

## CHAPTER 17

### CASE 4 – A CONTESTED BUS STOP RELOCATION

A. Austria

*Matthias Zußner*

The legal basis for the approval and planning of bus stops in Austria is the Austrian Motor Transport Lines Act.<sup>1</sup> and the implementing ordinance of the Austrian Motor Transport Lines Act<sup>2</sup>. The designation and relocation of bus stops is reviewed and approved with a *Bescheid* by the governor (*Landeshauptmann*) of the federal state on the basis of an application by the entitlement holder, following a verbal hearing involving an on-site inspection, in particular with regard to passenger and road safety (§ 33 of the Austrian Motor Transport Lines Act). The Austrian Motor Transport Lines Act does not grant residents and users of public transport any subjective rights. Mrs Fritz therefore has no remedy at her disposal. She is also not heard in the legal procedure for setting bus stops according to the Austrian Motor Transport Lines Act.

In order to access the source code, it would only be conceivable for Mrs. Fritz to submit a general request for information to her city as to which source code is used and on what grounds the new bus route is determined. In such a general request for information<sup>3</sup>, Mrs Fritz can demand to be given the factual reasons for the transport planning and the reasons that were decisive; at least for the question of why a particular stop was relocated, it does not appear to be wilful, and the

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<sup>1</sup> *Bundesgesetz über die linienmäßige Beförderung von Personen mit Kraftfahrzeugen (Kraftfahr liniengesetz – KfIG)*, BGBl. I No. 203/1999

<sup>2</sup> *Verordnung des Bundesministers für Verkehr, Innovation und Technologie über die Durchführung des Bundesgesetzes über die linienmäßige Beförderung von Personen mit Kraftfahrzeugen (Kraftfahr liniengesetz) (Kraftfahr liniengesetz-Durchführungsverordnung - KfIG-DV)*, BGBl. II No. 45/2001.

<sup>3</sup> In Austria, the federal and provincial governments have enacted so-called Information Disclosure Acts; see for example *Bundesgesetz vom 15. Mai 1987 über die Auskunftspflicht der Verwaltung des Bundes und eine Änderung des Bundesministeriengesetzes 1986 (Auskunftspflichtgesetz)*, BGBl. No. 287/1987. A so-called freedom of Information Act soon come into force, see *Bundesgesetz, mit dem das Bundes-Verfassungsgesetz geändert und ein Informationsfreiheitsgesetz erlassen wird*, BGBl. I No. 5/2024.

general request of information is therefore permissible. Mrs Fritz can also request information about the content of the documents uploaded to the platform<sup>4</sup>.

However, the city must not violate any confidentiality interests, in particular, confidentiality interests relating to possible trade secrets associated with the content of the source code. This precludes the disclosure of the source code. When providing information about the content of the uploaded documents, data protection laws must be observed<sup>5</sup>; however, the information can in any case be provided in anonymised form. The city is not obliged to prove the rationality of the system to Ms. Fritz in the context of the general request for information (regardless of whether it is a black box or not) but is merely obliged to answer Ms Fritz's questions in a factual and comprehensible manner.

## B. China

*Xixin Wang*

Unfortunately, in this case, Mrs Fritz does not have much remedy under Chinese law. Pursuant to Article 9 of the *Regulation on the Management of Urban Bus and Tram Passenger Transport* promulgated by China's Ministry of Transportation in 2017<sup>6</sup>, the urban public transportation department must, based on the urban bus and tram network planning, in combination with urban development and the needs of public transport, scientifically demonstrate timely open or adjust urban bus and tram lines and stations, and solicit public opinions. In practice, however, while some localities do consult the public before making adjustments to existing bus routes<sup>7</sup>, others simply do not<sup>8</sup>. The problem is that when public consultation is not duly practised, ordinary Chinese citizens will be unable to challenge such unlawful omissions on the part of the local authority through either administrative reconsideration or administrative litigation. This is because both remedial channels are confined to just concrete administrative acts as opposed to abstract administrative acts. The former denotes single-case

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<sup>4</sup> Supreme Administrative Court (VwGH) 22.08.2023, Ra 2022/10/0166.

<sup>5</sup> Supreme Administrative Court (VwGH) 26.01.2023, Ra 2022/07/0026.

<sup>6</sup> [https://xxgk.mot.gov.cn/jigou/fgs/202006/t20200623\\_3307841.html](https://xxgk.mot.gov.cn/jigou/fgs/202006/t20200623_3307841.html).

<sup>7</sup> <https://jtw.sh.gov.cn/dczx/20240903/900422cfff1c14cd48a01f44f88741f12.html>.

<sup>8</sup> [https://jtyst.xinjiang.gov.cn/hd/hd\\_xjxq?id=b5c6758607954c5d8f782903cfd669ea&site=650000043&url=/xjtytsj/xjxq/new\\_hd\\_xjxq.shtml](https://jtyst.xinjiang.gov.cn/hd/hd_xjxq?id=b5c6758607954c5d8f782903cfd669ea&site=650000043&url=/xjtytsj/xjxq/new_hd_xjxq.shtml).

decisions, whereas the latter refers to decisions with general applicability. The decision to change bus routes is considered an abstract administrative act with general applicability. Therefore, the failure to follow legally ordained procedures in arriving at such a decision, though strictly speaking unlawful, falls outside the purview of administrative reconsideration and litigation.

