05 November 2015

Lord Burns GCB
Chair of the Independent Commission
on Freedom of Information
Post point 9.54
9th Floor
102 Petty France
London
SW1H 9AJ

Dear Lord Burns GCB

FREEDOM OF INFORMATION COMMISSION CALL FOR PUBLIC EVIDENCE CONSULTATION

1. I write in answer to the public consultation of the Freedom of Information Commission call for public evidence relating to the consultation regarding the Commission's consideration of the workings of the Freedom of Information Act 2000.

2. I am a frequent user of the Freedom of Information Act 2000 and object most vehemently to any proposed changes or attempts to water down the effects of the current Act.

3. I have made many FOIs to many local authorities and other public bodies, including central government.

4. The Freedom of Information Act 2000 is in my view, working very efficiently and it was considered at an inquiry by the Justice Committee of the House of Commons, who produced its report in 2012, copy enclosed.

5. The Committee concluded that in its view, the Act was working perfectly adequately. I therefore see no reason why the Commission should reach any contrary view accordingly.

6. In addition, the Commission should be aware that the case of Magyar Helsinki Bizottság v. Hungary (application no. 18030/11) was heard on 4 November 2015 before the Grand Chamber of the ECHR, copy documents enclosed, including the submissions filed by Mr. Richard Clayton QC on behalf of (i) the Media Legal Defence Initiative (a charity which helps journalists and independent media outlets worldwide to defend their rights), (ii) the Campaign for Freedom of Information (a non-profit organisation working to improve public access to official information in the UK), (iii) ARTICLE 19 (a charity which defends and promotes the freedoms of expression and information around the world), (iv) the Access to Information Programme (a Bulgarian NGO working to enhance the exercise of the right of access to information) and (v) the Hungarian Civil

Liberties Union (a human rights NGO working to promote human and constitutional rights in Hungary).

7. This case is the first time that the Grand Chamber has considered whether article 10 ECHR gives a right to obtain information from public bodies as part of "freedom of expression" and the "right to receive and impart information and ideas".

8. The UK was also granted the right to intervene in the case, and judgment has now been reserved.

9. Until however the judgment has been delivered by the court, it is impossible to say whether it will find that article 10(1) ECHR does impose a right to obtain information from public authorities or not.

10. However, if that does turn out to be the case, any proposals put forward by the Commission and any amending legislation, if any that is brought forward, will have to take account of the effects of the judgment accordingly.

11. I therefore make the following points relating to this particular consultation accordingly.

PERCEIVED INDEPENDENCE AND/OR IMPARTIALITY OF THE FREEDOM OF INFORMATION COMMISSION

1. I consider that the setting up of this Commission by the Cabinet Office, who have a vested interest in maintaining secrecy and lack of accountability and transparency in Government cannot be seen to be either independent or impartial.

2. In addition, the Commission appear to be using offices provided by the Ministry of Justice, who were previously responsible for overseeing the smooth running of the Act, before that was arbitrarily taken over by the Cabinet Office.

3. In particular, I have concerns regarding the appointment of the Rt. Hon. Jack Straw and the Rt. Hon. Lord Howard of Lymphe to the Commission.

4. Both of them have been former Home Secretaries and the Rt. Hon. Jack Straw is on record as having voiced his opposition to the Freedom of Information Act both when in government and subsequently.

5. Indeed, it was widely reported that the Rt. Hon. Jack Straw was opposed to the Freedom of Information Bill during its passage through Parliament, and was responsible for ensuring that a large number of exemptions were included in the Bill in order to give his support.

6. The Rt. Hon. Lord Howard of Lymphe has also publicly voiced similar concerns. In addition, Dame Patricia Hodgson has also voiced her opposition to the Act whilst she was chair of Ofcom.

7. Accordingly, I object to all three of these persons being part of the Commission and invite them to recuse themselves and resign accordingly.

8. In addition, I consider that the terms of reference have been drawn up on a manner that seems to pre-determine the outcome of the Commission.

9. The terms of the questions appear to suggest the answers and are drafted in terms that create the presumption in favour of reform of the Act relating to all of the issues considered.

10. I consider that the Commission therefore doesn't have the appearance of independence and impartiality from an objective point of view, and that accordingly any of its findings will be vitiated accordingly.

CONSIDERATION OF THE QUESTIONS BEING CONSIDERED BY THE COMMISSION

Question 1: What protection should there be for information relating to the internal deliberations of public bodies? For how long after a decision does such information remain sensitive? Should different protections apply to different kinds of information that are currently protected by sections 35 and 36?

1. There should be no additional protection relating too the process of internal deliberations of public bodies.

2. There are already ample exemptions relating to withholding sensitive information and policy making, subject to a "public interest" test in sections 35-36 of the Freedom of Information Act 2000, and it is unnecessary and disproportionate to impose an absolute exemption.

3. The imposition of a "public interest" test is clearly an important safety valve and the public body is currently given ample opportunity to make out its case against disclosure under the balancing act that is applicable.

4. Furthermore, the availability of the current tiers of appeal procedures ensures that experts both within the Information Commission and sitting on the various appellate tribunals thereafter adequately review any irrational decisions.

5. Any imposition on a blanket ban on the right to seek such disclosures would mean that the public would be unable to hold public bodies to account and the workings of public bodies would be shrouded in unaccountability and a complete lack of transparency. This would be a fundamental attack on the democratic system accordingly.

6. Finally, if such exemptions were to be available all along the board, this would lead to a two-tier system of freedom of information between environmental information and the right to obtain information generally.

7. Currently, the right to obtain environmental information is governed by the Environmental Information Regulations 2004, and no similar Ministerial veto is available, nor can the regulations be amended, being the implementation of a EU Directive.

8. Therefore, it would be totally disproportionate to impose the right to issue a veto in general freedom of information matters when it isn't possible to do so in environmental matters.

9. The current proposals are clearly motivated by the fact that facts have come out regarding public bodies and their decisions that have caused embarrassment to the governments of the day.

10. In fact much valuable information has emerged regarding the functioning of such public bodies, by which the citizen has been able to hold wrong doing by public bodies to account accordingly.

Question 2: What protection should there be for information which relates to the process of collective Cabinet discussion and agreement? Is this information entitled to the same or greater protection than that afforded to other internal deliberative information? For how long should such material be protected?

1. There should be no additional protection relating too the process of collective discussion and agreement.

2. There are already exemptions relating to future publications and policy making, subject to a "public interest" test in sections 27-33 of the Freedom of Information Act 2000, and it is unnecessary and disproportionate to impose an absolute exemption.

3. The imposition of a "public interest" test is clearly an important safety valve and the public body is currently given ample opportunity to make out its case against disclosure under the balancing act that is applicable.

4. Furthermore, the availability of the current tiers of appeal procedures ensures that experts both within the Information Commission and sitting on the various appellate tribunals thereafter adequately review any irrational decisions.

5. Any imposition on a blanket ban on the right to seek such disclosures would mean that the public would be unable to hold the executive to account and the workings of government would be shrouded in unaccountability and a complete lack of transparency. This would be a fundamental attack on the democratic system accordingly.

6. Finally, if such exemptions were to be available all along the board, this would lead to a two-tier system of freedom of information between environmental information and the right to obtain information generally.

7. Currently, the right to obtain environmental information is governed by the Environmental Information Regulations 2004, and no similar Ministerial veto is available, nor can the regulations be amended, being the implementation of a EU Directive.

8. Therefore, it would be totally disproportionate to impose the right to issue a veto in general freedom of information matters when it isn't possible to do so in environmental matters.

9. The current proposals are clearly motivated by the fact that facts have come out regarding government policy making and decisions that have caused embarrassment to the governments of the day.

Question 3: What protection should there be for information which involves candid assessment of risks? For how long does such information remain sensitive?

1. The current exemptions both absolute and subject to the "public interest" test currently provide adequate safeguards for all of the reasons previously set out.

2. Finally, if such exemptions were to be available all along the board, this would lead to a two-tier system of freedom of information between environmental information and the right to obtain information generally.

3. Currently, the right to obtain environmental information is governed by the Environmental Information Regulations 2004, and no similar Ministerial veto is available, nor can the regulations be amended, being the implementation of a EU Directive.

4. Therefore, it would be totally disproportionate to impose the right to issue a veto in general freedom of information matters when it isn't possible to do so in environmental matters.

5. If however, if such further exemptions were to be imposed, then they should be for a limited time only until the risks had passed regarding disclosure. This shouldn't be too rigid and should be flexible to meet the particular circumstances of each case accordingly.

6. It would be disproportionate to impose any further absolute exemptions accordingly.

7. Question 4: Should the executive have a veto (subject to judicial review) over the release of information? If so, how should this operate and what safeguards are required? If not, what implications does this have for the rest of the Act, and how could government protect sensitive information from disclosure instead?

8. This issue as is well known was fully considered in R. (Evans) v. Attorney General [2015] 2 W.L.R. 813 before the Supreme Court when the issue of the veto overruling a decision of the Information Commissioner or the First Tier Tribunal was fully considered.

9. The court held that it was quite wrong for the Attorney General to consider imposing a veto simply because he disagreed with the Information Commissioner's or the Tribunal's decision. There is a perfectly adequate appeal system and that in my view provides all of the safeguards to prevent any irrational decisions being implemented.

