

CHAPTER 15

CASE 2 – THE UNJUSTIFIED DENIAL OF A LICENCE

A. Austria

Matthias Zußner

A formal decision by an administrative authority is a notice and can be contested by means of an appeal against a notice before the competent administrative court. The notice is unlawful because it does not contain sufficient reasoning¹. The lack of reasoning does not result from the fact that Ms Tramp is not familiar with the source code. Ms Tramp also has no access to the source code in administrative appeal proceedings unless the source code is on file, because knowledge of the source code is not required for adequate reasoning and because the source code does not have to be in the case file. However, the authority must provide adequate reasons for its decision, which means that Ms Tramp must have a clear understanding of the factors on the basis of which she was refused the licence or access by decision.

The authority issuing the decision is a party to the appeal proceedings and can present (new) posthumous human reasons in favour of its decision during the proceedings; however, it cannot retrospectively provide the reasons for the decision that were already required at the time the decision was issued. The decision is unlawful for lack of reasoning. However, the authority cannot be obliged to issue a new decision; instead, the administrative court is obliged to make a decision on the merits of the case on the basis of the complaint against the decision². This means that the administrative court must – regardless of whether the contested decision was made using algorithms – conduct an independent legal assessment of Ms Tramp’s case and provide adequate reasons for its decision.

The administrative court can only request access to the source code if it is not part of the administrative file, within the framework of so-called administrative assistance (Article 22 B-VG), but the source code, if it exists, may not be handed over if it is subject to official secrecy.

¹ Cf. J. Hengstschläger, D. Leeb, *Verwaltungsverfahrenrecht* para 441 et seq (2023).

² § 28 para 2-4 of the Austrian Proceedings of Administrative Courts Act (*Verwaltungsgerichtsverfahrensgesetz – VwGVG*, BGBl. I No. 33/2013.).

B. China

Xixin Wang

The Chinese *Administrative Licensing Law* regulates the licensing activities of public authorities. Since it was passed in 2004 and has not been revised thus far, AI-assisted licensing decision-making is yet to be explicitly covered by the law itself. Yet, according to Article 38, if the administrative agency makes a written decision not to grant an administrative licence in accordance with the law, it must explain the reasons and inform the applicant of its right to apply for administrative reconsideration or initiate administrative litigation in accordance with the law. This means that the local authority is legally obliged to give Ms Tramp an explanation for denying her application. In Article 12 of its 2010 judicial interpretation *Provisions on Several Issues Concerning the Trial of Administrative Licensing Cases*³, the Chinese Supreme People's Court states that "If the defendant (public administration) refuses to allow the plaintiff (aggrieved citizens) to access the administrative licence decision, relevant archival materials, or supervision and inspection records without justifiable reasons, the people's court may order the defendant to allow the plaintiff to access them within a statutory or reasonable period of time". The key question in this case, therefore, is what kind of explanation should be given to Ms Tramp and what materials/information should be accessible to her as part of reasoning?

As to the first question, Chinese written law has been particularly vague about the specific requirements for explaining the reasons for denying licensing applications. But it is logically imperative that such explanations clearly indicate why the applicant fails to satisfy the criteria established by law. This is confirmed in a case decided by the Zhejiang Provincial High Court in 2021, which was subsequently selected by the Supreme People's Court to be published in the SPC Gazette, indicating a nod from the top judiciary. In this case, the Zhejiang provincial court ruled that although the Housing and Urban Rural Development Bureau of Yuyao City in Zhejiang province has repeatedly emphasised that liquefied petroleum gas is a flammable, explosive, and toxic hazardous substance directly related to public safety and counter-terrorism prevention, and that the admission conditions cannot be lowered, it must strictly implement administrative licensing in accordance with legal

³ <http://gongbao.court.gov.cn/Details/9877a506d98c026da10988e0446460.html>.

conditions and standards. Admittedly, it is difficult to supervise the gas business licence once it is issued. However, the Bureau has not submitted relevant evidence that the application does not meet the legal conditions, standard basis, and safety hazards of the administrative licence involved in the case⁴. In this light, under Chinese law, Ms Tramp is entitled to request that the local authority provide a detailed explanation of how and why her application falls short of the legal criteria for selling newspapers and maps in a kiosk. Specifically, the authority is legally bound to explain firstly, whether the variables and considerations used in the AI algorithm are legally mandated and then whether there are any irrelevant considerations; secondly, to what extent and in what way Mrs Tramp meets or fails to meet the lawful standards. The Chinese court can review the explanation provided by the authority to determine if it is legally justified.

This naturally brings us to the second question. To understand the licensing decision-making process, Ms. Tramp wants to access the materials and information that the local authority used to reject her application. According to the OGI Regulation, State secrets and trade secrets are exempt from disclosure. If the local authority demonstrates sufficient reason that the AI algorithm used to make licensing decisions qualifies as State secrets or trade secrets, it can then lawfully deny access to such algorithms. Otherwise, it must disclose such algorithm to Ms. Tramp, as required by both the OGI Regulation and the *Administrative Licensing Law*. If the source code is developed by a private entity and is considered a trade secret of the company, it is up to the court to decide whether the public interest in disclosing the source code to enhance government transparency and accountability outweighs the private interest in trade secrets. If the answer is positive, the court can compel the local authority to disclose the source code to Ms. Tramp; otherwise, it will not do so. In any case, the factors and information on which the AI was built, or a generic explanation of how the code works (e.g., its structure and logic), should be considered neither as a trade secret nor a state secret. Otherwise, the local authority could essentially make licensing decisions in a complete and impenetrable black box. This means that Ms Tramp should be able to access them under Chinese law. Moreover, the Administrative Litigation Law prohibits the public administration from justifying administrative decisions posthumously. According to Article 60 of the 2002 *Supreme People's Court's Provisions on*

⁴https://www.pkclaw.com/en_case/95b2ca8d4055fce13d81b7cb21812c21a54d437e75e2c3d3bdfb.html.

*Several Issues Concerning Evidence in Administrative Litigation*⁵, evidence collected by the defending administration in administrative litigation cases after taking specific administrative actions or during litigation proceedings cannot be used as a basis for determining that the specific administrative act being sued is legal. If there was no human involvement in the original decision-making process, the local authority cannot supply *ex post facto* human-made justification for the originally purely AI-made decision, which would be considered inadmissible evidence in court. If the court finds that the decision lacked adequate reasoning at the time it was made (via AI), it could annul the denial regardless of any later justifications. In the meantime, Ms Tramp is also entitled, per Article 24 of the PIPL, to reject the denial decision and request that the local authority retake the decision-making process with human involvement.

