Thematic factsheet[1]
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THE RIGHT OF ACCESS TO INFORMATION, A KEY PREREQUISITE FOR THE FREEDOM OF EXPRESSION

Article 10 of the European Convention on Human Rights does not confer a general right of access to information. It does not impose on Member States positive obligations to collect and disseminate information of its own motion. However, the recent case-law of the European Court of Human Rights underlined that the Convention was a living instrument which should be interpreted in the light of present-day conditions, which empowered it to adopt a broader interpretation of the notion of the "freedom to receive information" encompassing recognition of a right of access to information. By departing from its previous case-law, the Court took clearly the stance that the right of access to information held by public authorities fell now within the ambit of Article 10 of the Convention.

Accordingly, such a right and obligation could arise, firstly, where disclosure of information had been imposed by a judicial order which had gained legal force and, secondly, in circumstances where the access to information is essential for the exercise of one's freedom to receive and impart information and where its denial would interfere with that right.

To benefit from the protection of Article 10, the information, data or documents to which access is sought must meet a public-interest test in order to prompt a need for disclosure. Such a need may exist, *inter alia*, where the disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole. The public interest also relates to matters which affect the public to such an extent that it may legitimately take an interest in them. This comprises matters capable of giving rise to considerable controversy, which concern important social issues or involve issues that the public would have an interest in being informed about.

The fact that the information requested is ready and available constitute an important criterion in the overall assessment of whether a refusal to provide information can be regarded as interfering with the freedom to "receive and impart information" as protected by Article 10 of the Convention.

Authorities' refusal to provide the names of public defenders and the number of their appointments: violation

Magyar Helsinki Bizottság v. Hungary [GC] - 18030/11
Judgment 8.11.2016

The case concerned the authorities' refusal to provide with information relating to the work of *ex officio* defence counsel, as the authorities had classified that information as personal data that was not subject to disclosure under Hungarian law.

[1] This document presents a non-exhaustive selection of the CoE instruments and of the ECHR relevant case law. Its aim is to improve the awareness of the acts or omissions of the national authorities likely to amount to a hindrance of Article 10 of the Convention. This information is not a legal assessment of the alerts and should not be treated or used as such.

The Court noted that the information requested from the police by the applicant NGO was necessary for it to complete the study on the functioning of the public defenders' system being conducted by it in its capacity as a non-governmental human-rights organisation, with a view to contributing to discussion on an issue of obvious public interest. In the Court's view, by denying the applicant access to the requested information the domestic authorities had impaired the NGO's exercise of its freedom to receive and impart information, in a manner striking at the very substance of its Article 10 rights.

The Court found in particular that the public defenders' privacy rights would not have been negatively affected had the applicant NGO's request for the information been granted, because although the information request had admittedly concerned personal data, it did not involve information outside the public domain.

The Court also held that the Hungarian law, as interpreted by the domestic courts, had excluded any meaningful assessment of the applicant NGO's freedom-of-expression rights, and considered that in the present case, any restrictions on the applicant NGO's proposed publication – which was intended to contribute to a debate on a matter of general interest – ought to have been subjected to the utmost scrutiny.

Lastly, the Court considered that the Government's arguments were not sufficient to show that the interference complained of had been "necessary in a democratic society" and held that, notwithstanding the discretion left to the respondent State (its "margin of appreciation"), there had not been a reasonable relationship of proportionality between the measure complained of (refusal to provide the names of the *ex officio* defence counsel and the number of times they had been appointed to act as counsel in certain jurisdictions) and the legitimate aim pursued (protection of the rights of others).

Conclusion: violation of Article 10 of the Convention

Criminal conviction of investigating journalist for having obtained, in breach of official secret, information about previous convictions of private persons

Dammann v. Switzerland - 77551/01
Judgment 25.4.2006

In this case, the European Court held for the first time that the gathering of information was an essential preparatory step in journalism and an inherent, protected part of the freedom of the press.