10. It also seems quite wrong in principle that a Government Minister should have the right of veto over information that he personally considers that the public shouldn't see or know about.

11. In effect, the Government Minister is acting as Judge and jury in his or her own cause and as such, Government Ministers should have the courage of their convictions to be able to pursue their respective cases before the appropriate tribunals and respect their decisions as a result.

12. No one is of course suggesting that a Government Minister shouldn't exercise the right of appeal in an appropriate case, and there should also be a level playing field between the executive and the citizen so far as remedies are concerned.

13. Finally, if such vetoes were to be available all along the board, this would lead to a two-tier system of freedom of information between environmental information and the right to obtain information generally.

14. Currently, the right to obtain environmental information is governed by the Environmental Information Regulations 2004, and no similar Ministerial veto is available, nor can the regulations be amended, being the implementation of a EU Directive.

15. Therefore, it would be totally disproportionate to impose the right to issue a veto in general freedom of information matters when it isn't possible to do so in environmental matters.

Question 5: What is the appropriate enforcement and appeal system for freedom of information requests?

1. The current review by the Information Commissioner and subsequent right of appeal to the First Tier Tribunal under section 57(1) of the Freedom of Information Act 2000 currently satisfies the procedural guarantees under article 6(1) ECHR as incorporated under schedule 1 of the Human Rights Act 1998, taking the proceedings as a whole.

2. It is right that there should be a rehearing on the merits both regarding factual and legal issues before the First Tier Tribunal, to provide for a public hearing and public judgment as required by article 6(1) ECHR.

3. Furthermore, the availability of the current tiers of appeal procedures ensures that experts both within the Information Commission and sitting on the various appellate tribunals thereafter adequately review any irrational decisions.

4. The further avenue of appeal with permission to the Upper Tribunal on points of law and jurisdiction appear also to be proportionate, as the full hearing on the merits has already taken place.

5. There seems no need for any changes, and it would also be quite wrong to seek to impose any fees for appealing to inferior tribunals, which in any event operate a much more informal regime than that currently provided by the court system proper.

6. Any imposition of fees would accordingly be a denial of the right of access to justice accordingly.

Question 6: Is the burden imposed on public authorities under the Act justified by the public interest in the public's right to know? Or are controls needed to reduce the burden of FoI on public authorities? If controls are justified, should these be targeted at the kinds of requests which impose a disproportionate burden on public authorities? Which kinds of requests do impose a disproportionate burden?

This really challenges the very purpose of enacting the Freedom of Information Act in the first place.

Of course it must have been obvious that public bodies would have to deal with FOI requests and there has been imposed financial ceilings on both local and central government regarding the amount of time that may be expended on a particular request.

Under the current Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, the current ceiling is £600 for central government and £400 for other public bodies. This seems entirely proportionate and there is no need for any changes accordingly.

This in my view is sufficient, and it is of course subject to challenge via the Information Commissioner and the relevant tribunals.

It would also be totally disproportionate to seek to impose any fees for making FOI requests as this would be discriminatory and would mean that FOI requests would only be available for the rich and powerful and also media organisations.

This may also infringe article 14 ECHR as incorporated under article 6(1) of the Human Rights Act 1998 regarding discrimination against ordinary citizens seeking to hold the executive to account.

It is also extremely difficult to determine which types of requests impose any significant burden on public bodies, as they are not best placed to give a value judgment on the matter.

If a particular FOI request is misconceived or time wasting, there are already provisions to deal with that, but it is strongly contended that the current provisions of section 14(1) of the Freedom of Information Act 2000 are not sufficiently defined to determine on what grounds a particular FOI request is deemed to be "vexatious" in spite of the recent ruling in Dransfield v. Information Commissioner [2015] EWCA Civ 454.

Unfortunately in Dransfield, the Court of Appeal in effect simply whitewashed the Upper Tribunal decision and missed the opportunity of adequately considering and defining the criteria that should be applicable to identify misconceived and time wasting FOI requests.

Such a requirement that the law must be sufficiently precise and foreseeable to satisfy the "prescribed by law" requirements of article 10(1) ECHR as incorporated under schedule 1 of the Human Rights Act 1998.

It is contended that at present, section 14(1) of the Freedom of Information Act 2000 fails this important ECHR test accordingly.

Yours sincerely

Terence Ewing

Encs

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Press Release
issued by the Registrar of the Court

ECHR 348 (2015)
04.11.2015

Grand Chamber hearing concerning non-governmental organisation's complaint of being refused access to information

The European Court of Human Rights is holding a **Grand Chamber**[1] hearing today **Wednesday 4 November 2015 at 9.15 a.m.** in the case of **Magyar Helsinki Bizottság v. Hungary** (application no. 18030/11)

The case concerns the authorities' refusal to provide an NGO with information related to the work of court-appointed defenders.

The hearing will be broadcast from 2.30 p.m. on the Court's Internet site (www.echr.coe.int). After the hearing the Court will begin its deliberations, which will be held in private. Its ruling in the case will, however, be made at a later stage.

The applicant, Magyar Helsinki Bizottság (Hungarian Helsinki Committee), is a non-governmental organisation (NGO) based in Budapest. It is active in the field of monitoring the implementation of international human rights instruments in Hungary and in related advocacy. In pursuit of a survey on the quality of defence provided by public defenders, the organisation requested from a number of police departments the names of the public defenders selected by them in 2008 and the number of appointments per lawyer involved. The organisation referred to the 1992 Data Act, arguing that the data requested constituted public information.

In 2009 the organisation brought court proceedings against two police departments which had rejected the request for information. After a first-instance judgment in favour of the organisation the claim was rejected by the appeal court, holding that public defenders did not carry out a task of public interest and that therefore the release of information concerning those defenders could not be successfully demanded under the 1992 Data Act. That decision was upheld by the Supreme Court in 2010, which found that while the implementation, by defence counsels, of the constitutional right of defence was a task of the State, the public defenders' subsequent activity was a private one and therefore their names did not constitute public information.

The applicant NGO relies on Article 10 of the European Convention on Human Rights, complaining that the Hungarian courts' refusal to order the surrender of the information in question amounted to a breach of its right to access to information.

Procedure

The application was lodged with the European Court of Human Rights on 14 March 2011. On 26 May 2015 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber. The Government of the United Kingdom was granted leave to intervene as a third-party in the hearing.

1 Under Article 30 of the European Convention on Human Rights, "Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects. "

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Composition of the Court

The case will be heard by a Grand Chamber, composed as follows:

Guido **Raimondi** (Italy), *President*,
András **Sajó** (Hungary),
Işıl **Karakaş** (Turkey),
Luis **López Guerra** (Spain),
Mirjana **Lazarova Trajkovska** ("The former Yugoslav Republic of Macedonia"),
Angelika **Nußberger** (Germany),
Nebojša **Vučinić** (Montenegro)
Kristina **Pardalos** (San Marino),
Ganna **Yudkivska** (Ukraine),
Linos-Alexandre **Sicilianos** (Greece),
Helen **Keller** (Switzerland),
André **Potocki** (France),
Aleš **Pejchal** (the Czech Republic),
Egidijus **Kūris** (Lithuania),
Robert **Spano** (Iceland),
Iulia Antoanella **Motoc** (Romania),
Jon Fridrik **Kjølbro** (Denmark)*, judges*,
Ksenija **Turković** (Croatia),
Boštjan M. **Zupančič** (Slovenia),
Mārtiņš **Mits** (Latvia)
Síofra **O'Leary** (Ireland), *substitute judges*,

and also Lawrence **Early**, *Jurisconsult.*

Representatives of the parties

Government of Hungary

Zoltán **Tallódi**, *Agent*,
Mónika **Weller**, *Co-Agent*,

Applicant

Tamas **Fazekas**, *Counsel*, Tibor Lajos **Sepsi**, *Counsel,* Csaba **Tordai** and Nóra **Novoszádek**, *Advisers*

Third party

Government of the United Kingdom

Jason **Coppel QC,** *Counsel,*
Anna **McLeod**, *Agent,*
Asma **Mahmood**, *Adviser.*

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.

BACKGROUND

1. These written comments are submitted by Fair Trials, in accordance with the permission to intervene granted by the Deputy Section Registrar of the Second Section by letter of 1 June 2015 in accordance with Article 36(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the 'Convention') and Rule 44(2) of the Rules of the Court.

2. Fair Trials focuses on the right to a fair trial protected by Article 6 of the Convention. We intervene in this case because it demonstrates how respect for other rights helps protect the right to a fair trial. Specifically, access to information, as protected by Article 10 of the Convention, may help to drive good practice by criminal justice institutions (and the refusal of such access leave bad practice undetected, at the expense of many unheard individual holders of Article 6 rights).

INTRODUCTION

3. The question addressed to the parties asks whether there has been an interference with the applicant's right to receive information within the meaning of Article 10(1) of the Convention, and if so whether that interference was necessary in terms of Article 10(2) of the Convention, by reference to the case-law cited in *Társaság a Szabadságjogokért v. Hungary*.[1]

4. We understand that the existence of an interference is not disputed before the Court. Rather, the issue is whether a restriction on access, by an NGO, to information relating to appointments of ex officio lawyers under a legal aid system, where this restriction is founded on the privacy of legal services provided by a lawyer, is compatible with Article 10(2) of the Convention. As set out in *Társaság*, the permissibility of an interference under Article 10(2) is assessed by reference to three elements: 'whether it was 'prescribed by law', whether it pursued a 'legitimate aim' and whether it was 'necessary in a democratic society'.[2] (paragraphs 30-39). Fair Trials will focus solely on the final element of this test. We note that, in relation to the 'necessity in a democratic society' element, the Court has developed general principles, with certain more specific lines of case-law relating to different kinds of restrictions and issues.