C. Estonia

Katrin Nyman-Metcalf

In Estonia, it is likely that this kind of project would be part of the open source AI projects where the base component of applications can be reused and further developed by interested parties, free of charge. All the open-source AI components are available in the eGovernment code repository and/or GitHub⁶. When the source code of AI programmes is available online, there is no need for a special demand for access. Ms Tramp can access this by identifying herself with the digital ID. As this is automatically available, she does not have to ask for it from either the authority or the court.

However, if she wishes to challenge the decision when she has obtained this information, Ms Tramp can do so. The fact that AI was used does not relieve the responsible body of their duty to take all relevant circumstances into account. Perhaps they can show that the AI did so, and no additional human reasoning is needed, but there have not been any such cases in Estonia yet – rather, there has always been human involvement at some stage.

A somewhat similar case can be observed in Estonia regarding forestry decisions. Here, complaints included that decisions were taken

⁵ <https://ipc.court.gov.cn/zh-cn/news/view-398.html>.

⁶ <https://www.kratid.ee/en/kratijupid>.

automatically (by AI) without a clear legal basis for this, and that this had led to the simplified procedure being used rather than the full one, which should be used when there are contested facts. The court examined the procedure and found that the data had been entered by the responsible (human) person and, in the light of the relevant inspection manual, the system used by the respondent in the automated procedure was not able to exercise discretion. The system was only responsible for determining whether the notification submitted was compliant with the applicable law and other rules. If not, it referred the problematic case to the responsible person, and it would enter the ordinary, full, procedure. The court recognised that problems may arise if the system is unable to identify the situation in which the forest notification should be referred to the ordinary procedure, but in the cases at hand, this had not happened. If such a situation had been demonstrated, this would have been a ground for finding in favour of the complainant⁷.

D. European Union

Leonardo Parona

When considered within the specific context of the EU legal system, this hypothetical case must be approached with the understanding that a licence such as the one requested by Ms Tramp cannot easily be equated to any act typically issued by EU Institutions and bodies. Nonetheless, there are several sectors in which EU institutions and agencies – both directly and within composite procedures involving national authorities – authorise the commercialisation of products or the initiation of economic activities⁸. As a relevant example, we can refer to the EFSA, which is experimenting with the use of AI in the evidence management process for chemical risk assessments it carries out within authorisation procedures⁹. Similar applications are expected by the European Medicines Agency (EMA)¹⁰.

⁷ Tallinn Administrative Court, Case 3-22-206, 6 December 2022 and Case 3-22-369, 16 December 2022.

⁸ On composite procedures see G. della Cananea, *The European Union's Mixed Administrative Proceedings*, in 68 *Law & Contemporary Problems* 197 (2004); L. De Lucia, *Conflict and Cooperation within European Composite Administration (Between Philia and Eris)*, 5 *Eur. Rev. Admin Law* 43 (2012)

⁹ See <https://efsa.onlinelibrary.wiley.com/doi/epdf/10.2903/sp.efsa.2024.EN-8567>.

¹⁰ Regulation (EU) No 123/2022 of 25th January 2022, regarding a stronger role for the European Medicines Agency in crisis preparedness and management for medicinal

Having clarified this adjustment, it is possible to highlight the main specificities of the present hypothetical, where an AI system assists a human decision-maker, who significantly relies on its negative opinion for the licence denial. The denial is accompanied by an extremely generic motivation, according to which the granting of the licence “would be contrary to the public interest”. The generic nature of the grounds initially put forward by the competent authority is even aggravated by its subsequent denial to grant access to the AI program, which could have – theoretically and partially – represented a potential remedy. It is therefore necessary to address two distinct issues, i.e. the reasons justifying the denial on the one hand, and access on the other hand.

As far as the first aspect is concerned, since the authority simply made reference to the AI’s negative opinion, “without giving any further reason”, it seems evident that the denial is deprived of adequate reasons, which makes the act invalid due to the breach of Article 41(2) CFR and 296(2) TFEU, and therefore suitable to be challenged by Ms Tramp through an action for annulment under Article 263 TFEU. The denial also seems to run contrary to the duty to provide an explanation under Article 86 of the AI Act, although the latter provision’s applicability is debatable in this case, given that the employed AI system does not reasonably qualify as a high-risk one under Annex III.

Regarding the “posthumous reasons” referred to in the hypothetical case, the CJEU would probably not accept them as a legitimate means of fulfilling the obligations set out in Article 296(2) TFEU and would find them in violation of the right to good administration¹¹. This is because one of the core functions of the duty to provide reasons is to offer the affected parties sufficient elements to understand whether the decision is invalid and, consequently, decide whether or not to resort to the remedies provided by the EU legal order¹². As a result, a decision for which the reasons are provided at a later stage (especially once judicial review is already initiated) would be deemed invalid.

products and medical devices, establishes that “This Regulation should allow the Agency to [...] tak[e] advantage of all the potential of supercomputing, artificial intelligence and big data to develop predicting models and take better and more timely and effective decisions” (Recital 45).

¹¹ See G. della Cananea, *Due Process of Law Beyond the State. Requirements of Administrative Procedure* (2016), 78; J.L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 *Geo. Wash. L. Rev.* 105 (2007).

¹² C-439/11 *Ziegler v Commission* [2011] OJ C 347; T-67/11 *Martinair Holland NV v Commission* [2015].

It is nonetheless accepted by the case law of the CJEU that, in the light of the circumstances of the case, the reasons initially provided need not expound every detail of the relevant facts and points of law¹³. In the present case, however, the mere reference to the AI's non-intelligible negative opinion does not seem sufficient to meet even this attenuated standard.

As far as the second – central – aspect is concerned, i.e. access, it should be recalled that in general terms the topic is regulated by Regulation (EC) No 1049/2001. It might however be debated, on the one hand, whether the AI program used by the authority would constitute a 'document' under Article 3(a) of the Regulation and therefore fall within its scope of application, and, on the other hand, whether any of the exceptions under Article 4 would apply in the present case¹⁴. The CJEU has not yet addressed issues of this kind; however, it has recognised in general terms that access cannot be denied if the 'document' in question (assuming the AI program can be considered as such) has played a central role in the procedure¹⁵. Hence, the Court could force the authority to grant access to the AI program, or at least to explain its structure and logic of operation, provided that it would find the exceptions in Article 4 inapplicable in this case¹⁶; or it would, in any case, deem Ms Tramp's interests prevailing over those protected by the exceptions¹⁷.

¹³ C-286/13 *Dole v Commission*.

