IRIS plus
LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

Access to Information on Government Action, especially from the Media Point of View

Private citizens have two possible ways of informing themselves about government activities. Taking the first way, they can demand direct access to information held by public authorities. In an ever-increasing number of countries, such a right to receive information or to inspect government documents is established in the form of constitutional norms or via regulations provided by statutory law. The civil right to information on government actions was only introduced comparatively recently. It responds to the increasing importance that information has for the information society era as far as democracy is concerned and the increasing complexity of government activity. The importance of comprehensive access to information on the part of citizens within democratic systems is also emphasized by a recently published Green Book of the Council of Europe on "The Future of Democracy in Europe: Trends, Analyses and Reforms". In order to make decisions as to what political goals they support or reject and which politicians they will vote for, citizens need adequate information.

The other way for private citizens to obtain such information is the traditional one, in which information is made available via the media. The media observe the actions of government officials, thus offering private citizens a source of information (albeit an indirect one). On account of their monitoring function the media are often characterized as the "fourth branch" of government, alongside the executive, legislative and judicial branches. The audiovisual and print media thus have a constitutive role for democracy, which is why they are granted a number of privileges in the obtaining and dissemination of information.

Taking into consideration the citizen's direct and indirect avenues to information, this *IRIS plus* outlines the right of accessing information as enshrined in international and European law as well as guaranteed on a national level.

Strasbourg, February 2005

Susanne Nikoltchev
IRIS Coordinator
Head of the Legal Information Department
European Audiovisual Observatory

IRIS *plus* is a supplement to **IRIS,** *Legal Observations of the European Audiovisual Observatory,* **Issue 2005-02**

OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

76 ALLEE DE LA ROBERTSAU • F-67000 STRASBOURG
TEL. +33 (0)3 88 14 44 00 • FAX +33 (0)3 88 14 44 19
http://www.obs.coe.int
e-mail: obs@obs.coe.int

IRIS plus
LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

Access to Information on Government Action, especially from the Media Point of View

Thorsten Ader and Max Schoenthal
Institute of European Media Law (EMR), Saarbrücken/Brussels

A. Introduction

The origins of the right to access information, and indeed of the modern freedom of the press and other media, go back several centuries. In 1766, the Finnish clergyman and parliamentarian Anders Chydenius secured the passage of an ordinance by the Swedish Parliament (Finland was under Swedish rule at the time) concerning the freedom of the press and the right to access official documents. An even earlier example is provided by developments that took place in China under the Tang Dynasty (618 – 907 A.D.). A committee of experts was set up, which was in charge of recording decisions taken by the government. At the same time, the committee also had the task of criticizing the government, including the Emperor. In an era before the advent of the media or the press as we understand them today, the committee thus exercised a monitoring function, while at the same time maintaining information for the Emperor's subjects.[1] As we shall demonstrate below, the Swedish ordinance of 1766 can be seen as containing the common roots of freedom of the press and freedom of the media, on the one hand, and the right to access information on the other.

In the course of the development of rights to access information, the passage of a Freedom of Information Act[2] (FOIA) in the United States of America in the 20th century represents a milestone on the road to a civil right to receive information and a civil right to inspect files. In Europe, apart from the example of Sweden described above, it was not until the 1970s that a wave of freedom of information bills or constitutional guarantees of the right to access information began.[3]

Alongside this there exist guarantees of freedom of the press and of the media in all Western-style democracies. In some cases there are also constitutional or ordinary statutory law regulations concerning the rights of representatives of the press or the media to have access to government information. In Germany, this has led to the terms "press privilege" (*Presseprivileg*) and "media privilege" (*Medienprivileg*). The overlapping scope of freedom of access to information and freedom of the media, and the interplay between the right of private citizens to information on the one hand and "media privileges" on the other, will constitute the subject of the present study. How strongly has the right to information for the "common" citizen made itself felt in European legislations? What specific "media privileges" are there, and to the representatives of which media do they apply? Has the introduction of a general freedom of information made specific regulations for representatives of the media obsolete?

We shall begin by describing the development of these norms in general, and then with reference to a selection of individual countries, in the course of which the issues referred to above will be investigated.

B. The Right to Access Information under International and European Law

The sources of the various freedoms mentioned here can be found not only in international law but also in the legal instruments of the Council of Europe and the European Community. For example, freedom of expression, which includes freedom of communication and freedom of information, is dealt with in international and supranational treaties and subordinate legal instruments.

I. International Law

The origin of the freedom of expression as we understand it today is often traced back to Resolution 59 (I) of the General Assembly of the United Nations of 14 December 1946. The Universal Declaration of Human Rights, which was adopted by the General Assembly of the United Nations on 10 December 1948, also contains a provision devoted to freedom of opinion and expression (Article 19), according to which everyone has the right to hold opinions without interference and to seek, receive and impart information and ideas. This right was eventually codified in international law in 1966, in Article 19 of the International Covenant on Civil and Political Rights.

Alongside these general guarantees of human rights there are also more specific initiatives and regulations. On 6 December 2004, the UN (United Nations) Special Rapporteur on Freedom of Opinion and Expression, the OSCE (Organisation for Security and Co-operation in Europe) Representative on Freedom of the Media and the OAS (Organisation of American States) Special Rapporteur on Freedom of Expression signed a joint declaration on access to information and on secrecy legislation.[4] The declaration calls on all countries to enact freedom of information laws based on the principle of maximum disclosure. The declaration also aims at ensuring that access to information held by public authorities is not prevented by means of restrictive secrecy laws. Exceptions to the right to access information should be clearly and precisely delimited and countries should set up independent bodies authorized to hear appeals against refusals to provide information. Journalists and others should not be subject to liability for further disseminating information that has been leaked to them.

The increasing degree of general inter-state co-operation in the area of access to information is shown clearly by the founding of the International Conference of Information Commissioners in the year 2003.[5] One specific agreement under international law is the Aarhus Convention,[6] which deals with citizens' access to information concerning the environment.