5. The general principles were recently restated in *Animal Defenders International v. United Kingdom*[3] as follows (we paraphrase): **(i)** freedom of expression constitutes one of the essential foundations of a democratic society; exceptions are to be construed strictly and the necessity of interferences convincingly established; **(ii)** the restriction must be justified by a 'pressing social need'; states enjoy a margin of appreciation but the Court has a supervisory jurisdiction embracing both the legislation and the decisions applying it; and **(iii)** the Court looks at the interference complained of to determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'.[4]

6. In applying these general principles, the Court has then developed further lines of authority, including in relation to interferences pursing the aim of the 'protection of the reputation or rights of others'. In that context, the Court 'may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention', i.e. Article 10 and Article 8[5]). The Court has, so far, dealt with this balancing exercise in the context of publications with adverse consequences on individual reputations. This case raises the question of the balancing of these rights in relation to the access to information held by public authorities which may pertain to individual identities.

7. This intervention seeks to assist the Court in finding the right approach to this case, making the following observations: (A) 'watchdog' scrutiny of police appointments of legal aid lawyers is an essential indirect guarantor of respect for fair trial rights, so information as to such appointments is important public interest information calling for utmost protection under Article 10; (B) the countervailing interest relating to the privacy of lawyers' identities is limited, due to their voluntary involvement, in their capacity as members of a profession, in a process involving public scrutiny; and (C) to the extent that any truly private information is involved, national authorities are required to conduct a balancing exercise, which requires adequate reasons for any limitation of the activities of watchdogs seeking to scrutinise the justice system.

(A) THE ARTICLE 10 RIGHT

8. The Court considers states' margin of appreciation to interfere with Article 10 rights particularly narrow where an issue of 'general interest' is at stake, including the functioning of justice.[6] In the same way, access to public information regarding legal aid appointments by police should, without question, merit utmost protection under Article 10. As explained below, (1) legal aid is a fundamental component of fair justice, as recognised in international instruments, and concerns as to police appointments are a matter of general concern. Further, (2) due to the vacuum of direct control over legal services quality arising from the confidentiality of lawyer-client relations and the limited scope for effective use of complaints mechanisms, external scrutiny of a system by NGOs represents an important guarantee of respect for Article 6 at large.

(1) Legal aid and concerns about police appointments

Legal aid: a condition *sine qua non* to a fair trial

9. If legal defence were represented as Maslow's pyramid of human needs, funding for assistance by a lawyer would be the bottom layer: the precondition without which further considerations are essentially theoretical. Funding enables the exercise of the right of access to a lawyer, which, as the Court noted in *A.T. v Luxembourg*,[7] we regard as the 'gateway' to the enjoyment of other

rights, such as interpretation and translation, access to the case file, seeking alternative investigative steps etc. – i.e. the 'whole range of services specifically associated with legal assistance' in the Court's words.[8] In the case of a person who cannot afford a lawyer, accessing this service depends upon legal aid. As explained below, the right to legal aid is recognised by authoritative instruments as a cornerstone of justice.

10. The General Assembly of the United Nations, at its plenary session of 20 December 2012, unanimously adopted the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems[9] (UNPGs). The UNPGs are premised on the basis that 'legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law and that it is a foundation for the enjoyment of other rights, including the right to a fair trial, as a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process'.[10]

11. In 2009, the European Union adopted a Resolution on a roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings (the 'Roadmap'). Pursuant to that plan, three Directives have been adopted to date further to the Roadmap: Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings;[11] Directive 2012/12/13 on the right to information in criminal proceedings;[12] and Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings[13] (the 'Access to a Lawyer Directive').

12. The Roadmap originally envisaged a measure combining the right of access to a lawyer and the right to legal aid (the so-called 'Measure C'), reflecting the interconnection of the two. In order to make progress, however, Measure C was 'de-coupled' and the Access to a Lawyer Directive adopted first in October 2013. The following month, the European Commission (the 'Commission') brought forward a further proposal for a directive on 'provisional legal aid'[14] (the 'Proposed Directive'), combined with a Commission Recommendation[15] relating to legal aid more generally (the 'Recommendation').

13. The Proposed Directive, in the form put forward by the European Commission, was limited in scope, applicable only to persons deprived of liberty and directed at so-called 'provisional legal aid', essentially the mechanism for ensuring access to a legal advice at the early stages following arrest. Though Fair Trials considered this approach unduly narrow, it does of course correspond to the emphasis on early assistance by a lawyer in *Salduz v. Turkey*[16] which underlined the particular vulnerability of the suspect at the early stages of proceedings – usually at a police station following arrest – which can only be compensated by the presence of a lawyer to protect them against self-incrimination and irreversible prejudice to their rights of defence.[17] The European

Parliament has since proposed expanding the scope of the Directive to cover all cases (not just those deprived of liberty) and to cover the entire criminal proceedings.

14. As explained further below, these instruments emphasise the role of quality control systems to ensure that legal aid services perform their function effectively. First, however, we set out the major concerns about quality and effectiveness in legal aid systems, as revealed by members of the Legal Experts Advisory Panel (an EU-wide network of over 140 criminal justice experts representing all 28 EU Member States and coordinated by Fair Trials) and other materials.

Concerns regarding police appointments of legal aid lawyers

15. Fair Trials' 2012 report, 'The Practical Operation of Legal Aid in the EU'[18] (the '2012 Report'), based on consultations with the Legal Experts Advisory Panel, points out that, where legal aid lawyers were appointed by police, there were concerns that their advice might be prejudiced as they are unlikely to be instructed in the future if they challenge the investigation. This is a similar phenomenon to that described by defence lawyers in relation to police station interpreters, whose independence is questioned due to the existence of commercial relationships arising from their working regularly with the relevant police force.[19]

16. This is not an abstract, theoretical issue. The judgments of the Court themselves associate police appointments of lawyers with defence rights violations. For instance, in *Martin v. Estonia*,[20] a 19 year-old suspect 'waived' his right to be assisted by the family-appointed lawyer, mandated instead a publicly funded lawyer he maintained he had been pressured to mandate by the police, and while represented by the latter made admissions resulting in his conviction and imprisonment, resulting in a breach of Article 6(3)(c) of the Convention. In *Dvorski v. Croatia*,[21] a 21 year-old suspect appointed a lawyer (a former police officer) suggested by police after the family-appointed lawyer was denied access to him and made confessions which contributed to his conviction and imprisonment; this raised 'serious concerns' as to respect for Article 6(3)(c).[22]

17. The United Nations document 'Early access to legal aid in criminal justice processes: a handbook for policy-makers and practitioners'[23] (the 'UNPGs Handbook'), designed for the implementation of the UNPGs, recognises the risk to independence linked to police appointments, noting that '[e]xperience in a number of countries where criminal legal aid is provided by lawyers in private practice shows that independence may be compromised by the way in which lawyers are assigned to cases, as well as by the methods of remuneration' and discusses whether lawyers are able to 'resist improper influences' where they are 'dependent for their livelihood on the police or judiciary'.[24] It continues, in relation to systems where police are responsible for appointments, that 'a police officer or prosecutor will have a direct interest in the appointment of a lawyer to advise and assist a suspect or accused person, and it is difficult to ensure that appointment decisions are

made according to proper and appropriate criteria'.[25] Citing a report from Hungary, it points out that 'there is evidence from a number of countries that such schemes facilitate or encourage improper relationships between lawyers and those appointing them, resulting in corruption or poor quality of legal aid provision'.[26]

18. Another concern is the quality of legal aid service provision. The 2012 document and Fair Trials' position paper[27] on the Proposed Directive highlighted that, since the remuneration of legal aid services is often very low, services of this nature are often not of sufficient quality. Practitioners note that such lawyers may be young and inexperienced, and less able to assert themselves against police (particularly given that, as reported in other Fair Trials documents,[28] lawyers' ability to participate in questioning is currently not always clearly regulated and may depend upon the skills, confidence and experience of the individual lawyer). Thus, lawyers acting in this context may be less able or willing to protect their clients against infringements of their rights, and it cannot, of course, be excluded that police will take account of the competences of a given lawyer when making a selection under the national system. So even in the absence of a real 'commercial' independence issue, police appointments of lawyers may oppose fair trial interests.

19. There is no uniform practice as to the organisation of appointments under legal aid schemes. For the purposes of this intervention, we sought information from members of the Legal Experts Advisory Panel as to how legal aid systems operated in their countries. We were told as follows:

    a. In Luxembourg, a pool of lawyers are available on standby under a *permanence* (duty lawyer system) operated by the bar association, one of two (one for police, one for hearings before the investigating judge. While police are responsible for selecting a lawyer from the list and making contact with them, lawyers are assigned to the permanence on a rotating basis, half a dozen at a time.

    b. In Estonia, the police make a request to the Bar Association, which operates an electronic solution which operates on a random basis, selecting from among approximately 130 lawyers of the 900 registered to practice in Estonia, though there are concerns as to the quality of lawyers acting in such cases.

    c. In Poland, though the formal system of court appointment intervenes only after the first appearance before a judge (leaving many people unrepresented in police questioning), Regional Bar Associations operate lists of duty lawyers to enable early assistance and they (the bar associations) make appointments from that list.

    d. In the Czech Republic, legal aid lawyer appointments are made by the court (including for the purposes of questioning by police). The court cannot appoint any lawyer but has to

proceed according to the sequence of names of the attorneys in the list of lawyers who have agreed to provide these services; the court must proceed go through in order.