¹⁴ For the negative opinion on this issue see the – now quite dated – Opinion of AG Sharpston delivered on 15th October 2009 in the case C-28/08, where he observed that "it seems a little unlikely that the Community legislator had AI potential in mind when framing Regulation No 1049/2001" (para 146, note 64). For a more permissive – and updated – vision, see J. Mazur, *Can public access to documents support the transparency of automated decision-making? The European Union law perspective*, 29 *International Journal of Law and Information Technology* 1 (2021).

¹⁵ See the leading cases C-46/87 and 227/88, *Hoechst v Commission*. The jurisprudence has long expanded the right to access to the documents "which may be relevant so that their probative value for the defence can be assessed" (T-7/89 *Hercules*).

¹⁶ It shall be recalled that according to the CJEU caselaw, in order to justify a refusal of an access request, it is not sufficient for the requested document to fall within the scope of Article 4(2) and (3) of Regulation No. 1049/2001, but rather: "the Institution concerned must also provide explanations as to how access to that document could specifically and actually undermine the interest protected by an exception laid down in that article" (C-365/12, *Commission v EnBW*, especially para 64, and C-331/15 *French Republic v Carl Schlyter* [2017] OJ C 374).

¹⁷ In fact, "the possibility of relying on general presumptions applying to certain categories of documents" in order to refuse access is very limited, since "they restrict the fundamental principle of transparency laid down in Article 11 TEU, Article 15 TFEU and Regulation No. 1049/2001 [...]. Accordingly, the use of such presumptions must be founded on reasonable and convincing grounds" (Case T-306/12 *Spirela v Commission*

It should also be noted that in case of “automated decision-making”, Article 15(2)(f) of Regulation (EU) No 1725/2018 on the processing of personal data by Union institutions and bodies establishes the right to obtain “meaningful information about the logic involved, as well as the significance and the envisaged consequences” – in the same way that the GDPR provides for national authorities under Articles 13(2)(f), 14(2)(h) and 15(1)(h).

In a recent reply to a European Ombudsman’s inquiry, the Commission observed that “the information that the Commission makes available to the public in relation to IT tools with AI components depends on many factors” but recognises that once a system is being developed or actually used by the Commission, the latter shall, among other means to ensure transparency, allow public access to documents¹⁸.

The consequences of the violation of the – widely and variously protected – right to access depend on the circumstances of the case and whether, had the party been given the opportunity to access, the outcome of the procedure and the judicial remedy eventually instituted, would have been different¹⁹. As a consequence, the Court would probably annul both denials: the first (the denial of the licence) for a violation of the duty to give reasons, and the second for the absence of valid grounds for excluding access. In the second case, it might also order the authority to comply with Article 15(2)(f) of Regulation (EU) No 1725/2018, and substantially explain the structure and logic of operation of the AI program. Whether this latter remedy would prevent the annulment of the denial of the licence is a controversial issue, which depends to a large extent on the way Ms Tramp introduced the actions in Court. It is, in fact, reasonable to conclude that if she sought the annulment for a breach of the duty to give reasons, the annulment would still be granted by the Court, regardless of the issuance of the order to explain the AI program’s functioning logic.

[2014] para 52; as well as Cases C-514/11 and C-605/11 *Liga Para a Proteçao da Naturaleza (LPN), Republic of Finland v Commission*).

¹⁸ Besides access, the Commission refers to: the Register of the Data Protection Office, the Interoperable solutions portal Joinup, the Open-Source platform and the Register of Commission Documents. It also adds that “IT tools in exploratory mode (including many with AI) [...] are by default not made public”. The Commission’s reply (SI/4/2024/MIK) is available online at: <https://www.ombudsman.europa.eu/it/doc/correspondence/it/191562>. See in particular p. 5.

¹⁹ C-204/00 *Alborg Portland and Others v Commission*, para 145.

E. France

Maximilien Lanna

Ms Tramp applies to the local authority to obtain a licence to sell newspapers and maps in a kiosk. An AI program delivers a negative opinion, and the authority gives no further explanation about the rejection.

Does Ms Tramp have a right to information regarding the decision that was made by the AI program?

The obligation to give reasons for administrative decisions is one of the safeguards of the rule of law. This means providing the person concerned with an explanation of the decision taken by the authority. European regulations and national laws are both imposing a “right to explanation”, initially or upon request, or “explicability” of algorithmic decisions.

Article L. 300-2 of the French Code of relations between the public and the administration classifies the “codes sources” of the algorithms used for decision-making as “documents produced or received, as part of their public service mission, by the State, local authorities and other persons governed by public law or persons governed by private law entrusted with such a mission”. As a result, the “right of access to administrative documents” applies to them.

In accordance with Article L. 311-1-3 of the same code, an individual decision taken based on algorithmic processing must include an explicit statement informing the interested party. The rules defining this processing, and the main features of its implementation are communicated by the administration to the interested party on request.

On a broader scale, according to Article R311-3-1-2, the authority must inform the subject, upon request, about any individual decision taken on the basis of algorithmic processing. This information must be provided in an intelligible form, without revealing legally protected secrets and should include the following: the extent and manner in which algorithmic processing contributes to the decision-making process; the data used and their sources; the parameters of the processing, including, where applicable, their weighting relevant to the data subject’s situation, and the operations performed by the algorithm.

Some doubts have emerged about the scope of this right to explicability. The Constitutional Council has clarified the matter, stating that the data controller must have “control over the algorithmic processing and its evolution [...] in order to be able to explain, in detail

and in an intelligible form, to the data subject the way in which the processing has been implemented with regard to him or her". This decision created a right to 233ationalizat *ex post* explanations, now incorporated into Article 47, 2°, of the French Data Protection Act.

Article 9(1)I of the Council of Europe Convention 108+ requires disclosure of the reasoning behind the treatment. The explanatory report to the convention states that individuals have not only the right to know the reasoning behind the treatment, but also the consequences of this reasoning, as well as the conclusions that may have been drawn from it in the use of algorithms for automated decision-making, specifically in the context of profiling.

Given the legal framework governing the transparency of algorithms, Mrs Tramp will have access to a certain amount of information, such as the source code and a brief explanation of how the algorithm works. For the time being, however, there might still be some hesitation as to whether greater explicability of the algorithm's operation may be required.

F. Germany

Cristina Fraenkel-Haeberle & Charlotte Langer

Decision of the court in accordance with current German law

According to the current legal framework in Germany, the decision to deny Ms Tramp the desired licence is unlawful because § 35a VwVfG does not permit fully automated decisions in cases where there is room for discretion or margin of appreciation. In the present case, the outcome is evidently not determined solely by the objective facts of the case; rather, the algorithm weighs different factors against each other, exercising a discretion that is designated for human decision-makers under § 35a VwVfG. This constitutes a significant procedural error that cannot be rectified retroactively. It also cannot be ruled out that the procedural error influenced the decision, meaning that the exception of § 46 VwVfG does not apply²⁰.