That being said, Mrs Fritz does have the right to request the local government to disclose all the documents uploaded to the platform under the OGI Regulation, which are unlikely to be exempt from the government's legal duty of transparency. Moreover, unless the program's code is considered State or trade secrets, the local administration is expected to make it accessible to Mrs Fritz. Even if the code is deemed a corporate secret, the court can still balance the corporate secret against the public interest in informing citizens and decide to publish the code if it finds that the public interest outweighs the corporate secret. If the program remains a black box, Mrs Fritz will have to rely on the documents made available to her under the OGI Regulation to argue that, based on all the briefs and documents submitted by private parties, as well as all the documents prepared by the public administration related to bus routes, frequency, population, and other relevant factors, it is unreasonable to arrive at the decision made by the authority. The public administration can highlight the contrast by explaining the logic and rationale behind its decision based on these documents and considerations, even without disclosing the source code.

### C. Estonia

*Katrin Nyman-Metcalf*

As for access to the source code, these are publicly available for anyone after entering the system with a digital ID (that everyone in Estonia has). As to a possible remedy, Mrs Fritz can apply, but, in general, the local authority retains significant discretion in deciding where bus stops are to be positioned, regardless of whether they decide on it by using algorithms or other forms of tools. The remedy would most probably be through citizens' 'political' pressure on the local authorities rather than a court case, as it would be difficult to see how Mrs Fritz could have standing in a case just based on not liking the position of bus stops.

However, what appears relevant here is the legislation on access to public information. In Estonia, this is the Public Information Act<sup>9</sup>. The Act stipulates the principle of public information being accessible and open for re-use. Thus, exclusive licences are only permitted in exceptional cases. Article 3<sup>1</sup> of the Act states that: “a holder of information shall not enter into exclusive agreements for the re-use of information, unless this is necessary and justified in the public interest. The validity of the justification for an exclusive agreement shall be reviewed at least every three years.” People can select how to ask for information and in what form they want to receive the information, Articles 13 and 17. There are also various requirements for keeping websites and otherwise making information available proactively. The form of the information is not relevant. Looking at the website of Tallinn Town Government, the kind of information this case is about would be public and must be made available. However, this does not guarantee that Mrs Fritz will get the bus stop moved back to her preferred location.

#### D. European Union

*Leonardo Parona*

As a preliminary consideration, it must be clarified that the situation envisaged by the present case is purely hypothetical in the perspective of the EU legal order. In fact, as is well known, unlike in traditional States, the Union does not possess, nor administer, any territory; hence it lacks urban planning and land use functions as hypothesised in the present case. These rest with the Member States. The Union has, nonetheless, launched some initiatives to assist national authorities in innovating these sectors – also through AI – for instance by experimenting with Local Digital Twins<sup>10</sup>.

It should also be added that even Member States’ competences in these sectors are only partially influenced by EU law, mainly through the

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<sup>9</sup> <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/503052023003/consolide>.

<sup>10</sup> See Commission implementing decision (EU) 2024/459 on setting up the European Digital Infrastructure Consortium for Networked Local Digital Twins towards the CitiVERSE. This kind of initiatives take place within the broader framework of the Decision (EU) 2022/2481 of the European Parliament and of the Council of 14<sup>th</sup> December 2022 establishing the Digital Decade Policy Programme 2030, and of the Digital Compass Communication of 9<sup>th</sup> May 2021 of the European Commission (formally entitled “2030 Digital Compass: the European way for the Digital Decade”).

integration of environmental considerations within urban planning: an aspect which is not particularly relevant to the case at hand.

It is therefore possible to address the main legal issues posed by the present case only by referring to the general principles of EU law. Three features of the contested decision need to be considered.

Firstly, it should be recognised that the decision to reorganise the bus routes and stops does not pertain to individuals but involves a large and partly undetermined group of people. As is well known, some of the guarantees enshrined in the general principles of EU law do not rigidly or entirely apply to this kind of decision, as they are designed to protect against the adoption of individual adverse measures. Nevertheless, within the AI-assisted administrative procedure carried out by the city of Wantaa, some form of citizen involvement had actually been ensured in the guise of a public consultation, so that it is not possible to claim that was an outright lack of participation. What seems lacking, rather, is an actual and thorough consideration of the comments submitted by the population in general and by Mrs Fritz in particular. Given the aforementioned general nature of the decision to relocate the bus stop, it is improbable that the CJEU would affirm that the authority was under a legal obligation to specifically address each comment, brief and document received during the consultation phase or collected through the online platform.

Secondly, the decision represents a typical exercise of discretion. While, for the reasons already outlined concerning the characteristics and competences of the EU administration, the case law of the CJEU does not address the reviewability of this specific type of act, it is still possible to draw on the jurisprudence regarding discretionary acts of EU institutions. In this regard, it is an established principle that a remedy against this type of act, mainly in the form of an annulment, can be obtained only if its manifest irrationality and disproportionate nature are demonstrated. A change of only 900 metres in the location of a bus stop seems far from constituting a significant deviation from the principles of rationality and proportionality. The administration, moreover, found the AI-driven solution “efficient, rational, and sustainable”, giving evidence – though briefly and in an extremely generic form – of the fact that there had been a human assessment of the output produced by the AI-driven program before the final decision was issued.