Facts of the case: As a reporter for a daily newspaper, the applicant decided to investigate a major robbery that had taken place after a break-in at a post office in Zürich. As part of that investigation he telephoned the switchboard of the Public Prosecutor's Office. As none of the public prosecutors were available, the applicant transmitted to an administrative assistant a list of names of persons who had been arrested in connection with the robbery and asked her for information as to whether the individuals concerned had any previous convictions. After consulting the prosecuting authorities' database, the assistant sent the applicant a fax containing the information he had requested. The applicant did not publish the information, nor did he use it for any other purpose. However, he apparently showed the fax to a police officer, who reported the incident to the prosecuting authorities. Criminal proceedings were then brought against the applicant, prosecuted for inciting another to disclose official secrets. He was acquitted at first instance and sentenced, on appeal, to a criminal fine of approximately EUR 325. The Court of Appeal considered in particular that the applicant, as an experienced reporter, must have known that the assistant was bound by professional secrecy, that information on those involved in criminal proceedings was confidential, and that no public prosecutor

would have agreed to comply with his request. The court noted that the interest of individuals in the preservation of their private life prevailed over any public interest, especially as at that stage it was impossible to know whether or not the persons in question would ultimately be convicted of the offences of which they were suspected.

The European Court considered that data relating to a suspect's criminal record merited protection. However, that information could have been obtained by other means, such as consulting case-law reports or press archives. Therefore the grounds relied on by the Swiss authorities to justify fining the applicant did not appear "relevant and sufficient", since the details in question had been in the public domain. With regard to the Swiss courts' argument that the applicant should have known that the information he had requested was confidential, the Court considered that the Swiss Government had to bear a large share of responsibility for the indiscretion committed by the assistant at the public prosecutor's office, especially as the applicant had apparently not tricked, threatened or pressurised her into disclosing the desired information. Furthermore, no damage had been done to the rights of the persons concerned. While there might have been a risk, at a particular time, of interference with other persons' rights, the risk had disappeared once the applicant had himself decided not to publish the information in question.

Moreover, although the penalty imposed on the applicant had not been very harsh, what mattered was not that he had been sentenced to a minor penalty, but that he had been convicted at all. While the penalty had not prevented the applicant from expressing himself, his conviction had nonetheless amounted to a kind of censorship which was likely to discourage him from undertaking research, inherent in his job, with a view to preparing an informed press article on a topical subject. Punishing, as it did, a step that had been taken prior to publication, such a conviction was likely to deter journalists from contributing to public discussion of issues affecting the life of the community and might thus hamper the press in its role as information provider and watchdog. That being so, the applicant's conviction had not been reasonably proportionate to the pursuit of the legitimate aim in question, having regard to the interest of a democratic society in ensuring and maintaining the freedom of the press.

Conclusion: violation of Article 10 of the Convention

Forcible removal of journalists from press gallery of Parliament prevented them from obtaining first-hand and direct knowledge of the events unfolding in Parliament

Selmani and Others v. the former Yugoslav Republic of Macedonia - 67259/14
Judgment 9.2.2017

The applicants were journalists covering a parliamentary debate when a commotion, provoked by a group of MPs, broke out, triggering the intervention of security staff. When the applicants refused to comply with an order to vacate the gallery, they were forcibly removed.

The central issue in the proceedings before the Court was whether the interference complained of was necessary in a democratic society. The disorder in the parliamentary chamber and the way in which the authorities handled it were matters of legitimate public interest. The media therefore had the task of imparting information on the event and the public had the right to receive such information.

During the disturbance in the chamber, the applicants were passive bystanders who were simply doing their work and observing the events. They did not pose any threat to public safety, order in the chamber or otherwise. Their removal entailed adverse effects that instantaneously prevented them from obtaining first-hand and direct knowledge based on their personal experience of the events unfolding in

Parliament. Those were important elements in the exercise of the applicants' journalistic functions, of which the public should not have been deprived.

Conclusion: violation of Article 10 of the Convention

Refusal to allow access to intelligence information despite a binding decision directing disclosure

Youth Initiative for Human Rights v. Serbia - 48135/06
Judgment 25.6.2013

The applicant was a non-governmental organisation which monitored the implementation of transitional laws with a view to ensuring respect for human rights, democracy and the rule of law. In October 2005 it requested the Serbian intelligence agency to inform it how many people had been subjected to electronic surveillance by that agency in 2005. Relying on the Freedom of Information Act 2004 the agency refused. The applicant complained to the Information Commissioner, who found that the agency had broken the law and ordered it to make the requested information available to the applicant within three days. The agency's appeal was dismissed. In September 2008 the agency notified the applicant that it did not hold the information requested.