However, the court's decision also depends on whether Ms Tramp fulfils the substantive legal requirements to obtain the desired licence.

²⁰ This provision states that an administrative act cannot be overturned solely on grounds of formal deficits if it is evident that the formal error did not influence the decision. For details, see U. Ramsauer, § 46 *Folgen von Verfahrens- und Formfehlern*, in U. Ramsauer, F. Kopp (eds), *Verwaltungsverfahrensgesetz Kommentar* 1145 et seq. (2022).

The type of lawsuit she must file to achieve her goal is a *Verpflichtungsklage* (action for the issue of an administrative act) under § 42(1) Alt. 2 *Verwaltungsgerichtsordnung* (VwGO; Administrative Court Code of Procedure), specifically a *Versagungsgegenklage* (action against the rejection of an application), which seeks not only to overturn the rejection but also to grant the licence²¹. For this action to be successful, she needs to prove that the rejection infringes upon her rights since she is entitled to the licence²². Therefore, if the administration can produce compelling reasons why Ms Tramp cannot be granted the licence based on the relevant substantive law, the court will uphold the decision.

Either way, she has a right to information about the processing of her personal data based on Art. 15(h) GDPR, which includes meaningful details regarding the underlying logic of automated decision-making procedures.

A hypothetical solution under a less restrictive automation regime

Due to the restrictive legal regime concerning automation, the central question of the present case – whether a claimant can obtain access to an extensive administrative self-learning algorithm – is sidestepped in the above, as it has no bearing on the solution of the case. In the following, we will therefore examine the case in a hypothetical setting where full automation would be permitted even for administrative decisions involving discretion and margin of appreciation.

Ms Tramp would not be able to challenge the decision on the basis of formal defects alone. However, under § 39(1) VwVfG, the administration is still required to provide reasons for its decisions²³, including the considerations made in exercising discretion or margin of appreciation, as stipulated in § 39(1) S. 3 VwVfG. This forms the basis for the court’s assessment of whether errors of judgment had been made by the administration. To meet this requirement, neither disclosing the source code nor providing a human explanation would be sufficient; the administration would have to disclose the underlying logic and explain the determining factors behind the algorithm’s individual decision.

Administrative courts follow the *Ermittlungsgrundsatz* (investigative principle) as laid down in § 86(1) S. 1 VwGO, meaning the

²¹ For additional details, see, e.g., R.P. Schenke, § 42, in W.R. Schenke, F. Kopp (eds), *Verwaltungsgerichtsordnung Kommentar* 246 (2022).

²² R.P. Schenke, W.R. Schenke, § 113, in W.R. Schenke, F. Kopp, cit. at 142, 1505 ff.

²³ For an in-depth explanation of the requirement to give reasons including possible exceptions, none of which are pertinent here, see the hypothetical case n. 1.

court ascertains the relevant facts²⁴. However, this does not grant courts the authority to compel parties to disclose evidence against their will²⁵. If a party refuses to disclose pertinent facts, the court may rule against it due to lack of evidence²⁶. In the present case, the court would certainly note the lack of necessary justification in the administrative act and request the administration to provide it.

To this end, the administration could disclose the algorithmic source code. Whether such an approach would indeed satisfy the requirement to give reasons has not yet been determined by lawmakers or courts in Germany, as the situation has not arisen in practice. There is some doubt in international scholarship about whether simply disclosing the source code – which is often complex and only comprehensible to experts in the field – would genuinely serve the claimant’s interests²⁷. For both the claimant and the court to assess the lawfulness of the provided reasons, they must be understandable. If the given explanation consists solely of computer code, this appears unlikely, particularly with complex machine-learning programs that do not follow clear, deterministic rules but extract patterns from vast amounts of training data. Consequently, revealing the source code is probably “neither necessary nor sufficient”²⁸ to meet the giving reasons requirement.

Instead, the administration could attempt to give reasons by providing a human account of which legal requirements (as established in the relevant laws governing the use of public spaces and the licensing of businesses) Ms Trump allegedly fails to meet. This approach of subsequent reason-giving is permitted in § 45 (1) Nr. 2 VwVfG to remedy an unlawful administrative act lacking an explanation. However, this provision only permits the administration to provide the deliberations it *actually made* when considering the application, i.e., the ‘true’ reasons for

²⁴ This is in contrast to the adduction principle in civil law, where it is the parties’ duty to provide the facts they deem relevant and they wish to disclose. For further details see, for example W.R. Schenke, § 86, in W.R. Schenke, F. Kopp, *Verwaltungsgerichtsordnung Kommentar*, cit., 1145 ff.

²⁵ H. Müller, *Der Amtsermittlungsgrundsatz in der öffentlich-rechtlichen Gerichtsbarkeit*, in *Juristische Schulung* 324 (2014).

²⁶ *Ibid.*, 328; W.R. Schenke, § 108, in W.R. Schenke, F. Kopp (eds), *Verwaltungsgerichtsordnung Kommentar*, cit., 1367 ff.

²⁷ M. Martini, § 28, *Digitalisierung der Verwaltung*, in W. Kahl, M. Ludwigs (eds), *Handbuch des Verwaltungsrechts* 1105, 1127 (2021); J. A. Kroll et al, *Accountable Algorithms*, 165 U. Pa. L. Rev., 633 (2017); L. Edwards, M. Veale, *Slave to the Algorithm? Why a “Right to an Explanation” Is Probably Not the Remedy You Are Looking For*, 16 Duke L. & Tech. Rev. 18 (2017); J. Zerilli et al, *Transparency in Algorithmic and Human Decision-Making: Is There a Double Standard?*, 32 *Philosophy & Technology* 661 (2019).

²⁸ J. A. Kroll et al, *Accountable Algorithms*, cit., 633.

the challenged decision²⁹. It does not allow the administration to produce some arbitrary justification³⁰. Although § 114(2) VwGO permits the administration to supplement explanations concerning the exercise of discretion, this only applies to an existing explanation that has been amended or extended³¹. It does not allow the administration to provide reasons where none at all had been given before³².

In conclusion, when using sophisticated and complex self-learning software to decide on applications, the administration must investigate the true reasons why the algorithm made the challenged decision and present these to the court. Any lawful self-learning algorithm would therefore need to be configured to allow for examination of the underlying logic behind its decision-making processes, as well as the key factors influencing individual decisions, including any deliberations that influenced the exercise of discretion. These would then form the basis for the court's ruling.