Thirdly, an AI system like the one used in this case does not appear to qualify as high-risk under Article 6 and Annex III, so the pertinent requirements of the AI Act do not apply. This is not only due to the subject matter involved but also because at least some of the

exceptions under Article 6(3) – already discussed in the answers to the general questions – seem applicable to this case.

As a consequence, it should be noted that Mrs Fritz would have access to both jurisdictional remedies (like the ones provided by the CJEU) and non-jurisdictional solutions (mainly issued by the European Ombudsman). However, the actual successfulness of these remedies appears unlikely since, for the reasons clarified above, it is difficult to demonstrate that such a discretionary power has been unlawfully exercised.

Lastly, as far as the issue of access is concerned, it is necessary to distinguish (as the questions formulated in the hypothetical do) between access to “all the documents uploaded to the platform”, and to “the program’s code”. The former are documents collected through online public consultation and will therefore be accessible under the general conditions established by Regulation (EC) No 1049/2001 – just as would be the case with a traditional (*i.e.* non-AI-assisted) administrative procedure. The latter, involving the program’s code, which is covered by corporate secret in this case, requires balancing Mrs Fritz’s individual right to access with the AI program developer’s commercial interests and intellectual property rights<sup>11</sup>. It cannot therefore be solved by invoking the right to an explanation of the algorithm’s functioning logic as envisaged by current EU secondary law. This is due to the non-individual nature of the contested act, which excludes the application of both Article 15(2)(f) of Regulation (EU) No 1725/2018, and Article 86(1)

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<sup>11</sup> Cf. Article 4(2) Regulation (EC) No 1049/2001. See, on this aspect, O. Mir, *Algorithms, Automation, and Administrative Procedure at EU Level*, in H.C.H. Hofmann, F. Pflücke (eds.), *Governance of Automated Decision-Making and EU Law* (2024), 77. As the CJEU has clarified, when deciding whether to apply an exception, EU bodies “must also supply explanations as to how access to that document could specifically and actually undermine the interest protected by an exception” (joined Cases C-514/07 and C-528/07, *Sweden and others*, para 73), although it is true that they can resort to “general presumptions which apply to certain categories of documents” (Case C-404/10 *Commission v Éditions Odile Jacob*, para 116). Although exceptions under Article 4(2) are therefore generally interpreted in a restrictive manner, it is necessary to recall that the jurisprudence on this aspect is at times particularly protective of commercial interests; see for instance the judgment issued on 15<sup>th</sup> December 2021, in the case T-158/19, *Patrick Breyer v European Research Executive Agency*, para 202, and the cited caselaw, where the Court concluded that the need for transparency and the interests justifying the access request must be “especially pressing” in order to prevail “over the legitimate interest in the protection of the commercial interests”. On this topic, see K. Foss-Solbrekk, *Searchlights across the black box: Trade secrecy versus access to information*, 50 *Comput. L. & Sec. Rev.* 1 (2023).

of the AI Act – the latter being inapplicable also because the AI system used in this case is not considered high-risk.

## E. France

### *Maximilien Lanna*

The city of Wantaa decides to reorganise central bus routes to optimise runs, stops, and interconnections. This reorganisation is carried out by an AI program using a Large Language Model provided by an external company. The project is adopted despite being considered a black box. Although she submitted briefs and documents through an online platform, Mrs Fritz is adversely affected by this decision, as the bus stop close to her house has been moved to 900 metres away.

To determine if Mrs Fritz has any remedy at her disposal, we must first establish the legal status of the decision adopted and whether it falls within the scope of an automated administrative decision as defined by the European regulation and French law.

Article 22 of GDPR states that a data subject has the right not to be subject to a decision based exclusively on automated processing [...] producing legal effects concerning him or her or significantly affecting them in a similar way. The text therefore recognises that automated decision-making, including profiling, can have serious consequences for data subjects.

Nevertheless, the GDPR does not define “legal effects” or “similarly significant”, even if the wording used makes it clear that only decisions with a serious impact are covered by Article 22.

According to guidelines provided by the European Data Protection Board (formerly known as WP29), even if a decision-making process has no effect on the legal rights of individuals, it could still fall within the scope of Article 22 if it produces an equivalent effect or one that significantly affects the person concerned in a similar way. Even if there is no change in his or her legal rights or obligations, the person concerned could still be sufficiently affected to require the protections provided by this provision. Furthermore, recital 71 provides typical examples, such as “the automatic rejection of a credit application or online recruitment practices without any human intervention”.

Given those examples, the fact that a bus stop has been moved does not appear to constitute an individual administrative decision based on the use of automated data processing.

In this case, Mrs Fritz will have to take action through the traditional route of administrative litigation (and more specifically, through the *recours pour excès de pouvoir* (abuse of authority) against the decision taken based on an algorithm).

Should the decision be seen as an individual administrative decision based on the use of an algorithm, the classic guarantees already mentioned will apply. It will be possible to consider that the decision was taken based on the consent of the person concerned by the processing (GDPR, Article 22, 3). This will enable Mrs Fritz to obtain human intervention on the part of the data controller, to express her point of view, and to contest the decision.

The authority communicates the following information to the person who is the subject of an individual decision taken on the basis of algorithmic processing, at the latter's request in an intelligible form and subject to not infringing on secrets protected by law, the degree and mode of contribution of the algorithmic processing to the decision-making process; the data processed and their sources; the processing parameters and, where applicable, their weighting, applied to the data subject's situation; the operations carried out by the processing.