20. As these examples show, allocation of competences to bar associations and other safeguards may provide some protection. In the absence of safeguards of this nature, where police are responsible for appointments, concerns will necessarily be more severe, emphasising the role of parties seeking to monitor their exercise of their powers (see point 2 below).

(2) <u>The watchdog role in relation to pre-trial justice and legal aid</u>

21. Given the above, the control of independence and quality is crucial to the fair operation of justice. Yet, due to the vacuum of other controls over the adequacy of legal aid provision (arising from the confidentiality of lawyer-client relationships and the limitations of individual complaints mechanisms), control driven by individual enforcement is necessarily limited. Instead, there is an emphasis on external control, including through the involvement of watchdogs.

The vacuum of direct control of quality

22. The Court's case-law recognises that the conduct of defence is primarily a matter between lawyer and client (see, inter alia, *Czekalla v. Portuga*[29]). Indeed, as for all matters which form part of the lawyer-client relationship, these are protected by professional confidentiality. Concretely, where quality and independence issues might arise – e.g. in relation to advice given and decisions made – the state is positively prohibited from monitoring these (see, in this regard, Article 4 of the Access to a Lawyer Directive, which imposes an unqualified confidentiality obligation). Thus, it is in principle not for the state to monitor the actual quality in a specific case.

23. In addition, the possibilities of controlling quality on a case by case basis are limited. While a state bears ultimate responsibility for securing fair trial rights (see *Czekalla v. Portugal* above, paragraph 65), state authorities' obligation to intervene in a case arises only where a manifest deficiency becomes known, e.g. the failure of a lawyer to take a key procedural step which deprives the client of defence opportunities. Absent a glaring error, it will generally depend upon the individual concerned to identify an issue and raise an issue before the courts. A beneficiary of legal aid, by definition, does not have access to alternative legal advice and may not be in a position to identify a failure in the legal services they are receiving, still less to complain effectively about them before the courts (or other avenues). In any case, such mechanisms are by definition *ex post facto* responses which, in relation to the early stages of proceedings, can intervene only after prejudice may have occurred to the rights of the defence.

The need for systemic-level safeguards

24. This vacuum of other controls places a particular focus upon systemic-level control and external scrutiny of legal aid systems. This is recognised in the international instruments mentioned earlier. Section 3 of the Recommendation deals with 'Effectiveness and Quality of Legal Aid', specifying that 'Legal assistance provided under legal aid schemes should be of high quality in order to ensure the fairness of proceedings. To this end, systems to ensure the quality of legal aid lawyers should be in place in all Member States'.[30] The Recommendation suggests systems of accreditation and training, and in relation to the appointment of legal aid lawyers suggests that there should be 'transparent and accountable mechanisms to ensure that suspects or accused persons can make an informed choice on legal assistance under the legal aid scheme, free from undue influence'.[31] The European Parliament, in its report adopted 18 May 2015,[32] proposed incorporating similar provisions into the Proposed Directive itself, inserting Article 5a which would require Member States to implement systems of accreditation and continuous professional training, and to ensure that appropriate training is provided to all staff involved in the decision-making on legal aid in criminal proceedings.

25. The UNPGs deal more specifically with the issue of appointments and independence, suggesting that states should create an independent body to administer legal aid services, which should be 'independent of the Government in decision-making related to legal aid and not be subject to the direction, control or financial intimidation of any person in the performance of its functions'.[33] It being clear that the system of appointments is crucial to the fair operation of a legal aid system, effective external oversight of an appointments system by a 'watchdog' will help control whether such a system is operating fairly in practice.

Data transparency as a driver of good practice

26. In that regard, it may be noted that the Proposed Directive includes a data collection obligation requiring Member States to collect data with regard to how the right to legal aid has been implemented and to forward this information to the Commission.[34] Alternative linguistic versions have been put forward by the Council of the European Union and the European Parliament, but there is no proposal to remove this obligation, showing that there is agreement between the EU institutions and Member States as to the need for data collection in order to monitor effectively the implementation of the right to legal aid. The UNPGs also favour data collection, affirming that 'States should ensure that mechanisms to track, monitor and evaluate legal aid are established and should continually strive to improve the provision of legal aid'.[35]

27. This recourse to data collection in legal aid is a reflection of the fact that detecting unsatisfactory practice, as opposed to individual violations, may require data analysis. For instance, there may be

a certain number of violations of Article 5(4) of the Convention by some Member States due to the failure to provide access to the case file in criminal proceedings, and remedies may be afforded in some cases. But this picture is complemented by reports such as that of the Helsinki Foundation for Human Rights,[36] detailing – based on requests for access to information – the statistical prevalence of refusals of access to the case file. Indeed, the documentation of such practices is, at some level, the underlying basis for the Roadmap, seeking to strengthen control of justice systems by, inter alia, submitting national legislation to Commission scrutiny.

28. This should be read against what can be identified as a general trend towards enabling external commentators to monitor performance of justice systems through statistical data. Under the auspices of the Council of Europe, the European Commission for the Efficiency of Justice, aimed at the 'improvement of the efficiency and functioning of justice', collects and analyses data relating to the administration of justice, e.g. budgets, number of legal aid cases, number of courts etc.[37] Within the European Union, the Justice Scoreboard,[38] drawing on a wide range of sources (e.g. Eurostat, World Bank, contact points in national justice systems etc.), evaluates matters such as length of proceedings in different kinds of cases, time for determination of appeals etc. The World Justice Rule of Law Index[39] compiles a ranking to quantify states' observance of the rule of law, including in the area of justice.

29. The reality is that such systems are indirect drivers of observance of fair trial rights protected by Article 6 at large. One can cite, for example, comments of Council of Europe experts regarding the independence of judiciary in Georgia, noting a 99.99% conviction rate between 2007 and 2010 vis à vis 50-60% internationally.[40] An individual accused may gain little from invoking their Article 6 right to an impartial tribunal, but external scrutiny by watchdogs may serve, over time, to address the systemic cause of injustices. The Court has several times recognised that protecting the Article 10 right of the press to report on court proceedings is consistent with the requirement under Article 6(1) for trials to be public, indicating that this weighs in the balance. Article 10 right-holders, likewise, help ensure compliance with Article 6 at a more general level.

(B) THE LIMITED COUNTERVAILING ARTICLE 8 RIGHT

30. In relation to the Article 10/8 balancing exercise, the Court regard to the particular status of the person concerned (e.g., in publication cases, whether the person invoking Article 8 rights is a politician or has volunteered themselves to scrutiny).[41] In line with this approach, it is important to distinguish between the role of a lawyer as an agent of a public justice system and the privacy of the client-lawyer relationship itself.

31. In several responses to our enquiry for this intervention, respondents confirmed that public lists were available with the names of those eligible to provide legal aid services, such that lawyers can

be said to have waived privacy rights to some degree. It is true that their inclusion in a list is different from their involvement in a specific case. But one may note that a witness in a public trial – compelled by law to attend – also has to accept that their involvement in the case will be known, and it would seem illogical for a lawyer, acting of his/her own volition and deriving financial benefit from public funds, to enjoy greater protection, particularly in relation to the early stages of criminal proceedings which the Court recognises are key to the fairness of the proceedings as a whole[42] and where 'watchdog' scrutiny of the system is most valuable. Nor does the publication of information concerning the appointment of a lawyer encroach upon the confidentiality of their client relationships (the names of clients are not needed, so even basic information about the lawyer-client relationship will not be known).

32. It follows from the above that the Court should be slow to recognise whether the 'rights of others' can properly be invoked as a justification at all, with respect to the identities of lawyers voluntarily participating in a public service. Only at the most tangential level does this information relate in any way to the private activity of a lawyer, in so far as it may enable conclusions as to any commercial relationship with the police due to frequency of appointments. This being precisely the object of the public interest enquiry protected by Article 10, a balancing exercise is needed.

(C) AS TO THE BALANCING EXERCISE ITSELF

33. To the extent that a countervailing Article 8 interest is recognised, the Court must verify whether the national authorities have established a 'pressing social need' for the restriction, struck a fair balance between the Article 8 and 10 rights at issue, and given 'relevant' and 'sufficient' grounds for their decisions, extending to those of independent courts.