Ultimately, the court's decision still depends on the details of the case and the substantive law³³. If there are compelling reasons why Ms Tramp cannot be granted the licence, the court will uphold the rejection. If the administration (including any algorithms it employs) made an error in the exercise of its discretion, such as considering factors that are not legally permissible, failing to consider relevant factors, wrongly giving weight to certain factors, or not exercising its discretion at all, the court – providing certain specifications – will direct the administration to make a new decision. The same applies if the administration fails to provide reasons: since the court cannot determine the lawfulness of the decision, it will direct the administration to make a new one. If the failure to provide reasons resulted from the opaque setup of the algorithm used to make the decision, the court will prohibit its use in making the new decision. If the facts of the case are such that, after the lawful exercise of discretion, no decision other than granting the licence can be lawful

²⁹ U. Ramsauer, § 45 Heilung von Verfahrens- und Formfehlern, in U. Ramsauer, F. Kopp, *Verwaltungsverfahrensgesetz Kommentar*, cit.

³⁰ *Ibid.*; J. F. Lindner, D. Jahr, Der unzureichend begründete Verwaltungsakt: Das Verhältnis der §§ 39, 40, 45 VwVfG zu § 114 S. 2 VwGO, *Juristische Schulung* 673 (2013).

³¹ J. Ruthig, § 114, in W.R. Schenke, F. Kopp (eds), *Verwaltungsgerichtsordnung Kommentar* (2022).

³² *Ibid.*; F. Hufen, *Verwaltungsprozessrecht*, cit., 407.

³³ For details concerning possible outcomes of a *Verpflichtungsklage* and their prerequisites see R.P. Schenke, W.R. Schenke, § 113, in W.R. Schenke, F. Kopp (eds), *Verwaltungsgerichtsordnung Kommentar*, 1505 ff. (2022).

³³ *Ibid.*; F. Hufen, *Verwaltungsprozessrecht* (2021).

(*Ermessensreduzierung auf Null* – reduction of discretion to zero)³⁴, the court will grant the licence.

In addition, Ms Tramp can request information about the algorithm's underlying logic under Art. 15(h) GDPR, as the algorithm processes her personal data.

G. Italy

Stefano D'Ancona

Italian case law has affirmed that algorithmic decisions must be made through a transparent process.

The “technical rule” must be understandable and accessible; even the confidentiality of the companies that produce the computer mechanisms involved is irrelevant. By placing these tools at the disposal of the authoritative power, such companies clearly acknowledge the associated consequences regarding the required transparency (Council of State, no. 8473/2019).

According to Italian case law, the source code of a computer program used by a public authority can be classified as an “administrative document” under Article 22(1)(d) of Law No. 241/1990 (General law on administrative procedure). The source code contains instructions that impact an activity of public interest.

In this regard, the Lazio Regional Administrative Court found against an authority that only provided a description of the algorithm without making the source codes available to the affected party. According to the court, “Software is, therefore, the expression of an organised and structured set of instructions... capable of causing a function, task or result to be performed or obtained by means of an electronic information processing system”, and “will have to be suitably processed to arrive at a program that can be executed by the processor, thus serving as the starting point (‘source’) of the entire process leading to the execution of the program itself by the machine hardware, which may include other stages such as precompilation, compilation, interpretation, loading and linking³⁵.”

Consequently, software takes on a crucial role in the administrative process for adopting a computerised act, and its legal

³⁴ *Ibid.*, 1516.

³⁵ TAR Lazio Rome, section III, 21 March 2017, no. 3742.

classification as a computerised administrative act is important for various purposes. First and foremost, to verify the admissibility of access mentioned in Articles 22 et seq. of Law no. 241 of 1990 to the relevant computer program and, ultimately, to its source language.

In our case, in conclusion, the authority must grant Mrs Tramp access to the source code because she has a present, direct, and concrete interest in knowing it for the defence of that interest (see also TAR Lazio Rome, section III, 01/07/2020, no. 7526).

According to case law precedents on access to intelligent systems used in public administration, authorities are obliged to provide citizens with clear and comprehensible explanations of how algorithmic systems work.

Precisely because of the principle of transparency, the administration may provide post-hoc explanations regarding the automated decision. In a similar case, the courts stated that an explanatory note from the administration to the citizen, explaining the reasons for the automated decision, should be considered legitimate.

Jurisprudence, in sum, admits the use of AI in the administrative procedure, but parties must be enabled to verify that the outcomes of the procedure structured in this way comply with the prescriptions and purposes established by the law or by the Administration itself, by indicating the priorities assigned in the evaluation and decision-making procedure and the data that have been selected as relevant³⁶. An explicatory note must therefore “state the parameters on the basis of which the decision was taken and thus enable the applicants to understand the factual assumptions and the legal reasons for the measure issued” (TAR Toscana, no. 109/2022). This, however, would not prevent the annulment of the automated decision, especially if the post-hoc reasons are different from those that led to the automated decision. On the other hand, it can also be affirmed that the supplementation of the grounds is admissible if it takes place through the acts of the proceedings or through an autonomous validation measure, using unequivocal and sufficient elements present in the investigative acts (Council of State, section VII, 06/06/2024, no. 5069). This principle can, therefore, also be applied if the first measure taken using automated systems.

From another perspective, however, an authority can intervene after the automated decision and revise it based on the principle of non-exclusivity. A judgment summarising the guidelines on this matter

³⁶ Council of State VI, 13 December 2019 no. 8472 and 8 April 2019 no. 2270.

declared that an algorithm, as long as it allows “review by the human element of the results of its application (human in the loop) can constitute a mechanism for simplifying the Administration’s actions” (Council of State no. 5117/2023).

H. Netherlands

Louise Verboeket & Jacobine van den Brink

In this case, we are dealing with a single-case decision (*beschikking*), specifically the decision (*besluit*) to deny Ms Tramp the requested licence³⁷. The fact that this decision was based on negative advice generated by an AI-driven program does not affect the regular administrative law procedure. This means that, after lodging an objection with the administrative authority (*bestuursorgaan*), Ms Tramp can appeal the decision on the objection (*beslissing op bezwaar*) to the administrative court (*bestuursrechter*)³⁸.

Based on the case law previously discussed³⁹, the administrative authority has the obligation to disclose, fully, promptly, and on its own initiative, the decisions made, and the data and assumptions used, in an appropriate manner so that these decisions, data, and assumptions are accessible to third parties⁴⁰. If the administrative authority, as in this case, does not comply with this obligation on its own initiative, then the administrative court will order the administrative authority to do so, on pain of annulment of the decision⁴¹. The Court could thus indeed order the administrative authority to explain the structure and the operating logic of the AI-driven program.