Furthermore, Article 47.2 of the French Data Protection Act stipulates that the data controller must ensure that the algorithmic processing and its evolution are under control, in order to explain to the data subject, in detail, and in an intelligible form, how the processing has been implemented regarding him or her.

Last but not least, Mrs Fritz should not, in theory, have access to the algorithm's source code. However, Article L. 311-6 of the CRPA states that administrative documents whose disclosure would breach business secrecy may be disclosed only to the interested party.

## F. Germany

*Cristina Fraenkel-Haeberle & Charlotte Langer*

### *Legal remedies*

If the plan was developed through a formal public planning procedure (*Planfeststellungsverfahren*), Mrs Fritz can raise an objection during the planning stage. This is obligatory for transit plans involving trams under § 28(1) S. 1 *Personenbeförderungsgesetz* (PBefG; Passenger Transport Law). Since the present case only concerns the bus network, it is unclear whether the municipality followed the formal procedure. In

the formal planning procedure, plans must be publicly announced before finalisation, allowing the public to submit objections.

At a later stage, legal remedies become limited. A lawsuit filed by Mrs Fritz would be deemed inadmissible. To bring a case before an administrative court, the claimant must be *klagebefugt* (entitled to sue), meaning they must credibly demonstrate a breach of a *subjektiv-öffentliches Recht* (a subjective public right)<sup>12</sup>. This applies if the provision allegedly violated is intended to grant an individual the right to make a claim, rather than merely serving the public interest<sup>13</sup>. However, no such law confers an individual right to public transport. While the state is objectively required to provide public transport<sup>14</sup>, this obligation only serves the public interest and does not establish an individual subjective public right<sup>15</sup>.

#### *Access to the code and submitted documents*

Mrs Fritz might be granted access to the submitted documents, but not to the code. Since public comments and submissions do not constitute personal data as defined by the GDPR, Mrs Fritz cannot base her request on Art. 15(h) GDPR. The *Informationsfreiheitsgesetz* (Freedom of Information Law), if applicable to her municipality<sup>16</sup>, grants her the right to access official information<sup>17</sup> (such as the factors considered in the restructuring of the public transport system), but does not apply if the requested information is protected as intellectual property<sup>18</sup>.

#### *The rationality of the decision*

The dispute about the new plan's rationality could be settled by looking at the bigger picture: What are the running costs of the new plan

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<sup>12</sup> R.P. Schenke, § 42, in W.R. Schenke, F. Kopp (eds), *Verwaltungsgerichtsordnung Kommentar* 291 et seq. (2022).

<sup>13</sup> *Ibid.*; concerning subjective public rights in public planning procedure, see A. Leist, C. J. Tams, *Schwerpunktbereich – Einführung in das Planfeststellungsrecht*, in *Juristische Schulung* 1093 (2007)

<sup>14</sup> Under § 8 (3) PBefG and the corresponding federal state's regulations.

<sup>15</sup> VG Münster, judgment of 23.02.2007 - 1 K 1207/06; VG Aachen, judgment of 08.09.2006 - 9 K 479/05.

<sup>16</sup> As this is a matter for the federal states, it depends on which state the municipality is in and whether that state has a freedom of information law.

<sup>17</sup> In a similar case which, however, did not involve private intellectual property, the municipality recognised a citizen's right to request the results of a feasibility study concerning public transport measures. See the *VG Hamburg* judgment of 28.1.2020 - 17 K 2383/19.

<sup>18</sup> See, for example, § 6 IFG (federal government Freedom of Information Law). The states' freedom of information laws contain similar provisions.

compared to the previous one? How many residents benefit from this system compared with the old one? Does this plan reduce fuel and labour costs, shorten routes, optimise connections, and improve access to remote areas of the town? To determine these factors, the private company could be asked to provide information without having to disclose its code. For example, they could share details on the algorithm's target function, the weight assigned to different factors, the strategies for balancing conflicting interests, and the thresholds for acceptable walking distances or waiting times, among other things. The municipality might also request several different plans from the private company, each based on slightly different starting points. For instance, the company could adjust the importance of factors such as fuel and labour costs or decrease the maximum walking distance to the nearest bus stop, and so on. This approach is useful because, given the enormous complexity of a system involving so many factors – most of which allow for some leeway in either direction – there will not be a single 'right' or 'best' answer. By comparing three or four possible plans, none of which will be objectively 'best', the administration will be able to exercise some subjective judgment.

### G. Italy

*Stefano D'Ancona*

Ms Fritz can request access according to the principles already stated in the previous questions. Specifically, case law states that adhering to a thesis that precluded access to the source codes, which constitute the source of the software, would end up legitimising the obscuring of significant portions of administrative activities relating to the management of public competitions, with an obvious violation of the principle of transparency. In essence, an unsustainable 'double track' situation would arise where, in competitions managed with the aid of computer tools, the rule of transparency would have a reduced scope compared with traditional competition procedures (TAR Lazio Rome, 30 June 2020, no. 7370). This conclusion clarifies the traceability of the algorithm used in the computer program that conducted the written tests for the competition, as outlined in the accessible documents under Law no. 241/90, since the program, in its entirety, oversaw an administrative activity of significant public interest.