II. Council of Europe

At Council of Europe level the significance of access to information held by public authorities was also recognised at quite an early stage and could therefore be included in legal instruments of this inter-state organisation.

1. Article 10 ECHR

One legal instrument which is of fundamental importance for this and for the freedom of the media is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Comprehensive protection of freedom of opinion and expression is guaranteed in Article 10 ECHR.[7] The scope of this provision includes:

- active and passive freedom of information, here understood as the right to inform others and to receive information onself in turn, as well as
- freedom of communication via mass media (including freedom to broadcast).

With the right to receive information Article 10 also protects the so-called passive freedom of information, which includes active

efforts to obtain (as well as the collecting of) information.[8] A question which would appear to be more difficult to answer is whether the right to receive information can also be used to impose an obligation on public administrations to provide information on procedures that is not generally accessible. In an *obiter dictum* the former European Commission for Human Rights envisaged this possibility.[9] The argument was based on the importance of freedom of opinion and freedom of information for every democratic polity, an importance which demanded a free exchange of opinions concerning the exercise of state power in particular, and also presupposed that administrative information should be fundamentally accessible.[10] On the other hand, the case law of the European Court of Human Rights (ECtHR) has without exception supported the view that Article 10 does not create an obligation for States to grant access to official documents that they desire to keep secret.[11] According to this view, Article 10 prohibits the government from preventing the reception of information whose further dissemination is desired; this, however, cannot be used to derive a positive duty to provide information on the part of public authorities. One further argument that is put forward in favour of this position is that the Council of Europe has demanded the granting of access-to-information rights by the Member States in specific recommendations. This demonstrates, so the argument claims, that such rights cannot already be derived from Article 10, but rather that definitely worded legal instruments are required.[12] The right of unrestricted reception therefore extends only to generally accessible information – e.g. a parliamentary debate.[13] To the extent that the interpretation of Article 10 brings to light tendencies to use this norm to derive a right to receive information, it is less a right to concrete individual pieces of information that is meant but rather a right to receive information in general, i.e. the reception of a plurality of opinions.[14] The Court, for example, has recognised a right of the public to be appropriately informed.[15] As a logical consequence of the information function of the media, which act as a "public watchdog", the public has a right, it is claimed, to receive information of general interest.[16] Since this right would otherwise be completely trivial, States have an obligation to arrange their information systems in such a way as to ensure that citizens can indeed inform themselves on essential issues.[17] The activities protected within the framework of the freedom to broadcast[18] as guaranteed by Article 10 range from the organisation of broadcasting stations to the choice of contents and to the transmission and further dissemination of information.[19]

2. Recommendations of the Council of Europe

The right to access information is the subject of two recommendations of the Committee of Ministers of the Council of Europe, albeit that the EctHR does not pursue their implementation– so-called *Soft Law.*[20]

Recommendation No. R (81) 19 from the year 1981 on the access to information held by public authorities[21] represented one of the reasons for the increasing number of freedom of information acts that were passed in Europe from the 1980s onwards.

Among the principles set out in the recommendation are that public authorities should respond within a reasonable time and that any refusal of a request for access to information should be accompanied by a statement of the reasons on which the refusal is based. The more recent recommendation Rec(2002)2[22] of the Committee of Ministers on access to official documents, of 21 February 2002, adds the principle that provision of information should as a rule be free of charge. The more recent recommendation also includes definitions, as well as regulations for the processing of requests, and all in all is significantly more detailed.

The right of citizens to information is to be directed against administrative authorities. The first recommendation, however, does not include legislative bodies and judicial authorities within the scope of the right. This is all the more surprising inasmuch as the transparency of the legislative process within a democratic polity is accorded major importance. The new recommendation goes one step further, appealing to the Member States to examine to what extent the right to access information could be extended to include information held by legislative bodies and judicial authorities.

According to the first recommendation, the right to access information should be subject only to such limitations and restrictions as are necessary in a democratic society for the protection of legitimate public interests and for the protection of privacy and other legitimate private interests. The recommendation listed typical exceptions such as (among others): national security, public order, and the prevention of crime. These limitations on the right to access information were themselves subject to a restriction. The latter consisted in the requirement that due regard be given to the specific interest of an individual in information held by the public authorities which concerned him personally. The recommendation, however, envisaged no corresponding duty to give due regard to the special interest of the media in access to information.

By contrast, the new recommendation concludes with a list of possible grounds for exceptions. Even when such grounds are present, access to information should only be allowed to be refused if there is no overriding public interest in the making public of the information. Such an overriding public interest could possibly also be claimed by journalists in the course of their research,[23] which would mean that from the point of view of the media this formulation could represent a step in the right direction.

The individual grounds for exceptions listed in the 2002 recommendation can be found in this (or in similar) form in many freedom of information acts. Such restrictions, however, are often significantly more detailed and/or adapted to national conditions. In detail, the recommendation allows the following types of restrictions on the right to access information for the protection of certain important legal interests:

- national security, defence and international relations;
- public safety;
- the prevention, investigation and prosecution of criminal activities;
- privacy and other legitimate private interests;
- commercial and other economic interests, be they private or public;
- the equality of parties concerning court proceedings;
- nature;
- inspection, control and supervision by public authorities;
- the economic, monetary and exchange rate policies of the state;
- the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

III. European Union

In the existing primary law of the European Community, and also in the Charter of Fundamental Rights of the Union and in the Treaty establishing a Constitution for Europe, there is a series of provisions that deserve attention in the present context. Regulations on access to information are also contained in implementing instruments. Here, however, a strict distinction needs to be made between provisions relating to the treatment of documents of Community institutions, on the one hand, and, on the other, provisions – such as the Council of Europe recommendation discussed above – that relate to access to information held by the public authorities of Member States.