The next question is precisely which data fall under this obligation to disclose. In the *AERIUS II* judgment, the administrative court⁴² made a distinction between customised input data (*maatwerkinvoergegevens*) and standard input data (*standaardinvoergegevens*)⁴³. The administrative

³⁷ Art. 1:3(2) GALA.

³⁸ Art. 7:1 and 8:1 GALA.

³⁹ See the answer to the fourth question in the Chapter on the Netherlands in Part II.

⁴⁰ ABRvS 17 May 2017, ECLI:NL:RVS:2017:1259 (*AERIUS I*), paras. 14.3-14.4, Supreme Court 17 August 2018, ECLI:NL:HR:2018:1316, CRvB 15 May 2019 ECLI:NL:CRVB:2019:1737. Cf. CBb 8 October 2015, ECLI:NL:CBB:2015:318, para. 4.5.3.

⁴¹ Art. 8:42 in conjunction with 8:45(1) GALA.

⁴² Specifically, the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*).

⁴³ ABRvS 18 July 2018, ECLI:NL:RVS:2018:2454 (*AERIUS II*), paras. 23.2-23.5.

court considered that the obligation to disclose applies particularly to customised input data, meaning the data specific to the decision to be made, which the user of the algorithm (in this case, the administrative authority) must enter themselves. It is therefore not sufficient for the administrative authority to simply make Ms Tramp aware of the outcome of the AI-driven programme. The administrative authority must also clarify which choices, meaning which customised input data, the decision to deny the requested licence is based on. This information must enable Ms Tramp, as the party concerned (*belanghebbende*), to decide whether to make use of the option to file an objection or to exercise the right to appeal against the decision on the objection. It must also allow her to challenge the accuracy of the data used, the calculations made, and the assumptions, choices, and decisions based on them. Sole reliance on the output of the AI-driven system, without adequate explanation of how the decision was reached, would render it a ‘black box’ and would therefore fail to meet the requirement for a proper statement of reasons (*deugdelijke motivering*) as established by Article 3:46 of the Dutch General Administrative Law Act (GALA, *Algemene wet bestuursrecht*)⁴⁴. Moreover, a lack of transparency regarding the workings of the AI-driven system could lead to a judicial ruling that the use of the AI-driven system is unlawful in and of itself⁴⁵.

According to the administrative court in the *AERIUS II* judgment, the obligation to disclose does not, at least not without further consideration, apply to standard input data unrelated to a specific decision, such as the complete dataset. If Ms Tramp, as the party concerned, indicates that she requires (information about) standard input data to substantiate her appeal, while these data were not made clear in or alongside the decision, then the administrative authority must make these data available to Ms Tramp upon her request. Ms Tramp should submit her request for information and access to the customised and/or standard input data in a timely manner during the procedure. She should, if possible, specify which particular data her request concerns, so that the administrative authority can provide access as clearly and specifically as possible. All in all, it is therefore not necessarily the case that the Court would grant Ms Tramp access to the AI-driven programme, the source code, or the factors on which the AI was built. She will need to request the information in a timely and specific manner, stating that she requires it to substantiate her appeal.

⁴⁴ ABRvS 17 May 2017, ECLI:NL:RVS:2017:1259 (*AERIUS I*), para. 14.3.

⁴⁵ District Court of The Hague 5 February 2020, ECLI:NL:RBDHA:2020:1878 (*SyRI*), paras. 6.49, 6.65, 6.82 and 6.94.

The final question is whether the administrative authority could provide posthumous human reasons for the decision to deny the licence during the trial, and whether this could prevent the annulment of the denial. Under Dutch law, the administrative court will, in principle, review the legality of the decision *ex tunc*. Nevertheless, the administrative authority could 'heal' its decision by providing additional reasoning for the decision before court⁴⁶. There are various routes for this. The administrative court could choose to set aside the deficiency of reasoning (*het motiveringsgebrek passeren*) by applying Article 6:22 of the GALA, provided that the court finds it plausible that Ms Tramp was not disadvantaged by this deficiency. In that case, the decision would not be annulled, at least not on the grounds of insufficient reasoning. Given the fundamental nature of the lack of reasoning in this case, it is unlikely that the administrative court would opt for this approach. The administrative court could also, based on the additional reasoning provided by the administrative authority, choose to annul the decision but uphold its legal consequences⁴⁷. A third option is for the administrative court to first apply a so-called administrative loop (*bestuurlijke lus*), providing the administrative authority with the opportunity to repair a flaw in its decision as the case is pending before court⁴⁸. The administrative court would then render an interlocutory judgment (*tussenuitspraak*), in which it offers the administrative authority the opportunity to repair the defects in the decision within a certain time limit⁴⁹. If the administrative authority successfully repairs the decision by providing additional reasoning for the decision, the final judgment would be the same as in the second option: the decision is annulled, but its legal consequences are upheld by the administrative court⁵⁰. In conclusion, the latter two options would not prevent the annulment of the decision, but, in practice, the legal consequences (namely the rejection of Ms Tramp's application for the licence) would be upheld.

⁴⁶ Cf. Art. 8:41a GALA, on the basis of which the administrative court is obliged to resolve the dispute as definitively as possible.

⁴⁷ Art. 8:72(3)(a) GALA.

⁴⁸ Art. 8:51a and 8:51d GALA.

⁴⁹ Art. 8:80a GALA.

⁵⁰ R.J.N. Schlössels, R.J.B. Schutgens, S.E. Zijlstra, *Bestuursrecht in de sociale rechtsstaat*. 2. *Rechtsbescherming, Overheidsaansprakelijkheid (Handboeken staats- en bestuursrecht)* (2019).

I. Spain

Agustí Cerrillo-i-Martínez

Law 40/2015 recognises the general principle of transparency in government acts (Article 3). However, its articles do not include any specific mechanism to make automated government actions more transparent, apart from the usual mechanisms such as publication of administrative decisions through notifications. It also does not provide any obligation to publish the code of the algorithm. It rules only that a competent body or bodies must be established beforehand to audit the information system and its source code. Law 19/2013 of 9 December, on transparency, access to public information, and good governance also lacks any provisions on the proactive dissemination of information relating to automated government decisions.

Royal Decree 203/2021 establishes that e-Offices must provide information on automated administrative actions for interested parties (Article 11.1.i). In particular, they must publish a description of its design and functions, its accountability and transparency mechanisms, and the data used to configure and train it.