34. We note, in this regard, that the Court essentially takes the view that the outcome of an application should not, in principle, vary whether it is brought by the Article 10 right-holder or the Article 8 right-holder, since the margin of appreciation should be the same.[43] From that perspective, guidance can be drawn from cases before the Court of Justice of the EU brought on the basis of EU data protection provisions to oppose publication of information (derived from the Court's own case-law on Article 8), which point to an approach consistent with the above suggestion:

    a. *Österreichischer Rundfunk*[44] concerned legislation enabling the communication of information to the public concerning salaries of civil servants, including the names of persons receiving such salaries; this was found permissible provided that the inclusion of the names was considered necessary to the legitimate aim of ensuring control of public spending. The direct link between a lawyer's identity and the exercise of a state function calls for a similar approach, with the necessity of any interference amply justified by the preponderant interest in ensuring external 'watchdog' control of fair trial rights.

b. *Schecke GBr v Hessen* and *Eifert v Hessen*[45] found invalid provisions of legislation which, in relation to natural persons who are beneficiaries of EU aid, imposed an obligation to publish their personal data 'without drawing a distinction based on relevant criteria such (…) *the frequency of such aid* or the nature and amount thereof' (our emphasis); by contrast, with regard to legal persons, the obligation to publish identifying details was proportionate as legal persons were in any case subject to more onerous obligations in relation to publication of their data. The involvement of a lawyer in a legal aid case or cases, in their capacity as members of a profession engaged in the delivery of justice, is closer to the legal person than the natural person and similarly calls for limited protection.

35. Of course, for present purposes, what matters is the autonomous meaning of the Convention, as opposed to definitions elsewhere – or under national law (see, by analogy, *Tatár and Fáber v. Hungary*[46]), as to whether a gathering was an 'assembly' within the meaning of Article 11 of the Convention). Further, the Court notes that it is only 'where a balancing exercise (…) has been undertaken by the national authorities *in conformity with the criteria laid down in the Court's case-law*'[47] (our emphasis) that it will be slow to interfere with the decision.

36. If a national authority categorises information as to appointments as private information, and not public interest information connected to the exercise of a state function requiring protection under Article 10, and does not therefore seek to balance the relevant interests at issue, it follows that the Court will not be in a position to identify 'relevant' or 'sufficient' reasons. That is to say, if a state is going to restrict access to this information so important for controlling fairness of a core part of the criminal justice system, it has to justify doing so by reference to the countervailing interests protected by Article 10(2); it may not meet that obligation if it applies the national freedom of information law in such a way as to exclude the information from its scope outright, such that no balancing act is carried out. Indeed, without such an analysis the national authority cannot consider compromise solutions – e.g. replacing names data with numbers to enable checks as to repetitive appointments while protecting lawyers' identities – in order to strike a fair balance.

37. If such a balancing exercise is carried out, Fair Trials suggests that it necessarily favours the disclosure of information regarding police appointments of lawyers, as access to this information ensures crucial external oversight and indirectly safeguards compliance with Article 6 of the Convention. Far greater justification than the protection of the identity or commercial activity of a lawyer would be required, and any such justification would need to be well substantiated. The reality of justice in today's Europe is that unfairness in legal aid cases is not easily detected on a case by case basis: the watchdog is needed and its activities must be protected.

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[3] *Animal Defenders International v. United Kingdom* App. No 48876/08 (Judgment of 22 April 2013).

[4] *Animal Defenders International v. United Kingdom*, paragraph 100.

[5] *Axel Springer A.G. v. Germany* App. No 39954/08 (Judgment of 7 February 2012), paragraph 43.

[6] See, for instance, *Roland Dumas v. France* App. No 34875/07 (Judgment of 15 July 2010), paragraph 43.

[7] *A.T. v. Luxembourg* App. No 30460/13 (Judgment of 9 April 2015), paragraph 58.

[8] See *Dayanan v. Turkey* App. No 7377/03 (Judgment of 13 October 2009), paragraph 32.

[9] United Nations Office on Drugs and Crime, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, New York 2013, available at https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf (see **Annex 1**).

[10] UNPGs, preamble, point 1.

[11] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280, p. 1), available at http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1434981815696&uri=CELEX:32010L0064.

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[13] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013 L 294, p. 1), available at http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1434981954911&uri=CELEX:32013L0048.

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[15] Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings (OJ 2013 C 378, p. 3), available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2013.378.01.0011.01.ENG (see **Annex 2**)..

[16] *Salduz v. Turkey* App. No 36391/02 (Judgment of 27 November 2008).

[17] *Salduz v. Turkey* paragraph 54.

[18] Fair Trials, *The Practical Operation of Legal Aid in the EU*, July 2012, available at http://www.fairtrials.org/wp-content/uploads/2012/09/Legal_Aid_Report.pdf (see **Annex 3**).

[19] See, in this regard, Fair Trials, *Communiqué issued after the meeting 'Defence Rights in the EU', 10 May 2013, Vilnius, Lithuania* ('Vilnius Communiqué') available at http://www.fairtrials.org/wp-content/uploads/Fair-Trials-International-Lithuania-ADR-communique.pdf, paragraphs 5, 15 and 18 (see **Annex 4**).

[20] *Martin v. Estonia* App. No 35985/09 (Judgment of 30 May 2013).

[21] *Dvorski v. Croatia* App. No 25703/11 (Judgment of 28 November 2013).

[22] No breach of the fairness of the proceedings as a whole was found, but two judges dissented. The judgment was referred to the Grand Chamber on 14 April 2014.

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[25] UNPGs Handbook, page 76.

[26] UNPGs Handbook, page 76.

[27] Fair Trials / Legal Experts Advisory Panel, *Position paper on the proposed directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings*, February 2015, available at http://www.fairtrials.org/wp-content/uploads/Position-Paper-on-Legal-Aid.pdf (see **Annex 5**).

[28] See, for instance, Vilnius Communiqué, cited above note 19, paragraphs 15, 49 and 61.

[29] *Czekalla v. Portugal* App. No 38830/97 (Judgment of 10 October 2002), paragraph 60.

[30] Recommendation, paragraph 17.

[31] Recommendation, paragraphs 19-22 and 26.

[32] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Report on the proposal for a directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, 18 May 2015, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0165+0+DOC+PDF+V0//EN (see **Annex 6**).

[33] UNPGs, guideline 11, paragraph 59(a).

[34] Proposed Directive, Article 6.

[35] UNPGs, guideline 17, paragraph 73.

[36] Helsinki Foundation for Human Rights, *Abuse of pre-trial detention in Poland as a result of the limited access of suspects and defence lawyers to case-files*, 2013, available at http://programy.hfhr.pl/monitoringprocesulegislacyjnego/files/2014/01/Abuse-internet-1.pdf.

[37] See http://www.coe.int/t/dghl/cooperation/cepej/presentation/cepej_en.asp.

[38] See http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm.

[39] See http://worldjusticeproject.org/rule-of-law-index.

[40] EU / Council of Europe Eastern Partnership-Council of Europe Facility Project on "Good Governance and Fight against Corruption" *Technical paper, Country Risk Assessment – Georgia*, available at http://www.coe.int/t/DGHL/cooperation/economiccrime/corruption/Projects/EaP-CoE%20Facility/Technical%20Paper/2524-EaP-TP%209_2013_Risk%20Assess_GE%20Final.pdf, part 8.4.2.

[41] See, for instance, *Riolo v. Italy* App. No 42211/07 (Judgment of 17 July 2008), paragraph 65.

[42] See *Salduz v. Turkey*, note 16 above and *Dayanan v. Turkey*, note 8 above.

[43] See *Axel Springer AG v. Germany*, cited note 5 above, paragraph 87.

[44] Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Ors* ECLI:EU:C:2002:662, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1434986374254&uri=CELEX:62000CJ0465 (see **Annex 7**).

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[46] *Tatár and Fáber v. Hungary* Apps. Nos 26005/08 26160/08 (Judgment of 12 June 2012), paragraph 38.

[47] See *Axel Springer AG v. Germany*, cited above note 5, paragraph 88.

IN THE EUROPEAN COURT OF HUMAN RIGHTS **App. No.18030/11**

GRAND CHAMBER

MAGYAR HELSINKI BIZOTTSÁG

v

HUNGARY

THIRD PARTY INTERVENTION SUBMITTED IN ACCORDANCE WITH RULE 44(3) OF THE RULES OF COURT

Introduction and Summary

1. This submission is made pursuant to rule 44(3) of the Rules of Court, following permission granted by the President by a letter dated 4 September 2015 by the following interveners: (i) the Media Legal Defence Initiative (a charity which helps journalists and independent media outlets worldwide to defend their rights), (ii) the Campaign for Freedom of Information (a non-profit organisation working to improve public access to official information in the UK), (iii) ARTICLE 19 (a charity which defends and promotes the freedoms of expression and information around the world), (iv) the Access to Information Programme (a Bulgarian NGO working to enhance the exercise of the right of access to information) and (v) the Hungarian Civil Liberties Union (a human rights NGO working to promote human and constitutional rights in Hungary).

2. In summary, the Interveners consider that it would be consistent with the principles underlying Article 10, the recent case law of the Court, international law and the case law in various jurisdictions to apply the well-established living instrument doctrine in order that the Court recognises a right of access to information requested from a public body within Article 10. It should recognise that the failure to communicate such information, disclosure of which is in the public interest, to applicants acting as public watchdogs is, accordingly, an interference with their Article 10 rights. Alternatively, the failure to communicate such information breaches a positive obligation on the State.

3. In striking a balance in cases where the information requested includes personal data, the Court should consider the public interest in that information, the status of the data subject and the nature of the use to which it will be put. The balance is particularly likely to favour disclosure where the information concerns individuals acting in an official capacity, in receipt of public funding and involved in public functions.

