

Access to official documents

Steering Committee for Human Rights

Evolution of the Court's jurisprudence on access to information under Article 10 of the European Convention on Human Rights

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Early case-law

Factors derived from the Court's own case law, and the Convention itself, reinforcing the understanding that Article 10 of the European Convention on Human Rights (ECHR) did not secure a standalone right of access to information held by public authorities / access to public documents.

- Wording of Article 10 – Article 10 ECHR does not include an explicit reference to the freedom to “seek” information (in comparison to the International Covenant on Civil and Political Rights (Article 19) and the Universal Declaration on Human Rights (Article 19))
- Early case law of the Court
 - “Leander principle” : “the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that “others wish or may be willing to impart to him.” ([Leander v. Sweden](#))
 - No positive obligation: Article 10 did not confer on a State positive obligations to collect and disseminate information of its own motion, even if it concerns private data – on health hazard or environmental impact([Guerra and Others v. Italy](#)).

Moving towards a limited right to access to information

The Court moved from the rejection of the right to access information to gradually acknowledging limited right to access information falls within the right to freedom of expression as protected by Article 10 (*Társaság a Szabadságjogokért v. Hungary*, *Youth Initiative for Human Rights v. Serbia*, *Kenedi v. Hungary*): in circumstances where one arm of the State had recognized a right to receive information (e.g. a court judgment, legislation) but another arm of the State had failed to give effect to that right.

This stand of the case-law hindered the Court's ability to keep up with the consensus within international community, including the CoE member states on the issue.

Hungarian Helsinki Committee v. Hungary (Grand Chamber)

The Grand Chamber recognised the right to access information as part of the right to freedom of expression guaranteed by Article 10, however not as a fully-fledged / stand- alone right under the provision, but a right that could arise in two scenarios:

- (1) where disclosure of the information has been imposed by an enforceable judicial order (as confirmed in the Court' previous case-law), and
- (2) in circumstances where access to the information is instrumental for an individual's exercise of their right to freedom of expression, and thus -as a consequence - where the denial of information

constitutes an interference with the right to freedom of expression. This condition can be understood as different and more restrictive than access provided under national Freedom of Information Acts in the interest of, amongst others, good governance, transparency of public institutions.

Preconditions and follow-up cases

The Court set out four elements, that could indicate that a denial of access to information falls within the second category of case. Admittedly, these elements are not necessarily present in the legislation of member states or can be interpreted differently in domestic practice. Consequently, applicants before the Court need to be conscious of how to construct their case before the domestic jurisdictions and before the court.

1. *The purpose of the information request*: before Article 10 can come into play, the applicant needs to substantiate that the information sought is necessary for the exercise of the right to freedom of expression.

The starting point of the Court's assessment is not a general right to the transparency of governance or decision-making but the right to freedom of expression. Thus the applicant needs to demonstrate that the denial of information would hinder or impair his or her right to the exercise of the right. Does the applicant need to demonstrate the underlying reason of his data request before the domestic authorities?

See for example

- o Saure v. Germany

The Court held that it had been incumbent on the applicant to substantiate why physical access to the files (regarding Mr. U.B., a former Prime Minister of the *Land* of Schleswig-Holstein who had died in a hotel in Switzerland in 1987), had been instrumental for the exercise of his right to freedom of expression. However, he had not done so and had not claimed before the domestic courts that he had been prevented from doing so. He had limited himself to a general reference to his watchdog role as a journalist, to the public interest in the circumstances and the voluminous scope of the files concerned.

- o Saure v. Germany (no. 2)

"There is a requirement on the applicants under the Convention provision to substantiate the purpose of their request, both before the domestic courts and before this Court. It is not sufficient for an applicant to make an abstract point to the effect that certain information should be made accessible as a matter of general principle of openness. More generally, it should be reiterated that the Court's task is not to review domestic law in the abstract but to determine whether the way in which it was applied to or affected the applicant gave rise to a breach of the Convention."

see also:

Namazli v. Azerbaijan "it would not be sufficient for an applicant to explain that purpose for the first time in the proceedings before the Court"

Compare

Šeks v. Croatia: the applicant sought access to the classified documents in order to use the information obtained for the purposes of writing a book about the creation of the Croatian State. Under domestic law, he was not under the obligation to state the reasons for which he was requesting access to the documents in question. It was not strictly relevant whether the

documents were indeed crucial for his book; what is sufficient is that the applicant sought access to them in order to provide his readers with a full and detailed chronology of the events that took place during the period referred to.

2. *The nature of the information sought*: the information to which access is sought must generally meet a “public-interest test” for the disclosure to be necessary under Article 10.
 - o The openness and transparency in government decision-making, (underlying Freedom of Information Acts generally) and the requirement that the information sought satisfy a public-interest test in order to prompt a need for disclosure under Article 10 of the Convention are of a different nature
 - o question of the relevance of qualification under domestic law (public information, information subject to disclosure in the public interest, etc)

Zöldi v. Hungary : whether the identity of grant recipients of two foundations (carrying out public functions) set up by the National Bank qualify as public-interest data under the Convention? The Court found that information held by legal entities performing functions of a public nature are of public interest.