Some of the regional regulations on automated administrative actions also provide that “the rulings on actions are located in the e-Office of the administration of the Generalitat” (Article 54.2 of Decree 76/2020, of 4 August, on e-government of Catalonia). In particular, these rulings will be issued before the automated action comes into use and must include the definition of the specifications, programming, maintenance, supervision, quality control, and where applicable, auditing of the information system and its source code, and identify the responsible body if the automated government action should be contested. A similar ruling appears in Law 4/2019 of 17 July on the e-government of Galicia, establishing that “the e-Office of the Xunta de Galicia and the “Diario Oficial de Galicia” will publish the full text of the rulings indicated in the previous section”.

In practice, Spanish public authorities are not proactively publishing information on automated government actions or, in particular, on source codes⁵¹.

⁵¹ Relevant to this, Article 64.4.d) of the Workers’ Statute (amended by Law 12/2021 of 28 September, amending the consolidated text of the Workers’ Statute Law, approved by Royal Legislative Decree 2/2015 of 23 October to guarantee the employment rights of persons working in the distribution of digital platforms) recognises the works council’s right to “Be informed by the company of the parameters, rules, and

Given this situation, the only option available for interested parties is to request access to the information (*freedom of information*) in accordance with transparency legislation⁵². However, this route can be difficult in practice.

This has been demonstrated in the well-known Bosco case. In this case, a citizen entity (Fundación Ciudadana Civio) asked the Ministry for Ecological Transition (MTE) for information on the online application that allows power suppliers to check whether the person applying for the *bono social* (energy discount) meets the requirements to be considered a vulnerable consumer⁵³. The Ministry for Ecological Transition did not respond within the stipulated period, and Civio presented a complaint to the Council of Transparency and Good Governance – an independent body ensuring the right of access – which resolved to accept part of the complaint and require the Ministry for Ecological Transition to provide the claimant, within ten working days, with information relating to the online application, the technical specification of the application, the results of testing to check that the implemented application complied with its functional specification, and any other deliverable explaining the functions of the application (R/0701/2018). This resolution rejected the limitations claimed by the Ministry for Ecological Transition relating to the national defence and public security. However, it did consider that the limitation relating to intellectual property should be applied for the source code of the software, stating that “Given that the source code is expressed in written form, it is logical to think that the software can be protected by the rights of the author as a work of literature”. Finally, it stated that “the technical specifications of computer programmes [are] published on the Internet. The latter do not affect the protected

instructions which form the basis of algorithms or artificial intelligence systems affecting decision-making which may impact working conditions, access to employment, and job security, including the creation of profiles.”

⁵² See also AEPD, *Guía para el cumplimiento del deber de informar* (2018); *Adecuación al RGPD de tratamientos que incorporan Inteligencia Artificial. Una introducción* (2020); *Requisitos para Auditorías de Tratamientos que incluyan IA* (2021).

⁵³ The second transitional provision of Royal Decree 897/2017 of 6 October, regulating the figure of the vulnerable consumer, the *bono social* and other measures to protect domestic electricity consumers, rules that “The Ministry of Energy, Tourism, and the Digital Agenda will ensure that the software enabling the power supplier in question to check that applicants for the *bono social* meet the requirements to be considered a vulnerable consumer, as stated in Article 3, will be available in the e-Office of that department.” The Royal Decree was further developed in Articles 6 and 8 of Order ETU 943/2017 of 6 October on the mechanism to check the requirements to be considered a vulnerable consumer.

hardware, and in our judgement serve the purpose of the LTAIBG to control public actions and the decision-making process”.

Resolution 701/2018 of 18 February 2019 of the Council of Transparency and Good Governance was challenged before the Central Administrative Court, whose ruling 143/2021 of 30 December rejected the appeal brought against the resolution due to, among other reasons, considering that “refusing access to the source code of the software is not a breach of the principle of legality”, as Civio had stated. The ruling also considered that access to the source code would infringe on the limits of public security, the administrative functions of surveillance, inspection and control; economic and monetary policy, professional confidentiality and intellectual and industrial property, and the guarantee of confidentiality required in decision-making processes, as set out in Article 14.1 of Law 19/2013 of 9 December, on transparency, access to public information, and good governance. Lastly, it also indicated that delivering the source code would make the software vulnerable to attack, and these vulnerabilities could be used to access linked databases, such as those of tax departments or Social Security.

This ruling was appealed before the National High Court (*Audiencia Nacional*) (section 7^a) which issued its ruling on 30 April 2024 (appeal 51/2022). First, it ruled that the limitation relating to the protection of intellectual property is applicable. Second, the ruling states that “revealing the code objectively increases the severity of the vulnerabilities of any computer application, even more so when dealing with classified or sensitive information. The Government cannot be required to develop all its applications using open source software” (...) as “this would put at risk the confidentiality of tax information, make it possible to impersonate authorised users, falsify consent, etc.” Lastly, adopting the arguments of the State Attorney, it concludes that “a computer application is simply a tool forming part of a government procedure which will continue producing a government action fully subject to the legal order, such that control of the legality of the government actions continues to be guaranteed: the legality (or otherwise) of the government action is not justified by the use of the computer application, but by its adherence to the legal order of the action.”

A cassation appeal against this ruling has been presented in the Supreme Court, which has yet to rule on it.

Finally, relating to the possibility of demanding a *human* explanation for an automatic decision, we must again turn to Articles 41 Law 40/2015 and 22 of the GDPR.

L. United Kingdom

Gordon Anthony

Two main issues arise from this scenario: access to the AI program, and the *ex post-facto* rationalization of decisions. In addressing those issues, it is assumed that Ms Tramp's challenge would be heard by way of judicial review proceedings and that the ordinary rules of evidence and discovery would apply.

The issue of access to the AI program is potentially very complicated as: (a) the public law points in the case would plainly require the court to have access to it and/or an explanation of its workings; but (b) the program will presumably have been developed by a private company which has sold it under licence to the local authority and included a commercial sensitivity clause. In those circumstances, the private company may need to be joined to proceedings as a third party (Notice Party), and the court would have to decide whether to order disclosure of commercially sensitive information. It is very difficult to know whether it would make such an order. On the one hand, the court would plainly have the power to order such discovery (subject to a potential appeal to a higher court), though it could be expected to be very reluctant to do something that would damage the commercial interests of a third party which has sold a product under a lawful contract with a public authority. Either way, it is likely that the court would wish to receive submissions on the points arising before making any ruling - and some of those submissions may need to be heard *in camera*.

The issue of *ex post-facto* rationalization might be addressed through either a rigid approach or a pragmatic approach.