With reference to the relationship between the right of access to source code and intellectual property pertaining to software, the following should be noted. Article 24 L. 241/1990 provides that access may be restricted for reasons relating to the protection of intellectual property rights (Article 24(6)(d) L. 241/90). Therefore, there is indeed a need for courts to assess which interest is predominant on a case-by-case basis: the right to knowledge or the right to patent protection. Case law has, however, affirmed that classifying a program as an administrative document makes it possible to overcome any profiles of an economic nature arising from the possibility for the creator of the program to exploit the further commercial potential of the asset<sup>19</sup>.

In a case involving the Ministry of the University, the court clarified that the mere fact that the algorithm was not directly implemented by the Ministry's own officials or employees, but rather by a private company hired to create it following a tender process, does not in itself pose an obstacle, as it constitutes a subject of a private contract. In fact, regardless of whether the substantive discipline is public or private, the algorithm directly reflects the activities of the relevant public authority, which are undoubtedly in the public interest as they pertain to the organisation of public education services. The algorithm was a crucial component of the process and is permanently retained by the ministerial administration that commissioned it for its own purposes (TAR Lazio Rome, 30 June 2020, no. 7370).

In this case, Ms Fritz's request for access to the source code is justified in relation to her right to defend her interests. It is clear that, based on the aforementioned principles, citizens have access to the data used by the administration to make decisions, while ensuring the protection of third-party confidentiality.

Regarding access to software and source code, it should be noted that Italian law includes significant provisions in the CAD (Digital Administration Code, Legislative Decree 82/2005) that require the public authority, even when using proprietary software, to request the availability of the source code from the private supplier during the tender process (Article 69 CAD). This is without prejudice to the requirement that the Italian legislator has imposed on authorities to prioritise access to software solutions not covered by intellectual property, known as open software (Article 68 CAD). Ms Fritz could therefore challenge a potential denial of access based on a third party's ownership rights to the software.

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<sup>19</sup> TAR Lazio Rome, 30 June 2020, no. 7370.

There are few precedents for decisions made by machine learning algorithms. Courts and scholarship, however, assert that a court may always evaluate the rationality of a decision, regardless of how that decision is reached. Scholars have affirmed that the IT measure is subject to review from the “procedural” perspective of the correctness of the construction and management process of the algorithm (including its construction, data entry, and data selection), as well as from the “intrinsic” perspective of assessing the logicity and reasonableness of the decision<sup>20</sup>.

The authority’s demonstration of the rationality and correctness of the decision made through the use of machine learning AI (both supervised and unsupervised) can be linked to the ex-post tests and checks it has conducted.

In the most important decisions on the matter, the Council of State (VI Section of the Council of State, both from 2019 (two years after the *prequel*): no. 2270 of 8 April and no. 8472 of 13 December) stated that “if indeed technology leads the machine to evolve autonomously, if not everything is knowable beforehand, it is still necessary for the public administration to play an ex-post role, with frequent tests, updates and if necessary, refinements of the algorithm downstream”.

## H. Netherlands

*Louise Verboeket & Jacobine van den Brink*

Under Dutch law, different legal relationships could be relevant here. Firstly, the relationship between the Provincial Executive (*Gedeputeerde Staten*) as the grantor of the concession<sup>21</sup> and the transport company as the concession holder. Agreements regarding (changes to) the timetable (*dienstregeling*) are, in principle, not part of the public law concession but relate to the private law execution of the concession<sup>22</sup>. If Mrs Fritz wishes to challenge the change in the timetable, it will be difficult for her to prove that she has a direct interest in the timetable change, as she would need to demonstrate that her interest is distinct from that of other residents living near the bus route<sup>23</sup>.

<sup>20</sup> L. Carbone, *L’algoritmo e il suo giudice* (2023), in [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

<sup>21</sup> Art. 20 Passenger Transport Act 2000 (*Wet personenvervoer 2000*).

<sup>22</sup> Art. 32(2)(f) Passenger Transport Act 2000, CBb 28 April 2009, ECLI:NL:CBB:2009:BI7098, para. 5.3.

<sup>23</sup> Art. 1:2(1) GALA, CBb 19 October 2021, ECLI:NL:CBB:2021:959.

However, Mrs Fritz is primarily concerned with the relocation of the bus stop near her home. Under Dutch law, the relocation of a bus stop is considered a traffic order (*verkeersbesluit*) within the meaning of Article 18 of the Road Traffic Act (*Wegenverkeerswet*). When preparing a traffic order, the administrative authority (*bestuursorgaan*) has the choice between a regular procedure and the uniform public preparatory procedure (*uniforme openbare voorbereidingsprocedure*)<sup>24</sup>. The uniform public preparatory procedure enables an administrative authority to involve the public in the preparation of a decision (*besluit*), particularly one that will affect a large number of parties concerned (*belanghebbenden*) or other persons unknown to the administrative authority<sup>25</sup>. In this case, the municipality appears to have opted for (a variation of) a uniform public preparatory procedure in which an AI-driven program processed the input on the bus routes into a new timetable. In such a case, the uniform public preparatory procedure effectively replaces the objection phase, allowing Mrs Fritz to appeal the traffic order regarding the relocation of the bus stop without first having to file an objection (*bezwaar*)<sup>26</sup>. Under Article 3:44(2) and 7:4(2) of the Dutch General Administrative Law Act (GALA, *Algemene wet bestuursrecht*), Mrs Fritz has the right to access the case-related documents, including the submitted opinions (*zienswijzen*)<sup>27</sup>.