According to the European Court of Human Rights, when a non-governmental organization is involved in matters of public interest, it exercises a role of public watchdog of similar importance to that of the press. The applicant's activities thus warranted similar Convention protection to that afforded to the press. As the applicant had obviously been involved in the legitimate gathering of information of public interest with the intention of imparting it to the public and thereby contributing to the public debate, there had been an interference with the applicant's right to freedom of expression. The exercise of freedom of expression could be subject to restrictions, but any such restrictions had to be in accordance with domestic law. The restrictions imposed by the intelligence agency in the present case had not met that criterion. Although the intelligence agency had eventually responded that it did not hold the information, that response was unpersuasive in view of the nature of the information (the number of people subjected to electronic surveillance by that agency in 2005) and the agency's initial response. The obstinate reluctance of the Serbian intelligence agency to comply with the order of the Information Commissioner had thus been in defiance of domestic law and was tantamount to arbitrariness.

Conclusion: violation of Article 10 of the Convention

Persistent attempts by authorities to avoid compliance with court order requiring them to give unrestricted access to documents on former State Security Service

Kenedi v. Hungary - 31475/05
Judgment 26.5.2009

The applicant, a historian, asked the Ministry of the Interior for access to certain documents as he wished to publish a study on the functioning of the Hungarian State Security Service in the 1960s. After his request had been refused on the grounds that the documents were classified as State secrets the applicant obtained an order from a regional court for unrestricted access after successfully arguing that it was necessary for the purposes of his ongoing historical research. Following the failure of its appeal to the Supreme Court, the Ministry offered access on condition that the applicant signed a confidentiality undertaking. The applicant refused and instituted enforcement proceedings in October 2000. However, following repeated court applications and appeals by the Ministry on various grounds, the applicant had still not been given unrestricted access to all the documents concerned some eight and a half years later.

The applicant's complaint that he had been prevented from publishing an objective study on the functioning of the State Security Service by the Ministry's prevarication fell to be examined under Article 10. The applicant had obtained a court order granting him access to the documents and, although a dispute had arisen over the extent of that access, the domestic courts had repeatedly found for the applicant in the ensuing enforcement proceedings and had fined the Ministry. In these circumstances, the authorities' obstinate reluctance to comply with the execution orders, which had also led to a finding by the Court of a violation of the "reasonable-time" requirement under Article 6 § 1 of the Convention, was in defiance of domestic law and tantamount to arbitrariness. Such a misuse of the power vested in the authorities could not be characterised as a measure "prescribed by law".

Conclusion: violation of Article 10 of the Convention

Denial of access to information on a pending constitutional case

Társaság a Szabadságjogokért v. Hungary - 37374/05
Judgment 14.4.2009

In March 2004 a Member of Parliament and other individuals lodged a complaint for review of the constitutionality of amendments to the Criminal Code concerning drug-related offences. Several months later the applicant, a human-rights non-governmental organisation active in the field of drug policy, requested access to the pending complaint. Without consulting the MP, the Constitutional Court refused the applicant's request explaining that complaints before it could be made available to outsiders only with the approval of the complainant. Subsequently, the applicant brought an action in the regional court for an order requiring the Constitutional Court to give it access to the file, in accordance with the relevant provisions of the Data Act 1992. In a decision that was upheld by the court of appeal, the regional courts dismissed the applicant's action after finding that the requested data was "personal" and could therefore not be accessed without the complainant's approval. The protection of such data could not, in the courts' view, be overridden by other lawful interests, including the accessibility of public information.

The European Court of Human Rights held that, given the nature of the applicant's activities involving human-rights litigation in the field of protection of freedom of information, the applicant was a social "watchdog", whose activities warranted similar Convention protection to that afforded to the press. The Court further observed that an application for abstract review of constitutionality, particularly when made by a Member of Parliament, undoubtedly constituted a matter of public interest. In creating an administrative obstacle and refusing to grant access to the content of such application to the applicant, which was involved in the legitimate gathering of information on matters of public importance, the authorities had interfered in the preparatory stage of that process. Moreover, the Constitutional Court's monopoly of information in such cases amounted to a form of censorship.

As to the merits, the Court noted that the information sought by the applicant was ready and available and did not require any collection of any data by the Government. In such circumstances, the States had an obligation not to impede the flow of information sought by the applicant. Further, no reference to the private life of the MP in question could be discerned in his complaint. It would be fatal for freedom of expression in the sphere of politics if public figures were able to censor the press and public debate in the name of their personality rights. Finally, the Court considered that obstacles designed to hinder access to information of public interest might discourage those working in the media or related fields from performing their vital role of "public watchdog" and thus affect their ability to provide accurate and reliable information.