1. Access to Documents of the Institutions

Article 255 of the Treaty establishing the European Community stipulates that citizens have a general right of access to the documents of the European Parliament, the Council and the Commission. This provision is an expression of the democratic principle and also concretises the principle of transparency that is laid down in Arti-

cle 1(2) of the EU Treaty.[24] The provision has been criticised for failing to list any other community institutions besides the Council, Parliament and Commission as being subject to the citizen's right to access information. The wording, according to critics, leaves open the possibility of removing parts of the Community's administrative actions from the scope of the right to access information by establishing new administrative units.[25]

The Treaty establishing a Constitution for Europe,[26] which was signed in Rome on 29 October 2004, also contains regulations concerning the right of access to documents – regulations which, in part, are wider in scope than Article 255 of the Treaty establishing the European Community. For example, Article I-50(3) of the constitutional Treaty[27] envisages, for any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium. The provision is thus explicitly worded in a very broad way; the restriction to the three institutions mentioned above has been removed and the aim pursued is clearly that of expanding the scope of the requirement to provide information to include the widest possible circle of bodies and institutions. A limitation, however, is imposed by Article III-399, which stipulates that the Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to the requirement only when exercising their administrative tasks. In this connection, mention should also be made of Article III-436(1)(a), according to which a Member State is not obliged to supply information the disclosure of which it considers contrary to the essential interests of its security.

According to the case law of the European Court of Justice to date, the right of access still does not represent a fundamental Community right inherent in the general legal principles that have their origins in the common constitutional traditions of the Member States.[28] Article 42 of the Charter of Fundamental Rights of the European Union, however, also establishes a right to access the documents of the Parliament, the Council and the Commission. The constitutional Treaty envisages the integration of the Charter of Fundamental Rights. The aforementioned provision is contained therein as Article II-102 and will thus become binding primary law of the Union when and if the constitutional Treaty enters into force. The right to access documents, however, is not guaranteed without restriction, and may in concrete individual cases need to be weighed against the legal positions stated in the provision.

Regulation (EC) No 1049/200 of 20 May 2001 fulfills the law-making requirement contained in Article 255(2) of the Treaty establishing the European Community.[29] This instrument regulates the details concerning the application procedure for public access to European Parliament, Council and Commission documents. It also lists the conditions under which the institutions of the Community may refuse access to documents. These exceptions to freedom of access essentially correspond to the Council of Europe recommendation from the year 2002 and are to be interpreted narrowly, according to the case law of the European Court of Justice to date, in order to guarantee the maximum possible scope of the right of access.[30] According to Article 4(6) of the Regulation, Community institutions are to make extracts of documents available, to the extent that the information they contain is only partly subject to secrecy provisions. If necessary, however, the supplying of extracts can be deemed inappropriate, in the event that it involves an excessive expenditure of time and energy and the information remaining that has not been blacked out is useless to the applicant.[31]

The Regulation does not affect the right of Member States to regulate access to documents.[32] The Community-law provisions are addressed exclusively to the Community institutions and thus have no immediate influence on the form of the corresponding national legal instruments. It is true that Regulation (EC) No 1049/2001 envisages that the right of access should also extend to third-party documents, and that this represents a turnaround vis-à-vis the previous "author" rule, according to which Community institutions were not entitled to disclose third-party documents. The Member States, however, retain the right according to Article 4(5) of the Regulation to request that the Community institution not disclose documents originating from that Member State. The Community institution concerned must comply with this request without further consideration of the matter.[33]

2. Access to Information Held by Public Authorities of Member States

The regulations for Community documents are to be distinguished from provisions dealing with situations in which claims aimed at securing the right to receive information or inspect documents are addressed to the Member States. To date, there are no Regulations or Directives providing for a general right on the part of citizens to receive government information or to inspect the files of government offices or agencies. On the other hand, Directive 2003/4/EC of 28 January 2003 on public access to environmental information[34] provides for a genuine right (albeit a right which is specific in scope) to be granted information.

Another Directive worthy of mention is Directive 2003/98/EC of the European Parliament and the Council of 17 November 2003 on the re-use of public sector information. Here the essential issue is not so much whether or not a right to access information exists, but rather how information held by public sector agencies can be re-used.[35] This Directive, while making it clear that Member States are not subject to an obligation to reveal certain sources of information to the citizens, provides rules of conduct for cases where sources of information have already been revealed. For example, a non-discriminatory position vis-à-vis potential re-users from commercial and non-commercial fields is to be guaranteed. Comparable categories of document re-use are all to be subject to the same conditions; moreover, public agencies re-using documents for their own commercial activities are not to be accorded any advantages over other users.

C. The Legal Situation at National Level

Now that we have concluded our examination of the regulations of international and European law that contain provisions relating to the right to access documents held by public agencies, we turn to a description of the legal situation in certain selected Member States. First, we examine the right of access to information.[36] Among the regulations of particular interest to us are those which specifically grant the media and/or representatives of the media certain rights to obtain information from public authorities (the "media privilege"). We then deal with countries having only a general right of access to information, following which we turn our attention to the regulations of states exemplifying both a general right of access to information and a media privilege, before finally examining legal systems in which there is a media privilege only.

I. General Right to Information Only

1. Sweden

As stated in the Introduction, Sweden was the first country in the world to establish a legal rule concerning the right of access to official files. This took the form of an ordinance on freedom of the press, dating from 1766 and – even at such an early date – expressly intended to complement the freedom to publish official documents.[37]

According to Chapter 1 Art. 1 of the law on freedom of the press currently in force, which has constitutional status, every Swedish citizen has the right to publish his thoughts and convictions in printed form, to publish official documents, to make statements

relating to any subject matter whatsoever and to communicate information thereto. These rights are intended to ensure the free exchange of opinions and to serve the cause of informing and educating the public. The second chapter of the law contains the provisions on the right to access information. Art. 1 of that chapter stipulates that (also) for the promotion of a free exchange of opinions and in the interests of general edification every Swedish citizen is authorised to inspect official documents. This right is more or less the counterpart to the previously mentioned right to publish official documents.

In accordance with Chapter 2 Art. 3(1) of the law on freedom of the press, a document is essentially to be considered "official" if it is held by a public authority and counts as having been received or produced by that authority. This definition also includes documents prepared not by the authority itself but by third parties.