The administrative court (*bestuursrechter*) generally reviews a traffic order as follows<sup>28</sup>. Under Article 21 of the Administrative Provisions regarding Road Traffic Decree (*Besluit administratieve bepalingen inzake het wegverkeer*), the reasoning for the traffic order must state which objective or objectives are intended to be achieved. It must also indicate which of the interests listed in Article 2(1) and (2) of the Road Traffic Act underlie the traffic order. If other interests are also at stake, the reasoning must explain how these interests have been weighed against each other. When issuing a traffic order, the administrative authority has discretion in interpreting the interests listed in Article 2 of the Road Traffic Act (*beoordelingsruimte*). Therefore, the court exercises restraint in reviewing whether the administrative authority has made unreasonable use of that discretion. Once the administrative authority has determined which traffic interests should be taken into account and

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<sup>24</sup> Division 3.4 GALA.

<sup>25</sup> Art. 3:15(2) GALA.

<sup>26</sup> Art. 7:1(1)(d) GALA.

<sup>27</sup> ABRvS 13 February 2019, ECLI:NL:RVS:2019:440.

<sup>28</sup> District Court of Zeeland-West-Brabant 24 August 2020, ECLI:NL:RBZWB:2020:4059, paras. 5.1-5.3.

to what extent, it must balance those interests. In doing so, the administrative authority has policy discretion (*beleidsruimte*). Again, the court exercises restraint in reviewing whether the negative effects of the traffic order for one or more interested parties are disproportionate in relation to the objectives served by the order. Consequently, case law indicates that the administrative authority is not required to demonstrate the absolute necessity of a traffic order<sup>29</sup>. It is sufficient for the traffic order to serve the interests listed in Article 2(1) and (2) of the Road Traffic Act and for it to be clear how these interests were balanced against each other.

It is primarily this latter requirement that appears not to have been met in this case. Since the AI-driven system essentially operates as a 'black box', the municipal authority has not clarified how the interests under the Road Traffic Act were weighed. As a result, the traffic order is unlikely to withstand judicial scrutiny. It is not necessary for Mrs Fritz to prove the irrationality of the AI-driven decision, although case law suggests that to this end she could, for example, present a report from an opposing expert<sup>30</sup>. Moreover, the fact that an AI system functions as a 'black box' leads to a reversal of the burden of proof: the administrative authority must demonstrate that the system did not make an irrational decision or, more precisely, must clarify which data were used and what the rational relationship is between those data and the decision<sup>31</sup>. As mentioned, the administrative authority must also explicitly link this to the interests listed in Article 2(1) and (2) of the Road Traffic Act. It cannot be assumed that all the input processed by the AI-driven system is relevant to those interests and, therefore, should have been considered in the decision-making process.

The remaining question is whether Mrs Fritz has access to the program's code, notwithstanding the fact that it is protected by corporate secrecy. On the one hand, the administrative authority's decision to outsource the development of the AI-driven program does not absolve it of its transparency obligation<sup>32</sup>. If access to the program's code is

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<sup>29</sup> ABRvS 29 May 2019, ECLI:NL:RVS:2019:1774, para. 13.1.

<sup>30</sup> District Court of Noord-Nederland 31 March 2023, ECLI:NL:RBNNE:2023:1217.

<sup>31</sup> Council of State (*Raad van State*), *Digitalisering. Wetgeving en bestuursrechtspraak* (The Hague 2021) 73-74, based on the case law discussed in the answer to the fourth question in the Chapter on the Netherlands in Part II. Cf District Court of The Hague 5 February 2020, ECLI:NL:RBDHA:2020:1878 (*SyRI*), para. 6.49, *Kamerstukken I* 2021/22, 35447, H, 18.

<sup>32</sup> J.C.A. de Poorter, J. Goossens, *Effectieve rechtsbescherming bij algoritmische besluitvorming in het bestuursrecht*, *Nederlands Juristenblad* 2777 (2019), 3304, Ministry of Justice and Security, *Richtlijnen voor het toepassen van algoritmen door overheden en*

necessary to fulfil that transparency obligation, it must be provided. Article 8:29 of the GALA offers the possibility for only the administrative court, and not Mrs Fritz as the opposing party, to be given access to the program’s code, provided there are compelling reasons<sup>33</sup>. The fact that the program’s code is protected by corporate secrecy could be such a compelling reason<sup>34</sup>. On the other hand, Mrs Fritz does not necessarily need access to the program’s code to substantiate her appeal against the traffic order<sup>35</sup>. In other words, the administrative authority is not necessarily required to provide access to the program’s code (technical transparency) to ensure that the choices made, the assumptions used, and the data applied are clear and accountable (explainability)<sup>36</sup>. The latter (explainability without technical transparency) may be sufficient to meet the transparency obligation incumbent upon the administrative authority.

## I. Spain

### *Agustí Cerrillo-i-Martínez*

In this case, Mrs. Fritz could file a complaint before the Waanta City Council. The complaint is neither an administrative nor judicial remedy against the city council's decision. It is simply information provided by a person to inform the city council of the poor functioning of municipal services or their dissatisfaction with it.

Spanish legislation does not generally regulate the filing of complaints before city councils. Law 7/1985, of 2 April, on the Basis of Local Government only regulates that “For the defence of the rights of

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*publieksvoorlichting over data-analyses* (2021) 6-7, 21 and 29, Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*), *An open and frank approach: transparent use of algorithms by the government. Call for a legal transparency requirement in the government’s use of algorithms* (Utrecht 2023) 9.