(1) Whether Article 10 is applicable in the circumstances of the case

4. The Interveners submit that the right to freedom of expression includes a right of access to requested information held by public bodies, that Article 10 is, therefore, applicable to the present circumstances, relying on four of arguments: (a) the text of Article 10 itself; (b) underlying principle; (c) the evolving case law of the Court; and (d) comparative material.

(a) The Textual Argument

5. The wording of Article 10 expressly "*include[s]*" within its definition of the freedom of expression a "*freedom…to receive…information…without interference by public authority*"; the language of Article 10 therefore expressly supports a right of access to information as being within the scope of Article 10 (cf Article 8). The right to impart information and the right to receive information are two distinct rights within Article 10: ***Sunday Times v UK*** (A/30) (1979) 2 EHRR 245 at [65]-[66]. There is a right to receive information without interference; seeking information from the State is an expression of that wish to receive.

(b) Underlying Principle

6. Freedom of expression conferring a right of access to information also accords with the general principles underlying the protection of the right. All four principal theories underpinning the protection of freedom of expression[1] justify the incorporation of the right of access to information. Access to information is a necessary condition of, and a prerequisite for, freedom of expression if that right is to have value and substance.

7. The first theory, associated with John Stuart Mill,[2] (and adopted by Holmes J in the US Supreme Court case of ***Abrams v US*** 250 US 616 (1919)) is that free speech is integral to the discovery of 'truth'. The marketplace of ideas justifies a positive obligation to provide access to information because an individual is unable to reach a view on the truth of a particular idea if he is unable to access potentially relevant information which the State holds. The marketplace of ideas is, or at least risks being, perpetually unbalanced if the individual is unable to participate in the debate on equal terms with the State, or those who take advantage of the State's silence.

8. The second theory is that freedom of expression is essential to allow informed participation in a democracy.[3] The best way in which one can participate in an informed manner is by having the right of access to information held by the State. Even if an individual does not make use of the right themselves, they are likely to rely upon the use of it made by others such as the press or campaigning organisations. Democratic engagement may be undermined if the available information is partial or absent.

9. The third theory is that restrictions on freedom of expression enhance suspicion of Government and undermine public trust.[4] This perspective has clear implications for the right of access to information because Governments which withhold information do not secure confidence and because transparent decision-making instrumentally leads to better governance and enhanced public trust.

[1] For a full discussion see E. Barendt, ***Freedom of Speech*** (2005, 2nd ed), chapter 1.
[2] J.S. Mill, ***On Liberty***, chapter 2.
[3] A. Meiklejohn, ***Free Speech and its Relation of Self-Government*** (1948). Precisely this basis is articulated in the eighth recital to the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) ("Aarhus") and recital (1) to Directive 2003/4/EC on public access to environmental information.
[4] F. Schauer, ***Free Speech: A Philosophical Enquiry*** (1982). See too: ***Department of Justice v Reporters' Committee for the Freedom of the Press*** (1989) 489 US 749, 773; ***National Archives & Records Administration v Favish*** (2004) 541 US 157, 171.

10. Finally, freedom of expression is justified by the Court as an aspect of self-fulfilment: ***Stoll v Switzerland*** (69698/01) (2008) 47 EHRR 59 at [101]; ***Satakunnan Markkinapörssi Oy v Finland*** (931/13), July 21, 2015 at [56]. Without a right of access to information the individual citizen, for whose protection the Convention is intended, is less likely, or even unable, to receive and impart information and ideas on his own terms, thus hindering his self-fulfilment and development of his personal knowledge.

(c) The Case Law of the Court

11. The Interveners accept that the older Court cases deny that a right of access to information falls within the scope of Article 10. However, that approach has rightly been the subject of considerable evolution, in accordance with the Court's long-standing principle that the Convention is to be treated as a 'living instrument': ***Tyrer v UK*** (5856/72) (1978) 2 EHHR 1 at [31]. In developing the living instrument principle the Court has in recent years moved away from placing decisive weight upon the absence of a consensus among contracting states and from treating it as a limit on the scope of rights. Instead, the Court looks for common values and an emerging consensus when applying the living instrument principle: see the Grand Chamber decision in ***Goodwin v UK*** (28957/95) (2002) 35 EHRR 18 at [85]: "*the Court attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend*"; ***Rantsev v Cyprus & Russia*** (25965/04) (2010) 51 EHRR 1 at [277], when applying the living instrument principle, "*increasingly high standards required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably require greater firmness in assessing breaches of the fundamental values of democratic societies*"; and ***Hirst v UK (No 2)*** (74025/01) (2006) 42 EHRR 41 at [81]: "*even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue*". Thus, the Grand Chamber is not bound to follow its previous judgments, but must interpret the Convention as a living instrument in the light of present conditions: ***Mamatkulov v Turkey*** (46827/99) (2005) 41 EHRR 25 at [121].

12. The Court will recall that it has adopted the living instrument approach to discern new aspects of a Convention right, even where the *travaux préparatoires* indicate that a deliberate decision was taken not to draft the Convention in such a manner, where the new aspect accords with the approach of contracting states, wider international practice and present-day conditions: ***Sigurjonsson v Iceland*** (16130/90) (1993) 16 EHRR 462 at [35]. The Convention cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago at a time when a minority of the present Contracting Parties adopted the Convention: see ***Loizidou v Turkey (Preliminary Objections)*** (15318/89) (1995) 20 EHRR 99 at [71].

13. The traditional approach on the issues before the Court has its basis in ***Leander v Sweden*** (9248/81) (1987) 9 EHRR 433 at [74], which has been subsequently applied in ***Gaskin v UK*** (10454/93) (1989) 12 EHRR 36 at [52], ***Guerra v Italy*** (14967/89) (1998) 26 EHRR 357 (although 8 judges accepted there was a positive right of access to information)[5] and ***Roche v UK*** (32555/96) (2005) 42 EHRR 30. The Interveners note that in those

[5] Concurring Opinion of Mrs Palm, joined by Mr R. Bernhardt, Mr Russo, Mr Macdonald, Mr Makarczyk and Mr Van Dijk "*put strong emphasis on the factual situation at hand not excluding that under different circumstances the State may have a positive obligation to make available information to the public and to disseminate such information which by its nature could not*

cases, the Court derived the same information access right through Article 8, which has no textual basis for such a right, instead of Article 10, which does.

14. However, the recent decisions of the Court have all rejected the ***Leander*** approach: see ***Tarsasag a Szabadsagjogokert v Hungar****y* (37374/05) (2011) 53 EHRR 3; ***Kenedi v Hunga****ry* (31475/05) (2009) 27 BHRC 335; the Grand Chamber in ***Gillberg v Sweden*** (41723/06) (2013) 34 BHRC 247; ***Youth Initiative for Human Rights v Serbi****a* (48135/06*)* (2013) 36 BHRC 687*;* ***Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria*** (39534/07) November 28, 2013; ***Roşiianu v Romania*** (27329/06) June 24, 2014; ***Guseva v Bulgaria*** (6987/07) February 17, 2015.

Conclusions from the Case Law

15. The following propositions can be drawn from the recent case law of the Court:

(1) The Court now expressly recognises a right of access to requested information within the scope of Article 10: ***Tarsasag*** at [26]-[28], [36]; ***Youth Initiative***, at [24]; ***Österreichische*** at [33], [41]; ***Roşiianu*** at [62]-[65].

(2) This right of access to information under Article 10 contributes to the free exchange of opinions and ideas and to the efficient and correct administration of public affairs: ***Gillberg*** at [95]; ***Guseva*** at [41], [55].

(3) The gathering of information is an essential part of the journalistic function, and there is an obligation on the part of the State not to impede the flow of information over which it holds a monopoly, lest a form of indirect censorship occur: ***Tarsasag*** at [27]; ***Shapovalov v Ukraine*** (45835/05), July 31, 2012 at [68]; ***Dammann v Switzerland*** (77551/01), April 25, 2006 at [52]; and ***Guseva*** at [37].

(4) It is in the general public interest that the requested information held by a public body be made accessible: ***Matky v Czech Republic*** (19101/03), July 10, 200; ***Tarsasag*** at [38]; ***Youth Initiative*** at [24]; ***Österreichische*** at [36]; ***Guseva*** at [55].

(5) The journalistic function of acting as a social or public watchdog, i.e. generating or adding to public debate over a matter of public interest, is not restricted to professional journalists, but encompasses NGOs, researchers and individual activists: ***Tarsasag*** at [27]; ***Kenedi*** at [43]; ***Gillberg*** at [87], [93]; ***Youth Initiative*** at [20]; ***Österreichische*** at [34-36]; ***Guseva*** at [38]-[39], [41], [54].

(6) The right of access to information is not restricted to cases in which the applicant has a domestic court judgment in its favour but has been unable to enforce it: ***Gillberg***, ***Österreichische***.[6]

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otherwise come to the knowledge of the public"; Judge Jambrek: "*the wording of Article 10, and the natural meaning of the words used, does not allow the inference to be drawn that a State has positive obligations to provide information, save when a person of his/her own will demands/requests information which is at the disposal of the Government at the material time*"; Judge Thór Vilhjámssonn supported the Commission's view that Article 10 imposed a positive obligation to "*collect, process and disseminate information which could not otherwise have come to the knowledge of the public*".

[6] See also: the concession of an interference in the present case by the Government of Hungary.