Traditionally it is assumed that it is representatives of the press, rather than individual citizens, who would have an interest in publication of official documents. The provisions mentioned above are thus aimed at informing and educating the public, which is generally considered to be the central function of the media. This, and the fact that the corresponding provisions are contained in a law dealing with the activities of the press, emphasises the special importance that access to official information has for the performance of this function of the media within society. If we take into account the fact that the Internet now provides (almost) every citizen with a readily available opportunity to publish, the right to publish such documents should be seen in a new light.

In accordance with Art. 2, written documents can be excluded from the right of access if one of the legal interests[38] listed there is concerned and a restriction of access is necessary for its protection. However, every restriction of the right of access requires special authorisation in the form of a (statutory) law, which specifies precisely the conditions for such intervention. This function is fulfilled by the so-called "secrecy law", which concretely states the individual exceptions and explicitly names the interests capable of justifying secrecy. Provisions for absolute secrecy are the exception in this law. In most cases the exceptions are formulated as authorisations to refuse access in individual cases if the protected interests are infringed.

Public authorities are subject to a wide-ranging obligation to maintain publicly accessible registers of their documents. These registers are in many cases required to include documents falling under one of the exceptions. The publicly accessible documents are to be made accessible upon request immediately – or as soon as possible – without the imposition of fees.

2. Ireland

In April 1997, Ireland passed a Freedom of Information Act. The aim was to enable both the media and the general public alike to have effective and inexpensive access to information held by the government.

The Irish Freedom of Information Act applies to representatives of the media and private citizens alike, since according to Article 6 every person has a right of access to state records. Public agencies and offices are required by law to produce a reference book detailing their structure and organisation, the nature of the documents they hold, and the procedures foreseen for enabling access.

Since the year 2000, the public service broadcaster RTÉ has been included under the terms of the Act, which means that a media undertaking itself is subject to the obligation to provide information. Public access in this case extends to documents relating to management, administration, finances, business transactions, communication and contractual agreements which are held by RTÉ and which were produced after 21 April 1998, i.e. after the date the Freedom of Information Act entered into force.[39]

The Freedom of Information Act was amended by the Freedom of Information (Amendment) Act of 11 April 2003, which involved a significant broadening of the definition of the term "government". There was great controversy over the introduction of a system of compulsory fees for applications to access information not relating to the person concerned and over the corresponding appeals procedure; these changes came into force on 7 July 2003. The cost of pursuing an application to inspect files through all instances of the administrative appeals procedure amounts to a total of EUR 240.[40] The fees for such a procedure are higher in Ireland than in other countries. Fears were expressed that the fees could deter private citizens, non-governmental organisations and journalists from requesting information.[41] Private individuals would probably be more heavily deterred by these regulations than representatives of the media, since the cost risk in the case of the latter is as a rule carried by an entire undertaking. The situation is probably different for freelance journalists, who may now be faced with the difficulty of weighing up whether or not the "investment" in the procurement of information will pay off.[42]

II. General Right to Access Information alongside Media-Specific Regulations

1. Regulations Relating to the General Right to Access Information

a) Slovenia

Article 39(1) of the Slovenian Constitution[43] protects freedom of opinion and freedom of speech. The freedom to appear or perform in public, the freedom of the press, and the freedom of other forms of public information and expression are also guaranteed, as is the freedom to collect, to receive, and to impart news and opinions. In addition, Article 39(2) provides for citizens access to government information, provided a specific interest is demonstrated.

The right is stated in Article 5 of the law on access to information of a public nature,[44] which lays down the ways in which access can be obtained. According to that law, government offices or agencies are to keep information material available either for immediate inspection or as a mechanically produced copy or photocopy or electronic record. Article 4 of the law defines information of a public nature as information that originates in the field of activity of public corporations and is present in the form of a document, file, dossier, register, record or documentary material produced by such a corporation, possibly in cooperation with other corporations, or received from third parties. Article 6 stipulates the conditions under which the application for the granting of access to public information can be refused.[45] According to Article 8 public bodies must maintain indexes of the public information held within their sphere of authority.

b) Germany

aa) Federal Level

The German Constitution protects freedom of information by Article 5(1)(1) of the Basic Law (*Grundgesetz – GG*). This does not, however, encompass a right of access to information. In connection with the guarantee of freedom of information in Article 5(1)(1) GG the Federal Constitutional Court (*Bundesverfassungsgericht*) has confirmed in its N-TV decision[46] that this guarantee does not include a right to demand the opening up of sources of information. In the instant case, a broadcaster had appealed against a legal provision prohibiting sound and video recordings of court proceedings. The Court, however, declared this rule to be constitutional, since the legislative power is not subject to an obligation to open up particular sources of information for access by the public or the media. Rather, the legislative power can decide on the accessibility of a source of information and the modalities of access. It is only after the establishment of general access that the scope of protection of the freedom of information can be affected by the subjection of a fundamental right to such intervention.

At Federal level, there is (as yet) no freedom of information law in Germany. However, the draft bill the government has recently introduced in the federal parliament (*Bundestag*) aims at creating such a law.

Specific regulations on the right to receive information and inspect files are, however, contained in the law on the records of the state security service of the former German Democratic Republic (*Gesetz über die Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik*, abbreviated as *Stasi-Unterlagen-Gesetz* or simply *StUG*)[47] of 20 December 1991, which is designed to facilitate the process of coming to terms with the legacy of the former East German domestic secret service. In accordance with the provisions of Art. 13(1) StUG affected parties can apply for and must be granted information on available catalogued records concerning themselves. Non-affected third parties must also be given information, under the terms of Art. 13(7) StUG; applicants must in this case, however, provide details that enable the information to be located. Information will only be provided if the effort involved in doing so is not disproportionate to the applicant's stated interest in the information.