<sup>33</sup> Private law contains a similar provision in Article 22 Dutch Code of Civil Procedure (*Rv, Wetboek van Burgerlijke Rechtsvordering*).

<sup>34</sup> Cf. Art. 5.1(1)(c) and (2)(f) Open Government Act (*Woo, Wet open overheid*).

<sup>35</sup> ABRvS 18 July 2018, ECLI:NL:RVS:2018:2454 (*AERIUS II*), para. 23.5, Council of State, *Digitalisering. Wetgeving en bestuursrechtspraak* (The Hague 2021) 74, *Kamerstukken II* 2023/24 26643, 1149, p. 20. Compare, among others, with CRvB 10 January 2019, ECLI:NL:CRVB:2019:183, paras. 4.2.1-4.2.2, CRvB 13 February 2019, ECLI:NL:CRVB:2019:606, paras. 4.2.1-4.2.2, CRvB 15 May 2019, ECLI:NL:CRVB:2019:1737, para. 4.3.7.

<sup>36</sup> C.J. Wolswinkel, *Willekeur of algoritme? Laveren tussen analoog en digitaal bestuursrecht* (2020), 39-43, with reference to Supreme Court 17 August 2018, ECLI:NL:HR:2018:1316.

residents before the municipal administration, the Plenary Session will create a Special Committee for Suggestions and Complaints, whose operation will be regulated by internal rules". Among its functions, "The aforementioned Committee may supervise the activity of the municipal administration, and it must refer to the Plenary Session, submitting an annual report on the complaints submitted and the deficiencies observed in the functioning of municipal services, specifying the suggestions or recommendations rejected by the municipal administration". (Article 132)

Some city councils have passed a regulation on the submission and processing of complaints, claims, suggestions, and initiatives. Beyond the provisions regarding the submission of complaints in person or electronically and their internal processing by the city council, it is important to highlight here that these regulations generally stipulate that complaints shall not, in any case, be considered an administrative remedy, nor shall their submission interrupt the deadlines established by the current regulations. These complaints in no way affect the exercise of other actions or rights that may be exercised by those who consider they have an interest in the procedure.

Concerning access to the program's code and in addition to what has been previously said, access to the program's code can be limited when it can affect commercial interests (Article 14.1.h Law 19/2013 of 9 December, on transparency, access to public information, and good governance). Furthermore, Law 1/2019, of 20 February on Trade Secrets – which transposes into the Spanish legal system Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure – seeks to protect information generated in the course of business research and innovation which cannot be protected by intellectual property rights, and which may form part of an offer. This information, which is kept confidential to ensure companies are competitive, constitutes trade secrets or undisclosed information. In particular, it refers to reserved information (i.e., it is not generally known or easily accessible), has a commercial value thanks to its confidentiality, and whose owner has taken reasonable measures to keep it confidential.

Finally, if the case is put before the city council by a private company, Law 9/2017, of 8 November, on Public Sector Contracts stipulates that "contracting authorities may not disclose the information provided by companies that has been designated as confidential at the time of submitting their offer. The confidential nature applies, among

other things, to technical or trade secrets, confidential aspects of the offers, and any other information whose content could be used to distort competition, either in that procurement process or in subsequent ones". However, bidders may not declare that all the information submitted is confidential. To that end, a case-by-case assessment must be conducted to achieve an appropriate balance. To facilitate this task, it would be useful for the contract specifications to define the scope of the confidentiality clause as precisely as possible.

## L. United Kingdom

*Gordon Anthony*

There are three main issues arising from this scenario: consultation requirements; fettering of discretion; and breach of equality duties (found in statute law). These will be analysed initially; answers to the range of questions noted above will follow.

In terms of consultation, it might be doubted whether the requirements of the common law have been met in this scenario. Those requirements are often said to be: (1) that a consultation must occur at a time when proposals are at a formative stage; (2) that consultees are given adequate information on which to respond; (3) that consultees are given adequate time in which to respond; and (4) that the decision-maker considered conscientiously the response to consultation<sup>37</sup>. While the common law requirements are context-sensitive – meaning that they apply variably, depending on the nature of the decision, whether it is based on statutory duty, etc.<sup>38</sup> – a consultation must be “*carried out properly*” where one is undertaken<sup>39</sup>. On these facts, it might plainly be doubted whether that has been done. In the first instance, there would be a concern about how far a process that culminates in a “black box” exercise could adhere to the requirements of transparency and participation that infuse the law on consultation – submissions have here apparently been made and then processed on an inaccessible basis. It might also be doubted whether Wantaa could show that it had conscientiously considered all responses: if the program is, in essence,

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<sup>37</sup> *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56, [2014] 1 WLR 3947, 3957, para 25, citing *R v Brent London Borough Council ex p Gunning* [1986] 84 LGR 168, 189.

<sup>38</sup> *Lloyd v McMahon* [1987] AC 625, 702, Lord Bridge.

<sup>39</sup> *R v North and East Devon Health Authority, ex parte Coughlin* [2001] QB 213, para 108.

closed from public view and from Wantaa's officials, it would follow that the decision-maker could not have considered fully the information that was generated by the consultation.