- o Question of relevance of domestic qualification of internal documents, documents considered preparatory for decision-making

Sieć Obywatelska Watchdog Polska v. Poland : do the meetings of the President and Vice President of the Constitutional Court constitutes internal documents not subject to disclosure or public-interest data?

The applicant NGO asked the Constitutional Court to disclose information concerning a list of professional meetings held the President of the Constitutional Court and the Vice-president of the Constitutional Court. The request was denied on the grounds that the meetings calendar was not an official but internal document and did not constitute public information pursuant to the provisions of the act on Access to Public Information. Such line of the domestic case-law in essence did not take into account the Convention criteria in respect of what information can be considered to be of public interest.

- o What is the relevance of national law providing exemptions from disclosure (on grounds of national security, personal data protection etc)? can exceptions be applied automatically?

MIKASHVILI and others v. Georgia: exact custodial address of the person convicted of murder in a high-profile criminal case, access to information about the income earned by civil servants, Georgian Young Lawyer' Association v. Georgia: Ministry of the Interior's refusal to disclose the names of the police officers who had been sanctioned for the excessive use force during demonstrations, Studio Monitori and Others v. Georgia access to material in criminal proceedings against unrelated third parties

- o Obligation on domestic authorities to carry out a balancing of the interests at stake.

NEDERLANDSE OMROEP STICHTING and Others v. the Netherlands

The applicants are the public service broadcaster, a commercial broadcaster, and a national who on various dates in 2014 sought access to information relevant to the handling of the crisis by the Government regarding the downing of flight MH17, including all documents of the Ministerial Committee for Crisis Management MH17 and the Interdepartmental Committee for Crisis Management MH17 and diplomatic correspondence. They relied on the Transparency of Public

Administration Act. The requested information was released in part, some documents were redacted, some were withheld in their entirety.

The information sought by the applicants (regarding the downing of flight MH17, including all documents of the Ministerial Committee for Crisis Management MH17 and the Interdepartmental Committee for Crisis Management MH17 and diplomatic correspondence) would contribute to a discussion of public interest, the domestic authorities denial to transfer the information on grounds of protection of the rights of others – in particular, the victims, their next of kin and civil servants not holding public positions, security of Dutch personnel in the disaster zone, the relations between the Netherlands and other States or international organisations, the privacy of members of the public and civil servants, or the expression of personal opinions on policy in documents for internal consultation reflected a careful balancing by the national authorities of the interests at stake.

- o Does the information need to be crucial for the exercise of freedom of expression?

Studio Monitori and Others v. Georgia even in the absence of the information sought, the applicants were able to proceed with their journalistic investigation, thus the relevant criminal case material was not instrumental for the effective exercise of their freedom-of-expression rights

Contrast with

Šeks v. Croatia: (see above) It was not strictly relevant whether the documents were indeed crucial for his book; what is sufficient is that the applicant sought access to them in order to provide his readers with a full and detailed chronology of the events that took place during the period referred to.)

- o Does the information need to be accurate? Are domestic courts obliged to review the accuracy of released information?

Association Burestop 55 and others v. France: the alleged interference did not result from a refusal to provide access to information on environmental hazards, but from the alleged dishonesty, inaccuracy or inadequacy of information supplied by a public authority under an obligation to provide information prescribed by domestic law, which was akin to a refusal to provide information.

3. The role of the applicant: where the individual is seeking access to the information with a view to informing the public in a capacity as a public or social watchdog

Generous interpretation given by the Grand Chamber on watchdogs : “given the important role played by the Internet in enhancing the public’s access to news and facilitating the dissemination of information, the function of bloggers and popular users of the social media may be also assimilated to that of “public watchdogs” in so far as the protection afforded by Article 10 is concerned.”

- o *Journalists*

Zöldi v. Hungary

- o Watchdogs:

Sieć Obywatelska Watchdog Polska v. Poland: applicant NGO did not need the information sought to prepare a press article or to complete a survey but since its activity amounted to gathering and disseminating information which might be important for the public or contribute to public debate, the Court excepted its role as “watchdogs”..

Contrast with

Centre for Democracy and the Rule of Law v. Ukraine: the applicant organisation lodged an application with the Constitutional Court, asking to be provided with copies of academic legal opinions underlying the court’s decision. It did not submit any information which would indicate that it had any particular

experience in or that it pursued activities related to constitutional issues, as its profile of activities concerned media and information.

- o Access to information of directly interested citizens (under national law) ?

Yuriy Chumak v. Ukraine;

The applicant submitted a written information request to the President of Ukraine in relation to the practice of unlawful restriction of access to normative legal acts. He was not provided with the information because of its confidential nature and the fact that such information did not have any implications for his rights and freedoms.

4. Ready and available information

Sieć Obywatelska Watchdog Polska v. Poland : the NGO asked for the records of everyone who had come into and out of the Constitutional Court building during a period of 6 months. There was no obligation in domestic law to keep records of persons entering and leaving public buildings and it could not be effectively verified whether the requested logbook actually existed. Thus there was no evidence that the information sought by the applicant NGO was “ready and accessible”.