The use of the records of the state security service for the task of working through the political and historical legacies involved, as well as the use of the records by the press, radio and television, is regulated in Arts. 32 *et seq*. StUG. Unless the person affected has given permission, records containing personal information may only be used if the information concerns employees of, or persons having benefited from, the state security service. This also applies if the records concern contemporary figures of historical importance, individuals with political functions, or office-bearers. Information concerning office-bearers can only be used to the extent that they concern the contemporary historical role of that person and the performance of their function or the duties of their office. Moreover, records containing personal information may only be made available if they do not infringe any of those persons' overriding interests warranting protection. In the course of deliberation particular attention should be paid to the question of whether the original acquisition of the information was based on an infringement of human rights. In the case of the records that had been collected concerning the former German Federal Chancellor Helmut Kohl, the Federal Constitutional Court ruled that it would be fundamentally unconscionable for Dr. Kohl if the personal information concerning him that was contained in the state security service records were to be made available to the press. This holds, at least, for information that was gained through an invasion of privacy or an infringement of the right of expression, as well as for information based on espionage in the broadest sense. Other records, containing for example information from generally accessible sources, should not however be issued to the press in terms of a deliberation. Access to the records collected on Helmut Kohl by former East German spies operating in West Germany is therefore not to be granted.[48]

bb) State (*Land*) Level

There are presently four freedom of information laws in force – in the *Länder* of Berlin,[49] Brandenburg,[50] North Rhine-Westphalia[51] and Schleswig-Holstein.[52] But in other German states as well efforts are underway to introduce such laws. The freedom of information laws grant citizens the right to access information held by the public authorities of the state in question. Rights vis-à-vis federal authorities cannot accrue from these state laws, but rights vis-à-vis state authorities implementing federal laws can.

2. Media-Specific Regulations

a) Slovenia

According to Article 45 of the law on the mass media[53] government agencies must grant the mass media access to information. The circle of those subject to the obligation to comply with this right is interpreted broadly, and includes all persons and corporations that can be ascribed to the State. The authorisation to receive information extends to editorial staff, journalists and other authors or programme producers. Article 45(7) of the law on the mass media provides that journalists and authors bear neither criminal nor civil law liability for the publication of accurate information.

b) Germany

According to the allocation of competences embodied in Germany's Basic Law (*Grundgesetz – GG*) the federal government has only a very limited responsibility as far as the media are concerned. There is a skeleton competence on the part of the federal government for general legal relations concerning the press, according to Art. 72, 75(1)(2) GG. However, there is at present no skeleton law on the rights of the press. The relevant regulations are therefore decided at state (*Land*) level.

For the audiovisual sector there are, in part, special provisions on rights to information on the part of representatives of the media vis-à-vis government authorities. For example, the media law of the state of Baden-Württemberg, in Art. 6(2), imposes an obligation on the authorities to provide broadcasters (or their representatives) with information that assists them in performing their public tasks. The same holds for the "convergent" media law of the Saarland (Art. 5). In those states (*Länder*) in which the broadcasting laws do not contain such provisions, there is a reference to the corresponding provisions for representatives of the press. The press laws of the German states provide for a right to information on the part of representatives of the press vis-à-vis government authorities. In the state of North Rhine-Westphalia, for example, Art. 26 of the state press law (*Landespressegesetz*) declares that the regulation applicable to the press under Art. 4 of that law also applies to broadcasting. Questions such as the form, content and extent of the duty of public authorities to actually provide information depend on what is required to satisfy the claim in each individual case. Information can be provided in the form of a press conference, a press statement, a series of printed communiqués or extracts of official documents. The discretionary powers of the authority can, however, be restricted to certain forms of information.[54] Complex matters may require that information be provided in writing, if the spoken form would not rule out the possibility of misunderstandings, gaps and transmission errors. In individual cases the discretionary powers can be restricted to such an extent that a right to inspect the relevant files must be granted.[55]

The aforementioned freedom of information laws contain a very broad definition as to who is required to provide information. For example, natural and legal persons under private law, to the extent that they fulfil public-sector functions, are counted among the authorities or public agencies, cf. § 2(4) IFG NRW. Similar considerations apply to the right to information under press law, as previously codified in Art. 4 of the Saarland press law, for example.[56] Broadcasters, too, can be declared to be subject to the obligation to provide information, unless a divergent special regulation is effective, as for example in accordance with Art. 4(5) of the press law of Saxony.

3. A Consideration of the Regulations

The Slovenian Constitution, in the aforementioned Article 39(2), makes the right to access information dependent on a statutorily recognised legal interest. The norm thus fails to adhere to the framework laid down by the Council of Europe recommendations. These recommendations explicitly urge Member States not to make the right to information dependent on the prior existence of an interest or even on a statement of reasons. However, such an interest is required neither for access rights under the law on access to information of a public nature nor for access rights under the law on the mass media, as under the present legal situation Slovenian citizens and journalists have the right to receive information without the requirement to provide further justification in support of their request. The ordinary statutory law provisions thus accord with the Council of Europe recommendations and extend beyond the constitutional guarantee of right of access.

The law on access to information of a public nature came into force in 2003, i.e. two years after the media law. This raises the question of whether the regulation contained in the media law has thereby become (partly) redundant. The main difference between the regulations is the requirement imposed upon public authorities by the law on the mass media to maintain information on matters relating to their field of activity for publication by the mass media. This means that, in addition to granting access to certain documents, they must also actively cooperate with the media in the process of information-gathering and must make provision for appropriate procedures in this regard. Moreover, the procedures envisaged by both laws display a great deal of similarity. There would initially seem to be a privileging of the media in the provision stating that public authorities must issue a written explanation of the reasons for the rejection of an application by the end of the next working day if the editor of the medium concerned so desires (Article 45(5) of the law on the mass media). Under the law on access to information of a public nature there is a duty to justify the rejection of an application and to reach a decision on an application within 20 days. It would appear that, in the interests of guaranteeing that the media are able to work quickly, a clear distinction is made here.