16. Accordingly, Article 10 protects a right of access to information, within the concept of the freedom to receive information, where the information is held by the State under an information monopoly (i.e. it is not otherwise accessible) and it is in the public interest that the information sought be disclosed, subject to Article 10(2).

17. Any individual requesting information, with a view to placing the information in the public domain which is in the public interest is acting as a public watchdog: see also the Concurring Opinion in ***Youth Initiative*** and the judgment in ***Guseva*** at [38] and [41]. There was no particular magic or term of art to the research being carried out in ***Kenedi*** by a historian, or in ***Gillberg*** by a sociologist and a paediatrician. The scope of the Convention right should not be restricted to a particular category of persons: ***Braun v Poland*** (30162/10), November 4, 2014 at [47], "*the Convention offers a protection to all participants in debates on matters of legitimate public concern*". The nature of the performance by a particular requestor of a public watchdog role is better suited to consideration at the justification stage.

18. The Interveners submit that any concerns that the evolved interpretation of Article 10 may be of uncertain scope is answered by reference to the existence across the Council of Europe of domestic legislative structures that already provide a general right of access to information, subject to limited exceptions, and which can thereby inform the scope of the right to be drawn out of the ***Tarsasag*** line of authority. The Court in ***Guseva*** reasoned in precisely this manner at [41].[7] Where the domestic State has occupied the field and has provided a right of access, the implementation and scope of that right and the regulation of the exercise of that right must be done in a manner which is compatible with the Article 10 right of access to information which the State has, by enacting domestic legislation, accepted.

19. Importantly, the case law of the Court shows that a blanket prohibition on giving consideration to a Convention right can rarely be capable of being a proportionate interference, see: ***Hirst*** at [76]-[84], ***Mizzi v Malta*** (26111/02) (2008) 46 EHRR 27 at [112]; and ***S & Marper v UK*** (30562/04) (2008) 48 EHRR 1169 at [125].

(d) Comparative material

20. In addressing whether it is open to this Court to interpret Article 10 as incorporating a right of access to information, the Court should take into account the interpretative approach of national and supra-national judicial bodies. The correct approach is set out in ***Demir v Turkey*** (34503/97) (2009) 48 EHRR 54 at [65]-[86] where the Grand Chamber stated that it should take into account evolving norms of national and international law in its interpretation of Convention provisions. Both support the Interveners' submissions.

[7] Such an approach is analogous to that taken by the European Court under Article 1 of Protocol 1, whereby there is no provision of a right to acquire possessions or to receive a social security benefit or pension payment of any kind or amount unless provided for by national law, but where national law provides the right it can only be interfered with consistently with Article 1: see e.g. ***Carson v United Kingdom*** (42184/05) (2010) 51 EHRR 13 at [53]. It is also analogous with the Court's approach that Article 6(1) does not provide for a right of appeal, but where one is given, it must be conducted in a manner compliant with Article 6 safeguards: ***Delcourt v Belgium*** (A/11) (1970) 1 EHRR 355 at [25].

21. The Interveners refer the Court to the provisions of and decisions under Article 19(2) of the International Covenant on Civil and Political Rights 1966 and Article 13 of the American Convention on Human Rights 1969 (including the seminal case of ***Reyes v Chile*** (2006) IACHR, September 19, 2006, applied in ***Lund v Brazil*** (2010) IACHR, November 24, 2010). That jurisprudence, including the acceptance of freedom of information as part of Article 19 by the UN Special Rapporteur on Freedom of Expression in 1999,[8] forms an important international development in recognising the essential need for a right of access to information as an element of freedom of expression. Moreover, under Article 19(2), the Human Rights Committee has applied the principles of ***General Comment 34*** that the right to freedom of expression includes the protection of the right of access to State-held information, particularly for media organisations or those performing a social watchdog role, in ***Gauthier v Canada***, No.633/95 at paragraph 13.4, ***Toktakunov v Kyrgyzstan***, No.1470/2006 at paragraph 7.4 and ***Castañeda v Mexico***, No. 2202/2012 at paragraphs 7.2-7.7. This Court's recent case law has been contemporaneous and in line with this wider international acceptance of access to information as part and parcel of the right to access to expression. The same development can be seen in the Declaration of Principles on Freedom of Expression in Africa 2002, within which Principle IV provides for a right to freedom of information.[9]

22. Furthermore, a number of individual Council of Europe States have discerned a right of access to information from a constitutional right to freedom of expression or general constitutional principles:

    (a) The Dutch Administrative Jurisdiction Division of the Council of State has determined that an information request under Dutch freedom of information legislation was refused as exempt, but the Court went on to find that the restriction was an interference with the requestor's Article 10 rights. It concluded that the interference was proportionate in the circumstances of the case, because the right of access to information under Article 10 was not absolute: ***Stichting Ontmoetingsruimte De Linkse Kerk v Burgemeester en Wethouders van Leiden***, 19 January 2011, Afdeling Bestuursrechtspraak Raad van State.

    (b) The German Constitutional and Federal Courts have repeatedly held that unimpeded access to information is required to enable the press to exercise its rightful function in a democracy under article 5(1) of the Basic Law (right to freedom of expression, arts and sciences), and that official disclosure requirements are required to enable or ease press functions: **BVerfG 1 BvR 23/14**, decision of 8 September 2014; **BVerwG 6 A 5.13**, judgment of 27 November 2013; **BVerwG 6 A 2.12**, judgment of 20 February 2013.

    (c) The Italian Supreme Administrative Court held, in ***Case No.570/1996***, 6 May 1996 (Sixth Section), that a newspaper was entitled to have access to and publish administrative documents "*because the right of access is instrumental*" to the right of freedom of expression provided for in the Italian Constitution.

[8] UN Special Rapporteur on Freedom of Expression and Opinion, Annual Report, 1995, UN Doc. E/CN.4/1995/32; Annual Report 1999, UN Doc. E/CN.4/1999/64, para. 12; Annual Report, 2013, UN Doc. A/68/362. See too: the Joint Declaration by the UN Special Rapporteur on Freedom of Expression and Opinion, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, December 2004.

[9] And see the fourth recital: "*Convinced that respect for freedom of expression, as well as the right of access to information held by public bodies and companies, will lead to greater public transparency and accountability, as well as to good governance and the strengthening of democracy*". See also: ***Good v Botswana***, Communication 313/05 (2010).

(d) The Icelandic Supreme Court ruled in ***The Organisation of Disabled in Iceland v The Icelandic State*** (Hrd 397/2001) that a request for information concerning the formation of a panel of State-appointed experts, made under a domestic information access regime, must be interpreted in the light of Article 10 and restricted only in accordance with the principles in Article 10(2).

(e) The Constitutional Court of Georgia has derived a right of access to information from the right of freedom of expression. In ***Georgian Young Lawyers' Association v Parliament of Georgia*** (No.2/2/359), 6 June 2006, the Georgian Constitutional Court specifically held that Article 10 "*creates an obligation of a State to make accessible information of social interest within reasonable limitations*", and that a commercial sensitive customs register was proportionately withheld (p.313).

(f) Similarly, in ***Case No. 1010 of 6 March 2012*** the Armenian Constitutional Court held that "*access to public information is the core condition for democracy and accountable and transparent government*", and was an essential element of constitutional free expression rights.

(g) The French Conseil d'Etat described the right of access to administrative documents as a fundamental guarantee granted to the citizen in the exercise of their liberties: ***M. Ullmann***, CE, 29 April 2002 (No.228830).

(h) The Belgian Raad van State has similarly reiterated that the right of access to official documents under article 32 of the Belgian Constitution imposes a positive obligation on public authorities which must be met: ***CVBA Belgische Verbruikersunie Test-Aankoop v Federaal Agenstschap voor de Veiligheid van de Voedselketen***, A.206.941/VII-38-690, 15 May 2014.

23. The general right to freedom of expression has been interpreted to give rise to a right to official information in India,[10] Pakistan,[11] Sri Lanka,[12] Israel,[13] Japan[14] and in Canada.[15]

24. Moreover, the Interveners' research has established that 109 countries around the world make general legal provision for access to official information. Within the Council of Europe, the only Contracting States not to possess such laws are Andorra, Cyprus, Luxembourg and San Marino. 47 European States have ratified the Aarhus Convention (1998, see fn3 above); the only Council of Europe States not to have done so are Andorra, Liechtenstein, Monaco, San Marino, Russia and Turkey. There is now a clear acceptance within the Council

[10] ***State of Uttar Pradesh v Raj Narain*** [1975] AIR (SC) 865 at [74] *per* Ray CJ; ***Gupta v President of India*** [1982] AIR (SC) 149; ***Dinesh Trivedi v Union of India*** (1997) 4 SCC 306; ***Union of India v Association for Democratic Reforms*** [2002] AIR (SC) 2112; ***Koolwal v State of Rajasthan*** [1988] AIR (Raj) 2.

[11] A similar view to that in India was taken in the concurring judgment of Muhammed Afzal Lone J in ***Sharif v Pakistan*** [1993] PLD (SC) 473, 746 in the Supreme Court, interpreting the Constitution of Pakistan.

[12] The protection for freedom of expression provided in the constitution of Sri Lanka has been held, in order to ensure the right is effective, to include the right of a person to receive certain information from public authorities on matters of public interest: ***Environmental Foundation Ltd v Urban Development Authority of Sri Lanka***, Case 47/2004, judgment of 28 November 2005.