Conclusion: violation of Article 10 of the Convention

Refusal by regional authority to provide copy of its decisions to an association wishing to study the impact of property transfers on agricultural and forest land

Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria - 39534/07
Judgment 28.11.2013

The applicant was a registered association whose aims were to research the impact of transfers of ownership of agricultural and forest land on society and to give opinions on relevant draft legislation. In that connection, in April 2005 it asked the Tyrol Real Property Transactions Commission, a regional authority whose approval was required for certain agricultural and forest land transactions, to provide it with copies of all decisions it had issued since the beginning of the year. It accepted that details of the parties and other sensitive information could be deleted and offered to reimburse the costs this entailed. The Commission refused citing a lack of time and personnel. Its decision was upheld by the domestic courts.

The European Court examined whether the reasons given by the domestic authorities for refusing the association's request were "relevant and sufficient" in the specific circumstances of the case. It was true that the request for information in the instant case was not confined to a particular document, but concerned a series of decisions issued over a period of time. In addition, the need to anonymise the decisions and send copies to the association would have required substantial resources. Nevertheless, the association had accepted that personal data would have to be removed from the decisions and had offered to reimburse the cost of producing and mailing the requested copies. In addition, it was striking that none of the decisions of the Commission – a public authority responsible for deciding disputes over "civil rights" – were published, either electronically or otherwise.

In sum, the reasons relied on by the domestic authorities for refusing the association's request for access to the Commission's decisions were "relevant", but not "sufficient". While it was not for the Court to establish how the Commission should have granted the association access to its decisions, a complete refusal to give it access to any of its decisions was disproportionate and could not be regarded as having been necessary in a democratic society.

Conclusion: violation of Article 10 of the Convention

OTHER RELEVANT COUNCIL OF EUROPE INSTRUMENTS

Recommendation Rec(2002)2 of the Committee of Ministers to the Member States on Access to Official Documents

"Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.

Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

i. national security, defence and international relations;
ii. public safety;
iii. the prevention, investigation and prosecution of criminal activities;
iv. privacy and other legitimate private interests;
v. commercial and other economic interests, be they private or public;

vi. the equality of parties concerning court proceedings;
vii. nature;
viii. inspection, control and supervision by public authorities;
ix. the economic, monetary and exchange rate policies of the state;
x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

Access to a document may be refused if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure. ..."

Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors *(Adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies)*

« Member States should put in place a comprehensive legislative framework that enables journalists and other media actors to contribute to public debate effectively and without fear. Such a framework should (…) guarantee public access to information (…)

The Council of Europe Convention on Access to Official Documents[2]

This Convention is the first binding international legal instrument to recognise a general right of access to official documents held by public authorities. It lays down a right of access to official documents. Limitations on this right are only permitted in order to protect certain interests like national security, defence or privacy. It sets forth the minimum standards to be applied in the processing of requests for access to official documents, review procedure and complementary measures and it has the flexibility required to allow national laws to build on this foundation and provide even greater access to official documents.

"Article 2 – Right of access to official documents
1. Each Party shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities.
2. Each Party shall take the necessary measures in its domestic law to give effect to the provisions for access to official documents set out in this Convention.
3. These measures shall be taken at the latest at the time of entry into force of this Convention in respect of that Party.

Article 3 – Possible limitations to access to official documents
1. Each Party may limit the right of access to official documents. Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:
a. national security, defence and international relations;
b. public safety;
c. the prevention, investigation and prosecution of criminal activities;
d. disciplinary investigations;
e. inspection, control and supervision by public authorities;

[2] Opened to signature on 18 June 2009. It has so far been ratified by seven member States (Bosnia and Herzegovina, Finland, Hungary, Lithuania, Montenegro, Norway and Sweden) and will enter into force on the first day of the month following the expiration of three months after the date on which ten member States of the Council of Europe express their consent to be bound by the Convention

f. privacy and other legitimate private interests;

g. commercial and other economic interests;

h. the economic, monetary and exchange rate policies of the State;

i. the equality of parties in court proceedings and the effective administration of justice;

j. environment; or

k. the deliberations within or between public authorities concerning the examination of a matter.

Concerned States may, at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that communication with the reigning Family and its Household or the Head of State shall also be included among the possible limitations.

2. Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.

3. The Parties shall consider setting time limits beyond which the limitations mentioned in paragraph 1 would no longer apply.

Article 4 – Requests for access to official documents

1. An applicant for an official document shall not be obliged to give reasons for having access to the official document.(…)"