It should be noted, moreover, that the law on the mass media is to be amended. An initial piece of draft legislation in this regard dates from 3 March 2004.[57] The amendments will also affect the right of representatives of the media to access information. On the one hand, the definition of public information will acquire greater precision, and on the other, provision will be made for time limits within which requests must be responded to, as well as for sanctions in the event of breaches of the law. Another factor that would appear worthy of mention is that, for the first time, journalists would be granted a right of access to non-public information held by public authorities. Journalists are also to be given the chance to legally appeal a decision to deny access to desired information. It thus becomes clear that the legislative power, while not assuming that the enactment of the law on access to information of a public nature will make the above-mentioned regulations of the media law superfluous, nevertheless felt the need to make a number of adjustments.

Following what was said above concerning Germany, the media's right to information can be claimed by representatives of the media who identify themselves as such. The supplying of the information is thus made dependent upon the applicant's belonging to the media. On the basis of this law journalists can contact the person within a public authority who is responsible for supplying such information, who must then supply the information requested unless the law makes provision for reasons on the basis of which the request can be refused. Thus, a representative of the media may have to be satisfied with information supplied by, for example, the spokesperson or press secretary of a public authority or agency.

III. Exclusively Media-Specific Regulations

1. Malta

Article 47 Sub-Article 1 of the press law[58] provides for a right of access for journalists to information. With this provision, the government establishes a procedure for supplying representatives of the press with information useful to them in the performance of their public task. This privilege applies to audiovisual media as well, despite the word "press" in the text of the law. This follows from Articles 2 and 23 of the press law. The exceptions provided for in Article 47 Sub-Article 2 largely accord with the list presented above in the treatment of the Council of Europe recommendation.

2. Cyprus

The Press Law 145/1989 from the year 1989 guarantees the freedom of the press, the unhindered circulation of newspapers, and the protection of sources. Article 7(2) contains the right of foreign and Cypriot journalists to consult public sources of information, to seek and receive information from every public authority having responsibility for the relevant matters in the Republic of Cyprus, and to circulate that information freely and via means of their own choosing. The authorities responsible must make the desired information available as quickly as possible if no reasons to the contrary exist and none of the usual exceptions applies (Article 7(3)).

The norms mentioned must be viewed, however, in connection with Article 67(1) of the Act 1/1990 on the public service. This prescribes that all information which comes to the attention of a public official, whether in written or in spoken form, is confidential. Public officials are strictly forbidden to transmit such information unless such transmission occurs as part of the performance of their duties or upon formal instructions from the authority responsible, i.e. the minister in charge.

D. Conclusions

A clear trend can be discerned towards the enactment of legal regulations that grant citizens a right to access government information. Such regulations already exist in the majority of European countries,[59] and further countries appear to be about to follow suit. Neither international nor European law distinguish between ordinary citizens and representatives of the media as far as the right to access government information is concerned.

Another important aspect in addition to the issue of access to information is the protection of journalists' sources against government intervention. One factor which is remarkable in this connection is that the legal interests that could exceptionally justify the disclosure of journalists' sources correspond in a whole series of cases with the legal interests whose need of protection is adduced in justifying the refusal of an application for access to government documents. This can be admirably illustrated by a decision of the German Federal Constitutional Court. The Court approved the analysis by police and public prosecutors of data concerning telephone calls made by journalists, as this was of assistance in concrete cases involving the prosecution of particularly serious crimes.[60] The protection of the prosecution of criminal activities can however also be claimed by the State in rejecting a citizen's application for access to information (cf. e.g. the Council of Europe recommendation, Section B. II. 2.). Certain mutual relations can thus be discerned between, on the one hand, the situation in which the State would like to gain access to information in the hands of representatives of the media who want to keep that information essentially secret, and on the other hand the situation in which the State avoids granting a request for information by a journalist on the grounds of the same interests of secrecy.

To the extent that general sets of rights to freedom of information exist at national level, they are as a rule relatively extensive.[61]

Nevertheless, in some of the countries examined there are (still) privileged regulations of various kinds in the area of the media, and it is conspicuous that such provisions are not being repealed in the course of introducing general access rights for citizens to government information, but continue to exist alongside these new regulations and in some cases are intended to be further developed. From the point of view of the legislator, they thus do not appear to have lost their *raison d'être*.

In conclusion, it can be said that the general right of citizens to access information held by government agencies in many cases extends beyond the existing regulations on media privilege. The circle of those entitled to claim the right is defined more broadly and the right is construed more comprehensively. Where general and special regulations exist side by side, journalists invoking a general freedom of information law would not need to disclose the fact that their request for information was being made as part of a story they were pursuing for the media. Rather, they could invoke their civil right to

information, without needing to demonstrate a special interest in being given the information requested. This could in many cases represent a considerable benefit as far as the research work of investigative journalism is concerned, especially when attempting to expose wrongdoing on the part of public authorities. To this extent, a civil right to information would expand the range of possibilities for journalists and thus also for the audiovisual media.

It would appear, however, that a conclusive judgment on the question of whether the right to access information makes the media privilege superfluous is at present still premature. This is especially true due to the fact that access rights have for the most part been introduced only recently and in many case have still to demonstrate their significance for the media in everyday practice.