The issue of fettering of discretion follows from the above. The basic rule here is that, when a public body has discretion under a legal scheme, it must retain for itself the option of exercising that discretion on a case-by-case basis. On the given facts, it would appear that Wantaa has denied itself that possibility insofar as it adopted the AI decision without changes. While Wantaa may wish to show the court how it had considered all of the relevant data before confirming the decision, it is not clear how it could do so, given that this was a black box process. It can therefore be assumed that Wantaa's officials could not have seen the material – and it could thereby be assumed that the rule against fettering would have been breached by Wantaa's unquestioning acceptance of the decision.

The matter of equality duties starts with a range of statutory schemes throughout the UK, which can impose consultation requirements upon decision-makers<sup>40</sup>. While consultation requirements do not arise in every case, they may arise here, notably as Ms Fritz would appear to be an older citizen who has specifically requested that a bus stop be retained close to her home. While she cannot expect that such an outcome will automatically be realised, she can expect decision-making that explains why it has been decided to move the bus stop, or at least to explain in broad terms what considerations have guided the decision-making process. In the absence of such information, she might legitimately say that the decision-making process is unlawful by reason of failing to follow the statutory equality scheme; and she may equally say that the decision is unreasonable and/or disproportionate at common law.

Turning to the list of questions, Ms Fritz could certainly challenge the decision and may have strong grounds to do so with reference to consultation rules, fettering, and equality schemes. She could also request access to all documents uploaded to the platform, though she would need to be able to explain in advance the utility of any such disclosure – the illegality in the case may be apparent even without access to all documents. The matter of access to the code would, in turn, raise similar discovery issues to those considered at Case 2 above, and the points made there are repeated here. The issue of (ir)rationality

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<sup>40</sup> See, most prominently, the Equality Act 2010 and the Northern Ireland Act 1998, section 75.

would then potentially be resolved through the use of the fettering doctrine: the courts sometimes say that a public body has acted irrationally where it has fettered its power, which it appears to have done here.

## M. United States

*Catherine M. Sharkey & Caterina Barrena Hyneman*

### *Background*

In the U.S., similar decisions are made at the city and municipality level as local governments grapple with incorporating AI to improve efficiency. For example, cities in Florida now use an AI program to review incoming plans and ensure that they meet all land development and building codes<sup>41</sup>. This algorithm is trained specifically on Florida Building Code<sup>42</sup>.

### *Answer*

Mrs. Fritz would be unlikely to win any challenges and is unlikely to even be able to petition for a human appeals process. Unlike decisions about a person’s unemployment benefits or business license, decisions taken by a government about general city planning are unlikely to implicate individual rights and requirements under the Due Process Clause and other laws, regardless of the municipality. While moving a bus stop 900 meters away from Mrs. Fritz’s house may be inconvenient, it does not threaten her “life, liberty, or property,” which is required under the Fourteenth Amendment<sup>43</sup>. If she did bring a challenge against the City of Wantaa for a violation of her due process rights, it would likely be dismissed for lack of standing because she cannot show injury.

Mrs. Fritz may nonetheless be able to bring an administrative challenge depending on how the rule was promulgated. U.S. cities and states vary widely in their process for promulgating rules and policy, so for simplicity it will be assumed that the City of Wantaa follows a process

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<sup>41</sup> City of Alimonte Springs, *AI-Powered Site Plan Review*, <https://altamonte.org/1279/AI-Powered-Site-Plan-Review>; N. Nawari, R. Christy, *Using AI to Review Construction Plans*, Warrington College of Bus. (Nov. 14, 2023), <https://warrington.ufl.edu/due-diligence/2023/11/14/using-ai-to-review-construction-plans/>.

<sup>42</sup> N. Nawari, R. Christy, *Using AI to Review Construction Plans*, cit.

<sup>43</sup> U.S. Const. amend. XIV.

similar to the federal APA, requiring notice and opportunity to comment, as well as reason-giving on the part of the agency<sup>44</sup>.

To begin, the City of Wantaa appears to have met the notice requirement, designed to ensure that the affected parties are given notice of the proposed change and how to make their voices heard. Moreover, the city allowed interested parties to submit briefs and documents online. It is unclear whether Mrs. Fritz's comment qualified as a "vital question [] of cogent materiality" to which the agency owed a response<sup>45</sup>.

Under the APA (or a similar rule), Mrs. Fritz would be able to request anything that was required to explain the decisions the algorithm made and the evidence that the algorithm relied on to meaningfully comment. So, if the algorithm relied on all the documents uploaded to the platform, she may be able to access that. Accessing all of the source code seems a less obvious win for Mrs. Fritz, as the algorithm did not necessarily rely on the code to make decisions. But any assumptions built into the code, such as which comments were more or less relevant or which to ignore completely, must be disclosed. This information, if disclosed, could also prove the decision's rationality.

Given that the AI program is a black box, patented, and thus unable to give explanations as to the reasoning behind its decisions or the science behind the algorithm, it has failed the reason-giving imperative for agency decisions. Mrs. Fritz can challenge the rule as arbitrary and capricious. But, given that the rule promulgated was not unconstitutional but merely issued without administrative process, it is likely that the administration could reissue the rule properly so that it would hold up to a court's judicial review.

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<sup>44</sup> See the answer to the fourth question in the Chapter on the United States in Part II.

<sup>45</sup> U.S. v. Nova Scotia Food Products Corp., 568 F.2d 240, 252-53 (2d Cir. 1977).