[13] The High Court of Israel applied common law constitutional principles in HC 1601-1604/90 ***Shalit v Peres*** 44(3) PD 353 to hold that a right of access to information was a part of the right to freedom of expression and fundamental in order that the public can exercise its democratic rights.

[14] ***Kaneko v Japan***, Supreme Court, 1969.11.26 Keishu 23-11-l490.

[15] The Canadian Supreme Court has held that, although the right to freedom of expression provided in the Charter does not contain a general right of access to information, the right does arise where it is shown that, without access, meaningful public discussion and criticism on matters of public interest would be substantially impeded, and where there are no countervailing considerations inconsistent with disclosure***: Ontario v Criminal Lawyers' Association*** 2010 SCC 23; [2010] 1 SCR 815 at [30]-[40] per McLachlin CJ and Abella J.

of Europe, and globally, of the importance of access to official information, representing a much more consistent position than in 1987 when only six Contracting States (and 12 globally) had national laws on access to information.

25. Attention is also drawn to the Council of Europe Convention on Access to Official Documents (Convention 205, 18 July 2009), which Hungary has ratified. Article 2.1 creates a right of access to official documents[16] and under article 3.1 all limitations must be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting various specific objectives. It is noteworthy that the Venice Commission has treated the failure to comply with the Convention as highly relevant when assessing compliance with European standards, see: ***Opinion on Act CXII of 2011 on Informational Self-Determination and Freedom of Expression of Hungary*** (CL-AD (2012) 023) at [59]-[71].

Conclusion on the applicability of Article 10 in the circumstances of the case

26. In the light of the Court's consistent recent case law, the international legal material, the practice of both Contracting States and non-European States to the grant of information access rights, and the principles underlying Article 10 the Court should now expressly recognise the evolution of the meaning of Article 10. The non-disclosure of official information, disclosure of which is in the public interest amounts to an interference with the applicants' freedom of expression. An evolution in the Court's case law is consistent with principle and has numerous antecedents (see, for example, in ***Goodwin v UK***, above).

(2) Whether denial of access to information is a failure to fulfil a positive obligation or an unjustifiable interference

27. The Interveners understand that the Government of Hungary has conceded an interference with Article 10(1), despite a domestic court judgment in its favour, as it has done in a number of previous cases, where in those cases the Hungarian State has failed to give effect to a domestic court order to provide access.[17]

Unjustifiable interference

28. The Interveners' primary submission is that the Government's concession is rightly made because the denial of access to information is an unjustifiable interference. As indicated above, the language of Article 10 expressly protects "*freedom…to receive…information…without interference by public authority*"; and access to official information is inherent to and is a necessary corollary of making freedom of expression effective. Accordingly, the failure to provide official information is an interference under Article 10 in accordance with the living instrument principle.

A positive obligation

29. The Interveners do not consider that an emphasis on whether a right should be analysed as a negative interference or a positive obligation is especially helpful. The ultimate question is "*the fair balance to be struck between the competing interests*": ***Dickson v United Kingdom*** (44362/04) (2007) 46 EHRR 927 at [70]

[16] Defined as "*all information recorded in any form, drawn up or received and held by public authorities*": see article 1.2(b).
[17] The issue of interference was rightly conceded in ***Matky***, ***Tarsasag*** and ***Kenedi***.

and ***Stjerna v Finland*** (18131/91) (1997) 24 EHRR 195 at [38]. However, in the alternative, the denial of access is a failure to fulfil a positive obligation. In general, the Court has been ready to imply a positive obligation to impose and enforce a legislative framework so as to give effect to a Convention right.[18] Relevant factors for imposing a positive obligation in this situation include the nature and importance of the right at stake, its public interest nature, its capacity to contribute to public debates, the nature of the restriction and the weight of any countervailing factors.[19] Those factors are quintessentially engaged in the context of a request to receive access to official information of public interest.

30. It cannot be objected that a positive obligation would be unduly onerous in these circumstances. First, the nature of the right is informed by the domestic legislative structures providing a right of access (paragraph 18 above). Secondly, the obligation would be more closely tied to the language and purpose of Article 10 than many other positive obligations imposed by the Court under Article 10.[20] Thirdly, the Court has been prepared to impose a positive obligation to provide official information under Articles 2, 6 and 8.[21] The Court will recall that in ***Centro Europa 7 Srl v Italy*** (38433/09), June 7, 2012 it imposed a positive obligation to "*put in place an appropriate legislative and administrative framework to guarantee effective pluralism*": at [136].

(3) If a positive obligation is the appropriate analysis, was a fair balance struck?

31. It is not appropriate for the Interveners to comment upon the domestic law and practice of Hungary, nor to provide a specific conclusion on the striking of a fair balance on the facts of the case. Some points of general principle are made below in order to assist the Court. In relation to the margin of appreciation, the Interveners accept that where a positive obligation is imposed the margin is more likely to be wide, but that there must be European supervision; Article 10 is a right of fundamental importance in democratic States and that there is a wide European consensus on this issue: ***Mosley v UK*** (48009/08) (2011) 53 EHRR 30 at [106]-[111].

32. In relation to the role of the applicants as public watchdogs, the Interveners have explained above (paragraph 17) that the scope of the right (or obligation) cannot be determined by the nature or identity of the applicant. Convention rights are provided to all. However, where a domestic court has evidence as to the intended use of the information, that may be relevant to the balancing exercise under Article 10(2). Article 10's basis in enabling public debate and informed participation in a democracy justifies a greater weight being given to the importance of disclosure where the applicant is acting as a (loosely defined) public watchdog who will contribute to that public good. Purely private interests can be accorded less weight.

(4) If an interference is the appropriate analysis, was the interference justified under Article 10(2)

[18] See e.g. ***X and Y v The Netherlands*** (8978/80) (1986) 8 EHRR 235 (the failure to provide criminal sanctions for an assault on a mentally incapacitated girl breaches Article 8); ***Wilson v UK*** (30668/96) (2002) 35 EHRR 20 (permitting employers to use financial incentives to induce employees to surrender important union rights breaches Article 11).
[19] See e.g. ***Appleby v UK*** (44306/98) (2003) 37 EHRR 38 at [41]-[49].
[20] ***Verein gegen Tierfabriken v Switzerland*** (24699/94) (2002) 34 EHRR 4 at [45]-[47] (protection of media expression); ***Feuntes Bobo v Spain*** (39293/98) (2001) 31 EHRR 5 (safeguarding from threats by private persons); ***Mustafa v Sweden*** (23883/06) (2011) 52 EHRR 24 (permitting installation of satellite dishes to receive foreign language programming).
[21] ***Öneryildiz v Turkey*** (48939/99) (2004) 39 EHRR 12 (Article 2); ***McGinley and Egan v UK*** (21825/93) (1999) 27 EHRR 1 at [85]-[86] (Article 6); ***Gaskin*** and ***Guerra*** (above) (Article 8).

33. The Interveners accept and support the right of access to official information being subject to a balancing exercise where that information constitutes personal data. However, the Article 10 right of access applies to information which it is in the public interest to disclose. The well-established approach of the Grand Chamber is that there is little scope for restrictions on freedom of expression in matters of public interest: ***Sürek v Turkey (No.1)*** [GC] (26682/95), July 8, 1999, at [61] and ***Lindon v France*** (21279/02) (2008) 46 EHRR 35 at [46].

34. Where the Article 10 right concerns access to official information, it will seldom be of assistance to apply the criteria in ***Axel Springer AG v Germany*** (39954/08) (2012) 55 EHRR 6 at [89]-[95], which primarily relate to the publication of private information obtained from the private sphere rather than from the State. The application of the criterion that the information contribute to a debate of general interest is the overriding factor, strengthened or weakened by the context of the particular issue as part of the proportionality balancing exercise mandated by Article 10(2).

35. The protection of personal data is a right to be respected, and is protected in various forms including Article 8 and, most specifically, Directive 95/46/EC. However, as the CJEU (GC) has held, "*The right to the protection of personal data is not, however, an absolute right, but must be considered in relation to its function in society*": Case C-92/09 ***Volker und Markus Schecke GbR v Land Hessen***, November 9, 2010 at [42]. A balancing exercise must be undertaken in all the circumstances of the case. Nothing in ***Satakunnan Markkinapörssi Oy*** (above) at [69]-[73] casts any doubt on this; there the tax data of all Finish citizens was being provided in a generalised manner without any apparent specific public interest in the data published.

36. The applicant's case concerns the names of public defenders in specific police districts: lawyers appointed by the State to defend individuals in criminal proceedings, principally at the expense of the public purse. The applicant, acting as a public watchdog, sought to investigate the appointment of such lawyers, and the quality of the service they provided. The Interveners consider this is a matter of the highest public interest. As the Grand Chamber held in ***Morice v France*** [GC] (29369/10), April 23, 2015: "*The specific status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence… However, for members of the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation*": at [132] (citations omitted). Relevant factors for the Court to consider when balancing an Article 10 right of access and the Article 8 right privacy are where the lawyer in question is appointed and paid for by the State, the accountability of the State for how such lawyers are appointed for those most in need and whether the legal services provided are of appropriate quality, and the extent to which privacy could be said to be impacted by disclosure (here of the names of the public defenders).

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21 September 2015