1) Details of how the ordinance arose and of the life and work of Anders Chydenius can be found in: Stephen Lamble, 'Freedom of Information, a Finnish clergyman's gift to democracy', in: *Freedom of Information Review*, No. 97, February 2002, 2-8.
2) In Anglo-American legal circles in particular, a set of provisions concerning citizens' access to information held by public authorities is usually designated as a "Freedom of Information Act". German [Editor's note: the original text was written in German.] usage for the most part, however, refers to the content of such provisions as the "right to access information". The term "freedom of information" is usually understood as meaning the basic right to freely impart and freely receive information, as a form of the right to freedom of expression guaranteed by e.g. Article 10(1) ECHR. If the imparting of information occurs via the press, broadcasting or internet services, this can be summarily designated as "freedom of the media". The use of the term "freedom of information" in the present article implies that the English-language term was found in the source texts in this form or that the original English-language legislation was so designated. The terms "right of access to information" and "right to access information" are used hereinafter as synonyms for "freedom of information".
3) Such provisions were enacted in 1978 in France, the Netherlands and Spain, in 1985 in Denmark, in 1986 in Greece, in 1987 in Austria, in 1989 in Portugal and in 1990 in Italy. The trend was then continued by the majority of countries in Eastern and Central Europe – in the course of the fundamental changes that followed the opening of the Iron Curtain, these countries introduced freedom of information acts in order to conform to Western standards of democracy and to prevent nepotism and corruption by creating transparency – and also by Belgium (1994), Finland (1995) and Ireland (1997) and the United Kingdom in the year 2000 (in force since January 2005).
4) The declaration is available at http://www.article19.org/docimages/1888.doc
5) See the Declaration of Cooperation by 14 Information Commissioners and Ombudsmen on 7 April 2003 in the *Europäische Akademie für Informationsfreiheit und Datenschutz* ('European Academy for Freedom of Information and Protection of Privacy') in Berlin, available at http://www.informationsfreiheit.de/info_international/dokumente/Declaration.pdf
6) The Aarhus Convention, which was signed in June 1998, is available in German at: http://www.aarhus-konvention.de/dokumente/docs/aarhus.pdf
7) The official text of the ECHR is available at http://conventions.coe.int/Treaty/en/Treaties/Word/005.doc
8) Jochen Frowein/Wolfgang Peukert, EMRK-Kommentar, 2. edition, 1996, Artikel 10, side note 11; Jens Meyer-Ladewig, EMRK Handkommentar, 1. edition. 2003, side note 14.
9) ECHR 8383/78, X v. Germany in DR 12, 227.
10) Johannes Wewers, Das Zugangsrecht zu Dokumenten in der europäischen Rechtsordnung ('The right of access to documents in the European legal system'), p. 148; Curtin/Meijers in CMLR 1995, p. 399.
11) ECtHR 26 March 1987, Series A, Vol. 116, p. 29, No. 47f. – Leander v. Sweden; ECtHR 7 July 1989, Series A, Vol. 160, p. 20 No. 49 - Gaskin v. United Kingdom; ECtHR 19 February 1998 in RJD 1998-I, p. 210 - Guerra v. Italy; ECtHR 15 June 2004, Sirbu and others v. Moldavia, available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=MOLDOVA&sessionid=627767&skin=hudoc-en
12) Wewers, *loc. cit.*, p. 149.
13) Mark Villiger, Handbuch der EMRK ('ECHR Handbook'), 1993, side note 599.
14) Tarlach McGonagle in IRIS Special: "Political Debate and the Role of the Media", 2004, p. 8.
15) ECtHR, EuGRZ 1979, 386 (390) - Sunday Times; EGMR, EuGRZ 1995, 16 (20) - Observer & Guardian.
16) ECtHR, Guerra (Endnote 11), side note 53. The special importance of broadcasting for the public opinion-forming process is also emphasised in the European Convention on Transfrontier Television, cf. Article 7(3) and Recitals 4 and 6.
17) Frowein/Peukert, *loc. cit.*, side note 14; Wewers, p. 150.
18) The consistent practice of the European Court of Human Rights has been to interpret Article 10 ECHR as encompassing a guarantee of freedom to broadcast, cf. ECtHR, EuGRZ 90, 255, Groppera (Rz. 55); ECtHR, EuGRZ 90, 261, Autronic; ECtHR, EuGRZ 94, 549, Lentia.
19) Christoph Grabenwarter, Europäische Menschenrechtskonvention ('European Convention on Human Rights'), Vienna 2003, p. 273.
20) McGonagle, *loc. cit.*, p. 9.
21) Recommendation No. R (81) 19 of the Council of Ministers to the Member States on the access to information held by public authorities of 25 November 1981, available (in English) at http://www.coe.int/T/e/legal_affairs/Legal_co-operation/Administrative_law_and_justice/Texts_&_Documents/Recommendation(81)19.asp
22) The recommendation is available at: http://www.coe.int/t/e/human%5Frights/media/5%5FDocumentary%5FResources/1%5FBasic%5FTexts/2%5FCommittee%5Fof%5FMinisters%27%5Ftexts/PDF_Rec(2002)002_E.pdf
23) The European Court of Human Rights has for example deemed the conviction of journalists for publishing certain tax documents, unauthorized copies of which they had in their possession, to be in violation of Article 10 of the ECHR, as the journalists' reporting was in the public interest, ECtHR of 21 January 1999, Reports of Judgments and Decisions 1999-I - Fressoz and Roire.
24) With the signing of the Treaty of Amsterdam the principle of transparency was incorporated into the instruments of the European Union (in Article 1(2) of the Treaty on European Union), largely at the instigation of the Nordic states (Lenz/Borchardt-Bitterlich, EUV/EGV, 3. Auflage, Art. 1 EUV, Rn. 14). This provision is, however, not directly applicable, so that individuals cannot rely on it. Cf. also Wegener in Calliess/Ruffert, 2. edition 2002, Art. 255 side note 1.
25) Callies/Ruffert-Wegener, *loc. cit.*, Art. 255 side note 9.
26) The Treaty establishing a Constitution for Europe is available at: http://www.europa.eu.int/constitution/index_en.htm
27) Article I-50(1) would in future establishe the principle of transparency.
