the person concerned would be deprived of the right of appeal. In addition to the necessary constitutional change, the ordering process, which is important for the independence of a controlling body, also called for the perpetuation of the Legal Protection Commissioner. This latter is appointed by the Federal President as proposed by the Federal Government and after the hearing of the presidents of the Supreme Administrative Court, the Constitutional Court and the National Council (Section 91a(2) of the Security Police Act).

More legal protection in the Act concerning Police Protection of the State was achieved by the fact that the prior vetting by the Legal Protection Commissioner was supplemented by a comprehensive information obligation of the person concerned following the end of the investigation (Section 16(2) of the Act concerning Police Protection of the State). This information from the person concerned ensures that the latter has a range of legal protection available in the case of doubt as to the legality of the investigations against him: from the appeal to the data protection authority through the administrative courts up to the appeal of the Supreme Courts. This information from the person concerned can only be deferred after the consent of the Legal Protection Commissioner, as long as the purpose of the investigation would be endangered or omitted if the public interest is overwhelmingly opposed to it (Section 16(3) of the Act concerning Police Protection of the State).

In addition, the numerous suggestions expressed for the improvement of control

were included in this respect, as in future, the deputies of the Legal Protection Commissioner by law will be more involved in the decision-making process. In addition to the establishment of the decision in the Legal Protection Senate in the case of certain investigative measures,³⁰ the Legal Protection Commissioner must strive for a common approach with his deputies in fundamental questions regarding task fulfilment in the area of state protection.³¹ Moreover, from the next appointment, pursuant to Section 91a(2) of the Security Police Act, at least one deputy must have been a long-standing judge or public prosecutor for at least ten years in order to ensure that they possess a high degree of practical experience. Furthermore, in order to ensure that sufficient personnel resources are also available for task fulfilment, the number of deputies will be extended from the current two to the necessary number of deputies (Section 91a(1) of the Security Police Act).

The legal protection is rounded off by the establishment of reporting requirements for the purpose of monitoring and reviewing the activities of the state protection to the responsible permanent subcommittee in parliament (Section 17 of the Act concerning Police Protection of the State).

V. OUTLOOK

We hope that the many, intensive deliberations have led to the conclusion that there is a law which meets the practical requirements of state protection by the police, and the aim of the legislative process has been achieved, that is to provide the state with the instruments necessary to protect the people living in Austria, insofar as this is consistent with the fundamental right to the protection of private life and the respect for privacy (Art. 8 of the European Convention of Human Rights).

¹ This article is essentially the written version of the lecture held by the author on the 13th legal protection day of the Federal Ministry of the Interior in Vienna on 11 March 2016.

² Federal Chancellery (2013) 81.

³ http://ales.univie.ac.at/fileadmin/user_upload/i_strafrecht_kriminologie/Reindl-Krauskopf/Dateien_NEU/BVT.pdf (05.04.2016).

⁴ Cf. Public Security Report 2015.

⁵ https://www.parlament.gv.at/PAKT/PR/JAHR_2015/PK0171/index.shtml (05.04.2016).

⁶ 110/ME 25. GP.

⁷ Cf. the comments received at https://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00110/index.shtml (05.04.2016).

⁸ Cf. AA-140 25. GP.

⁹ Cf. http://diepresse.com/home/politik/innenpolitik/4912919/Staatsschutzgesetz_Gruene-zogen-einige-Giftzaehne?parentid=5949293&showMask=1 (05.04.2016).

¹⁰ Cf. § 1 (3) PStSG.

¹¹ For more on this, see Giese in Vogl/Thanner (Eds.), SPG², § 16 note 1 ff.

¹² Cf. the task pursuant to Section 22(2) of the Security Police Act, as well as the available powers by Wimmer in Vogl/Thanner (Eds.), SPG², § 22 note 24 ff.

¹³ RV 81 BlgNR 21. GP, 5 f. as well as Z 4 (§ 21 (3) and Z 7 (§ 53 (1) Z 2a); BGBl I Nr 85/2000.

¹⁴ Cf. § 2 (3) PStSG.

¹⁵ RV 1520 BlgNR 24. GP, 1, 6 as well as Z 11 (§ 21 (3)); BGBl I Nr. 13/2012.

¹⁶ See AA-140 25. GP, 21.

¹⁷ Burgstaller/Kubarth (2015) 11; Burgstaller/Pirnat (2014) 24; Burgstaller/Pühringer (2013) 20.

¹⁸ See further point IV below.

¹⁹ Cf. § 12 (1) PStSG.

²⁰ See in detail AA-140 25. GP, 23.

²¹ Cf. § 53 (3a) and (3b) SPG.

²² See the corresponding provisions in the Telecommunications Act of 2003, Sections 93, 94 and 99 of the Telecommunications Act of 2003 as amended by Federal Law Gazette no. 6/2016, which will also enter into force on 1 July 2016.

²³ See most recently in Wiederin (2014) 672; aA Zerbes, WK-StPO § 129 Rz 30.

²⁴ Cf. AA-140 25. GP, 35 f.

²⁵ See on the necessity of influence: Wiederin (2014) 662 f.

²⁶ AA-140 25. GP.

²⁷ VfGH 29.06.2012, B 1031/11; Pühringer (2012/2013) 23.

²⁸ Tiroler Tageszeitung (2016).

²⁹ Cf. Art 130 Bundes-Verfassungsgesetz (B-VG).

³⁰ Cf. § 14 (3) PStSG.

³¹ Cf. § 91a (2) SPG.

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