The rigid approach - which would be the orthodox approach in law - would not permit the local authority to provide retrospective reasons, as reasons must be contemporaneous and provided by the person(s) who made the decision at hand. Given this, the courts generally draw a distinction between later evidence that clarifies a decision (which is potentially permissible) and evidence that seeks to alter the basis for a decision (which is not permissible)⁵⁴. In deciding whether evidence would be admissible, the court will consider closely the context to the case, including the nature of the decision that was taken and the interests affected by it. It is not clear here how *ex post facto* reasons would do

⁵⁴ *R v Westminster City Council, ex p Ermakov* [1996] 2 All ER 302.

anything other than redraw the parameters of the decision, given that it originally contained simply a statement about the public interest.

The pragmatic approach would note the problem presented by a discovery application and seek to ensure that the court could still determine whether the refusal of the licence was justified. In this context, the court might ask whether it would be possible for the local authority to provide more detail about how the AI program balanced the range of factors that were relevant to the application and, in that way, assess how the balance has been struck. On the assumption that this would be possible, this would require an *ex post facto* rationalization on the (exceptional) facts of the case, where the Notice Party may be able to assist the local authority in understanding how the program worked without disclosing commercial secrets. If that were not possible, it may be that large parts of the case would have to be heard *in camera* and without direct input from Ms Tramp. That, in turn, would raise fundamental questions about rights of access to justice and the principle of open justice.

In sum: this would be a very difficult case that would test the boundaries of what is permissible as a question of evidence and the principles that apply to *ex post-facto* rationalization.

M. United States

Catherine M. Sharkey & Caterina Barrena Hyneman

Background

Like in Ms. Tramp's case, many entities from the municipal to federal levels of government are harnessing AI and algorithms to service their populace⁵⁵. The AI programs they use come from a variety of sources. Some federal agencies, for example, have successfully created their own algorithms from scratch, while others rely on the private sector to meet their solutions⁵⁶.

⁵⁵ See MyCity Chatbot Beta, <https://chat.nyc.gov/> (exemplifying how New York City is deploying a chatbot to help business owners operate).

⁵⁶ D. Freeman Engstrom, D. E. Ho, C. M. Sharkey, M.-F. Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies* (2020) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/document/government-algorithm-artificial-intelligence-federal-administrative-agencies>, at 89.

Answer

The success of Ms. Tramp's plight is highly dependent on whether the algorithm is government-created or created by a third-party within the private sector.

If the AI program is created by a private sector actor, Ms. Tramp will likely be unsuccessful in obtaining any information about the underlying algorithm. While laws require her to have notice and explanation as to the adverse actions impacting her business, these are likely to be superseded by federal laws governing the protections of intellectual property and trade secrets⁵⁷. Courts have already rejected transparency arguments and due process arguments in the face of private interests and deemed that private companies who create algorithms used by government entities may protect their proprietary information⁵⁸. In *Loomis*, the Plaintiff received no information about the underlying algorithm⁵⁹.

However, courts have shown that they may leave the door open for narrow exceptions. In a New York state appellate court, the Defendant in a criminal case argued that his right to confront witnesses was violated because he was not able to access an algorithm's source code⁶⁰. The code in question was an algorithm that generated a statistical likelihood ratio that a DNA sample at the scene of the crime belonged to the Defendant⁶¹. The algorithm was described by expert witnesses as a "black box"⁶². The court disagreed with the Defendant in this case because there was enough human input and decision making throughout the process that these people could be cross-examined to give a thorough understanding of how the algorithm worked and how it was used at each step of the process⁶³. However, the court argued that, in future cases with different facts, an AI-system could be a declarant and the source information may need to be given to a person in court to satisfy the principle of explanation required under the law⁶⁴.

If the AI program is government-created, Ms. Tramp may be more successful in her attempt to gather information about her denial.

⁵⁷ J. Dempsey, S. Landau, *Challenging the Machine: Contestability in Government AI Systems*, Lawfare (Mar. 11, 2024), <https://www.lawfaremedia.org/article/challenging-the-machine-contestability-in-government-ai-systems>.

⁵⁸ *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016).

⁵⁹ *Ibid.*

⁶⁰ *People v. Wakefield*, 38 N.Y.S.3d 367, 373 (N.Y. App. Div. 2022).

⁶¹ *Ibid.*

⁶² *Ibid.* at 377.

⁶³ *Ibid.* at 379.

⁶⁴ *People v. Wakefield*, 107 N.Y.S.3d 487, 494 (N.Y. Sup. Ct. 2019).

However, in practice, transparency and privacy are trade-offs, and the Trump administration has emphasized that it plans to tip the scale in favor of privacy and deregulation. As the NIST Risk Management Framework elaborates, transparency means providing access to “appropriate levels of information”⁶⁵, as providing too much may allow bad actors to game the system.

A court may be able to force a government agency who built their own algorithm to give information on the structure because under the due process requirements of the Constitution, the government is compelled to explain to its people why adverse actions were taken against them⁶⁶. The government may still be constrained by intellectual property laws. The NIST Risk Management Framework is careful to point out that elements of an algorithm, like training data, can be subject to copyright laws⁶⁷. If intellectual property laws and national security factors are not at play, the structure of an algorithm and the logic taken may be necessary facts for people to have, as is evidenced by FCRA and ECRA⁶⁸. Even so, it seems more likely that someone like Ms. Tramp would receive documentation or a generic explanation rather than large amounts of source code or data.

Finally, the administration would not be able to issue human-made rationales for the decision during the trial to bolster the AI’s decision. For example, in the credit realm, ECRA and Regulation B “require statements of specific reasons in writing to applicants based on whom adverse action is taken”⁶⁹. The factors must be the actual ones that the algorithm or decision maker used when deciding, and citing a low credit score is not enough⁷⁰. The same likely applies to algorithms elsewhere in the government. Lack of transparency does not waive these requirements, nor does it allow humans to give ex-post rationales. The NIST framework, along with the APA and due process requirements of the Constitution, demands transparency and true notice and explanation given to those who have adverse consequences to protect against discrimination and so they may improve outcomes in the future.

⁶⁵ *Ibid.*

⁶⁶ J. Dempsey, S. Landau, *Challenging the Machine: Contestability in Government AI Systems*, cit.

⁶⁷ *Ibid.*

⁶⁸ See Consumer Fin. Prot. Bureau, *Consumer Financial Protection Circular 2022-03* (2022) <https://www.consumerfinance.gov/compliance/circulars/circular-2022-03-adverse-action-notification-requirements-in-connection-with-credit-decisions-based-on-complex-algorithms/>.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*