28) Generalanwalt Léger, C-41/00 P, SA-Interporc/Kommission, Collection 2003, I-2125,side note 80; *Magiera* in Meyer, Kommentar zur Charta der Grundrechte der Europäischen Union, 1. edition, 2003, Art. 42, side note. 6.
29) OJ L 145/43 of the EU of 31 Mai 2001, available at: http://europa.eu.int/comm/secretariat_general/sgc/acc_doc/docs/1049EN.pdf
30) ECJ, C-355/99 P, Council v. Hautala, Collection 2001, I-9565, side note 25 with further references.
31) ECJ, T-204/99, Matilla v. Council and Commission,Collection 2001, II-2265,side note 68.
32) ECJ, T-76/02, Messina v. Commission, Decision of 17 September 2003, Rdnr. 40 *et seq.*, not yet published in the official collection; cf. also Recital 15 of the Regulation.
33) EuG, T-168/02, IFAW Internationaler Tierschutz-Fonds v. Commission, judgment of 30 November 2004, not yet published in the official collection.
34) Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC; OJ L 41/29 of 14 February 2003, available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_041/l_04120030214en00260032.pdf The Directive fulfils the obligations under international law arising from the abovementioned Aarhus Convention.
35) Directive 2003/98/EC, OJ L 345/90 of the EU of 21 December 2003. Cf. in particular Recital 5 and Article 3 of the Directive.
36) We shall, however, dispense with a description of the provisions in existence in almost all countries that grant those affected by administrative and other procedures the right to inspect files.
37) Christian Hetsch, *Die Verordnung über den Zugang zu Dokumenten der Gemeinschaftsorgane im Lichte des Transparenzprinzips* ('The regulation on access to documents of Community institutions in the light of the transparency principle'), 2003, p. 36.
38) These are essentially congruent with the reasons listed in the recommendation of the Council of Europe.
39) Cf. on this topic Candelaria van Strien-Reney: Extension of Freedom of Information Act to RTÉ, in IRIS 2000-5, p. 16, available at: http://merlin.obs.coe.int/iris/2000/5/article26.en.html
40) The fees amount to: EUR 15 for a request to inspect documents other than those containing details of the person concerned only; EUR 75 for an application for an internal review of a decision by a public agency to reject a request to inspect documents, and EUR 150 for an application for review of such a decision.
41) Cf. on this topic Tarlach McGonagle: Developments concerning Freedom of Information, in IRIS 2003-9, p. 14, available at: http://merlin.obs.coe.int/iris/2003/9/article28.en.html
42) In contrast to this the *FOIA* in the USA, for example, privileges the media to the extent that representatives of the media are to be required to pay only the normal charges for the copying of documents, cf. *Freedom of Information Act*, 5 U.S.C. § 552.
43) Available at http://www.verfassungen.de
44) The law on access to information of a public nature of 5 March 2003 is available at http://mid.gov.si/mid/mid.nsf/V/KDAD5EEEE9150A3B6C1256D8F0045E9B2/$file/Zakon_o_dostopu_do_informacij_ANG.pdf
45) This is the case if interests such as those listed under B II above are involved.
46) BVerfG, judgment of 24 January 2001, reference 1 BvR 2623/95 and 1 BvR 622/99.
47) The Stasi Documents Act is available at: http://www.bstu.de/rechtl_grundl/index.htm
48) BVerwG, judgment of 23 June 2004, reference 3 C 41.03; cf. on this topic: http://www.bstu.de/aktuelles/presse2004/0803_statement_birthler.htm
49) The 'Law for the Promotion of Freedom of Information in the State of Berlin' (*Gesetz zur Förderung der Informationsfreiheit im Land Berlin*, abbreviated *IFG)* of 15 October 1999, available at: http://www.informationsfreiheit.de/info_berlin/gesetze/ifg_01.htm
50) The State of Brandenburg's 'Law on Inspection of Files and Access to Information' (*Akteneinsichts- und Informationszugangsgesetz – AIG*) of 10 March 1998, available at: http://www.lda.brandenburg.de/sixcms/detail.php?id=68313&template=allgemein_lda
51) The 'Law on the Freedom of Access to Information for the State of North Rhine-Westphalia' (*Gesetz über die Freiheit des Zugangs zu Informationen für das Land Nordrhein-Westfalen*, abbreviated as *IFG NRW*) of 27 November 2001, available at http://www.lfd.nrw.de/fachbereich/fach_3_komplett.html
52) The 'Law on Freedom of Access to Information for the State of Schleswig-Holstein' (*Gesetz über die Freiheit des Zugangs zu Informationen für das Land Schleswig-Holstein*, abbreviated as *IFG-SH*) of 9 February 2000, available at http://www.datenschutzzentrum.de/material/recht/infofrei/infofrei.htm
53) http://www.gov.si/srd/eng/index.html
54) Martin Löffler/Reinhart Ricker, *Handbuch des Presserechts* ('Handbook of Press Law'),2000, p. 149.
55) *Loc. cit.*
56) Administrative Court of the Saarland (*Verwaltungsgericht des Saarlandes*), Decision of 19 July 1996, 1 K 86/95, AfP 1997, 837. Yvonne Wildschütz, The Saarland Press Act (*Saarländisches Pressegesetz*) was repealed by the Saarland Media Law (*Saarländisches Mediengesetz*), see IRIS 2002-4, p. 5.
57) See Peter Strothmann, Changes to Media Act Adopted, IRIS 2004-5, p. 15, available at: http://merlin.obs.coe.int/iris/2004/5/article23.en.html
58) Section 248 of the Laws of Malta, available at: http://docs.justice.gov.mt/lom/legislation/english/leg/vol_6/chapt248.pdf
59) Cf. Kevin/Ader/Fueg/Pertzinidou/Schoenthal: *"Die Information der Bürger in der EU: Pflichten der Medien und der Institutionen im Hinblick auf das Recht des Bürgers auf umfassende und objektive Information" Studie im Auftrag des Europäischen Parlaments* ("The information of citizens in the EU: Duties of the media and institutions in respect of the right of the citizen to comprehensive and objective information", a study commissioned by the European Parliament).
60) See Jan Peter Müßig, Constitutional Court Approves Order to Provide Information on Telephone Communications, IRIS 2003-4, p. 13. Available at: http://merlin.obs.coe.int/iris/2003/4/article30.en
61) An exception in this regard is Italy, where the person seeking information must demonstrate a personal, concrete interest; cf. on this topic Kevin/Ader/Fueg/Pertzinidou/Schoenthal, *loc. cit.*, p. 103.